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***Posterior Norm Control in Hungary after the
Abolition of Actio Popularis***

“The commission of the Constitutional Court cannot be judged alone, based only on the statutory list. The determinant factor is the method of the commission’s practice, and it depends on a lot of legislative condition and on the purpose of the court.”¹

1. INTRODUCTION

Act No. XXXII. 1989 on the Constitutional Court, which came into force on 30th October 1989, called an institute to life which had not had previous model in our public law arrangement. Previously, the Administrative Court (founded on 1st January 1897) had provided constitution-jurisdiction part functions, and after that the Constitutional Law Council, which was attached to the Constitutional Law in 1983, evoked in 1984, but none of these organizations were a concrete constitutional balance of the Parliament.

The Hungarian Constitutional Court (hereinafter referred to as CC) became more than a constitutional balance because of its activism in the early years; it determined the developmental direction of legal fields with certain decisions, and it contributed to the

¹ SÓLYOM, LÁSZLÓ: *Az alkotmánybíráskodás kezdetei Magyarországon* [The Beginning of Constitution-jurisdiction], 1999, Osiris Kiadó, Budapest, 163.

expansion of the previous contents of many constitutional institutions as well. The institution of actio popularis rendered indispensable assistance for this, which made the CC suitable for removing anti-constitutional legal sources from the Hungarian legal system, and it provided the opportunity to take actions against the new rules, which were in opposition with the idea of constitutionality.

However, there were many critiques against the CC's practice and also against actio popularis. According to Gábor Halmai, the CC overrode its commission in many cases, and they interpreted laws in force to everybody² instead of the Constitution, while Tamás Lábady said that the 'blindly torpedoed popular petitions'³ created gaps in many cases in the legal system. Beyond this, the institution of actio popularis causes a large amount of cases. Also, it was phrased as critique that the CC missed the authority of proposing concrete norm control.

The Fundamental Law, which was accepted in 2012, and the new Constitutional Court Act (hereinafter referred to as New CC Act) remedied this insufficiency and summoned the real institution of constitutional complaints. Because of the abolition of the actio popularis special constitutional complaints and the actions of Ombudsman were also included into the regulation. The increase of the authority taxation – as László Sólyom explicated⁴ – does not automatically mean authority increase because it is influenced by regulatory environment as well as the self-understanding of judges in association with authorities. Because of that, it is questionable whether the newly created system can serve the constitutional state as effectively as the previous one. The other pending question is

² HALMAI, GÁBOR: Hans Kelsen és a magyar Alkotmánybíróság [Hans Kelsen and the Hungarian Constitutional Court], in CS. KISS, LAJOS (ed.): *Hans Kelsen jogtudománya* [Jurisprudence of Hans Kelsen], 2007, Gondolat Kiadó, Budapest, 480.

³ LÁBADY, TAMÁS: A populáris akció és az egyéni jogvédelem biztosítása az alkotmánybírósági eljárásban [Ensuring Popular Action and Individual Legal Defense in Constitutional Court Process], in *Magyar Jog*, Vol. 38. No. 7. (1991) 388.

⁴ SÓLYOM: *op. cit.* 163.

whether the actions of Ombudsman and the special constitutional law complaints can be capable of substituting actio popularis, or the abolition of the institute would cause irretrievable constitutional deficit.

I would like to provide answers for these questions by introducing the current Hungarian and international regulations and the recommendations of the Venice Commission.

2. LAW REGULATION AND CRITIQUES OF THE POSTERIOR NORM CONTROL

The laws⁵ codified in 2011 brought significant changes regarding CC regulations. The regulations of the CC are in the State Organization part of the Fundamental Law. Article 24, Paragraph 2 of the Fundamental Law – not exhaustively, but with stating the main authorities – establishes that the other tasks and authorities can be provided by the Fundamental Law and the cardinal only Acts to eliminate authority problems of the Constitution which allowed for surplus laws to give or revoke authorities from the CC.⁶

The list of authorities was contributed with the institute of real constitutional complaint. With this, the constituent provided the opportunity for the citizens to take actions against anti-constitutional judicial decisions. Besides, the constituent marked the followings as conditions: *“the possibilities for legal remedy have already been exhausted by the petitioner or no possibility for legal remedy is available for him or her”*⁷, in addition: *“the CC shall admit constitutional complaints if a conflict with the Fundamental Law significantly affects the judicial decision, or the case raises constitutional law issues of fundamental importance.”*⁸ The principal constitutional law issues like minimal admission were not determined, the CC judges the applications included in bills from

⁵ It applies to the Fundamental Law and the New CC Act.

