



## **Mechanism of Individual Complaints - German, Spanish and Hungarian Constitutional Courts - Comparative Analysis**

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## **Abstract**

The thesis is aimed at analyzing the mechanism of constitutional complaints in Germany, Spain and Hungary in the comparative perspective. Through exploring constitutional and legislative framework, analysis of constitutional case law as well as writings of scholars, it identifies main similarities and differences, evaluates the effectiveness of different variations of the mechanism, reveals the reasons for shortcomings and proposes possible ways of their correction. More particularly, the thesis examines the requirements for filing the complaint before the constitutional courts, including those related to standing, subject-matter of complaints and exhaustion of all remedies, focuses upon effects of judgments and elaborates on the relations of the constitutional courts with ordinary courts and the legislatures. This analysis represents the quest for finding the reasons of the failure of the mechanism of constitutional complaint in Hungary that is in sharp contrast with the success of the same mechanism in Germany and Spain. As a result of comparative analysis, it suggests the application of the German and Spanish experience to Hungary as a way of vitalization of the mechanism of constitutional complaints.

## Introduction

Protection of constitutional rights has been characterized as a main basis for legitimacy of constitutional adjudication<sup>1</sup>. Constitutional complaint represents a tool for the constitutional court to scrutinize the activities of public authorities and redress infringements upon constitutionally guaranteed rights of individuals.<sup>2</sup> It is frequently stressed that granting direct access to individuals with grievances against the state to the Constitutional Court and allowing the latter to engage in adjudication of rights alters the traditional balance of powers between the constitutional court and parliament and significantly influences relations between ordinary and constitutional courts.<sup>3</sup> Even though the mechanism of constitutional complaints generates tension in relations between the constitutional court and the public authorities the acts of which are subject to constitutional control, it has demonstrated to be a valuable addition to the centralized model of judicial review and the device that significantly enhances the potential of the constitutional court to contribute to the effective protection of fundamental rights.<sup>4</sup>

In the context of Germany and Spain, it has been underlined that overlapping of functions between ordinary and constitutional courts due to increased judicialization of constitutions (allowing ordinary judges to apply constitution) and constitutionalization of various areas of law (constitutional court's going beyond the realm of constitution by interpretation and application

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<sup>1</sup> Alec Stone Sweet, *Politics of Constitutional Review of Legislation in France and Europe*, 5 *Int'l J. Const. L.* 69 (2007) at p. 85; Renata Uitz, *Lessons on Limited Government, Constitutionalism and Rule of Law: Post-Communist Democracies Trapped between Constitutional Courts and Supreme Courts*, Paper Presented on Symposium "Democracy and Judiciary", Ankara 4-6 January 2005, published by Union of Turkish Bar Associations, Ed. by Dr. Ozan Ergül (2006), at p. 257

<sup>2</sup> See e.g. Herman Schwartz, *The Struggle for the Constitutional Justice in Post-Communist Europe*, University of Chicago Press (2000), pp. 34-35; Klaus Von Beyme, *The German Constitutional Court in an Uneasy Triangle between Parliament, Government and the Political Laender*, In: *Constitutional Justice, East and West: Democratic legitimacy and Constitutional Courts in Post-Communist Europe in the Comparative Perspective*, ed. by Wojciech Sadurski, Henri C. Alvarez, The Hague, Kluwer Law International(2002), at 114.

<sup>3</sup> Lech Garlicki, *Constitutional Courts versus Supreme Courts*, 5 *Int'l J. Const. L.* 44 (2007) at 66.

<sup>4</sup> Mario Patrono, *the Protection of Fundamental Rights by Constitutional Courts – A Comparative Perspective*, 31 *VUWLR* 401(2000), at p. 424. available <http://www.upf.pf/recherche/IRIDIP/RJP/RJP6/6Patrono.doc>

of ordinary law) led to significant conflicts between these institutions, taking into account that the constitutional court can control the constitutionality of activities of the ordinary judiciary and quash their decisions through the mechanism of individual complaint.<sup>5</sup> In Hungary, the tension is relieved, since the constitutional court does not exercise direct control over the activities of the ordinary courts and constitutionality of judicial decisions cannot be challenged through the constitutional complaint.<sup>6</sup> As frequently pointed out, the constitutional complaints represent the main part of the docket of constitutional courts of Germany and Spain, while in Hungary, it is rarely used in practice.<sup>7</sup> The failure of this device in Hungary that should logically be very attractive for individuals whose rights have been violated in contrast to the overwhelming success of the same mechanisms in Germany and Spain has been explained by limitations placed upon the Hungarian Constitutional Court in contrast to the scope of competence of its German and Spanish counterparts.<sup>8</sup>

From Germany that was the first to introduce the mechanism of individual complaints allowing the individuals to bring claims against public authorities for violations of their rights, the path of constitutional borrowings brings us to Spain and later on, to Hungary, both of which duplicated the German model with some adjustments. The comparison of the mechanism of constitutional complaints in Germany, Spain and Hungary seems to be especially interesting, since they are based on essentially same pattern, but differences in the scope of competences of the respective constitutional courts results in differences in the outcomes of their activities. As

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<sup>5</sup> Lech Garlicki, *supra* note 3, at 48-49; Leslie Turano, Spain: Les Custodiet Ipsos Custodet, Struggle for Jurisdiction Between the Tribunal Constitucional and Tribunal Supremo, 4 Int'l J. Const., L. 151(2006), at 154-155.

<sup>6</sup> Renata Uitz, Yet Another Revival of Horizontal Effect of Constitutional Rights: Why? And Why Now? – An Introduction, In: The Constitution in Private Relations, Expanding the Constitutionalism, ed. by Andras Sajo & Renata Uitz, Eleven International Publishing (2005), at pp. 7-8.

<sup>7</sup> Catherine Dupre, Importing the Law in Post-Communist Transitions, The Hungarian Constitutional Court and the Right to Human Dignity, Hart Publishing, Oxford (2003), at p. 36

<sup>8</sup> Georg Brunner, Structure and Proceedings of the Hungarian Constitutional Judiciary, In: Constitutional Judiciary in a New Democracy, the Hungarian Constitutional Court, László Sólyom & Georg Brunner, Ann Arbor, University of Michigan Press(2000), at 84-85.

pointed out by Quint, “in order to make sense of some sort of comparison, there must ordinarily be some degree of similarity among the things that are to be compared...but it is not the similarities, but rather differences that lend the endeavors their piquancy and value... because the differences represent the alternative means that have been chosen in various systems to pursue the common end.”<sup>9</sup> The aim of the thesis is to identify similarities between the mechanisms of individual complaints in Germany, Spain and Hungary but more importantly, the differences that grow out of variations in the regulation of this device. In the light of analyzing the conditions of exercising this power by the constitutional court (such as the issues of standing, subject-matter of complaints, remedies) as well as its inter-relation with ordinary courts and the legislature, the thesis will highlight the reasons and preconditions of success and failure of this mechanism in jurisdictions under consideration. Further, the thesis will focus on possible ways of correcting the shortcomings.

Assessment of the mechanisms of individual complaints of Germany, Spain and Hungary in the comparative perspective will be based upon the analysis of relevant provisions in the respective constitutions and laws on constitutional courts, case-law and writings of scholars.

The thesis is divided into *five* Chapters. The *First Chapter* analyzes the role of the mechanism of constitutional complaint in protection of human rights and in a wider perspective, its contribution to transformation from repressive regimes to democracy through raising the awareness of the individuals of their constitutionally guaranteed rights and giving lessons to the public authorities on how to protect these rights. Besides, the chapter identifies the similarities of the process of transition in the countries under consideration as well as differences and points to implications of these differences upon the activities of the constitutional courts. The *Second Chapter* focuses on the issues of standing and subject-matter of constitutional complaints. As related to the issue of standing, special emphasis is placed upon the reasonableness of granting access to the Public Defender and the Office of the Public Prosecutor to the Spanish

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<sup>9</sup> Peter E. Quint, *Leading a Constitutional Court, Perspectives from the Federal Republic of Germany*, *University of Pennsylvania Law Review*, Vol. 154. (2006), at p.1853.

Constitutional Court that represents a significant difference from the standing provisions in the other two countries. Further, the chapter focuses upon the range of acts of public authorities that can be challenged by means of the constitutional complaint as well as the rights the violation of which can be brought to the attention of the constitutional court. The Chapter considers two more questions that are interesting from the perspective of expanding the reach of the constitutional court through the mechanism of individual complaints for the attainments of its main goal – rights protection. These are the issues of applicability of constitutional rights in private relations and the willingness of constitutional courts to turn certain constitutional rights provisions into generators of new rights not enumerated in the constitution and thereby significantly extend the scope of constitutional protection of human rights. The *Third Chapter* covers the issues of delimitation of power and clashes between ordinary and constitutional courts in the context of proceedings on constitutional complaints with the specific emphasis upon the requirement of exhaustion of other remedies before addressing the constitutional court. The Chapter will first underline the similarities of German and Spanish models and then consider them in contrast with the Hungarian system. *The Fourth Chapter* covers the effects of judgments of the constitutional courts. *The Fifth Chapter* aims at analyzing basic features of inter-relation between the constitutional courts and legislatures in the countries under consideration and the tension resulting from the power of the constitutional court to adjudicate on constitutional rights.

## Chapter I - The Role of the Mechanism of Constitutional Complaints in rights protection and transition to democracy

Power of hearing individual complaints against public authorities regarding the violation of constitutionally guaranteed rights as a major departure from Kelsen's model represents an important tool at the disposal of the constitutional court for ensuring human rights protection.<sup>10</sup> If exercised effectively, it has potential to contribute to strengthening respect for fundamental rights and liberties. It is to be viewed as a possibility given to individuals to get redress for the violation of rights and also as a means of prevention of the abuse of power by state authorities in the future. It significantly contributes to the formation of political culture, development of civil society, raising the awareness of individuals on their constitutional rights as well as on competences and obligations imposed upon public authorities under the existing constitutional framework. Passivity and tolerance towards human rights violations committed by state authorities is a characteristic of the societies under the totalitarian regimes. All the three countries under consideration experienced dictatorships. What history showed us is unprecedented state terror and policy of persecution characteristic to the Nazi regime in Germany<sup>11</sup>, 46-year dictatorship of Franco in Spain with the state control over all spheres of public life<sup>12</sup> and communist rule in Hungary with monopolization of political power, crushing all aspects of the societal autonomy and placing the strict political and ideological supervision of the communist party and the state.<sup>13</sup> Living under this kind of regimes for an extensive period of

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<sup>10</sup> Kelsen conceived constitutional court as an instrument for guarding constitution through abstract review of constitutionality of legislation and excluded adjudication of constitutional rights from its jurisdiction, anticipating that it would obliterate distinction between judicial and legislative functions. See Herman Schwartz, *supra* note 2, at 34; Alec Stone Sweet, *supra* note 1, at 84.

<sup>11</sup> Transitional Justice, How emerging democracies reckon with former regimes, ed. by Neil Kritz, Volume II, Country Studies, United States Institute of the Peace Press, Washington D.C.(1995). at p. 1

<sup>12</sup> Ascension Elvira Perales, Implementing the Spanish Constitution, In: Constitutional Policy and Change in Europe, ed. by Joahim Jens Hesse and Nevil Johnson, Oxford University Press, 1995, at p. 214

<sup>13</sup> Alan Renwick, András Körösiényi, Government and Politics in Hungary, Central European University Press, Budapest (1999) at p. 12.



time has a considerable impact upon the society, its perceptions and understandings. Suppression of any protest against the existing rule makes the society “fearful and compliant”<sup>14</sup> and the way of thinking developed for years is not so easy to change. Taking these factors into account, establishment of the constitutional court and conferring upon it the power to hear individual complaints was of essential importance in the process of transition from authoritarian regimes to democracy for three countries under consideration. Mechanism of individual complaint carries the educational function that is important in two respects: On the one hand, by developing the skills of individuals to be active and not to tolerate the abuse on the part of the public authorities, it contributes to the formation of the society the members of which know their rights. On the other hand, through the mechanism of individual complaints the constitutional court gives lessons to the public authorities on human rights protection and by redressing violations serves as a deterrent from future human rights abuses. In this way, the constitutional court breaks with the authoritarian traditions and outlines the principles of the free and democratic rule-of-law state.<sup>15</sup>

Facing the reality of significant violations of human rights causes the loss of trust and dissatisfaction of the society with state institutions. Under totalitarian regimes, judiciary was discredited in the eyes of the society since it was an obedient servant of the dictatorial government and not the mechanism against the arbitrary state action.<sup>16</sup> Though allegiance to the existing regime was the only condition under which judges could work, it does not change the fact that judiciary did not perform functions it was designed for and supposed to perform. Therefore, it is not surprising that the public did not see the judiciary as a mechanism of

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<sup>14</sup> Albon, Rapporteur’s Report, In: Truth and Justice, the Delicate Balance, The Documentation of Prior Regimes and Individual Rights. Working Paper No. 1, The Institute for Constitutional and Legislative Policy, Central European University (1993), at p. 35

<sup>15</sup> Jutta Limbach, The Role of the Federal Constitutional Court, 53 SMU L. Rev. 429 (2000), at p. 440.

<sup>16</sup> Jeffrey Seitzer, Experimental constitutionalism: a comparative analysis of the institutional basis of rights enforcement in post-communist Hungary, In: Constitutional Dialogues in Comparative Perspective, ed. by Kenney, Reisinger, & Reitz. Macmillan Press Ltd. (1999); at p. 53; Sarah Wright Sheive, Central and Eastern European Constitutional Courts and Anti-Majoritarian Objection to Constitutional Review, 26 Law & Pol’y Int’l Bus. 1201, 1995, 1207-1208;

protecting its rights and possibility of getting redress against the abuse of power by the authorities. Establishment of the constitutional court that was separate from the ordinary judiciary and empowered to hear individual complaints was one of the first steps undertaken by the countries under consideration after overthrowing the totalitarian regime. The active participation of the society was one of the prerequisites for the success of this mechanism. It was important to show that constitutional court was an independent and impartial institution aimed at rights protection in order to win trust and acceptance for the new system by the public.<sup>17</sup> Taking into consideration the legacy of authoritarian regimes where the rights even if included in the constitution represented fiction<sup>18</sup> and not real and enforceable guarantees for individuals, constitutional court with the power of hearing grievances against the state authorities for the violation of such rights, ought to become an important tool for believing into the values and essence of democracy and rule of law by the society. At least initially, in the absence of the culture of human rights protection, the Constitutional Courts were to be effective in promoting the values and principles heavily suppressed under authoritarian regimes, but of high importance for establishing democracy and developing civil society. Overthrowing the authoritarian regime is much easier than building a state based on rule of law, reconciling the interest of governing effectively and ensuring human rights protection by placing constraints upon public authorities.<sup>19</sup> When making comparisons, it is to be noted that the nature of transition in Hungary was different from previous democratic transitions in Europe because of necessity to implement economic and political reforms simultaneously that made transition processes

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<sup>17</sup> Jeffrey Seitzer, *supra* note 16, at p. 55; Extract from the Article of László Sólyom, The Hungarian Constitutional Court and Social Change, 19 Yale J. Int'l L. 223(1994); In: Comparative Constitutional Law, by Vicki C. Jackson and Mark Tushnet, New York, Foundation Press (1999) at pp. 342-343.

