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Constitutional Court Control in Judicial Decision-Making
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**The Legal Protection Function of Constitutional Complaints
Against Judicial Decisions**

THESIS SUMMARY

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A) Introduction

Legal systems centralising constitutional review of laws face *neuralgic issues of separation of powers*. Indeed, where the judicial function is divided between two parallel courts, their activities must be coordinated. The legal system must then answer the question of how the existence of a constitutional court affects the functioning of the judiciary. A decision must be taken on whether the separate constitutional court should directly influence the adjudication of individual disputes and, if so, through what powers. Part of this issue is the dilemma of whether the Constitutional Court should be given the power to review judicial decisions and, if so, *what constitutional purpose* this power serves and what kind of judicial activity is dictated by this constitutional purpose.

The majority of the European legal systems still keep the constitutional court at a distance from judicial decisions, leaving it to examine only the constitutional validity of legislation. There is, however, *a strong trend towards* the emergence of the constitutional court, which is the guardian of the constitutionality of legislation, in an increasingly widespread role of reviewing the application of the law by the judiciary.

The concept of a constitutional court reviewing judicial decisions emerged in the German legal system in the process of democracy building after the Second World War as a type of multifaceted legal institution of constitutional complaint. On the continent, the German example was followed first by Spain (1978), then by Croatia and Slovenia (1991), and then by the Czech Republic and Slovakia (1993). Not in the Central and Eastern European wave of adaptation, but with a considerable delay, Hungary seemed to continue this series when it granted its constitutional court the right to review judicial decisions in 2011. The list is currently closed by Austria, where the constitutional court has been accepting individual complaints against judicial decisions since 2014, albeit only against administrative court decisions. In light of this evolutionary history, it is not surprising that some assert that a modern-day constitutional court can only be considered complete if it also controls the application of judicial law.

The constitutional court's legal framework for controlling judicial decision-making is not identical in the different legal systems. However, the characteristic features of the model of jurisdiction are the same everywhere: the person concerned has the right to lodge a complaint with the constitutional court against a judicial decision that violates a fundamental right and cannot be challenged by other legal remedies; the constitutional court has the power to annul the decision deemed to violate a fundamental right and to issue binding guidelines on fundamental rights shaping the interpretation of the law by the courts that are to act again in the given case.

The subject of the thesis is the interpretation of the possible purposes of the legal protection provided by the above-described mechanism and the analytical systematisation of the competence limits that can be derivated from these purposes.

B) Research objectives

The thesis seeks to develop a *coherent normative concept* of the legal protection function of constitutional complaints against judicial decisions. In the approach of the thesis, the normative idea of the function of the complaint is coherent if it integrates the constitutional complaint into the dual institutional system of fundamental rights protection by courts (i.e. the ordinary courts and the constitutional court) without contradictions.

More precisely, the thesis seeks to answer two closely related questions: (i) what is the legal protection function that coherently justifies the review of judicial decisions by the constitutional court; and (ii) how does the legal protection function attributed to the review of judicial decisions determine the scope of the review.

Nobody disputes that a constitutional complaint against a judicial decision can – based on its attributes – fulfil a dual function of legal protection. It can contribute to redressing individual violations of fundamental rights (subjective legal protection function) and the general enforcement of fundamental rights (objective legal protection function). These two functions are encoded in this jurisdictional model. Every constitutional complaint procedure contains the possibility that the contested judicial decision will be annulled by the constitutional court, thereby contributing to the protection of the petitioner's legal position as guaranteed by fundamental rights. Furthermore, in all proceedings on the merits, the constitutional court has something to say about the meaning of the fundamental rights norms of the constitution, which implies the possibility that the decision may go beyond the specific case under consideration and also guide subsequent judicial proceedings.

The co-existence of the two functions of legal protection in the constitutional complaint procedure seems particularly advantageous since it shows the multiple potentials for legal protection by the procedure. However, the multifunctionality carries tensions, too.

There are fundamental differences between a complaints procedure whose primary objective is to remedy individual rights violations and a complaints procedure whose primary objective is to promote the general enforcement of fundamental rights. The ranking of the two functions and determining their importance is essential for the scope and intensity of constitutional court control. Fundamental questions such as whether the body should screen petitions raising the possibility of a breach of a fundamental right according to their merits, whether it should examine questions of fact or only questions of law, whether it should merely interpret fundamental rights or apply them, applying their content to the specific facts of individual cases. The function of the complaint also determines to what extent this legal protection mechanism must meet the requirements of a fair procedure, such as the conduct of the procedure within a reasonable time or the predictability of procedural steps by the petitioner.

A consistent answer to the above questions can only be given if we have a *normative idea* of which of the complaint's subjective and objective legal protection functions is dominant. If we want the best for the enforcement of fundamental rights, this

choice cannot be an arbitrary one but falls on the legal protection function that most coherently integrates the constitutional complaint into the complex system of dual judicial protection of fundamental rights. The emerging concept is also a normative point of reference: a guide for the legislator and the constitutional court to correctly define jurisdiction details and a benchmark for jurisprudence to assess regulation and practice.