⁶ The Fundamental Law of Hungary, Art. 24. para. (2) point g).

⁷ Act CLI of 2011 on the Constitutional Court Art. 27. point b).

⁸ New CC Act, Art. 29.

case to case. In my opinion the CC should explicate what this admission criterion means – even in adjudication. It would be necessary because of three reasons: (1) The rule for the CC’s procedure determines it as a base case of challenge;⁹ (2) within the meaning of Art. 28 of the New CC Act it had to be applied in the case of every citizen complaint [also in the case of constitutional complaints based on Art. 26 para. (1)-(2)]; (3) it had to be predictable for citizens that the CC would accept their complaint. The difficulty of judging this criterion can be indicated by the fact that the CC has not been able to establish a unified, debate-free practice in the last nearly one and a half years, as in rejecting complaints the contents of minority opinions¹⁰ and parallel explanations¹¹ are demonstrating the lack of consensus. Béla Pokol’s and Péter Paczolay’s minority opinions are very important from these, which perfectly reveal the previously explained problems. According to Béla Pokol’s standpoint, the court violates the criminal law’s *nullum crimen sine lege* principle and Article XXVIII., Art. 4 of the Fundamental Law as well, when they extensively interpret Art. 216 para. 1 of the Criminal Code – *Any person who vandalizes a historic monument which is in his possession, commits a felony offense* – with punishing passive behaviour, hence, courts are violating principal rights, which makes the questionable applications a principal constitutional issue.¹²

Also troubling the CC’s practice – which narrowly defines the admission criteria of special constitutional complaints – István Stumpf wanted to indicate this in his minority opinion when he

⁹ 1/2012. (I. 3) Decision about the procedure of the Constitutional Court, Art. 30. para. 2 point a).

¹⁰ 3227/2012. (IX. 28.) CC Decision, Minority opinion of Dr. András Holló and Dr. Miklós Lévay, 3023/2012. (VI. 21.) CC Decision, Minority opinion of Dr. Miklós Lévay, 3077/2012. (VII. 26.) CC Decision, Minority opinion of Dr. Péter Paczolay and Dr. Béla Pokol, 3264/2012. (X. 4.) CC Decision, Minority opinion of Dr. István Stumpf.

¹¹ 3012/2012. (VI. 21.) CC Decision, parallel explanation of Dr. László Kiss, 3074/2012. (VII. 26.) CC Decision, parallel explanation of Dr. András Holló.

¹² 3077/2012. (VII. 26.) CC Decision, Minority opinion of Dr. Béla Pokol and Dr. Péter Paczolay.

explained that the CC is causing and maintaining a constitutional deficit when it requires the factual and codified 180 days. In his opinion the situation can be remedied if the substantial chance of a legal injury was enough reason for admission, or the 180 days could be calculated from the time when the public act comes into force.¹³ The Venice Commission's standpoint also highlights this in the case of Section 26 "*...an exception for the exhaustion of legal remedies should be provided for all cases where adhering to this rule could cause irreparable damage to the individual.*"¹⁴ So the institute could realize its original purpose – the partial substitution of actio popularis – if the CC ignored these authorities' practice¹⁵ of the German CC and rendered his authority on expanded way.

From 1st January 2012, the Fundamental Law wanted to narrow down the range of posterior norm control promoters to the quarter of the parliamentarians. The Constituent had asked for the Venice Commission's opinion before the rule was codified. In his report the Commission highlighted that "*the availability of an actio popularis in matters of constitutionality cannot be regarded as a European standard.*"¹⁶ also "*the actio popularis is not requisite in a democratic state.*"¹⁷ At the same time, they recommended the initiation of another channel to the Constituent and they mentioned the Ombudsman action¹⁸ as an example, which was included in the final version of the Fundamental Law because of this. The Ombudsman action was definitely needful against its many argued

¹³ 3264/2012. (X. 4.) CC Decision, Minority opinion of Dr. István Stumpf.