<sup>18</sup> Rett R. Ludwikowski, Constitution-Making in the Region of the Former Soviet Dominance, Duke University Press, (1996), at p. 37

<sup>19</sup> Walter F. Murphy, Constitutional Democracy, Creating and Maintaining a Just Political Order, In: Constitutional Justice, East and West: Democratic legitimacy and Constitutional Courts in Post-Communist Europe in the Comparative Perspective, By Wojciech Sadurski, Henri C. Alvarez The Hague, Kluwer Law International, 2002. p. 37

extremely complex and vulnerable.<sup>20</sup> It had its influence on the activities of the constitutional court as one of the most active participant of the process of transition.

The fact of establishing constitutional courts with the power of hearing individual complaints was indeed an important step. However, the success of this mechanism is heavily dependent upon the way of constructing the framework for its the operation, starting from the issue of standing and subject-matter of complaints and ending with the remedies granted to the complainants. Furthermore, clash between ordinary and constitutional courts, inter-relation with the parliament significantly influenced the results of the work.

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<sup>20</sup> Catherine Dupre, *supra* note 7, at p. 17; Luis López Guerra, the Application of Spanish Model in Constitutional Transitions in Central and Eastern Europe, 19 *Cardozo L. Rev.* 1937(1998), at p. 1939

## Chapter II – Standing and Subject-Matter of Constitutional Complaints

### 2.1. Standing

Standing provisions for constitutional complaints are basically the same in three jurisdictions under consideration (Germany, Spain, Hungary), making the claim on suffering a personal and direct violation of constitutional rights by the public authority as a requirement for resorting to the constitutional court.<sup>21</sup> Taking into account the substantive scope of constitutional rights, a complainant may be a natural person or private corporate body, citizen, foreigner or stateless person.<sup>22</sup> The feature that distinguishes Spanish standing provisions from the other two is that under Article 162(1) (b) of the Spanish Constitution and Article 46(1)(b) of SLCC, Public Defender and Office of the Public Prosecutor are also entitled to bring a constitutional complaint in relation to violations of rights and freedoms by the executive (Article 43, SLCC) as well as violations that are immediate and direct result of an act or omission by a judicial body (Article 44, SLCC) at their own initiative or at the request of the interested party. It means allowing the body having no personal interest in the outcome of the case to file the complaint before the constitutional court. Taking into consideration the responsibility for human rights protection imposed upon the Public Defender<sup>23</sup> and Office of the Public Prosecutor<sup>24</sup> as

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<sup>21</sup> Art. 93(4a), German Basic Law, Art. 90(1), FCCA; Arts. 53(2), 162(1) (b) of Spanish Constitution, Art. 41(2), SLCC; Art. 48(1), HCCA.

<sup>22</sup> Helmut Steinberger, Models of Constitutional jurisdiction, Collection of Science and technique of democracy no.2, European Commission for Democracy through Law, Council of Europe Publishing(1993), at p. 26; See also Brunner, *supra* note 8, at p. 84.

<sup>23</sup> As provided under Article 54 of Spanish Constitution, Public Defender is appointed by the Parliament for the protection of constitutional rights. Despite the procedure of parliamentary appointment, Public Defender is endowed with absolute independence. He/she supervises the activities of public authorities, receives complaints regarding the violations of human rights, conducts investigations, etc. On competences of the Public Defender, see Alvaro Gil Robles Gil Delgado, Framework of Relations between the Constitutional Court and the Ombudsman in Spain, Materials of Workshop of 1-2 July 1999, Kyev, available at [http://www.venice.coe.int/docs/1999/CDL-JU\(1999\)016-e.asp](http://www.venice.coe.int/docs/1999/CDL-JU(1999)016-e.asp)

<sup>24</sup> Under Article 124 of the Spanish Constitution, the Office of the Public Prosecutor is aimed at promoting the operation of justice, in the defense of the rule of law, rights of citizens and of the public interest, as safeguarded by law, whether ex officio or at the request of interested parties.

well as the fact that they are regularly addressed with complaints regarding the violations of constitutionally guaranteed rights and through conducting investigative activities are able to assess the seriousness of these violations, granting standing to these two bodies seems to be justified. However, this competence is to be resorted to only in exceptional circumstances, when the case involves significant infringement of human rights and addressing the constitutional court directly by injured persons is not possible. Entitling bodies entrusted with the task of human rights protection to file a complaint before the constitutional court can be especially beneficial at the initial stages of transition to democracy when the society lacks skills of using newly introduced mechanisms of human rights protection. Further, it represents an additional guarantee that serious human rights violations will not remain beyond reach of the constitutional court. However, the status of impartiality and independence of these institutions and their actual effectiveness in protecting human rights significantly determines the level of success of the use of this power.

## **2.2. Acts of Public Authorities Challenged Through the Constitutional Complaint**

The Constitutional complaint brought before the Federal Constitutional Court of Germany may relate to any act of a public authority violating a basic right: a law, a directive of an administrative agency, or a court decision.<sup>25</sup> While majority of claims (about 95 %) are filed against court rulings, claims directly challenging laws are very rare.<sup>26</sup> This may be explained by special requirements for the admissibility of such constitutional complaints. Claims directly challenging the constitutionality of laws are only admissible if the complainant is personally, presently and directly affected by the challenged legal provision without any further act of

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<sup>25</sup> Gotthard Wohrmann, *The Federal Constitutional Court: The introduction*, available at <http://www.iuscomp.org/gla/literature/Inbverfg.htm>;

<sup>26</sup> Jackson & Tushnet, *supra* note 17, at p. 521.

execution.<sup>27</sup> Even where these pre-requisites are met, the constitutional complaint is inadmissible if the complainant can reasonably obtain legal protection against the legal provision by recourse to the courts.<sup>28</sup> What frequently happens, however, is that a constitutional complaint indirectly alleges the unconstitutionality of the legal provision on which the challenged ruling is based.<sup>29</sup>

The writ of *amparo* may be invoked by Spanish Constitutional Tribunal against an administrative act or a judgment of a court, but not directly for the review of constitutionality of the statute.<sup>30</sup> Limitation of the range of acts that can be challenged before the constitutional court to the decisions of executive and judicial bodies is one of the main differentiating features of German and Spanish models. However, Spanish constitutional tribunal is not completely deprived of the possibility to declare the laws unconstitutional. As determined by Article 55(2) of SLCC, where protection is granted because the law applied violates fundamental rights or public freedoms, the chamber of the constitutional court that reviews the case may refer the question of constitutionality of the underlying statute to the full court that is entitled to declare this law unconstitutional in a new judgment.

Article 48 of Hungarian Act on Constitutional Court requires that individual is to be aggrieved in consequence of the application of the unconstitutional legal rule. The feature that distinguishes Hungarian model of constitutional complaints from Spanish and German models is that individual challenges not the decision of the judicial or executive body that violates his/her

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<sup>27</sup> Steinberger, *supra* note 22, at p. 27; Mauro Cappelletti, John Clarke Adams, Judicial review of legislation, European Antecedents and Adaptations, 79 Harv. L. Rev. 1207(1966), at p. 1221.

<sup>28</sup> Cristina Ruth, Kai Lohse, Constitutional Review of Decisions of Non-constitutional Courts by the Federal Constitutional Court, Report for Seminar “The limits of constitutional review of ordinary courts’ decisions in Constitutional Complaints Proceedings”, at pp. 3-4; available at [http://www.venice.coe.int/docs/2005/CDL-JU\(2005\)061-e.asp](http://www.venice.coe.int/docs/2005/CDL-JU(2005)061-e.asp)

<sup>29</sup> *Id.*

<sup>30</sup> Luis Lopez Guerra, Constitutional Review and Democracy - Constitutional Courts and the Legislative Process, Report for the Seminar “Strengthening the Principles of the Democratic State Ruled By Law in the Republic of Belarus by way of Constitutional Control,” at p. 4; available at [http://www.venice.coe.int/docs/2003/CDL-JU\(2003\)024-e.asp](http://www.venice.coe.int/docs/2003/CDL-JU(2003)024-e.asp)

constitutional right, but the legal norm on which this decision is based.<sup>31</sup> When considering the constitutional complaint, the constitutional court does not review the constitutionality of a particular decision of a public authority – judicial or executive - and accordingly, the individual situation of the complainant resulting from this decision. It examines the legal norm underlying the decision and may or may not find it unconstitutional. The problem with this mechanism is that it does not cover the situations when the norm itself is constitutional but is applied in the unconstitutional manner by the public authority in question.

### **2.3. Applicability of constitutional rights to private relations and constitutional complaint as a mechanism of protection**

The individual complaint is a possibility of filing claims against public authorities for acts violating constitutional rights. The question is whether and to what extent this mechanism can serve protection of constitutionally guaranteed rights from infringement by private individuals.

Constitutional rights are basically conceived as rights of the individual against the state and not the rights of individuals against each other.<sup>32</sup> As underlined in Article 1(3) of German Basic Law, “basic rights shall be binding for the legislative, executive and judicial powers.” Accordingly, basic rights are applicable to the relationship between the state and the individual and have no direct effect upon private economic and social dealings.<sup>33</sup> Private actors represent the source of potential danger to constitutionally guaranteed rights to the same extent as public authorities.<sup>34</sup> Private individuals may make use of their fundamental rights in the way that

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<sup>31</sup> Georg Brunner, *supra* note 8, at p. 84;

<sup>32</sup> Mattias Kumm & Victor Ferreres Comella, What is so Special about Constitutional Rights in Private Litigation, In: *The Constitution in Private Relations, Expanding the Constitutionalism*, ed. by Andras Sajó & Renata Uitz, Eleven International Publishing (2005), at p. 242.

<sup>33</sup> Steinberger, *supra* note 22, at p. 27.

<sup>34</sup> Kumm & Commella, *supra* note 32, at p. 243.

intrudes into the spheres of other private actors, spheres that are constitutionally protected.<sup>35</sup> This led to development of dual understanding of the nature of rights under German constitutional theory through making distinction between negative (subjective) and positive (objective) rights.<sup>36</sup> While negative rights protect the individual against the state, positive right represents the right to effective realization of personal freedoms and autonomy.<sup>37</sup> It means that the state should not only refrain from violating the rights itself, but take positive action to protect individuals adequately from the acts of third parties and ensure that they enjoy constitutionally guaranteed rights.<sup>38</sup> The public authorities to which these claims are addressed can be the legislator (for not having enacted the appropriate protective legislation), the executive (for taking the appropriate protective measures), or the judiciary (for not interpreting the law in the appropriately protective way).<sup>39</sup>

The necessity to ensure full and effective protection of constitutional rights led to introducing the principle of “indirect third party effect” of basic rights (*Mittelbare Drittwirkung*) by the Federal Constitutional Court in *Luth* case.<sup>40</sup> It was acknowledged that constitutional rights can affect the positions of private parties in the civil litigation, through subjecting private

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<sup>35</sup> Ulrich Preuß, The German *Drittwirkung* Doctrine, In: *The Constitution in Private Relations, Expanding the Constitutionalism*, ed. by Andras Sajó & Renata Uitz, Eleven International Publishing (2005), at p. 29

<sup>36</sup> Donald P. Kommers – Germany: Balancing Rights and Duties, In: *Interpreting Constitutions, A Comparative Study*, ed. by Jeffrey Goldsworthy, Oxford University Press (2006), at p. 183.

<sup>37</sup> *Id.*

<sup>38</sup> See in Dorsen, Rosenfeld, Sajó & Baer, *Comparative Constitutionalism, Cases and Materials*, American Casebook Series, WestGroup, 2003, at p. 1203.

<sup>39</sup> Matthias Kumm, Who is afraid of the Total constitution? Constitutional Rights as Principles and Constitutionalization of Private Law, *German Law Journal*, Vol. 07, No.04 (2006), at p. 344.

<sup>40</sup> *Luth* Case, 7 BVerfGE 198(1958) (free speech case, where the constitutional court found that the ordinary court has misjudged significance of the freedom of opinion of the complainant when weighing it against the private interest of the others). The recent decision proving that the principles adopted in *Luth* are still valid after almost 50 years is *Marital Agreements Case* (2001), where the Constitutional Court stressed the obligation of ordinary courts to ensure the consistency of private agreements with the constitution, after finding that the judge misunderstood the scope and impact of the constitutional right. (103 BVerfGE 89(2001)).



law to constitutional rights scrutiny by courts.<sup>41</sup> Constitutional rights were brought in play in private litigation only indirectly as duties of the respective public authorities, and in particular civil courts, to respect constitutional rights in the interpretation of private law.<sup>42</sup> As stressed by the German Federal Constitutional Court in *Luth*, constitutional rights embody an objective order of values affecting all areas of law, including private law.<sup>43</sup> Basic value commitments underlying constitutional rights radiate throughout the legal order and establish the requirement for the interpretation of private law by civil courts in the way that conforms to these commitments expressed in the constitution.<sup>44</sup> It means that private law is to be interpreted so as to reflect an adequate balance between the respective constitutional interests at stake.<sup>45</sup> As the ordinary court interprets the general clauses of the code, it has to strike a balance between the relevant competing considerations – protected constitutional value and statutorily protected interest.<sup>46</sup> In this situation, the competence of ordinary courts is limited to application of legal norms in conformity to the constitution and indirect horizontal effect in no way grants them the power to exercise constitutional review.<sup>47</sup> When a party feels that a civil court has failed to take constitutional rights adequately into account while interpreting civil law, a complaint can be filed with the Federal Constitutional Court.<sup>48</sup>

Similarly to the German model, Spanish Constitution and Organic Law on Constitutional Court do not expressly provide for the possibility of filing an individual appeal at the

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<sup>41</sup> Kumm & Comella, *supra* note 32, at p. 242; Ulrich Preuß, *supra* note 35, at p. 26.

<sup>42</sup> Mattias Kumm, *supra* note 38, at p. 352.

<sup>43</sup> *Luth* Case (1958) (7 BVerfGE 198), In: D. Kommers, *The Constitutional Jurisprudence of the Federal Republic of Germany*, 2<sup>nd</sup> ed. Duke University Press (1997), at p. 363.

<sup>44</sup> Kumm & Comella, *supra* note 32, at p. 252.

<sup>45</sup> *Mephisto* case(1971), BVerfGE 30, 173. In: Kommers, *supra* note 42, at pp. 310-304.

<sup>46</sup> Kumm & Comella, *supra* note 32, p. 253; Kommers, *supra* note 36, at p. 185.

<sup>47</sup> Renata Uitz, *supra* note 6, at pp. 4-5.

<sup>48</sup> Kumm, *supra* note 38, at p. 356

Constitutional Court against another individual for the violation of constitutionally guaranteed rights. However, the constitutional court appears to have extended its jurisdiction on constitutional complaints to acts of genuinely private persons, assuming that the cause of the complaint is the decision of the civil court that on ruling in private litigation failed to provide efficient protection of the individual rights against an act of a private person.<sup>49</sup> If the civil court failed to remedy the violation of a fundamental right, the court's decision may be challenged before the constitutional court through the mechanism of individual complaint.

