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**EFFECTS, ENFORCEABILITY AND THE EXECUTION
OF THE DECISIONS OF THE CONSTITUTIONAL COURT
– THE HUNGARIAN EXPERIENCE**

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SOME PRELIMINARY THEORETICAL CONSIDERATIONS

It is a commonplace that law constitutes an order which is enforceable and, in general, is enforced. In this sense legal rules must have sanctions to ensure compliance. Laws without sanctions are regarded by the legal community imperfect (*lex imperfecta*). Sanctioning institutions and processes form an essential part of the legal order. Law enforcement agencies symbolise that compliance with law is compulsory in societies.

Institutionalised and well-developed law enforcement agencies and processes can be identified in all fields of law, especially in criminal, and civil law.

However, constitutional law seems to be forgotten in this special connection. Ordinary court decisions are executed by law enforcement procedures; constitutional court decisions in most countries are not enforced in that way. As Hamilton rightly stated in the Federalist Papers, "the judiciary ... has no influence over either the sword or the purse... It may truly be said to have neither FORCE nor WILL but merely judgement". But, as a legal sociologists (Hoebel: The Law of Primitive Man, 1954, page 26.) notes "law has teeth, teeth that can bite if need be".

THE EFFECTS OF THE HUNGARIAN CONSTITUTIONAL COURT'S DECISIONS

The effects of the decisions of the Constitutional Court differ according the types of jurisdiction, and effects and execution are accordingly differentiated.

1. In the case of the so-called preventive control of the constitutionality of laws

– Parliament may prior to approval forward its Standing Orders indicating the contestable provision to the Constitutional Court for the examination of conformity with the Constitution. If the Constitutional Court declares the contestable provision of Standing Orders unconstitutional, Parliament shall eliminate the unconstitutionality. During the first ten years of the functioning of the Constitutional Court no such claim has been raised.

– Upon the motion of the President of the Republic the Constitutional Court examines the contestable provision of any Act enacted by Parliament but not yet promulgated. If the Constitutional Court declares the contestable provision of the Act unconstitutional, the President of the Republic shall not promulgate the Act until the unconstitutionality is eliminated by Parliament.

– Parliament, the President of the Republic and the Government has the right prior to the ratification of the treaty to request the examination of constitutionality of a contestable provision of an international treaty. If the Constitutional Court declares the contestable provision of the international treaty unconstitutional that shall not be ratified until the unconstitutionality is eliminated by the organ which concluded the treaty (no case-law exists for this type of jurisdiction).

2. Constitutional review of enacted norms (repressive norm control)

The most important competence of the Court is that if it finds a legal provision unconstitutional, declares the legal rule wholly or partly null and void.

As for the temporary effects of the decision there is a general rule: the provision which has been annulled by the decision of the Constitutional Court shall not be applied from the day of the publication of the relevant decision in the Official Gazette - thus the Constitutional Court invalidates the law *ex nunc*. The annulment of the provision effects neither the legal relationships which have developed prior to the publication of the decision nor the rights and duties which derived from them.

The act on the Constitutional Court makes one exception in criminal cases. The Constitutional Court orders the revision of any criminal proceedings concluded by a final decision without appeal on the basis of an unconstitutional provision, if the convict has not yet been relieved of the detrimental consequences, and the nullity of the provision applied in the proceedings would result in the reduction or the putting aside of the punishment or measure, or in the release from, or the limitation of responsibility. Thus the law provided for the procedural consequences of unconstitutionality in criminal cases. There was no similar provision for civil cases. This has been noted by the Constitutional Court as early as in 1991 (the Court commenced its functioning in 1990). The Court declared the unconstitutional omission of the legislator later on again. Finally, Parliament enacted a law in May 1999 that makes possible to reopen trials in civil cases and administrative procedures after that the Constitutional Court declared a legal provision unconstitutional and excluded its application.

Another rule of the Act on Constitutional Court makes possible for the Constitutional Court to determine the date of the abrogation of the unconstitutional legal rule or its applicability in the given case differently from the general rule mentioned above, if justified by a particularly important interest of legal security or of the person who initiated the procedure. This rule can effect in both retroactive and pro futuro annulments. The Court often makes use of these wide-ranging possibilities: e.g. annulling a provision *ex tunc*, retroacting to the date of entry into force; or annulling at a future date, giving possibility to the legislator to enact a new, possibly constitutional provision, thus avoiding the creation of an undesirable legal gap. In a recent case by a rare and peculiar solution, the Court has declared a provision unconstitutional *ex tunc*, but the retroactive annulment will enter into effect only when the legislator enacts the new provisions.