¹⁴ European Commission for Democracy Through Law (Venice Commission) Opinion no. 665/2012, Draft Opinion on Act CLI of 2011 on the Constitutional Court of Hungary, 8.

¹⁵ KELEMEN, KATALIN: Van még pálya (A magyar Alkotmánybíróság hatásköreiben bekövetkező változásokról) [There is still path (about the authority changes of the Hungarian Constitutional Court)], in *Fundamentum*, Vol. 15. No. 4. (2011) 90.

¹⁶ European Commission for Democracy Through Law (Venice Commission) Opinion no.614/2011. Opinion on the three legal question arising in the process of drafting the new Constitution of Hungary, 14.

¹⁷ Venice Commission Opinion no 665/2012. 12.

¹⁸ Venice Commission Opinion no 614/2011. 17.

elements, because the other two petitioners are definitely political actors, so their mere petitioner existence would politically transform every CC Decisions directed to posterior norm control. In the followings I would like to introduce these channels, highlighting the corner regulation points of each channel.

The government as a constituent considered a European standard, but in my opinion it is very difficult to imagine that it initiates a procedure against a law accepted by underlying parliamentary majority, which has been proved by the practice of the last two years.

The Fundamental Law meant a sharp change compared to the former regulation, because until 2012, even a single parliamentarian could initiate a posterior norm control, while in accordance with the regulations in force an application of the quarter of the parliamentarians is required. As the table below reveals, it is only in Belgium and Austria¹⁹ where they have more difficult procedure for parliamentarians to address the CC than in Hungary. In Germany – similarly to Hungary – the support of the quarter of the parliamentarians to initiate a posterior norm control procedure is also required. However, in Germany the governments and Constitutional Courts of the federated states can initiate the start of this type of procedure. Also, it is clearly visible that the one-fifths regulation is considered as a European standard. In Hungary the problem is that it is hardly imaginable in the case of two-thirds parliamentary majority that members of the opposition can stand into a camp to have the necessary quarter of the mandates, so it seems like a sleeping institution. This confirms that *„the government’s politican merger with the legislative power is a fact also admitted by the CC.”*²⁰

¹⁹ Where the governments of federal provinces and the CC can initiate a process ex officio.

²⁰ SMUK, PÉTER: A politikai zsákmányelv alkotmányos korlátai [The Political Principle of Booty’s Contitutional Limitations], in *Jog-Állam-Politika*, Vol. 2. No. 4. (2010) 7.

Required mandates for posterior norm control		
<i>Examined country</i>	<i>Required rate or mandates</i>	<i>%</i>
Hungary ²¹	1/4	25
Belgium ²²	House of Commons 1/3	33
Ukraine ²³	45	10
Slovak Republic ²⁴	1/5	20
Lithuania ²⁵	1/5	20
Latvia ²⁶	20	20
Poland ²⁷	Szejm 50, Senate 30	10,8 & 30
Czech Republic ²⁸	House of Commons 41, Senate 17	20,5 & 21
Bulgaria ²⁹	1/5	20
FR of Germany ³⁰	1/4	25
Austria ³¹	1/3	33
Spain ³²	Congress 50, Senate 50	14,3 & 19

1. table (edited by the author)

After the effective date of the Fundamental Law it was actually the Ombudsman Channel which was active but in that case the legislator made a mistake in that he did not regulate the mode of the authority's practice. Therefore, this task is the actual commissioner's duty. The possible forms of interpretations are: (1) postman role, (2)

²¹ The Fundamental Law of Hungary, Art. 24. para. (2) point e).

²² Constitution of Belgium, Art. 4.

²³ Constitution of Ukraine Art. 150.

²⁴ Constitution of Slovak Republic Art. 130. para. (1).

²⁵ Constitution of Lithuania Art. 106.

²⁶ Constitutional Court Act of Latvia Art. 17. para. (1).

²⁷ Constitution of Poland Art. 191. para. (1) point a).

²⁸ Constitutional Court Act of Czech Republic Art. 64. para. (1).

²⁹ Constitution of Bulgaria Art. 150.

³⁰ Constitution of Federal Republic of Germany Art. 93. para. (1).