As for the Hungarian approach toward the indirect effect of constitutional rights, it has been consistently elaborated and enforced in the practice of the constitutional court that obligation of the state to ensure objective institutionalized protection is linked to the notion of individual subjective rights.<sup>50</sup> The Constitutional Court for the first time considered the notions of subjective rights and objective obligations of the state in decision on regulation of abortion No. 64/1991, stressing that the state's duty to respect and protect subjective fundamental rights is not exhausted by the duty not to encroach on them, but includes the duty to ensure the conditions of their realization.<sup>51</sup> In the both decisions on abortion No. 64/1991 and 48/1998, the court once again underlined that the state is not only obliged to refrain from infringing upon the individual's life, but has a duty to take measures to ensure its protection: "the right to life is common root of the system of subjective rights and state's obligations and goals that serve the purpose of protecting life."<sup>52</sup> The importance of institutionalized protection of freedom of expression and freedom of religion was underlined in the constitutional court's jurisprudence. The Constitutional Court read Article 61 not only as a subjective right of the individual to

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<sup>49</sup> Steinberger, *supra* note 22, at p. 27.

<sup>50</sup> Decision No. 48/1998 (XI. 23.) AB (on regulation of abortion, related to the constitutionality of the Act of Parliament permitting abortion in the situation of serious crisis), Published in the Official Gazette (Magyar Közlöny) MK 1998/105.

<sup>51</sup> 64/1991(XII 17) AB. Hat., ABH 1991, 297 at 302.

<sup>52</sup> Decision No. 48/1998 (XI. 23.) AB, Published in the Official Gazette (Magyar Közlöny) MK 1998/105.

freedom of expression, but also as a duty of the state to secure conditions for creating and maintaining democratic public opinion and applied the same obligation in determining the criminal law limits of the freedom of expression as well as the constitutional obligations of the State to set up the organisational and legal guarantees for the right to information and the freedom of the press.<sup>53</sup> From freedom of religion, the constitutional court derived the obligation of the state to make it possible for children to attend “neutral” schools (i.e. schools not committed to any religion, but providing comprehensive, balanced and unbiased expression of ideas prevailing in the society) without placing a disproportionate burden and at the same time, ensure the legal possibility of establishing non-neutral schools.<sup>54</sup> This vision of the state’s role in rights protection can be understood as imposing obligations upon the legislature to enact laws protecting constitutional rights not only from infringement by public authorities, but also for protecting individuals against individuals. Similarly, executive authorities in the course of enforcement of laws and courts in the process of applying laws, have to ensure effective protection of constitutional rights. However, it does not follow from the obligation of institutional protection that the individual has the right to claim and to enforce these state services with reference to his rights given in the constitution.<sup>55</sup>

Similarly to Germany and Spain, in Hungary, ordinary courts are entrusted with the task of ensuring protection of constitutionally guaranteed rights.<sup>56</sup> However, the mechanism of bringing individual complaints before the Constitutional Court could not serve the same function and have the same effects as in Germany and Spain, since the scope of this competence of the Constitutional Court does not allow supervision over the activities of ordinary courts and examination of whether they take into account constitutional values in applying law. The

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<sup>53</sup> 30/1992 (V. 26) AB, ABH 1992, 167, 172; and 37/1992 (VI. 10) AB, ABH 1992, 227, 229.

<sup>54</sup> 4/1993 (II. 12) AB, ABH 1993, 48, 55;

<sup>55</sup> Gabor Halmai, *The Third Party Effect in Hungarian Constitutional Adjudication*, In: *The Constitution in Private Relations, Expanding the Constitutionalism*, ed. by Andras Sajó & Renata Uitz, Eleven International Publishing (2005), at p. 105.

<sup>56</sup> Articles 50(1) and 70K of the Constitution

constitutional court is not able to check whether the judicial decisions are based on unconstitutional interpretation of laws. The only thing the constitutional court checks through the constitutional complaint is whether the law based on which the ordinary court made a decision is constitutional or not, but it does not mean examination of constitutionality of the judicial decision itself. It leaves individual cases involving violations of fundamental rights solely under the consideration of ordinary courts, without any control and supervision of the constitutional court over the contents of these decisions. This is the feature that makes the sharp contrast between the mechanism of constitutional complaints as they are implemented on the one hand in Germany and Spain and on the other hand in Hungary.

As a final remark for all three systems, while recognizing state's duties to protect individuals against individuals from infringement of constitutional rights in private relations, the question still remains what are the acceptable limits of state intervention into these relations. Recognition of the impact of constitutional rights upon private relations is accompanied with the acknowledgment of the threat that by invoking the motive of rights protection the state may excessively intrude into the lives of individuals, "threatening individual liberty and eliminating the domain for personal autonomy".<sup>57</sup> Sometimes, it is disputable whether the intervention is to be justified as a necessary step for protecting the rights or it represents unjustified limitation of personal autonomy. Taking into consideration that private individuals violate human rights with the equal "success" as public authorities, interference of the state is inevitable for protecting those vulnerable, but certain standards are to be determined to avoid the excessive intervention of the state that is no less dangerous than the violation of the right from which the state tries to protect the person.

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<sup>57</sup> Mark Tushnet, *The Relationship between Judicial Review of Legislation and Interpretation of Non-constitutional Law, with Reference to Third Party Effect*, In: *The Constitution in Private Relations, Expanding the Constitutionalism*, ed. by Andras Sajó & Renata Uitz, Eleven International Publishing (2005), at p. 167

## **2.4. Rights the Violations of which can be Challenged through the Constitutional Complaint**

Determining the range of rights the violation of which may result into bringing the individual complaint before the constitutional court is the factor significantly influencing the activities of the court and its success as a guarantor of constitutional rights. After the collapse of repressive regimes, the states under consideration started to create constitutional framework for rights protection as an important prerequisite for successful transition to democracy. When formulating rights provisions and determining the degree of constitutional protection of various categories of rights, it is to be remembered that there is a need to adopt enforceable constitution instead of inserting in this instrument generous promises to the society with no perspective of their real implementation. After the experience of basic civil and political rights being suppressed under dictatorships, granting to these rights their proper place in the constitution and making them effective and enforceable was the first and absolutely justified step taken by all three countries under consideration. However, it was disputable whether or not to grant constitutional protection to economic and social rights. As demonstrated below, Germany, Spain and Hungary found different answers to this question.

Individual complaint can be filed before the Federal Constitutional Court on the violation of basic rights and rights equivalent to basic rights. Basic Rights are enumerated in Chapter 1 of German Basic Law (Articles 1-19) starting with human dignity as a supreme value of the constitutional order.<sup>58</sup> The remaining articles guarantee the right to life and physical integrity, right to free development of personality, freedom of expression, assembly and association, freedom of religion, freedom of movement, right to privacy, right to property, etc. Rights equivalent to basic rights include the right of resistance (Article 20.4), political rights and duties (Article 33), the right to vote and the right to be elected (Article 38), ban on extraordinary courts

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<sup>58</sup> Luth (1958) 7 BVerf GE 198 (“Basic Law is not a value neutral document. Its section on basic rights establishes the objective order of values. This value system centers upon dignity of the human personality developing freely within the social community.” Mephisto (1971) 30 BVerfGe 173, (“Inviolability of human dignity acts as a foundation of all basic rights.”)

(Article 101), hearings in accordance with criminal law, ban on retroactive criminal laws and multiple punishment (Article 103), legal guarantees in case of detention (Article 104). The rights listed above are not the only rights provided by the Basic Law<sup>59</sup>, but they are only rights the violation of which may result in bringing individual complaint before the Federal Constitutional Court. Basic Law is primarily oriented on civil and political rights. As for the constitutional protection of social rights, Germany followed American approach by removing social rights present in the Weimar Constitution, leaving only a brief definition of the German state as a “democratic and social federal state”(Art.20(1)).<sup>60</sup> It is notable that apart from individual liberties, Basic law provides protection for collective rights known as institutional guarantees enjoyed by such entities as the press, private schools, marriage and family.<sup>61</sup> Another important characteristic of rights provisions that significantly influences the activities of the constitutional court in considering constitutional complaints is the inclusion of limitations clauses with particular rights and liberties. For example, the right to free development of personality may be restricted by the rights of others or by constitutional order and moral code. (Art.2 (1)), while the right to inviolability of personal honor may become ground for limiting freedom of speech. (Art.5 (2)). As a guarantee against rights violations, Article 19(2) prescribes the way of limiting the rights, establishing on the one hand that the basic rights may be restricted only by law and on the other hand stressing that “in no case may the essential content of the right be encroached upon,” leaving interpreters with the task of defining this essence when a right is statutorily limited.<sup>62</sup>

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<sup>59</sup> Rights not listed in Article 93(4a) of the Constitution and therefore, impossible to serve as a basis for the constitutional complaint are the right to establish political parties (article 21), rights provided for in transitional provisions, including those from the Weimar Constitution (Articles 136 and 137 related to religious rights).

<sup>60</sup> Wiktor Osiatynski, Paradoxes of Constitutional Borrowing, 1 Int'l J. Const. L. 244(2003) at 252.

<sup>61</sup> Kommers, *supra* note 36, at p. 170.

<sup>62</sup> *Id.*

Though Spanish Constitution contains a long list of rights, different types of rights are afforded a different degree of protection. Not all the rights provided by the constitution may be invoked by the individual in order to make a complaint before the constitutional court. It will be possible only in case of violation of fundamental rights and public liberties provided by Section 1 of Chapter II of Spanish constitution (Articles 15-30 covering such important rights as right to life, personal integrity and liberty, freedom of movement, privacy, freedom of assembly and association, political rights, rights of prisoners, etc.) as well as Article 14 (equality before law) and objections of conscience recognized in Article 30. The violation of rights given in Section 2 of Chapter I, such as the right to marry, the right to property, the right to employment and free choice of profession, etc. may be challenged before ordinary courts, but not before the constitutional court.<sup>63</sup>

Spain found a different solution to the problem of placing social and economic rights in the system of constitutional protection. A limited number of economic and social rights are included in Chapter II and are binding upon all public authorities, as provided by Article 53(1) of Spanish Constitution. The right to unionization and the right to strike are part of Section 1, among fundamental rights and liberties the violation of which may be challenged before the constitutional court beyond the ordinary courts, while the right to ownership, the right to employment and free choice of profession, the right to collective bargaining are protected under Section 2 and may be invoked directly before ordinary courts, but not before the constitutional court. Other economic and social rights (such as duty of the state to organize and sustain the system of social welfare, the rights to health care and to decent housing, etc.) have taken form of tasks of the state in the social and economic spheres and serve as guiding principles for public authorities, without having a full constitutional status, i.e. they are not directly enforceable

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<sup>63</sup> Luis Lopez Guerra, Constitutional Review and Democracy - Constitutional Courts and the Legislative Process, Report for the Seminar "Strengthening the Principles of the Democratic State Ruled By Law in the Republic of Belarus by way of Constitutional Control," Venice Commission, CDL-JU (2003)24, Strasbourg, 15 July 2003, at pp. 3-4; available at [http://www.venice.coe.int/docs/2003/CDL-JU\(2003\)024-e.asp](http://www.venice.coe.int/docs/2003/CDL-JU(2003)024-e.asp)

constitutional guarantees.<sup>64</sup> As provided for in Article 53(3) of the Spanish Constitution, they may be invoked by ordinary courts only in the context of legal provisions by which they are developed, i.e. only if they are implemented through the subsequent legislation. Political discretion and availability of resources matter for giving effect to these principles in contrast to fundamental rights and public liberties, the essential content of which is guaranteed regardless of economic and social circumstances.<sup>65</sup>

As for Hungary, the constitution does not only expand the range of individual rights significantly, but also makes all rights, political and civil as well as economic and social ones, directly enforceable by the Constitutional Court.<sup>66</sup> The question of enforcing social rights and defining duties of the state with respect to giving effect to these rights seemed to be especially problematic. Dual transformation comprised by economic and political changes turned out to be a painful process. The society accustomed to a wide range of free welfare services revealed reluctance to tolerate to unpleasant consequences of developing market economy, including rising unemployment and cost of living and became increasingly sensitive towards social rights.<sup>67</sup> Since the provisions on social rights do not specify any extent or criteria for social care by the state,<sup>68</sup> the constitutional court faced an uneasy task of interpreting the scope of these rights.

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<sup>64</sup> Wiktor Osiatynski, *supra* note 59, at 253.

<sup>65</sup> Elvira Perales, *supra* note 12, at 219.

<sup>66</sup> Jeffrey Seitzer, *supra* note 16, at p. 44.

<sup>67</sup> Peter Paczolay, The New Hungarian Constitutional State: Challenges and Perspectives, In: Constitution-making in Eastern Europe, edited by A.E. Dick Howard, published by Woodrow Wilson Center Press (1993), at 47

<sup>68</sup> 1)The citizens of the Republic of Hungary have the right to social security; they are entitled to provisions necessary for subsistence in old age, illness, disability, widowhood, orphan hood and unemployment owing to the circumstances beyond their control. 2) The Republic of Hungary shall realize the right to this provision through social insurance and social services (Article 70/E). This provision is to be considered together with Article 17, according to which the state sees to the wants of the needy through the long line of social measures.



In the decision No. 42/2000<sup>69</sup>, the constitutional court differentiated the first generation rights – civil and political rights, setting limits upon public authorities for protecting individual liberty – from the second generation rights – economic, social and cultural rights, the enforcement of which depends upon the prevailing capabilities of the particular society. As noted in earlier decisions, social security means neither guaranteed income nor that the achieved living standard of citizens could not deteriorate as a result of the unfavourable development of economic conditions.<sup>70</sup> The constitutional right to social security stipulated in Article 70/E of the Constitution obliges the state to organize and operate a system of social security in order to ensure that citizens exercise their rights to benefits necessary for sustenance.<sup>71</sup> It entails the obligation of the State to secure a minimum livelihood through all of the welfare benefits. In establishing the system of social benefits securing minimum livelihood, the protection of human life and dignity is a fundamental constitutional requirement. The state enjoys a high degree of liberty in determining the tools and extent of enforcing social rights, but once someone's life and human dignity becomes endangered, the structure of state's obligations is changed. Beyond its duty to establish and operate social security system, the state has to reallocate resources available in order to eliminate concrete danger. However, guaranteeing the minimum livelihood shall not result in concretely defining specific rights as constitutional fundamental rights. Despite the fact that no constitutional fundamental rights to have concrete benefits follow from Article 70/E of the Constitution, the state on the basis of its general obligation to provide support – strives for securing the widest possible range of social benefits.

While striking down the provisions of the austerity package, the court did not question the power of the state to change the system of social benefits. However, it required that in interests of legal certainty, when there is a shift to a new system of welfare benefits, there is to be a

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<sup>69</sup> Decision 42/2000 (XI. 8.) AB

<sup>70</sup> Decision 32/1991 (VI. 6.) AB, ABH 1991, 146, 163

<sup>71</sup> Decision 26/1993 (IV. 29.) AB, ABH 1993, 196, 199 and reaffirmed in Decision 38/1994 (VI. 24.) AB (ABH 1994, 429, 433).

guaranteed changeover period to afford those concerned necessary time to adjust to the amended provisions and allow for family finances to get accustomed to the new conditions.<sup>72</sup> It is a constitutional requirement that the State's actions be calculable, so that people can plan economic or family-related decisions.<sup>73</sup> Despite the fact that the state authorities were free to transform the welfare benefits system, they were precluded from introducing the rules with the immediate effect.<sup>74</sup> In the context of austerity package, the principle of legal certainty implied that government could not cut social benefits on which people counted and changes had to be implemented gradually, giving the change to the people to adjust their lives to the new reality.<sup>75</sup>

As demonstrated above, the states under consideration took different approaches towards the range of rights afforded protection under the constitution and enforceable through the mechanism of individual complaints. While German Basic Law mainly focused on civil and political rights and completely excluded social rights from the list of Basic rights through following American experience, the Spanish Constitution suggested its own model of affording different degree of constitutional protection to different categories of constitutional rights. Hungarian approach of including an unprecedented number of directly enforceable rights in the constitution can be explained by the desire to give promises on rights protection to the population that had been suppressed under the authoritarian regime for years, but giving promises that cannot be fulfilled does not make much sense. With respect to the social rights, the constitutional court of Hungary had to clarify the degree of protection the citizens could claim from the state and the state was obliged to afford.

