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ON

"EXECUTION OF THE DECISIONS OF CONSTITUTIONAL COURTS: A CORNERSTONE OF THE PROCESS OF IMPLEMENTATION OF CONSTITUTIONAL JUSTICE"

ON THE OCCASION OF THE 10TH ANNIVERSARY OF THE CONSTITUTIONAL COURT OF AZERBAIJAN

REPORT

"EXPERIENCE OF THE EXECUTION OF CONSTITUTIONAL COURT'S DECISIONS DECLARING LEGISLATIVE OMISSION IN HUNGARY"

by
Mr Péter Paczolay
President of the Constitutional Court of Hungary

Execution of Constitutional Court decisions in general

Constitutionalism is based on the delicate and complex system of checks and balances. As already Montesquieu stated, power might be counter-balanced by power. Thus the judicial branch (called "the least dangerous branch" in the *Federalist Papers*) has the power to execute its decision through law-enforcement. This applies to constitutional review in those countries where judicial review is exercised by the ordinary judiciary like in the USA. However, the situation is different where the review of the constitutionality of laws is exercised by specialized Constitutional Courts that do not have the same way to execute their decisions. Thus the acceptance and the execution of the Constitutional Court's decisions is determined to a high extent by the political and legal culture of the country.

The enforcement of the Constitutional Court's decision is connected to the varying nature of the decisions themselves, while the nature of the decisions depends on the type of jurisdiction exercised in the given case.

As regards the competences of the Hungarian Constitutional Court, the following main types of constitutional decisions might be specified:

I. 'Self-executing' decisions

1. *Decision taken in the preventive review of enacted but not promulgated laws on request of the head-of state*. In this procedure the execution of the respective Constitutional Court decision is a routine regulated by the Constitution itself (Art. 26.): if the Court declares the law to be unconstitutional, the President of the Republic returns it to the Parliament, otherwise he is required to sign the law and to promulgate it.

II. Annulment of laws

2. *Decision taken in repressive norm control procedures of enacted laws and other legal norms.* This is the genuine jurisdiction of a constitutional court, and in my opinion the consequences of declaring a legal provision null and void, is the appropriate and most effective sanction in the hands of a constitutional judge. This is the source of power that can counter-balance the powers of the other branches. The declaration of unconstitutionality turns down a piece of legislation, and deletes it from the legal system. The effective weight of these decisions might be modified, among others, by the date of the annulment, as from the *ex tunc*, the *ex nunc*, or the *pro futuro* effect of the given decision derive different consequences to the legislator.

3. *The review of conformity with international treaties* leads to similar decisions as the repressive norm control. If a legal provision contradicts to an international obligation, the Court has to annul it.

4. *A decision taken in constitutional complaints procedure* is the only possibility for the Hungarian Constitutional Court to provide remedy for the violation of the constitutional rights of individuals in concrete cases. However the scope of this competence is limited (to cases where the legal provision on which the court decision was based is unconstitutional), and has a subsidiary character (after the exhaustion of other legal means). As in these cases the protection of individual rights by the Constitutional Court interferes with decisions taken by ordinary courts, the legislator had to integrate the effects of these Constitutional Court decisions to civil and criminal procedure, and both Codes contain provisions on the implementation and execution of Constitutional Court decisions.

III. Other types of decisions

5. The Hungarian Constitutional Court has the competence of *abstract constitutional interpretation* that substantially means giving advisory opinion. Such a competence is very delicate and over-politicised. Following from the nature of an advisory opinion, there is no execution of such decisions, they might have only indirect effect.

6. *In the case of conflict of competences among State organs the Constitutional Court decides on the competent organ*. (There is no substantial jurisprudence of this competence in Hungary.)

7. *Other types of jurisdiction as the review of decisions on the admissibility of referendums*. The National Electoral Commission decides on the admissibility of a popular initiative to referendum. The decision of the National Electoral Commission is reviewed on appeal by the Constitutional Court. In 2007, a conflict arose between the two organs. If the Constitutional Court does not agree with the opinion of the National Electoral Commission, it annuls its decision and orders a new procedure. The Constitutional Court had to explicitly utter that the National Electoral Commission is bound by the opinion of the Constitutional Court as presented in the reasoning (*ratio decidendi*), and in the new procedure the Commission is obliged to apply the opinion of the Constitutional Court.