³¹ FAVOREU, LOUIS: Az alkotmánybíróságok [Constitutional Courts], in PACZOLAY, PÉTER (ed.): *Alkotmánybíráskodás, alkotmányértelmezés* [Constitution-jurisdiction, Constitution-interpretation], 1995, ELTE, Budapest, 75.

³² Ibid. 113.

narrowly or (3) widely interpreted authority. The postman role would be unreasonable from many viewpoints. At first, the New CC Act's ministerial explanation concludes that "... a commissioner's application cannot mean the transmission of the incoming complaints, which would mean the return of the annulated authority of *actio popularis* into the legal system."³³ In addition "... the transmission of these complaints without any filter is a legal nonsense... primarily not... the preservation of the ombudsman's professional prestige justify..." but "*the adopted applications with conflicting content are forcing the institute into a schizophrenic situation.*"³⁴

In the case of the narrowly interpreted authority the ombudsman's action would not be more than a concrete norm control. Although, it would not mean that an ombudsman's act in his original function, or being detached from a concrete case could not initiate a posterior norm control procedure – according to the Venice Commission's standpoint it is considered as a European standard that in Europe it is only in Estonia and Ukraine where widely authorized ombudsman institute exists.³⁵ However, this is the only channel which is useable for citizens to initiate posterior norm control, so it is necessary that the ombudsman can widely interpret his authority. However, it has many problems as well; the first I would mention is that "*ombudsman has discretion in terms of the method of managing complaints asking for posterior norm control procedure.*"³⁶ But it could offend citizens' ideological freedom in many cases; just think of euthanasia or abortion.

³³ The Minister's Explanation of the New CC Act, 26.

³⁴ LÁPOSSY, ATTILA: Popularis akcióból ombudsamani akció? [Ombudsman action from a popular action?], in *Magyar Közigazgatás*, Vol. 1. No. 3. (2011) 121.

³⁵ Venice Commission Opinion no 614/2011. 17.

³⁶ LÁPOSSY, ATTILA: Közvetve és közvetlenül: az alapvető jogok biztosának indítványozási jogköre az alkotmánybíráskodás és alapjogvédelem szemszögéből [Directly and indirectly: the initiative authority of the Commissioner for Fundamental Rights from the aspects of constitution-jurisdiction and fundamental law protection], in *Kodifikáció és közigazgatás*, Vol. 1. No. 2. (2012) 41.

But beyond the ombudsman's discretion it is also necessary for citizens to know the cases which could be interiorized by the institute. That is why they created those aspects (in the shape of normative orders) which make the initiation of the posterior norm control reasonable. These aspects are reasonable if “(1) *constitutionally qualm raises related in the enforcement of fundamental rights, constitutional principles and claims determined in the Fundamental Law, (2) there is an injury in the fundamental rights of people in particularly protected groups or there is an injury in the right for healthy environment (3) extreme weight in the violence of fundamental rights, (4) the number of injured people justify it*”.³⁷ These aspects give enough insight for the citizens and the future ombudsman, so they can predict the correct handling of a petition. But this is a legislative instruction, so it also depends on the Commissioner of Fundamental Rights whether he feels it normative or not. Because of this, I consider it necessary to legally regulate the method of practicing this authority, even by the takeover of ombudsman's instructions, as this institution is not capable of building a constitutional control on it because of the lack of guarantee rules – even if it seems that they interpret their role as I have written above.

The other significant problem is the question of the compatibility of ombudsman's action and the principle ombudsman tasks, because the previous authority is only an additional license but it could implicate that the completion of his main tasks is disturbed. According to Attila Láposy, the ombudsman action in the aspect of the main functions of the Commissioner for Fundamental Rights is “*official and public service legal practice, compared to the examination of activities based on complaints is an additional, incremental license*”.³⁸ If we examine the statistics, we can see that there were 324³⁹ incoming posterior norm control applications to the

³⁷ The 7th section of the 2/2012 (I. 20.) Commissioner of Fundamental Rights directive about the professional rules and methods of the CFR's examination.

³⁸ LÁPOSSY: *op. cit.* (2012) 5.