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<sup>72</sup> Decision 43/1995, 30-06-1995, Magyar Közlöny (Official Gazette), 56/1995.

<sup>73</sup> Decision 43/1995, 30-06-1995, Magyar Közlöny (Official Gazette), 56/1995.

<sup>74</sup> Decision no. 44/1995, 30-06-1995, Magyar Közlöny (Official Gazette), 56/1995

<sup>75</sup> Kim Lane Scheppelle, *Democracy by Judiciary. Or, why Courts can be more democratic than parliaments*, In: *Re-thinking the Rule of Law after Communism*, ed. By Adam Czarnota, Martin Krygier, and Wojciech Sadurski, CEU Press, 2005, at p. 49.

What is common in relation to the rights provisions in constitutions among these three countries is that similarly to Germany and Spain, in Hungary regulations pertaining to fundamental rights and duties are to be governed by law, without restriction of meaning and content of these rights.<sup>76</sup>

## **2.5. The Quest for New Unenumerated rights – Open-ended Rights Provisions**

German, Spanish and Hungarian constitutional courts further enhanced their own discretionary powers by interpreting certain constitutional provisions as open-ended invitations to generate new unenumerated rights.<sup>77</sup> It made the constitutional courts very powerful, since they became able to significantly stretch the possibilities of constitutional protection of individuals from the abuse by public authorities. In Germany, Article 2(1) (the right to free development of personality), considered as interlinked with Article 1 (inviolability of human dignity), has been interpreted so broadly that any content can be poured into it.<sup>78</sup> In *Elfes* case<sup>79</sup>, the personality clause was defined as establishing the general freedom of action, covering all forms of activity related to the expression of personality. Later on, in *Falconry License* case<sup>80</sup>, the court said: “The rule of law considered in relation to the general presumption of freedom in favor of the citizen demands that the individual be protected against unnecessary intrusions by

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<sup>76</sup> Article 8(2) of Hungarian Constitution. Similar provisions can be found in German Basic Law (Article 19(2) and Spanish Constitution (Article 53(1)). Privileged status of the rights provisions in the German and Spanish Constitutions is clearly demonstrated by rules governing the constitutional amendment. In Germany, constitutional rights provisions (Articles 1-20) are expressly frozen into place by Article 79.3, a perpetuity clause that forbids constitutional revision of the rights texts. In Spain, Title X of the constitution establishes one procedure for a normal revision of the constitution controlled by elected politicians and another for revision of rights provisions, involving supra-majorities of elected politicians plus a referendum.

<sup>77</sup> Alec Stone Sweet, *Constitutional dialogues: protecting Human Rights in France, Germany, Italy and Spain*, In: *Constitutional Dialogues in Comparative Perspective* Edited by Kenney, Reisinger & Reitz Macmillan Press Ltd. 1 ed.1999) at p. 28.

<sup>78</sup> Kommers, *supra* note 42, at p. 313.

<sup>79</sup> *Elfes* Case (1957), 6 B Verf GE 32.

<sup>80</sup> *Falconry License case*, 55 BVerfGE 159(1980).

public authority. If statutory intrusion is unavoidable, the means must be appropriate to reach the legislative end and may not excessively burden the individual”.<sup>81</sup> The position of the Federal Constitutional Court of expanding the range of rights falling under constitutional protection is to be evaluated positively taking into account wide possibilities of state intrusion into individual’s life and in some cases, the questionable reasonableness and justifiability of such an intrusion. At the first sight, the recognition of the right to horseback riding in the wooden areas as falling within the protection of the personality clause<sup>82</sup> seems to be out of place, but it is to be admitted that placing limitations upon this right is indeed intrusion of the state into the freedom of action of the individual. The constitutional court as a tool designed to protect individuals from unreasonable intrusion of the state has to intervene and assess the justifiability of this kind of restriction upon human behavior. On the other hand, recognizing the right to free development of personality as a “catch-all” right that “captures every conceivable human activity” has its negative implications – “trivialization of fundamental rights and associated flood of constitutional challenges never contemplated by the Basic Law”.<sup>83</sup> Therefore, it could be reasonable to limit the scope of protection guaranteed by the personality clause only to those liberty interests that are *fundamental* to the development of personality.<sup>84</sup>

The Spanish Court insists on the necessity of a systematic and teleological constitutional interpretation, rather than strictly literal, especially with the reference to the finality of Article 1, considering liberty, justice, equality and political pluralism as the foremost values of its legal order.<sup>85</sup> Thus, not only does the Spanish Constitutional Court possess jurisdiction over the most

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<sup>81</sup> The personality rights secured by Article 2(1) may be restrained in the interests of the rights of others, public morals or the constitutional order. If a given statutory restriction on some aspect of human behavior is in accord with the moral code of the constitutional order, the restriction will be sustained.

<sup>82</sup> *Equestrian Case*, 80 BVerfGe 147(1989), In Kommers, *supra* note 42, at p. 319.

<sup>83</sup> 80 BVerfGe 147(1989). At 166 and 168, Dissenting opinion of Judge Dieter Grimm, In: Kommers, *supra* note 42, at p. 319

<sup>84</sup> *Id.*

<sup>85</sup> Alec Stone Sweet, *supra* note 76, at p. 28.

extensive list of rights in Western Europe, but all other constitutional provisions are to be interpreted in the light of objectives of liberty, justice and equality.<sup>86</sup>

Hungarian Constitutional Court relied on human dignity protected under Article 54(1) of Hungarian Constitution as a source for unenumerated rights. Human dignity was understood as one of the formulations of general personality right, as a ‘mother right’ on which courts can rely in order to protect the individual’s autonomy when no specifically named constitutional right can apply to the facts of the case and defined it as including the right to free personal development, self-determination, general freedom of action and privacy.<sup>87</sup> This understanding of human dignity as associated to a ‘general personality right’ corresponds to the interpretation of Articles 1 and 2 of German Basic Law and represents clear manifestation that the notion of human dignity was imported by the Hungarian Constitutional Court from German constitutional case law.<sup>88</sup> Further, various rights were derived from the right to human dignity, such as the right to know, ascertain or discover one’s parentage<sup>89</sup>, the right to marry or form a domestic partnership without regard to the sex of the partners.<sup>90</sup> Human dignity was characterized as a “maternal right” and a “source of still unnamed individual freedoms... with which we continuously guard the sphere of self-determination against (state) control.”<sup>91</sup>

### **Chapter III. Clashes between Courts – Reasons of Confrontation and Modes of ‘Judicial Cohabitation’**

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<sup>86</sup> *Id.*

<sup>87</sup> Decision on Trade Union Representation, 8/1990: 23 April 1990. See commentary in Laszlo Solyom, Introduction to the decisions of the Constitutional Court of the Republic of Hungary, In: Constitutional Judiciary in a New Democracy, Laszlo Solyom and Georg Brunner, Ann Arbor, The University of Michigan Press, 2000, at pp. 8, 105.

<sup>88</sup> Catherine Dupre, *supra* note 7, at pp. 65-67;

<sup>89</sup> Decision on Legal Guardians and on the Family Law Act, 57/1991: 8 November 1991.

<sup>90</sup> Decision on the Legal Equality of the same sex partnerships, 14/1995: 13 March 1995.

<sup>91</sup> Capital Punishment Case, No. 23/1990 (X.31) AB, at 11, 19 [Solyom, concurring opinion].

### **3.1. Relation between constitutional and ordinary courts and requirement of exhaustion of all remedies**

Determining competences and responsibilities of ordinary and constitutional courts in the protection of constitutionally guaranteed rights significantly influences the development of their relations and the outcome of their activities.

In Germany and Spain, essential characteristic of the mechanism of individual complaints is that it is of subsidiary nature and represents the complementary tool to ordinary courts that are entrusted with the task of ensuring protection of constitutionally guaranteed rights.<sup>92</sup> The cause of complaint may effectively be removed already in the course of litigation in the regular courts.<sup>93</sup> They are required to remedy not only violations of fundamental rights by other public authorities, but also those violations that are immediate and direct result of the act or omission by a judicial body, through the appeal of lower court decisions to the superior courts.<sup>94</sup> If regular courts fail to meet the obligation to redress the violations of rights, then the constitutional court will step in through the mechanism of constitutional complaint.<sup>95</sup> Claim regarding the violation of rights may be brought before the constitutional court only after all other legal remedies have been exhausted.<sup>96</sup> In Germany and Spain, the requirement of exhaustion of other remedies imposes certain requirements upon the complainants. Beyond lodging all admissible genuine appeals, the complainant has to exhaust all the procedural possibilities in the proceedings at

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<sup>92</sup> Luis Lopez Guerra, Constitutional Review and Democracy - Constitutional Courts and the Legislative Process, Report for Seminar “Strengthening the Principles of the Democratic State Ruled By Law in the Republic of Belarus by way of Constitutional Control,” at p. 5; available at [http://www.venice.coe.int/docs/2003/CDL-JU\(2003\)024-e.asp](http://www.venice.coe.int/docs/2003/CDL-JU(2003)024-e.asp)

<sup>93</sup> Steinberger, *supra* note 22, at p. 28.

<sup>94</sup> *Id*;

<sup>95</sup> Cristina Ruth, Kai Lohse, Constitutional Review of Decisions of Non-constitutional Courts by the Federal Constitutional Court, Report for the Seminar “The limits of constitutional review of ordinary courts’ decisions in Constitutional Complaints Proceedings”, at p. 3. [http://www.venice.coe.int/docs/2005/CDL-JU\(2005\)061-e.asp](http://www.venice.coe.int/docs/2005/CDL-JU(2005)061-e.asp)

<sup>96</sup> Art. 94(2), German Basic Law, Art. 90(2), FCCA; Art. 53(2), Spanish Constitution, Arts. 43-44, SLCC.

ordinary courts to prevent the violation of constitution in the first place or to remedy the violation of the fundamental right that has occurred, *i.e.* the complainant has to raise before ordinary courts those issues which he later wants to bring before the Constitutional Court.<sup>97</sup>

Similarly to Germany and Spain, ordinary courts represent main tools for protection of constitutional rights in Hungary (Arts. 50(1), 70/K, Constitution) and exhaustion of all remedies is required before filing an individual complaint at the Constitutional Court (Article 48(1), HCCA). However, the major difference is that while in Germany and Spain decisions of ordinary courts are directly challenged by the individuals and the mechanism of constitutional complaints represents the tool for the constitutional court to scrutinize the activities of the regular judiciary, in Hungary, as already mentioned, it is not the judicial decision that is challenged before the constitutional court, but the constitutionality of the legal provision underlying this decision. Therefore, constitutional complaint does not serve as a tool at the hands of the constitutional court to supervise ordinary courts. Taking this difference into account, the given chapter will first analyze the similarities between the Spanish and German models and then contrast its basic features with the Hungarian model.

## **3.2. Inter-relation between Ordinary and Constitutional Courts in Germany and Spain**

### **3.2.1. Delimitation of Powers**

Under the general idea of delimitation of competences, interpretation and application of ordinary legislation fell within the competence of regular courts, while the function of the constitutional court, as a guardian of the supreme law, was to find out whether constitution was

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<sup>97</sup> Oliver Klein, The Federal Constitutional Court's Relation with German Ordinary Courts, Report for the Seminar "Interrelations between Constitutional and Ordinary Courts", at p. 3; available at [www.venice.coe.int/docs/2006/CDL-JU\(2006\)045-e.pdf](http://www.venice.coe.int/docs/2006/CDL-JU(2006)045-e.pdf); Luis Lopez Guerra, Constitutional Review and Democracy - Constitutional Courts and the Legislative Process, Report for the Seminar "Strengthening the Principles of the Democratic State Ruled By Law in the Republic of Belarus by way of Constitutional Control," at p. 5; available [http://www.venice.coe.int/docs/2003/CDL-JU\(2003\)024-e.asp](http://www.venice.coe.int/docs/2003/CDL-JU(2003)024-e.asp); Cristina Ruth, Kai Lohse, Constitutional Review of Decisions of Non-constitutional Courts by the Federal Constitutional Court, Report for the Seminar "The limits of constitutional review of ordinary courts' decisions in Constitutional Complaints Proceedings", at p. 3; available [http://www.venice.coe.int/docs/2005/CDL-JU\(2005\)061-e.asp](http://www.venice.coe.int/docs/2005/CDL-JU(2005)061-e.asp)

violated through non-observance of individual rights.<sup>98</sup> However, it becomes more and more difficult to draw a distinction between constitutional and ordinary jurisdictions that is mainly due to two processes: “constitutionalization of ordinary law” meaning that when assessing whether a particular legislative provision or judicial decision is in conformity with the constitution, the constitutional court has to go beyond the realm of constitutional law and “invade” (through interpretation and application) other branches of law and “constitutionalization of the activities of ordinary courts,” meaning that while constitutional norms, principles and values become relevant to the application of specific statutes, they are applied not only by the constitutional court, but by ordinary courts in the resolution of disputes.<sup>99</sup>

The constitutionalization of German legal system was the result of the Federal Constitutional Court’s approach towards the interpretation of fundamental rights.<sup>100</sup> In Luth case<sup>101</sup> the following principles for distribution of functions between ordinary and constitutional courts were developed: The constitutional court requires that ordinary judges interpret and apply provisions of private law in the spirit of the value system of basic rights and weigh the importance of the basic right against the value of the interest protected under private laws; An incorrect balancing of competing values may result in the violation of the basic right and provide the basis for the complaint before the constitutional court; the function of the constitutional court is to assess whether the balance was made correctly and whether it resulted

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<sup>98</sup> Cristina Ruth, Kai Lohse, Constitutional Review of Decisions of Non-constitutional Courts by the Federal Constitutional Court, Report for the Seminar “The limits of constitutional review of ordinary courts’ decisions in Constitutional Complaints Proceedings”, at p. 5; [http://www.venice.coe.int/docs/2005/CDL-JU\(2005\)061-e.asp](http://www.venice.coe.int/docs/2005/CDL-JU(2005)061-e.asp). Ignacio Borrajo Iniesta, Limits of Facts, Law and Remedies, Myths and Realities, in Constitutional Review of Judicial Decisions, Spanish Experience, Report for the Seminar “The limits of constitutional review of ordinary courts’ decisions in Constitutional Complaints Proceedings”, at p. 4 ( available at [http://www.venice.coe.int/docs/2005/CDL-JU\(2005\)061-e.asp](http://www.venice.coe.int/docs/2005/CDL-JU(2005)061-e.asp))

<sup>99</sup> Lech Garlicki, *supra* note 3, at pp. 48-49; Alec Stone Sweet, *supra* note 76, at p. 32; Mattias Kumm, *supra* note 38, at p. 356.