IV. *Mandamus*

8*. Constitutional Court decisions establishing an unconstitutional omission*

Under Section 49 (1) of the Law on the Constitutional Court, if an unconstitutional omission of legislative duty is established by the Constitutional Court *ex officio* or on the basis of a petition by any person because the legislator has failed to fulfil its legislative duty mandated by a law, and this fact has given rise to an unconstitutional situation, it shall call upon the organ in default to perform its duty by a specific deadline.

The fact of omission and its substantial elements, furthermore, the deadline for the legislator to remedy the omission are established in the holdings of the Constitutional Court's decision. The reasoning of the decision sets out the arguments based on which the omission has been established by the Constitutional Court.

Surprisingly, the activism of the Constitutional Court has also shown itself in exercising the competence related to omissions. This competence had logically derived from supposing that after establishing an unconstitutional situation by the Constitutional Court, the legislator was to eliminate the omission, and the Constitutional Court was not expected to undertake the responsibility of legislation. However, in practice, the institution of establishing omissions has been applied in a much more varied way. The Constitutional Court has used this competence in an activist way for imposing positive requirements to legislate. Such a decision appears as a kind of *mandamus*, a constitutional mandate to legislate.

In the case of a failure to perform a legislative duty deriving from a normative authorisation, the Constitutional Court is going to do nothing else but establish the omission of legislation, and it shall not give any guidance on the contents of the norm to be adopted. In such cases, the reasons of the decision refer to the nature of the unconstitutional situation caused by the failure to legislate.

At the same time, when *lacuna legis* is established, the Constitutional Court also bears reference to what the contents of the norm to be adopted should be. In such cases, the unconstitutional situation is namely caused by the lack of a provision with a specific content (typically making it impossible to exercise one of the fundamental rights); that is why it is necessary for the Constitutional Court to set, in the holdings of the decision, positive

requirements for the legislator in respect of how to regulate certain issues. An example for this is the Constitutional Court providing that the judicial review of public administration decisions be regulated by allowing the court to judge upon the merits of the decision. Similar decisions show that the Constitutional Court has clearly overstepped the role of negative legislator.

When setting a deadline for performing the legislative duty, the Constitutional Court takes into account first of all the severity of the unconstitutional situation, the constitutional legal remedies available under the transitional period, furthermore – as a matter of course – the rules of procedure of the relevant legislative body, the obligations of prior negotiations resulting from the nature of the law to be adopted, and the workload of the legislative body. The deadline set by the Constitutional Court shall be interpreted strictly in particular in the cases (...) when, together with the establishment of the omission, the Constitutional Court keeps in force – for various reasons – certain statutory provisions the unconstitutionality of which has been established [Decision 47/1997 (X. 3.) AB, ABH 1997, 324, 325].

The duty of the legislator upon the establishment of an omission

The legislator shall be bound, without any right of discretion, to adopt a norm eliminating the unconstitutional situation within the deadline specified in the Constitutional Court decision establishing the omission. This duty is based, on the one hand, on Section 49 (2) of the Law on the Constitutional Court providing that the body in default shall meet its legislative duty within the specified deadline. This responsibility of the legislator is of an objective nature.

Neither the Standing Orders of the Parliament, nor the rules of procedure of the Government contain specific rules for the implementation of Constitutional Court decisions establishing omissions; such omissions shall be remedied in the framework of ordinary legislation.

A failure to meet the obligation of legislation has no legal sanction. In the legal literature, there are various ideas regularly raised with a view to enforcing Constitutional Court decisions establishing an omission. According to “gentle” opinions, turning to the general public or petitioning the President of the Republic can be a solution, while other opinions would even accept the dissolution of the Parliament in case of a failure to perform the legislative duty on time. Under Article 25 of the Constitution, the President of the Republic may propose the adoption of Acts of Parliament, thus having an important opportunity to remedy unconstitutional omissions of legislative duty. However, in fact, this right is rarely exercised by the President of the Republic; since the transformation of the political regime in Hungary, only one Act of Parliament has been initiated by the President of the Republic (Act V of 1991 on exercising general amnesty). Finally, some authors hold that, bearing in mind the nature of this competence, there is no need to enforce decisions establishing an omission, and it would be hard to find any effective solution complying both with the provisions and the principles of the Constitution.

The acceptance and the execution of the Constitutional Court’s decisions are determined to a high extent by the political and legal culture of the country. It is also related to the authority of the Constitutional Court. The field of legislative omissions is the most probable ground for the non-execution of Constitutional Court decisions. In Hungary, e. g. presently nearly twenty omissions have not been filled in by the legislator; it is true that some of them would require a qualified two-thirds majority.

This leads me to the conclusion that the declaration of unconstitutional omission should not replace annulment of unconstitutional legal provisions.