³⁹ Report of the ombudsman.

ombudsman until 15th July 2012, but there were 466⁴⁰ to the CC (thereof 413 constitutional complaints). So it is clearly visible that half of the entire cases were transferred to the Fundamental Rights. From the statistics it is also obvious that only the ombudsman initiated posterior norm control procedure in 2012, which confirms the inactivity of the other two channels. *“The petitioner’s loneliness is regrettable, because the involving of other technically prepared petitioners would effectively increase the authorities’ accessibility.”*⁴¹

I would like to determine these potential petitioners’ range with an outlook to the regulation of foreign countries. It can be definitely stated that there are no more channel models in Europe than the model established by actio popularis, but it has to be considered that Poland – where the similar system is missing – provides the same number of access. As illustrated, the current model is situated in the lower regions, even Romania has less channels than Hungary (the prosecutor and the court forms a channel in the table), but the range of the posterior norm control’s initiators is very wide (7 accessibility channels). However, in the Czech Republic, where also three channels are available, one of them is the ex officio, so the CC can initiate his process. There is one more channel in Germany and Austria but this number covers a much higher quality, because in these countries the federal governments are forming powerful constitutional balance with their possibility to turn for the CC, moreover, in Austria the CC has the right to officially conduct such procedures. The case of Slovakia is different, because a self-government organization cannot turn to the CC there, but the President of the Supreme Committee and the Supreme Prosecutor can do it, so the members of the legislation can initiate a process easier. The number of accessibility channels is extremely high in Poland, Bulgaria and Latvia. In these countries the local governments, the President of the Supreme Committee, the Supreme Prosecutor and the ombudsman can also initiate a procedure.

⁴⁰ Statistics of the CC’s available at: http://www.mkab.hu/letoltesek/stat_2012_1fev.pdf [cit. 2013-11-04].

⁴¹ LÁPOSSY: *op. cit.* (2012) 40.

The table's data shows that the possible channels are: (1) ex officio; (2) President of the Republic; (3) Leaders of the judiciary's supreme organisation; (4) Local government organization. This four can be found in most of the European countries as posterior norm control initiators, and these can be considered as European standards. Sometimes it occurs that one of them is missing but they try to replace it with a more powerful channel (for example ex officio). In Poland the civil sector (churches, trade unions in the cases affected to them) also appears among the initiators, however, in a limited way. The ex officio suggestion would not be a good idea in Hungary because the CC suffered from critiques due to their activism in the 90s, so they probably would not undertake the critiques associated with this authority. The President can be a possible solution, but one of his primary duties is to establish the national unity, so he should not have to make political decisions. However, it would be a realistic channel if the High Court and the Supreme Prosecutor had possibility to initiate in relation to their authority and function. Similarly, the local governments' possibility for posterior norm control would be a good solution.

In March 2013, the Fundamental Law – realizing this fact – expanded the petitioners' range with the President of the High Court and the Supreme Prosecutor. He wanted to remedy the problems outlined above so that *“the judiciary can fulfil its constitution-protective role better.”*⁴² This modification was welcomed because the new channels can decrease the ombudsman's occupation and can make the protection of the Fundamental Law better guaranteed. However, in my opinion they had to record that a norm control could be initiated in accordance with functional and jurisdictional issues only, because it would not be fortunate if the two initiators were attacked from political circles, accusing them with partiality of a political faction. I think the range of initiators would be complete if the local governments could initiate a posterior norm control in accordance with cases related to their authority. The ombudsman's occupation could be decreased if the civil sector was involved in the range of initiators, even following the Polish example with the

⁴² Explanation of the Fundamental Law's fourth modification, 23.

provided possibility of initiation to churches and trade unions (of course in issues accordance with their case only). But it should be noted that in Hungary the trade union movement is not as powerful as it is in Poland. In the case of churches the fact that their approved ecclesial existence depends on parliamentary confirmation could limit their activity in these situations.

The development of accessibility channels in the aspect of posterior norm control									
	C⁴³	PR⁴⁴	G⁴⁵	P⁴⁶	O⁴⁷	EX⁴⁸	PH-SP⁴⁹	OLC⁵⁰	Σ⁵¹
Poland⁵²	+	+	+	+	+	-	+	+	7
Bulgaria⁵³	-	+	+	+	+	-	+	+	6
Latvia⁵⁴	-	+	+	+	+	-	+	+	6
Ukraine⁵⁵	-	+	-	+	+	-	+	+	5
Slovakia⁵⁶	-	+	+	+	+	-	+	-	4
Austria⁵⁷	-	-	-	+	-	+	+	+	4
Germany⁵⁸	-	-	+	+	-	-	+	+	4
Czech Republic⁵⁹	-	+	-	+	-	+	-	-	3
Lithuania⁶⁰	-	+	-	+	-	-	+	-	3

⁴³ C: Civil.