<sup>100</sup> Lech Garlicki, *supra* note 3, at p. 51.

<sup>101</sup> Luth (1958) 7 BVerfGe 198, In: Kommers, *supra* note 42, at pp. 363-364, 366



in the violation of the basic rights; the constitutional court must ascertain whether an ordinary court has properly evaluated the scope and impact of basic rights in the field of private law. It must confine its inquiry to the radiating effect of basic rights on private law. Based on the principles developed in *Luth* case, it is possible to conclude that the Federal Constitutional Court did not intend to displace ordinary courts but asserted a more modest power of ensuring that the ordinary courts paid adequate attention to constitutional rights in developing the law under their control.<sup>102</sup> Though in the following years, as demonstrated in *Mephisto* and *Lebach* decisions, the Federal Constitutional Court lowered scrutiny and declined to interfere so long as the ordinary judge correctly defined the significance of the relevant constitutional principle, in *Deutschland Magazine* case, the deferential approach towards ordinary courts was abandoned.<sup>103</sup> In the mentioned case, the Federal Constitutional Court stressed the severity of encroachment upon the basic rights as an important factor to be taken into account and underlined that the more a civil court's decision encroaches upon the sphere of protected rights, the more searching must be the Constitutional Court's scrutiny to determine whether the infringement is constitutionally valid; and where the infringement is extremely burdensome, the court may even substitute its judgment for that of the civil courts.<sup>104</sup> As further defined in *Campaign Slur case*<sup>105</sup> the Federal Constitutional Court was obliged only to decide whether the courts have properly assessed the extent and effect of basic constitutional rights in the area of civil law; Doubtless the limits of its authority cannot be established with exact precision, for these limits depend upon the extent to which a basic right is infringed; the more a decision by a civil court encroaches upon the basic right, the more intense the judicial scrutiny of the reasons for the encroachment.

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<sup>102</sup> Tushnet, *supra* note 56, at p. 177

<sup>103</sup> Kommers, *supra* note 42, at p. 377.

<sup>104</sup> 42 BVerfGE 143 (1976); In: Kommers, *supra* note 42, at p. 378.

<sup>105</sup> 61 BVerfGE 1(1982); In: Kommers, *supra* note 42, at pp. 378-379

However, the Federal Constitutional Court still accords a significant degree of deference to the ordinary courts<sup>106</sup> and the fact that only a tiny fraction of complaints are successful points to the reality constitutional court avoids quashing decisions of ordinary courts.<sup>107</sup>

Similarly to Germany, in Spain all judges are required to interpret the law in conformity with the Constitution, as determined by the Spanish Constitutional Court (Judgments 5/1981 of 13 February, and 34/1981 of 10 November). Under Article 5 of Organic Act of the Judicial Power 1985, constitutional court case law is to be followed while interpreting and applying statutes. The obligation of protecting and respecting constitutional rights and freedoms is equally imposed upon all courts – ordinary and constitutional, meaning that all courts must scan the conformity of legislation with the constitution and all courts, not just the constitutional court, must read and construct laws and regulations in the light of the Constitution, and construe all legal provisions in the way most conducive to give full force and effect to human rights and freedoms.<sup>108</sup> Individual rights have an important effect upon reasoning and outcome of interpretation and application of ordinary law by regular courts.<sup>109</sup> Constitutional interpretation by ordinary courts is subjected to supervision by the constitutional court through the mechanism of individual complaints and the constitutional court through this mechanism of supervision guides all courts of law on how to respect and abide by fundamental rights.<sup>110</sup>

Therefore, in case of Germany and Spain, the constitutional court no longer enjoys monopoly over the application of the constitution but is still empowered to exercise control over

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<sup>106</sup> Kumm, & Comella, *supra* note 32, at p. 255.

<sup>107</sup> Lech Garlicki, *supra* note 3, at p. 52

<sup>108</sup> Ignacio Borrajo Iniesta, Limits of Facts, Law and Remedies, Myths and Realities, in Constitutional Review of Judicial Decisions, Spanish Experience, Report for the Seminar “The limits of constitutional review of ordinary courts’ decisions in Constitutional Complaints Proceedings”, at p. 16. available at [www.venice.coe.int/docs/2005/CDL-JU\(2005\)068-e.pdf](http://www.venice.coe.int/docs/2005/CDL-JU(2005)068-e.pdf)

<sup>109</sup> *Id.* at p. 11

<sup>110</sup> *Id.* at p. 16

the activities of the ordinary courts for finding out whether they properly evaluated the scope and impact of fundamental rights in the judicial process.

### **3.2.2. Clash between Ordinary and Constitutional Courts of Germany and Spain<sup>111</sup> – War for power or self-defense?**

Overlapping the functions generates tension between ordinary and constitutional courts.<sup>112</sup> As a result of intensive process of constitutionalization described above, the ordinary courts are not only entitled but obliged to apply ordinary law in the light of the constitution. Their activities inevitably involve the interpretation of constitution in the context of particular proceedings. Ordinary and constitutional courts may come to different conclusions while interpreting constitution and it frequently happens. An individual complaint represents an important tool used by the constitutional courts of Germany and Spain for controlling regular courts. Taking into account that constitutional complaints represent the largest part of the docket of both courts and 95 % of complaints are directed against judicial decisions<sup>113</sup>, this situation is potential source of conflicts between the ordinary and constitutional courts.<sup>114</sup> Sometimes, it is difficult for the ordinary courts to tolerate that the litigation which has gone through the entire appeals process before ordinary courts and was concluded by the final and non-appealable ruling is reviewed and quashed by the constitutional court.<sup>115</sup> Whatever we call the resulting tension - self-defense or war for power – it is inevitable when two courts perform the same functions and eventually, one is entitled to scrutinize the other and quash its decisions, but to avoid conflicts

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<sup>111</sup> The difference between Germany and Spain in terms of the institutional design of courts is that while Spanish Constitutional Court is opposed by the Supreme Court as the highest instance in the hierarchy of the ordinary courts, the German Federal Constitutional Court has to encounter five federal supreme courts.

<sup>112</sup> Lech Garlicki, *supra* note 3, at p. 65

<sup>113</sup> Jackson & Tushnet, *supra* note 17, at p. 521.

<sup>114</sup> Renata Uitz, *supra* note 1, at p. 243.

<sup>115</sup> Oliver Klein, The Federal Constitutional Court's Relation with German Ordinary Courts, Report for the Seminar "Interrelations between Constitutional and Ordinary Courts", at p.3. available at [www.venice.coe.int/docs/2006/CDL-JU\(2006\)045-e.pdf](http://www.venice.coe.int/docs/2006/CDL-JU(2006)045-e.pdf)

and find the ways of co-existence and cooperation is necessary for reaching the ultimate goal – protection of constitutional rights.

### 3.2.3. Limits of constitutional control as a balancing mechanism

It is important from the perspective of balance of powers between ordinary and constitutional courts and avoiding intrusion of the constitutional court into the activities of ordinary judiciary that the competence of the Federal constitutional court to review the decisions of ordinary courts is not boundless. There are three limitations that serve as important safeguards for the protection of ordinary courts from the excessive intrusion of the constitutional court into their activities: first, the constitutional court is entitled to examine only whether the ordinary courts stay within the boundaries of the constitution as concerns their ruling and procedure used<sup>116</sup>, i.e. the control constitutional justifiability;<sup>117</sup> second, the constitutional court is entitled to intervene after the entire appeals process before the ordinary courts has been exhausted: third, even if the constitutional complaint is successful, the constitutional court does not replace the ruling of the ordinary court with its own, merely objects to the violation of the constitution and refers the case back to the ordinary court giving the opportunity to the latter to reassess the case and make a new ruling but now observing the standards set by the constitutional court.<sup>118</sup> Despite these safeguards, a conflict might still occur if, for instance, the Federal Constitutional Court interprets the influence of the fundamental rights in other areas of

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<sup>116</sup> There are two aspects of the activities of ordinary courts that are subject to review by constitutional courts: review of the content of court rulings and review of court proceedings, the second one based upon the violations of the fundamental rights related to the administration of justice and subjected to the especially intensive examination by the constitutional court. For details *see* Cristina Ruth, Kai Lohse, Constitutional Review of Decisions of Non-constitutional Courts by the Federal Constitutional Court, Report for the Seminar “The limits of constitutional review of ordinary courts’ decisions in Constitutional Complaints Proceedings”, pp. 4-6, 9-16. [http://www.venice.coe.int/docs/2005/CDL-JU\(2005\)061-e.asp](http://www.venice.coe.int/docs/2005/CDL-JU(2005)061-e.asp)

<sup>117</sup> As underlined in the *Streets Theatre case (1984)* 67 BVerfGE 213, the constitutional court does not review the rulings of ordinary courts as regards the findings of facts and interpretation and application of criminal law. It must ensure that the ordinary courts observe the norms and standards of fundamental rights. For the details on the case see Kommers, *supra* note 42, at p. 431.

<sup>118</sup> Oliver Klein, The Federal Constitutional Court’s Relation with German Ordinary Courts, Report for the Seminar “Interrelations between Constitutional and Ordinary Courts”, at pp. 3-5, available at [www.venice.coe.int/docs/2006/CDL-JU\(2006\)045-e.pdf](http://www.venice.coe.int/docs/2006/CDL-JU(2006)045-e.pdf)

law in a different manner than the ordinary court does, and it therefore makes a ruling in a case which, in the opinion of the ordinary courts, does not fall within its competence; however, in such cases, the Federal Constitutional Court's authority prevails (Section 31(1) of FCCA).<sup>119</sup>

In Spain, the possibilities of intervention of the Constitutional Court in the activities of the regular judiciary are as limited as in Germany that significantly contributes to the reduction of tension caused by the supervision of the guardian of the constitution over ordinary courts. Requirement of exhaustion of all remedies is an important limitation. (Art. 53(2) of Const. Art. 41(1), 43, 44(1) (a), SLCC). Further, Article 54 of SLCC explicitly notes that when hearing the appeal for protection concerning the ruling of the ordinary court, the role of the constitutional court consists solely in determining whether the applicant's rights or freedoms have been violated and in preserving or restoring those rights or freedoms and excludes any further comment on the actions of the judicial bodies. It is important that the Constitutional Court cannot intervene in the process of interpreting and applying ordinary legislation by regular courts, unless there is a violation of constitution.<sup>120</sup> Whenever a fundamental right is relevant to the construction of laws and regulations, the interpretation accepted by constitutional judgments is overriding, while in all other areas, the case law of the Supreme Court offers the most authoritative interpretation not only of "ordinary laws" but of the Constitution itself.<sup>121</sup> The tension between the Spanish Constitutional and Supreme Courts is still frequent and sometimes reaches even the level of absurdity.<sup>122</sup>

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<sup>119</sup> *Id.* at p. 5.

<sup>120</sup> Ignacio Borrajo Iniesta, Limits of Facts, Law and Remedies, Myths and Realities, in Constitutional Review of Judicial Decisions, Spanish Experience, Report for the Seminar "The limits of constitutional review of ordinary courts' decisions in Constitutional Complaints Proceedings", at p. 9. available at [www.venice.coe.int/docs/2005/CDL-JU\(2005\)068-e.pdf](http://www.venice.coe.int/docs/2005/CDL-JU(2005)068-e.pdf)

<sup>121</sup> *Id.* at p. 13.

<sup>122</sup> In the recent decision of January 23, 2004 Spanish Supreme Court (First Chamber) ordered the judges of the constitutional court to pay damages to the citizen whose complaint had been declared inadmissible by the constitutional Court. The Supreme Court considered that the reasons for the decision of the constitutional court to declare the complaint inadmissible were insufficient and the plaintiff's faith in the rule of law has been harmed. According to the Supreme Court, the economic value of the harm that each

On inter-relation between ordinary and constitutional courts in Germany and Spain and the role of the constitutional complaint in this inter-relation, it is to be concluded that first, ordinary courts are in the first instance responsible for protection of human rights, the constitutional court intervenes only in exceptional circumstances and its powers are limited to reviewing whether the constitutional rights have been violated. However, the supervisory function of the constitutional court carries special importance for the effective functioning of the entire system of rights protection. Its case law serves as a guide for the ordinary courts on how to protect constitutional rights. However, difference in positions of the courts and the power of the constitutional court to quash the decision of the ordinary court generates tension and becomes the source of conflict. This kind of a conflict does not contribute to the achievement of the common goal of these institutions – ensuring protection of constitutional rights. Judicial cohabitation and cooperation in the course of which ordinary courts will not see the constitutional court as a rival and intruder into their competence and follow the principles developed by the constitutional court when re-examining the remanded cases, while the constitutional court will not exceed the limits of its powers is a necessary pre-requisite for the achievement of this goal. Even though it is difficult to recognize mistakes made by not paying adequate attention to constitutional rights and see the respective decision quashed as a result of the constitutional complaint, this kind of supervision is necessary as a mechanism of correction and a guide for future activities. On the other hand, excessive intrusion of the constitutional court into the activities of ordinary courts is to be avoided by prescribing limitations. This kind of limitations are mutually beneficial, since they save the court from excessive flow of cases that is difficult to cope taking into account the limited resources of the constitutional court.

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judge caused to the plaintiff amounted to 500 Euros. S.T.S. [Supreme Court], Jan. 23, 2004 J.T.C. No. 56/2004, Cited in Víctor Ferreres Comella, the Consequences of Centralized Constitutional Review in a Special Court, *Some thoughts on judicial activism*, 82 *Tex. L. Rev.* 1705(2004), at 1730.

### **3.3. Inter-relation between Ordinary and Constitutional Courts in Hungary**

As regards Hungary, as specified in Article 48(1) of HCCA, the individual complaint may be filed by anybody who is aggrieved **by the application of unconstitutional legal norm**, after he/she exhausted all the other remedies or has no other remedy available. So the requirement is that if other possibilities of being remedied except for the constitutional court are available, they must necessarily be exhausted. Article 57(5) of Hungarian Constitution establishes the right to seek legal remedy to judicial, administrative and other official decisions which infringe upon the rights and justified interests. Further, under Article 50(1), ordinary courts are entrusted with the task of protecting the rights and lawful interests of citizens. Article 70/K of the Constitution empowered regular courts to adjudicate on fundamental rights, stating that “claims arising as a result of infringement of fundamental rights and complaints made against governmental decisions concerning the discharge of obligations can be brought before the court”. Ordinary courts are entrusted with the task of redressing the violations of fundamental rights by public authorities in Spain and Germany as well, but in both countries, judicial decisions may be challenged through the individual complaints before the constitutional courts, when the infringement of the constitutional rights results from the court ruling itself or when there is a violation of the rights related to the administration of justice. The feature that differentiates the mechanisms of constitutional complaint of Hungary from that of Spain and Germany is that the subject of challenge and constitutional review is not a decision that embodies the direct violation of fundamental right, but the legal norm on which it is based.<sup>123</sup> It is the constitutionality of the statute applied in the particular case that the constitutional court reviews and not whether the given decision made by judges or other state authorities violates any of the petitioner’s constitutional rights.<sup>124</sup> It means that judicial decisions made by ordinary courts are not subjected to the scrutiny of constitutional courts. The constitutional court checks through the

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<sup>123</sup> Georg Brunner, *supra* note 8, at p. 84

<sup>124</sup> Web-page of Hungarian Constitutional Court, <http://www.mkab.hu/en/enpage1.htm>

constitutional complaint whether the law based on which the ordinary court made is constitutional or not, but it does not check the constitutionality of judicial decision itself. So the use of procedure makes sense only when the law applied by the court is unconstitutional, but not in cases when the rule is constitutional, but is applied by the judge in the unconstitutional manner. Therefore, unlike Germany and Spain, where the constitutional court exercises constitutional control over the jurisprudence of ordinary courts through the mechanism of individual complaint, Hungarian Constitutional Court is not entrusted with the same jurisdiction over the ordinary judiciary.<sup>125</sup> In other words, as long as the constitutional complaints procedure that authorizes the constitutional body to review the judicial decision based on an unconstitutional interpretation is not introduced, it can be said that the adjudication of fundamental rights is the function fulfilled by ordinary courts.<sup>126</sup> In the course of performing the function of protecting the rights, they are entitled to interpret the constitution in the context of specific cases, but it does not mean authorizing them to constitutionally review the legal instruments they are to apply or set aside the legal instruments they deem to be unconstitutional.<sup>127</sup> Article 32/A entitles the Constitutional Court to rule on the constitutionality of legal rules. As stressed by the Presidential Council of the Supreme Court of Hungary, if the ordinary courts were entitled to perform constitutional review, they could come to different conclusions and it would lead to legal uncertainty and unpredictability of legal regulations.<sup>128</sup>

The development of relations between ordinary and constitutional courts in Hungary is not free from tension as it could be expected due to the fact that judicial decisions are not subject to the constitutional review. It became evident from one of the earlier decisions of the Hungarian Constitutional Court passed in 1991. In the *Case on Legal Guardians and on the Family Act*, the constitutional court overstepped the boundaries of its legal power and annulled the decision of

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<sup>125</sup> Renata Uitz, *supra* note 6, at 7-8.