The jurisdiction of the Hungarian Constitutional Court includes both abstract and concrete norm control. The procedure of repressive norm control can be initiated by anybody (except of course as to the Standing Orders of Parliament). This unlimited possibility of *actio popularis* (no special personal interest is required) is discussed frequently in the literature and the Court itself is divided on the question of its scope. The overwhelming majority of the cases before the Court are abstract norm control initiated for the most part by private individuals, and seldom by political parties and other entities. Claims for concrete norm control, that is constitutional review initiated by ordinary judges in cases pending before their court, come not too often to the Constitutional Court (20-30 claims a year).

3. Examination of the Conformity with International Treaties

The legislator adopted a complex, multilevel system of the review of laws as compared to international agreements. The Constitutional Court examines any legal rule for its conformity with any international treaty. If it finds that a legal rule of the same or lower level as the legal rule promulgating the international treaty violates the international treaty, annul wholly or partly the legal rule which is inconsistent with the international treaty. If the Constitutional Court finds that a legal rule of higher level than the legal rule which promulgated the international treaty violates that international treaty, the Constitutional Court requests the organ or person who concluded the international treaty or the legislator - after weighing the circumstances and indicating the deadline - to resolve the contradiction. In this specific case (that has not occurred so far in the jurisprudence of the Court) the law indicates specific duties of the organ or person called upon to resolve the above-mentioned contradiction: according the wording of the respective provision they are obliged to comply with the request within the term appointed.

If the Constitutional Court finds that the legislator failed to comply with its legislative duty derived from an international treaty, the Constitutional Court shall request - appointing a term - the organ in default to provide for its duty. Again a warning to the organ in default: it has to provide for its legislative duty within the term appointed. But again, as in general, no sanctions are determined for cases of non-compliance. One might be surprised by the scrupulous and detailed regulation regarding a competence very rarely exercised by the Court.

4. Constitutional Complaint

Constitutional complaint - unlike its German or Spanish counterparts - has a limited scope in the Hungarian system of judicial review. It is true that anybody aggrieved by the application of an unconstitutional legal rule, after having exhausted all other legal remedies may submit a constitutional complaint to the Constitutional Court because of the violation of his/her constitutional rights. The Court follows the same rules as in the cases of repressive norm control. Nevertheless, this institution has limited effects on individuals because of the specific nature of the regulation. Successful constitutional complaints in the Hungarian system of judicial review are very rare; the law sets up severe procedural requirements; thus, this competence is basically absorbed by repressive norm control. It has, contrary to its possible original goal, limited effects on individuals seeking remedy for the violation of their basic rights. But on the rare occasions where the Court rules in favour of a constitutional complaints, the parties can seek for the enforceability of the decisions before the ordinary court. This is the only case where the law secures a similar possibility for the execution of a Constitutional Court decision. As mentioned above, in such a procedure ordinary courts are entitled to review previous court decisions and reopen already decided cases in criminal procedure according the provisions of the Act on Constitutional Court, in civil and administrative cases by the entitlement of an Act passed in 1999.

5. Unconstitutionality manifesting itself in omission

A controversial competence of the Hungarian Court is that it can declare the unconstitutional omission of legislation.

If the Constitutional Court *ex officio* or upon anybody's motion finds that the legislator has failed to comply with its legislative duty deriving from a legal rule and has thus given rise to

unconstitutionality, the Constitutional Court shall request - appointing a term - the organ in default to provide for its duty. Moreover, the Law states that the organ in default shall provide for its legislative duty within the term appointed by the Court.

As a matter of fact, such declarations sound impressive, but cannot be regarded as sanctions, because no specific ways of enforcement are defined. Such rules at least create an opportunity for the Court to refer to them if someone challenges the jurisdiction of the Court.

We can conclude, now being aware of the regulation of each competencies of the Court (the impeachment procedure against the President of the Republic has not been mentioned here) that with one exception (the enforceability of decisions regarding constitutional complaints by ordinary courts) the law - with its very definite language - puts obligation on the organs and high officers of the State to execute the Court's decisions, but does not provide sanctions for cases of non-compliance.

As for the personal scope of the Constitutional Court's decisions, we can differentiate between the decisions having binding force on all individuals (*erga omnes* effects – this is the general rule in the Hungarian system), and the decisions with effects only *inter partes*.