⁴⁴ PR: President of the Republic.

⁴⁵ G: Government.

⁴⁶ P: Parliament.

⁴⁷ O: Ombudsman.

⁴⁸ EX: Ex officio.

⁴⁹ PH-SP: President of the High Court – Supreme Prosecutor.

⁵⁰ OLG: Organs of the local government.

⁵¹ Σ: Number of the Access Channels.

⁵² Constitution of Poland Art. 191. para. (1) point a).

⁵³ Constitution of Bulgaria Art. 150.

⁵⁴ Constitutional Court Act of Latvia Art. 17. para. (1).

⁵⁵ Constitution of Ukraine Art. 150. para. (1).

⁵⁶ Constitution of Slovak Republic Art. 130. para. (1).

⁵⁷ FAVOREU op. cit. 75-76.

⁵⁸ Constitution of Federal Republic of Germany Art. 93. para. (2).

⁵⁹ Constitutional Court Act of Czech Republic Art. 64. para. (1).

Hungary⁶¹	-	-	+	+	+	-	-	-	3
F. Law Modification 4⁶²	-	-	+	+	+	-	+	-	4
Romania⁶³	-	-	-	+	-	-	+	-	2

1. table (edited by the author)

3. SUMMARY

Through the institute of actio popularis the CC (established in 1989) seemed to have the full scale of continentally known constitutional authorities. But this authority taxation was not complete because there was not any possibility for citizens to turn to the CC in the case of their individual law injury. Because of this the institute was one-sided regarding the jurisdiction side. The solution could be the establishment of the German-type institution of constitutional law complaints.

The Fundamental Law healed this one-sidedness of authority, at least in the aspect of taxation. But in practice it became one-sided again in the aspect of the CC's authority. In practice this one-sidedness was caused by the small number of posterior norm control's initiators and the regulations obliged on them. To try to heal this problem, in February 2013, the Constituent introduced two new channels, but in practice there was no essential change because the rules applying to the other three channels were not modified. In the new regulation entering into force in 2012, it was salutary that the Fundamental Law stated the CC's authorities, and a public act, which was on lower level than the cardinal law could not give or revoke authority to the CC.

The special constitutional complaint is what the legislator dedicates to substitute actio popularis but the CC narrowly interprets the admission procedure's rules (following the German

⁶⁰ Constitution of Lithuania Art. 106.

⁶¹ Fundamental Law of Hungary, Art. 24. para. (2) point e).

⁶² Fundamental Law's fourth modification.

⁶³ Constitution of Romania Art. 146.

Constitutional Court's practice in similar cases), so the institute is inappropriate for the purpose the legislator meant. As István Stumpf highlighted that in his minority opinion, the legal institution can only reach the desired purpose if it is more easily interpreted – no need for direct legal injury, or the 180 days time limit had to be counted from the date when the public act comes into force. The modification of the petitioners' range of posterior norm control is one of the most argued parts of the new regulation, because with the abolition of actio popularis the legislator determines the possible petitioners' range very narrowly. Based on the international practice, this regulation is an accepted European standard, but in my opinion it would be a better solution to introduce a filter mechanism in the first round and eliminate the institute definitively when the amount of the incoming applications to the CC is unmanageable. In the current regulatory environment the best solution would be the involvement of new channels.

In my opinion to solve these defects, the regulation should be modified in the following ways: (1) The special constitutional complaints should be regulated as the chance of legal injury was enough to accept the application, and the 180 days time limit had to be counted from the date when the public act comes into force. (2) The legislator should re-control the regulations related to posterior norm control petitioners in accordance with the following: a) The ombudsman's initiative authority has to be incorporated into a law; b) Decrease the number of parliamentarians who have the right of initiation from one-fourth to one-fifth; c) Expand the range of petitioners to the local governments in issues affecting their authority; d) Modify the President of the High Court and the Supreme Prosecutor's initiative authority for that they can turn to the CC in issues related with their task or authority, because in other cases their application could get a political tone. With these steps the problems named in this study could be remedied.

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