<sup>126</sup> Gabor Halmai, *supra* note 54, p. 106

<sup>127</sup> *Id.* at p. 111

<sup>128</sup> *Id.* at p. 113



the lower court that was based on unconstitutional legal provision, without having any statutory authorization.<sup>129</sup> Though it does not have direct power to review constitutionality of judicial decisions, the constitutional court introduced the concept of living law, allowing it to review not the language of the law as determining the contents of the norm but rather the meaning and the content that can be attributed to it from the consistent and unitary practice of applying the law.<sup>130</sup> The review of “living law” leads to the decision on the constitutionality of application of the law by courts.<sup>131</sup> Using this technique, the constitutional court ruled that if the practice of the ordinary courts had led to one specific, defined meaning and content to gain permanent and uniform acceptance in legal practice and that interpretation contained and gave effect to an unconstitutional content, then the constitutionality of that content had to be reviewed.<sup>132</sup>

As demonstrated above, the mechanism of constitutional complaint in Hungary differs from the same mechanism in Spain and Germany, since it allows constitutional review in order to discover the unconstitutional law, but not of the review of constitutionality of application of law. It does not allow the constitutional court to directly scrutinize the decisions of ordinary courts. In fact it is a claim against the law and not against the act of public authority, such as an ordinary court. Since the constitutional court does not decide individual cases against public authorities, the mechanism of individual complaints becomes much similar to the proceedings for posterior review of norms, when individual can reach the same result, annulment of the statute, by much simpler route of *actio popularis* that is not characterized by the strict standing

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<sup>129</sup> Decision 57/1991: 8 November 1991. In the present case, the legal practice interpreted the provision of the Family Act to permit the guardian *ad litem* to have standing to bring proceedings in the name of the minor. Upon attaining majority child had no legal possibility of establishing or clarifying its family law situation. The court found that the irrevocable forfeiture of the child’s right to ascertain its parentage by conferring upon a statutory agent an unqualified right to sue was unconstitutional and relevant provision would therefore be declared null and void. Available In Constitutional Judiciary in a New Democracy, by Solyom & Brunner, Ann Arbor, The University of Michigan Press (2000) at pp. 171-177

<sup>130</sup> Laszlo Solyom, *supra* note 86, at p. 4.

<sup>131</sup> *Id.*

<sup>132</sup> Decision 57/1991(8 November 1991), In: Constitutional Judiciary in a New Democracy, by Solyom & Brunner, Ann Arbor, The University of Michigan Press (2000) at p. 172

requirements as the individual complaint.<sup>133</sup> It can explain the fact that while in Spain and Germany, constitutional complaints are very popular and take significant portion of the constitutional courts' case load, in Hungary, during 1990-1996 only 102 constitutional complaints were filed, but 3170 preliminary review proceedings were initiated.<sup>134</sup> Taking these considerations into account, allowing the constitutional court to review the constitutionality of application of laws in the context of the mechanism of individual complaints can be recommended in order to vitalize the tool that serves as an effective mechanism of rights protection in Germany and Spain. On the one hand, it may be argued that Hungarian model reduces tension by precluding constitutional courts from examining judicial application of laws. On the other hand, introduction of the concept of living law demonstrated that despite the lack of statutory authorization, the Hungarian Constitutional Court still finds ways of scrutinizing the decisions of ordinary courts if it finds such a measure necessary. Besides, no system in which constitutional and ordinary courts operate is completely free from tension. In any system, judicial cooperation and cohabitation represents an essential way and prerequisite for effective protection of rights. Therefore, leaving the function of rights protection to the ordinary courts but at the same time, allowing the Hungarian Constitutional Court to review constitutionality of its activities in exceptional cases can be regarded as a justified change and the way of conferring to the mechanism of constitutional complaint an important function that has played in Spain and Germany.

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<sup>133</sup> Rights before Courts: a study of constitutional courts in the post-communist states of Central and Eastern Europe, by Wojciech Sadurski, Springer (2005) at p. 6; Peter Paczolay, Effects, Enforceability and Execution of the Decisions of the Constitutional Court – Hungarian Experience, Report for Seminar on execution of Decisions, Venice Commission, available at [http://www.venice.coe.int/docs/1999/CDL-JU\(1999\)026-e.asp](http://www.venice.coe.int/docs/1999/CDL-JU(1999)026-e.asp). Brunner, *supra* note 8, at p. 81, 84; (Hungarian variation of *actio popularis* allows anyone to bring an action before the constitutional court without observing any deadlines or showing any impact or other legally protected interest. It means that all legal norms and administrative provisions are subject to constitutional review. The overwhelming majority of proceedings fall into this category, allowing the citizens to participate in the enforcement of constitutional order and giving the opportunity to the constitutional court, in the early stages of democracy, to review the entire legal order for constitutionality).

<sup>134</sup> Brunner, *supra* note 8, at p. 100.

### **3.4. Exhaustion of all remedies and extraordinary direct access**

As mentioned above, the requirement of exhaustion of all remedies provided by the judiciary significantly reduces the potential conflict between the ordinary and constitutional courts. Nonetheless, considering the length of judicial proceedings in most countries, this requirement might lead to preserving unconstitutional situation for an extended period of time and result in the irreversible consequences.<sup>135</sup> Taking this into consideration, it might be advisable on the other hand, to grant the Constitutional Court a discretionary power to decide a complaint before exhaustion of other remedies, if the recourse to the courts would entail a serious and unavoidable detriment to the complainant.<sup>136</sup> Out of the models under consideration, the solution of removing the requirement of exhaustion of all remedies as a condition of admissibility of constitutional complaint in exceptional circumstances and allowing extraordinary direct access was adopted only by the Federal Republic of Germany. As specified by Article 90(2) of the FCCA, this requirement may be waived and the court may decide the complaint without exhaustion of remedies, if it is of general relevance or if recourse to other courts first would entail a serious and unavoidable disadvantage for the complainant. So there are two exceptions allowing the constitutional court to take the case that has not gone through regular legal procedures. When deciding whether or not to waive the requirement, the Constitutional Court should be extremely careful and selective, in order not to turn this provision into the mechanism of circumventing ordinary judiciary and avoid the case load.

### **3.5. Acceptance procedure – mechanism of coping with the case load**

The overall problem facing the constitutional courts is to control the flow of cases while ensuring that important cases are adjudicated within a reasonable period of time.<sup>137</sup> Easy access

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<sup>135</sup> Renata Uitz, *supra* note 1, at p. 246.

<sup>136</sup> Steinberger, *supra* note 22, at p. 28.

<sup>137</sup> Jackson & Tushnet, *supra* note 17, at p. 472.

to the constitutional court<sup>138</sup> immensely increases the workload and therefore, it has to be highly selective and establish mechanisms of preliminary examination with the filtering effect in order to reduce this case load without collateral damage to the warranted constitutional complaints.<sup>139</sup> The most important reasons for refusal to hear the complaint are the passing of time limits<sup>140</sup> and that the complaints fall within the jurisdiction of ordinary courts.<sup>141</sup> In the context of constitutional complaints, the introduction of the screening mechanism is especially important for Germany and Spain, while in Hungary where constitutional complaints are not so frequently resorted to, the problem of case load arose because of *actio popularis*<sup>142</sup>.

In Germany, before reaching merits of the case each complaint has to undergo acceptance procedure - preliminary examination made by the chamber consisting of 3 judges. (Art. 15a, FCCA).<sup>143</sup> The Chamber, by a unanimous decision, may refuse acceptance of a constitutional complaint if it is inadmissible (e.g. failing to meet the deadline) or does not meet the requirements for acceptance under FCCA. Namely, the complaint is to have fundamental constitutional significance<sup>144</sup> or the acceptance is to be necessary to enforce the complainant's

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<sup>138</sup> Filing a constitutional complaint is a simple procedure. Proceedings before the constitutional court are free of charge. (Art. 34(1), FCCA; Art. 95(1), Spanish Organic Law, Art. 28(1) of HCCA). However, in case of abuse of the right to file a complaint or if the complainant acts recklessly or in bad faith, the constitutional courts may impose a fine. (Article 34(2), FCCA; Art. 95(2-4) of Spanish Organic Law, Art. 28(2) of HCCA).

<sup>139</sup> Rett R. Ludwikowski, *supra* note 18, at p. 215;

<sup>140</sup> In Germany, general deadline is one month, while if a legislative act is challenged - one year. (Article 93, FCCA). In Spain, general deadline is 20 days for a complaint against court decisions, three months against normative acts other than laws – arts. 44(2) and 42, SLCC). In Hungary, there is a deadline of 60 days. (Article 48, HCCA).

<sup>141</sup> Klaus Von Beyme, *supra* note 2, at p. 114.

<sup>142</sup> Herman Schwartz, *supra* note 2, at 35.

<sup>143</sup> It is notable that later on the chambers were empowered to decide the cases on the merits, but only unanimously and when the decision conformed to the court's existing jurisprudence. For details see Kommers, *supra* note 36, at p. 175.

<sup>144</sup> The complaint has fundamental constitutional significant if it raises a constitutional question which cannot be automatically answered on the basis of Basic Law and has not been clarified by the case-law of the Federal Constitutional Court or with respect to which new need for clarification has arisen due to the change of circumstances. There must therefore be serious doubts as to the answer to the constitutional

constitutional rights, including in cases when the complainant suffers especially grave disadvantage as a result of refusal to decide on the complaint. (Art. 93a (2), FCCA). The refusal to accept constitutional complaint does not require reasons (Art. 93 d (1), FCCA).

In Spain, the application may be considered to be inadmissible where it manifestly and irreversibly fails to meet the conditions given in Articles from 41 to 46 (if brought by the person that has no standing, if all remedies have not been exhausted, etc.); where the application relates to rights and freedoms that are not constitutionally protected; where the application is manifestly devoid of content warranting the judgment by the constitutional court on its merits; where the Constitutional Court has already dismissed the appeal for constitutional protection on the merits in a broadly identical case. (Art. 50(1), FCCA). Similarly to Germany, Spanish Federal Constitutional Court took the position that only the cases of ‘constitutional importance’ should reach the adjudication of the merits and the excess of individual complaints presented is to be disposed quickly and efficiently without undue burden and delay.<sup>145</sup>

As mentioned above, since in Hungary the mechanism of constitutional complaint does not enjoy the same level of popularity as in Spain and Germany, as mentioned above, the problems related to the case load were basically related to *actio popularis* and the court tried to solve them through the combination of relegating minor issues to the back burner, invoking procedural devices, growing public awareness of the futility of filing complaints that will be ignored and the development of informal priority system.<sup>146</sup>

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question. An indication that a constitutional question has fundamental constitutional significance may in particular be the fact that there has been a dispute about the question in the specialised literature or there have been different answers to it in the case-law of the nonconstitutional courts.[BVerfGE 90, 22 (24-25), see also in „Stasi Dispute“ case, 1 BvR 1696/98, 25 Oct. 2005, at [http://www.bundesverfassungsgericht.de/en/decisions/rs20051025\\_1bvr169698\\_en.html](http://www.bundesverfassungsgericht.de/en/decisions/rs20051025_1bvr169698_en.html).

<sup>145</sup> Ignacio Borrajo Iniesta, Limits of Facts, Law and Remedies, Myths and Realities, in Constitutional Review of Judicial Decisions, Spanish Experience, Report for the Seminar “The limits of constitutional review of ordinary courts’ decisions in Constitutional Complaints Proceedings”, at p. 17; available at [www.venice.coe.int/docs/2005/CDL-JU\(2005\)068-e.pdf](http://www.venice.coe.int/docs/2005/CDL-JU(2005)068-e.pdf)

<sup>146</sup> Herman Schwartz, *supra* note 2, at p. 35

## Chapter IV - Remedies

One of the basic factors based on which we can judge about the effectiveness of the mechanism of constitutional complaints and that serves as a prerequisite for the public acceptance and support of the constitutional court is remedies awarded to the complainant if the constitutional right is found to be violated.

### 4.1. *Temporary measures*

Apart from the remedies awarded following the resolution of the case, preliminary measures of protection can also be granted.<sup>147</sup> As prescribed under Article 32(1) of FCCA, the Federal Constitutional Court may issue temporary injunction if “it is urgently needed to avert serious detriment ward off imminent force or for any other important reason for the common weal”. Existing legal provisions ensure that in urgent cases the temporary injunctions are issued without unnecessary delay – excluding oral proceedings (Art. 32(2)) and in the absence of the quorum of the panel, through the unanimous decision of at least 3 judges. (Art. 32(7)). However, the decision of the constitutional court on issuing or denying the temporary injunction is given without specifying reasons (Art. 32(5)) and in the proceedings on the constitutional complaint, it is impossible to protest against the decision (Art.32(3)). Temporary injunctions are generally valid for 6 months (Art. 32(6)), while those issued by the panel in urgent circumstances under Article 32(7) - only for 1 month, with the possibility of extension of both terms.

Article 56(1) of SLCC empowers the Spanish Constitutional Court, at its own initiative or at the request of the applicant, to stay execution by the public authorities of the act in respect of which constitutional protection is claimed where such execution might cause an injury that would defeat the very purpose of the protection. However, while considering the question of applying this measure, the law establishes the requirement of weighing the interests of the complainant against the general interests or fundamental rights of the third party and the balancing of these interests may result in the denial of the stay of execution.

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<sup>147</sup> Renata Uitz, *supra* note 1, at pp. 249-250.