ENFORCEABILITY OF CONSTITUTIONAL COURT DECISION

The only legal provision in the Act on the Constitutional Court regulating the enforcement of the Court's decisions sounds as follows: „The decisions of the Constitutional Court shall be binding on everybody”. The source of the binding force attributed by the law to the decisions of the Court lies in this very definite language of the law. The compliance with the decisions of the Court relies upon the respect for the general principle of rule of law. The only exception is the direct enforceability of decisions on constitutional complaint that should be executed by ordinary courts. This peculiar situation leads us to the following considerations.

In the compliance with Constitutional Court decisions primarily not legal but rather political and sociological factors play a significant role. The legitimacy of the Court is one of those factors. Legitimacy includes both respect and support for the institution. It is also connected to how can the Court can justify its jurisprudence for example by a coherent system of legal dogmatics and by methods of interpretation. Instead of enforceability of Constitutional Court decisions we can speak rather of the acceptance of court decisions. How do state organs accept the decisions of a court that does not have the means to enforce its own decisions? How do they accept decisions that often sharply violate or interfere with the interest of other branches of power?

The Hungarian experiences show a rather high level of compliance with the decisions. As regards the legislator, the Parliament, we experienced that it fulfils its obligations even in the most delicate and unpleasant decisions of the Court. The Court, when declaring an unconstitutional legislative omission, sets deadlines to the legislator, and obliged it to act. In the first years the deadlines were quite short, sometimes irrationally short; in the latest years the Court understands the difficulty of a fragmented Parliament to enact a rule in a short time, and allows longer time for legislative action. The delay for annulment stipulated by the Constitutional Court is not limited by any provision. The Court usually sets the deadlines between six and twelve months. Parliament as such has never questioned the power of the Constitutional Court to set up deadlines for the legislator. Sooner or later they passed the new legislation. In the majority of the cases this has happened with a - sometimes considerable -

delay. Administratively, the Parliament takes notes of the tasks set by the Constitutional Court. There is no legally set time-limit to comply with the Constitutional Court's decision.

The executive branch, the Government or cabinet shows similar respect. It has happened so far only once that the cabinet expressly criticised a decision of the Court. In 1995, the Court struck down several provisions of a package of laws, introducing austerity measures to the economy. The cabinet in a press release criticised the decisions, and made the Constitutional Court responsible for a possible economic breakdown of the country.

Otherwise, in its normal functioning, to execute a Constitutional Court decision, the cabinet takes a procedural decision which indicates the task, specifies the member of the cabinet who is responsible for the execution. The execution in this sense usually means the drafting of bills or other law-making techniques.

Politicians, instead of clearly and expressly turning against the court, try to interpret the decisions of the Court according to their interests or delay the compliance in concrete cases.

The relation of the Constitutional Court to the ordinary judiciary is a more sensitive issue. The Constitutional Court introduced in 1991 the concept of "living law" in its jurisprudence. This meant in the concrete case that the Constitutional Court adjudicated not the literal meaning of the provision but the meaning consequently attributed to it by ordinary courts, and annulled a court decision. As far as in Hungary the Constitutional Court cannot review the decisions of ordinary courts, the Supreme Court evaluated the concept of living law as an intrusion to the territory of the ordinary courts. Courts otherwise do not explicitly reject the decisions of the Constitutional Court but sometimes reinterpret them differently from the intent of the constitutional judges.

The Constitutional Court since 1993 uses the method of indicating that specific interpretation of a legal provision that is in conformity with the Constitution. In the respective cases the Court, instead of turning down a law, defines that which interpretation of the legal provision at stake can be accepted as constitutional.

CONCLUSIONS

1. The most powerful effect of a Constitutional Court decision is the invalidating of a legal provision, that amends the legal system, and plays the role characterised by Hans Kelsen as that of the "negative legislator". Moreover, the Constitutional Court's decisions are binding on everyone.
2. When a Constitutional Court decision addresses and obliges another branch of power or state organ, it makes no sense to speak of law enforcement similar to the judgements of courts of general jurisdiction. Only the legitimacy of the Constitutional Court, the rationalism and the moral power of its decisions can leave to the acceptance of the decisions, strengthened by a general respect for rule of law.
3. When the Constitutional Court gives remedy to individual complaints, its decisions - in criminal, civil, and administrative matters - can be executed by ordinary courts according to the general rules.