As for Hungary, according to the current situation, the Constitutional Court is not authorized to issue provisional orders. However, acknowledgement of the necessity of granting such power to the Constitutional Court led to the formulation of the draft amendment to the Act of the Constitutional Court that foresees the initiation of provisional order through which the enforcement of the challenged legal norm can be suspended if this appears to be urgently needed to prevent great disadvantage or for other particular reasons.<sup>148</sup>

## **4.2. Effects of Final Judgments**

The Chapter will separately consider the effects of final judgments of the Constitutional Courts of Germany, Spain and Hungary and will be finalized with identification of main similarities and differences.

### **4.2.1. Germany**

As specified by Article 95(1) of the FCCA, if the constitutional complaint is upheld, the decision shall state which provision of the Basic Law has been infringed by which act or omission. If the complaint against a decision of the public authority is upheld, it will be quashed. (Article 95(2), FCCA). However, the ruling of the constitutional court does not replace the judgment of the ordinary court that was found to be unconstitutional and therefore, the matter will be referred back for issuing a new ruling, this time paying due respect for constitutional rights.<sup>149</sup> If the law challenged through the individual complaint is found to be unconstitutional or if the quashed decision is based on an unconstitutional law, then this law will be declared null and void. (Article 95(3), FCCA). If the person was convicted based on the rule or interpretation of the rule that has been declared incompatible with the constitution, new proceedings may be instituted in accordance with the provisions of the Code of Criminal Procedure. (Art. 79(1), FCCA). In all other respects, final decisions based on the rule declared

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<sup>148</sup> Brunner, *supra* note 8, at p. 93.

<sup>149</sup> Steinberger, *supra* note 22, at p. 30.

null and void will remain unaffected and their execution will be inadmissible. (Article 79(2) of the FCCA).

Article 31(1) of the FCCA establishes binding effect of the decisions of the Federal Constitutional Court upon Federal and Land constitutional bodies as well as on all authorities and courts.<sup>150</sup> All public authorities are bound by the decisions of the constitutional court regardless of the type of proceedings and binding effect goes beyond the *res judicata* effect.<sup>151</sup> Furthermore, certain categories of decisions including those made in the proceedings on constitutional complaints that declare the law null and void or compatible or incompatible with the Basic Law have the force of law (Art. 31(2), FCCA). It means that these decisions are binding *inter omnes* on all authorities and private individuals.<sup>152</sup>

According to Article 32(2), the Constitutional Court may declare laws that it holds unconstitutional to be either null and void or compatible or incompatible with the Basic Law. The norm declared null and void immediately ceases to operate, while the norm declared incompatible, but not void, remains in force during the transition period, pending its correction by the legislature.<sup>153</sup> A statute is declared null and void *ex tunc*, i.e. from the beginning of the collision between the statute and the Constitution.<sup>154</sup> This rule is qualified however, by a provision of the FCCA that permits new trials in criminal cases in which the court convicts the

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<sup>150</sup> Only decisions on the merits have binding effect. Their binding effect extends to the actual ruling as well as the “essential reasoning on which it is based. See in Rainer Arnold, The Decisions of the Federal Constitutional Court and their Binding Force for Ordinary Courts, Report for Seminar “Inter-relation between Ordinary and Constitutional Courts” available at [http://www.venice.coe.int/docs/2006/CDL-JU\(2006\)047-e.pdf](http://www.venice.coe.int/docs/2006/CDL-JU(2006)047-e.pdf).

<sup>151</sup> Anke Eilers, “Binding Effect of the Federal Constitutional Court Decisions on Political Institutions, Report for the Seminar on “The Effects of Constitutional Court Decisions” (Tirana 28-29 April(2003)), at p. 8. available at [http://www.venice.coe.int/docs/2003/CDL-JU\(2003\)018-e.pdf](http://www.venice.coe.int/docs/2003/CDL-JU(2003)018-e.pdf)

<sup>152</sup> *Id.* at p. 7

<sup>153</sup> Kommers, *supra* note 42, at p. 53

<sup>154</sup> Anke Eilers, “Binding Effect of the Federal Constitutional Court Decisions on Political Institutions, Report for the Seminar on “The Effects of Constitutional Court Decisions” (Tirana 28-29 April(2003)), at p. 8; available at [http://www.venice.coe.int/docs/2003/CDL-JU\(2003\)018-e.pdf](http://www.venice.coe.int/docs/2003/CDL-JU(2003)018-e.pdf)



defendant under a subsequently voided statute. (Article 79(1), FCCA).<sup>155</sup> Statutes declared incompatible with the Basic Law but not void may continue to be enforced, but only under conditions laid down by the Constitutional Court and ordinary courts may not proceed with pending cases arising under such statutes until the legislature has amended or corrected the statute in conformity with the guidelines set by the court.<sup>156</sup>

It is important to remember that the decisions of the constitutional court are exclusively declaratory and “enforceable” through ordinary legislation and judicial proceedings.<sup>157</sup>

It is possible to avoid declaring the statute invalid, if the statute can be interpreted in conformity with the Basic Law.<sup>158</sup>

#### 4.2.2. Spain

Article 164(1) of the Spanish Constitution establishes the *erga omnes* effect of decisions declaring the unconstitutionality of the law or of a rule with the force of law. It is notable that in contrast to Germany, the laws cannot be directly challenged and declared incompatible with the constitution through the mechanism of individual complaints.<sup>159</sup>

As a result of examining the case, the constitutional court may either grant or refuse protection. (Art. 53, SLCC). As further specified in Article 55, in case of granting protection, the constitutional court may take one of the following measures:

a) It may declare the decision infringing upon a constitutional right invalid. Similarly to German model, when the Spanish Constitutional Court hears an appeal for protection

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<sup>155</sup>Kommers, *supra* note 42, at p. 54

<sup>156</sup> *Id.*

<sup>157</sup> *Id.*

<sup>158</sup> Anke Eilers, “Binding Effect of the Federal Constitutional Court Decisions on Political Institutions, Report for the Seminar on “The Effects of Constitutional Court Decisions” (Tirana 28-29 April(2003)), at p. 8; available at [http://www.venice.coe.int/docs/2003/CDL-JU\(2003\)018-e.pdf](http://www.venice.coe.int/docs/2003/CDL-JU(2003)018-e.pdf)

<sup>159</sup> Where the protection is granted because the law applied violates constitutional rights, the question may be referred to the full court that may declare the law unconstitutional in a new judgment (Article 55(2) of the Organic Law on Constitutional Court).

concerning the rulings by ordinary courts, its role consists only in determining whether the applicant's rights or freedoms have been violated; If the judicial decision violates constitutional rights, it will be annulled. The case may be returned back to the ordinary courts that will rule on the matter again, this time in the way that respects constitutional rights.<sup>160</sup> If no specific remand is decided, it is up to the parties to the proceedings and the judicial courts to see if fresh judicial action is proper or necessary.<sup>161</sup> Quashing by the constitutional court of a criminal conviction will not be followed by the reopening of the case (retrial or a new decision by the criminal court), unless it is so ordered in the constitutional judgment.<sup>162</sup> Remand can be ordered when the breach affected essential procedural guarantees, especially the right to due process.<sup>163</sup>

b) It may recognize the public right or freedom, without declaring any legal norm invalid.<sup>164</sup>

c) It may restore to the complainant the integrity of his or her rights or freedoms by the adoption of appropriate measures. This is a differentiating feature of the Spanish Constitutional

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<sup>160</sup> Ignacio Borrajo Iniesta, Limits of Facts, Law and Remedies, Myths and Realities, in Constitutional Review of Judicial Decisions, Spanish Experience, Report for the Seminar "The limits of constitutional review of ordinary courts' decisions in Constitutional Complaints Proceedings", at p. 13-14, available at [www.venice.coe.int/docs/2005/CDL-JU\(2005\)068-e.pdf](http://www.venice.coe.int/docs/2005/CDL-JU(2005)068-e.pdf) (Cited Judgments Chocolates Elgorriaga, 29/1989 of 6 February; Juan Sánchez Domínguez, 34/1997 of 25 February; or Ángel Cuellar Llanos, 203/2004 of 16 November).

<sup>161</sup> *Id.*

<sup>162</sup> Judgment Alcalde de Soria II, 159/1987 of 26 October, cited in Ignacio Borrajo Iniesta, Limits of Facts, Law and Remedies, Myths and Realities, in Constitutional Review of Judicial Decisions, Spanish Experience, Report for the Seminar "The limits of constitutional review of ordinary courts' decisions in Constitutional Complaints Proceedings", at p. 14.

<sup>163</sup> Judgments 215/1999 of 29 November, and 168/2001 of 16 July cited in Ignacio Borrajo Iniesta, Limits of Facts, Law and Remedies, Myths and Realities, in Constitutional Review of Judicial Decisions, Spanish Experience, Report for the Seminar "The limits of constitutional review of ordinary courts' decisions in Constitutional Complaints Proceedings", at p. 14.

<sup>164</sup> A second example is offered by the finding that surveillance of telephone conversations was in breach of the right to secret communications; but the conviction of the defendant is supported by independent evidence, not tainted by the illegal wiretapping, so the ruling of the criminal courts is in conformity to the right to be presumed innocent (Judgment 205/2005 of 18 July).

Court that cannot only invalidate the decision, but restore the complainant to his/her previous position by taking required steps.<sup>165</sup>

Reparation of the infringement of constitutional rights might require money awards, but the Spanish Constitutional Court limits itself to finding the violation of constitutional rights and does not award damages, leaving this function to the ordinary courts.<sup>166</sup> However, in exceptional cases, the Constitutional Court may itself award damages.<sup>167</sup>

Under Article 40 of SLCC, the judgments that declare the unconstitutionality of laws, regulations or enactments having the force of law shall provide grounds for review of proceedings in which unconstitutional laws, regulations or enactments were applied only in criminal proceedings or administrative litigation where the invalidity of the rule applied would entail a reduction of the penalty or sanction or exclusion, exemption or limitation of liability. So judgment declaring the law invalid will have retroactive effect only if it serves the interests of the person convicted on the basis of the statute.

Similarly to Germany, apart from invalidating the act, an alternative remedy is to propose particular reading of the challenged statute, saying that the statute will be constitutional only if interpreted in a particular way.<sup>168</sup>

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<sup>165</sup> Patrono, *supra* note 4, at p. 422.

<sup>166</sup> Ignacio Borrajo Iniesta, Limits of Facts, Law and Remedies, Myths and Realities, in Constitutional Review of Judicial Decisions, Spanish Experience, Report for the Seminar “The limits of constitutional review of ordinary courts’ decisions in Constitutional Complaints Proceedings”, at p. 14.

<sup>167</sup> After finding the violation of the right to privacy of Mrs. Preysler through the constitutional complaint and remanding the case to ordinary courts (first Preysler Judgement, 115/2000 of 5 May), the Supreme Court, though complying with the constitutional declaration, drastically reduced the compensation awarded by lower courts. In consequence of filing the second constitutional complaint, the Constitutional court ruled that the amount awarded by the Supreme Court was clearly inadequate to compensate the breach of the fundamental right and without remanding the decision for the second time, granted the compensation.(sited in Ignacio Borrajo Iniesta, Limits of Facts, Law and Remedies, Myths and Realities, in Constitutional Review of Judicial Decisions, Spanish Experience, Report for the Seminar “The limits of constitutional review of ordinary courts’ decisions in Constitutional Complaints Proceedings”, at p. 14.

<sup>168</sup> Víctor Ferreres Comella, *supra* note 121, at 1720

### 4.2.3. Hungary

The decisions of the Constitutional Court are non-appealable and binding on everybody. (Art. 27, HCCA). Finding the legal rule or other norm of state control unconstitutional will result in its invalidation (Art. 32/A, Hung. Const; Art. 40, HCCA) and losing force from the date of publication of the decision. (Art. 42(1), HCCA). It means that from this date, it shall not be applied. (Art. 43(1), HCCA). The Hungarian Constitutional court elaborated upon the principles governing invalidation of legal rules in the Decision on Powers *Ex nunc*<sup>169</sup>: It stressed that the principal rule is that of *ex nunc* invalidation. This conclusion finds further support in Article 42(2) of the HCCA, leaving the legal relationships which developed prior to the publication of the decision and rights and duties arising from such relationship unaffected by the annulment of the legal rule. As further underlined by the constitutional court, Article 43(4) of HCCA allows exception from the principal rule, rendering it possible to invalidate the rule *ex tunc* that is retroactively or even to determine the invalidation as being effective from the future date, if justified by the particular interest of legal certainty or of the person who brought a complaint. So the court may determine the consequences of the unconstitutionality for certain legal relationship on case-by-case basis, retroactively as well as prospectively. The consequences of unconstitutionality of a legal rule must be ordered in such a way it really results in legal certainty. The principal rule is that unconstitutional legal rules lose their validity upon the date of publication of the decision determining their unconstitutionality and that legal relations created previously would remain intact. Intervention into prior legal relations is prescribed by law only in the event such intervention is demanded by another rule of law principle competing with that of legal certainty. For example, there is an interest in protecting the rights of the person convicted based on the rule found to be unconstitutional. Article 43(3) of the Constitutional Court Act mandates the review of the final judgment in criminal proceedings for the benefit of the convicted person, but only if detrimental consequences of the punishment are still in force.

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<sup>169</sup> Decision on Powers *Ex nunc*. Decision 10/1992, In: Constitutional Judiciary in a New Democracy, by Solyom & Brunner, Ann Arbor, The University of Michigan Press (2000) at pp. at p. 207-213.

An important decision and a step towards making a constitutional complaint an effective remedy was the decision on No. 23/1998<sup>170</sup>, where the deficiencies and resulting ineffectiveness of the mechanism of individual complaints was acknowledged. As underlined in the decision, without the possibility of redressing the grievance, the mechanism of constitutional complaint is meaningless. In order to be effective, a legal remedy should have legal consequences, including the possibility for reopening a case. Possibility to order reopening the case as a remedy was available only for criminal cases in compliance with Article 43(3) of the HCCA. The Code on Civil Procedure did not make it possible for the petitioners to reopen a civil case. The constitutional complaint therefore was not an effective remedy. As required by the Constitutional Court, the Parliament amended the Act on Civil Procedure and made it possible for the petitioners to move for a new trial in ordinary courts provided that on the basis of the successful constitutional complaint, the Constitutional Court establishes with retroactive effect the unconstitutionality of application in the given case of the contested statute.

Finally, similarly to the approach taken by Germany and Spain, in order to avoid the invalidation of laws, the Hungarian Constitutional Court introduced the possibility of the constitution-conform interpretation of the statute stating that “if the constitutionality of the norm is challenged because of its incompleteness or lack of clarity, the Constitutional Court may determine the scope of the norm’s constitution-conform interpretation and may set those constitutional conditions which the interpretation of the norm must meet.”<sup>171</sup>

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<sup>170</sup> Decision of the Hungarian Constitutional Court, No. 23/1998, 09-06-1998, *Magyar Közlöny* (Official Gazette), 49/1998. Information on the decision was taken from the CODICES database of the Venice Commission and the web-page of the Hungarian Constitutional Court (<http://www.mkab.hu/en/enpage1.htm>)

<sup>171</sup> 38/1993(VI.11) AB, decision on constitutionality of certain norms applicable to the appointment of judges and judicial officials, ABH 1993, 266[Opinion of Chief Justice Solyom], see in Renata Uitz, *supra* note 1, at p. 260

#### 4.2.4. Some Similarities and Differences in Effects of Judgments

Germany opted for *ex tunc* invalidity and later on, Spain followed the same path.<sup>172</sup> As experience demonstrated, it is difficult to run consistently only one – either *ex tunc* or *ex nunc* maxim, bringing German courts to the conclusion that while in criminal cases the laws are apt to be held invalid *ex tunc*, in civil cases their invalidity may not be retroactive. (Article 79(2)).<sup>173</sup> In the light of this experience, the solution found by Hungary seems to be more flexible, announcing *ex nunc* invalidity as a general rule and giving discretion to the courts to deviate from the principal rule.

Spanish model is different from the German and Hungarian variations of constitutional complaints in the sense that it cannot only declare the decision null and void, but also take measures for full restoration of petitioner's rights and freedoms. Judgment given on the constitutional complaint by the Spanish Constitutional Court, in contrast to German and Hungarian Constitutional Court rulings cannot result into the invalidation of the law, due to the fact that laws cannot be directly challenged, however, if the violation of the constitutionally protected right is due to the unconstitutionality of the law, it may be declared invalid, though by the full court and in a new judgment.

In contrast to Hungarian variation of the constitutional complaint allowing the individual to challenge only the violation of rights resulting from application of an unconstitutional law, excluding the direct examination judicial decisions, the judgments of German and Spanish constitutional courts may result in invalidation of a ruling of ordinary courts. Neither of these two courts replaces the ruling of the ordinary court with its own and may remand the decision to the ordinary court for further examination.

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<sup>172</sup> Brunner, *supra* note 8, at p. 96

<sup>173</sup> Cappelletti, John Clarke Adams, *supra* note 27, at p. 1223.

## Chapter V - Constitutional Courts as powerful policy makers

Constitutional complaints alter traditional balance of powers between the constitutional court and the parliament.<sup>174</sup> Under Kelsenian model, the primary function of the constitutional court was to ensure smooth running of the constitutional process of government, while the protection of human rights was seen not as a primary purpose, but an indirect consequence of the process of constitutional adjudication.<sup>175</sup> The fear of Kelsen that introducing enforceable constitutional rights provisions and allowing the judges to discover the content and determine the scope of these rights would obliterate the distinction between the negative and positive legislature turned out to be justified.<sup>176</sup> By acquiring the competence of dealing with constitutional complaints, the status of constitutional courts as of powerful policy-makers was enhanced.<sup>177</sup> Allowing direct access of individuals to constitutional courts resulted in making these institutions the real guarantors of constitutional rights. Due to this role, constitutional courts are often blamed for inhibiting the activities of the legislature.<sup>178</sup> Therefore, finding a proper balance between two priorities – avoiding excessive intrusion of the constitutional court into the activities of the legislature, on the one hand and avoiding the violation of constitutionally guaranteed rights by lawmakers, on the other hand, acquires special importance.

When finding the violation of constitutionally guaranteed right, the constitutional court is entitled not only to declare the unconstitutional law invalid, but also signal to the parliament what is the legitimate policy route and determine principles guiding future legislative action.<sup>179</sup>

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<sup>174</sup> Lech Garlicki, *supra* note 3, at p. 66.

<sup>175</sup> Patrono, *supra* note 4, at p. 408.

<sup>176</sup> Alec Stone Sweet, *supra* note 1, at p. 84

<sup>177</sup> Alec Stone Sweet, *supra* note 76, at p. 10.

<sup>178</sup> Kommers, *supra* note 42, p. 56

<sup>179</sup> Alec Stone Sweet, *supra* note 76, at p.19

Some assert that constitutional court intervenes into the activities of the parliament through issuing instructions on how to legislate and consequently, acquires significant control over the outcomes.<sup>180</sup> According to others, legislature is not under excessive constraint, since constitutional aspirations rule out some, but not all choices and therefore, provide parliament with the possibility of selecting from the choices that are not ruled out.<sup>181</sup> Despite the fact that the legislature can circumvent the constitutional prescriptions, there always exists the threat of repeated censure and therefore, in most cases, legislature follows the guidance given by the constitutional court and undertakes “corrective revision” in conformity with the constitution.<sup>182</sup> The German experience showed that subsequent to constitutional court decisions, legislators diligently follow court’s preferred policies that resulted in the legislative implementation of constitutional case law.<sup>183</sup> Similarly, Hungarian Parliament had to devote significant time to revisions and demands of new laws and complied with the instructions of the Constitutional court on how the laws had to be written.<sup>184</sup> In order to repudiate the court, the parliament may change the constitution and enable the adoption of the law previously found to be unconstitutional.<sup>185</sup> This solution is rarely adopted, probably in part due to the difficulty in revising the constitution and in part due to unwillingness of the parliament to counteract the powerful constitutional court. As demonstrated by Hungarian experience, though the court was highly active, declaring laws unconstitutional and giving parliament instructions on how to

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<sup>180</sup> Alec Stone Sweet, *supra* note 1, p. 84.

<sup>181</sup> Michael J. Perry, *Morality, Politics, and Law: A Bicentennial Essay 170* (1988). In: Andras Sajó, *Constitutional Adjudication in the Light of Discourse Theory*, 17 *Cardozo L. Rev.* 1193(1996).

<sup>182</sup> Alec Stone Sweet, *supra* note 1, at p. 87

<sup>183</sup> Alec Stone Sweet, *supra* note 76, at p. 29.

<sup>184</sup> Kim Lane Scheppele, *supra* note 74, at p. 44.

<sup>185</sup> Alec Stone Sweet, *supra* note 1, at p. 88; Vilmos Sós, *The Paradigm of Constitutionalism, the Hungarian Experience*, In: *The Rule of Law after Communism, Problems and Prospects in East-Central Europe*, ed. by Martin Krygier, Adam Czarnota, Ashgate, Dartmouth, 1999, at p. 144



adopt laws, the Parliament overrode the court decision only once in 1990.<sup>186</sup> No other parliament has ever made use of power to challenge the court, not even the Austerity Package Parliament which had 72 % majority, but still instead of removing the constitutional provisions relied by the court for its most sweeping decisions, complied with the decisions of the constitutional court.<sup>187</sup>

Since invalidation of laws significantly deepens confrontation between the constitutional court and the legislature, it represents a measure of last resort taken by the constitutional court with the view of ensuring protection of constitutionally guaranteed rights. In order to soften the political impact of the decisions, apart from the possibility of invalidating unconstitutional law, the FCCA allowed declaring it to be incompatible with the Basic Law, but not void. (Article 31(2), FCCA). In such cases the court makes admonitory decisions, setting deadlines for corrective legislative action and issuing general guidelines within which the parliament is required to legislate.<sup>188</sup> As a second strategy, the court may sustain the challenged statute but warn the legislature that it will void the law in question unless the legislature acts to amend and repeal it.<sup>189</sup> Such decisions are prudential judgments designed to give to the legislature time to adjust to changing conditions and furnishes it with the flexibility it needs to work out creative solutions to the problem under scrutiny.<sup>190</sup>

The constitutional court may avoid the invalidation of the statute in case of finding its constitutionally permissible interpretation.<sup>191</sup> The constitutional courts under consideration

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<sup>186</sup> Peter Paczolay, *supra* note 66, at p. 44

<sup>187</sup> Kim Lane Scheppele, *supra* note 74, at p. 50.

<sup>188</sup> Anke Eilers, “Binding Effect of the Federal Constitutional Court Decisions on Political Institutions, Report for the Seminar on “The Effects of Constitutional Court Decisions” (Tirana 28-29 April(2003)), at p. 8; available at [http://www.venice.coe.int/docs/2003/CDL-JU\(2003\)018-e.pdf](http://www.venice.coe.int/docs/2003/CDL-JU(2003)018-e.pdf)

<sup>189</sup> Kommers, *supra* note 42, at p. 53.

<sup>190</sup> *Id.*

<sup>191</sup> Sajo, *supra* note 180, at 1208; Catherine Landfried, Judicial Policy-Making in Germany, the Federal Constitutional Court, In: Judicial Politics and Policy-Making in Western Europe, ed. by Mary L. Volcansek, Frank Cass & Co. Ltd., (1992). at p. 51.

frequently resort to this kind of solution. For example, while reviewing the provision of the Criminal Procedural Code, according to which the detained individuals have the right to be assisted by translator if they are foreigners who do not understand or speak Castilian, the Spanish Constitutional Court imposed its own reading of the statute to save its validity and held that this norm is not unconstitutional so long as it does not exclude Spanish citizens from the right to be assisted by the translators if they do not speak or understand Castilian.<sup>192</sup> In Decision 9/2004<sup>193</sup>, the Hungarian constitutional court hold: The provision providing for the right of a police officer to use firearms against a person whose behavior points to a direct use of firearms or other dangerous instruments against others is unconstitutional insofar as the expression "other dangerous instruments" can be interpreted too broadly and make the use of firearms possible even in cases where it would otherwise be unnecessary. The use of firearms by the police can be constitutional only against weapons and other instruments that may lead to taking the life of another.

From the perspective that it results into avoiding the invalidation of the statute, this solution can be seen as an expression of deference towards the legislature, but on the other hands, the effects of invalidation and interpretation do not differ much in the sense that in both cases, the court is telling parliament that a certain norm--a particular normative content--cannot be introduced in the legal system because the constitution, read in the way that the court has chosen to read it, prohibits it.<sup>194</sup> Common criticism towards constitutional courts is that sometimes the reading of the statute that the court imposes is clearly beyond the range of interpretations that the statute admits.<sup>195</sup> In this connection, it is usually stressed that the

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<sup>192</sup> 74/1987, STC No. 74/1987, May 25, 1987 (B.O.E., no. 137) (Spain), commented in Víctor Ferreres Comella, *supra* note 121, at 1720.

<sup>193</sup> Decision of Constitutional Court No. 9/2004, 30.03.2004, *Magyar Közlöny* (Official Gazette), 2004/38.

<sup>194</sup> Víctor Ferreres Comella, *supra* note 121, at p. 1722.

<sup>195</sup> *Id.* at 1724-1725.

constitutional court creates the law under the guise of review and interpretation and allegedly not only annihilates and re-writes the acts of parliament, but supplements and even amends constitution.<sup>196</sup>

Due to the fact that constitutional texts and especially rights provisions are seldom specific, the process of constitutional adjudication entails a significant degree of creativity.<sup>197</sup> Constitutional resolution of disputes is not mostly based upon objective logical deductions from the transparent textual context free from uncertainty, but entails subjective, value-laden judgments.<sup>198</sup> Constitutional case law (and not the formal amendment procedure) assumes the task of adjusting constitutional norms to changing political and social contexts and of developing those norms far beyond the originally intended scope.<sup>199</sup> This was demonstrated above, when considering the activities of the courts extending constitutional protection over rights not specifically mentioned in the constitution.

The question of acceptable degree of creativity of courts has been raised in the context of inter-relation between judiciary and legislature in *Princess Soraya Case*<sup>200</sup>, where despite the absence of statutory provision, the Federal High Court of Justice allowed recovery for the injury sustained by the plaintiff and the Federal Constitutional Court found it to be constitutionally unobjectionable, stating the following: “The judge’s task is not confined to ascertaining and implementing legislative decisions; he may have to make a value judgment, that is to bring to light and implement in his decisions those value concepts which are inherent in the constitutional order but which are not, or not adequately expressed in the language of written

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<sup>196</sup> Sajo, *supra* note 180, at 1197

<sup>197</sup> Edward McWhinney, *Supreme Courts and Judicial Lawmaking, Constitutional Tribunals and Constitutional Review*, Martinus Nijhoff Publishers (1986) at p. 87;

<sup>198</sup> Herman Schwartz, *supra* note 2, at p. 88.

<sup>199</sup> Garlicki, *supra* note 3, at p. 48

<sup>200</sup> (1973) 34 BVerfGe 269;

laws....In performing this task, the judge must guard against arbitrariness .... He must make it clear that the law fails to perform its function of providing a just solution for the legal problem at hand. Where the written law fails, the judge's decision fills the existing gap by using the common sense and general concepts of justice.”<sup>201</sup> Based on the above mentioned principles, the constitutional court did not consider it reasonable and necessary to wait until the legislature intervenes and fills in the gap and found it permissible for the judge to deviate from the written law, though only to the extent absolutely necessary in a particular case and for the purpose of strengthening the effect of constitutionally protected fundamental rights.<sup>202</sup>

The power to adjudicate on constitutional rights made the constitutional courts extremely powerful and enabled them to influence the activities of the parliament, with the view of ensuring effective protection of constitutional rights. However, maintaining the balance between activism and self-restraint is an important challenge facing the mentioned courts and represents a key to their success and achievement of their goals.

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<sup>201</sup> (1973) 34 BVerfGe 269; In: Kommers, *supra* note 42, at p. 125

<sup>202</sup> (1973) 34 BVerfGe 269; In: Kommers, *supra* note 42, at pp. 126-128.

## CONCLUSION

The thesis explored the mechanisms of constitutional complaints of Germany, Spain and Hungary in the comparative perspective, with the special emphasis not only upon the procedural and substantive requirements for the access to the constitutional courts, but also structural tensions between constitutional and ordinary courts and inter-relation between the constitutional courts and legislatures. Comparative analysis showed that while in Germany and Spain the mechanism of constitutional complaints represents highly attractive means of redress for individuals who suffered from violations of constitutionally guaranteed rights and therefore, a substantial part of the constitutional court's workload is taken by the constitutional complaints, the same mechanism has not enjoyed the identical degree of success in Hungary and in fact is not frequently resorted to. The reason for such difference is to be found in the specific characteristic of the Hungarian model of constitutional complaints. It allows the constitutional court to consider claims on application of unconstitutional law, but does not cover the situations when the norm itself is constitutional but is applied by the public authority in the unconstitutional manner. Therefore, individual bringing a constitutional complaint before the Hungarian Constitutional Court cannot challenge directly the unconstitutional application of laws by public authorities. This makes the mechanism of constitutional complaints significantly similar to the access to the constitutional court through *actio popularis* that does not require meeting strict standing requirements as in case of constitutional complaints and therefore, the latter way is preferred by the petitioners to the constitutional courts. Despite the fact that Hungarian Constitutional Court attempted to neutralize these shortcomings through development of the concept of "living law" that allowed the constitutional adjudicator to scrutinize the activities of ordinary judiciary and later on, amendment of the Code of Civil Procedure adopted in pursuance of the decision of the constitutional court, making it possible to re-open the case if as a result of successful constitutional complaint, the Constitutional Court established with retroactive effect the unconstitutionality of application of the contested statute,

these changes did not have much impact upon increasing the vitality of the mechanism of constitutional complaint. In order to make the constitutional complaint a workable tool, it would be advisable to follow the experience of Germany and Spain and empower the constitutional court to examine the constitutionality of decisions of public authorities directly. It means that primary responsibility for protection of constitutional rights will still remain with the ordinary courts, but constitutional complaint will serve as a mechanism of control and tool for redress if ordinary courts fail to meet their duties. As demonstrated by the analysis of German and Spanish experience, it is true that existence of this kind of system generates tensions between ordinary and constitutional courts, but such a structural tension is not excluded even now, under the currently existing inter-relationships between the constitutional and ordinary courts. Furthermore, proper balancing of powers through introducing limitations and willingness of the courts to follow the way of cooperation and not confrontation represents the solution to this challenge. On the other hand, it is clear that turning the constitutional complaint into the workable instrument for rights protection could bring more benefits than problems.

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