In different legal systems, the subjective and objective aspects of the complaint's legal protection function are emphasised differently. Therefore, the criteria for reviewing judgments differ substantially in the practice of constitutional courts. In terms of legislation, in some countries, the subjective (e.g. the Czech Republic) and in others, the objective function of fundamental rights protection is dominant (Spain). There are legal systems (such as Germany and Hungary) where the legislation does not allow ranking the two functions. This disparate regulation of comparable legal systems justifies the academic question of which of the two concepts of ranking of substantive law is better and what criteria should be used to answer this.

The thesis aims to clarify that identifying the limits of review of judicial decisions cannot be determined on purely substantive (material) legal grounds. The cases in which the constitutional court may intervene and the extent to which it may intervene in cases challenged before the court are decisively influenced by the legal protection function of the review of judicial decisions, too. The latter is not a question of substantive law but pure procedural law. Substantive law rules and doctrine merely delineate the scope and content of fundamental rights and thus answer whether the constitutional court has any role in a given dispute, as it can only protect fundamental rights in complaint proceedings. The substantive law no longer guides as to the framework within which and the precise manner in which the body should act in defence of fundamental rights. This question presupposes an interpretation not of the fundamental rights but of the institution's function for their protection.

At the same time, the analysis considers that the integrity of the constitutional complaint's function of protecting fundamental rights can only be preserved if the substantive legal limits of review effectively keep the constitutional court away from court cases not involving fundamental rights. Based on this premise, the analysis treats the substantive and procedural limits of the constitutional court's review as a whole. Thus, although the thesis's main objective is to interpret the function of the complaint procedure in protecting fundamental rights, the analysis devotes considerable attention to the substantive legal standards of the review. The structure of the thesis also contributes to the synoptic view of the two types of jurisdictional limits. Indeed, the analysis concludes the reflection on the definition of the legal protection function by systematising the jurisdictional limits in an interpretative framework.

C) Methods applied

The constitutional complaint has been a vital legal institution in many parts of Europe for over half a century. As a result, the constitutional theory and constitutional law-dogmatic issues it raises have been embedded in *academic discourse* for decades. The most

significant contribution to this is undoubtedly due to the highly productive German jurisprudence. The analysis builds above all on this academic discourse by examining the relevant sources of legal literature.

To achieve its objectives the thesis applies a *normative-theoretical approach*. It seeks the legal protection function of the constitutional complaint not within the Hungarian or any other legal system as it also aims to serve as a yardstick for their evaluation. Most of the findings outlined in the paper are thus of a more general, *cross-juridical validity*.

The function of the constitutional court's review of judicial decisions is, however, explored in the context of a specific jurisdictional model, which is embodied in the constitutional complaint constructed by the reconstructionists of the West German state after the Second World War and later transposed into the legal systems of several other states. In interpreting the function of the complaint, the thesis, therefore, takes account of the constraints that follow from the constitutional complaint as a model of jurisdiction.

It follows from the above that the thesis is not independent of positive law but explicitly builds on domestic and foreign legal rules on reviewing judicial decisions and the constitutional court practice based on them. The modelling of the constitutional complaint, identifying its characteristic features, and understanding its actual functioning presuppose a comparative examination of the legal rules and the constitutional court practice interpreting them. In addition, it also relies on the landmark decisions of Hungarian and foreign constitutional courts, particularly the German Constitutional Court, which had had a significant impact on European constitutional practice, to examine cross-jurisdictional constitutional theory issues. In addition, the thesis also uses case law of the constitutional courts to illustrate constitutional and fundamental rights theory problems.

It also follows from the previous that the questions under research are essentially based on constitutional theory and constitutional law-dogmatic analysis. In this spirit, the conceptual content of the substantive and procedural rules, which also appear in the substantive law, will be developed, and the individual concepts interpreted.

The normative theoretical analysis is complemented by historical, sociological explanations, which help contextual interpretation. This is done insofar as contextual analysis is considered integral to theoretical reasoning.

Although the normative-theoretical approach used in the thesis would have left other possibilities, the thesis also keeps the Hungarian Constitutional Court and the functioning of constitutional complaints in focus throughout. It does so even though the erosion of Hungarian constitutionalism has made it increasingly difficult to compare the work of the Hungarian Constitutional Court with that of constitutional courts in European democracies. Above all, the author is guided by the awareness that the framework of Hungarian constitutionalism can be restored in the foreseeable future. Thus, theoretical-dogmatic discussions of the conditions of constitutionalism and critical reflections on the requirements of constitutionalism also make sense in Hungarian terms. Nevertheless, the methodological dilemma in this regard is explicitly discussed in this thesis.

D) Summary of the results

The research's main findings can be well organised by presenting the thesis's structure. Therefore, this paper presents the structure of the thesis first, and then it outlines the main results.

(1) The structure of the thesis

The analysis proceeds in three structural steps to establish a hierarchy of the competing legal protection functions of the constitutional complaint, which coherently integrates this legal institution into the system of the institutionally divided judicial protection of fundamental rights. The analysis concludes that the complaint meets this coherence requirement if its primary function is assigned to the domain of objective fundamental rights protection.

The first part of the paper sets the jurisdictional model under analysis in a historical context, analysing in detail the essential stages in the rise of constitutional courts in the administration of justice. This can help to understand how the 'Kelsen' constitutional court, assigned initially to the abstract defence of the constitutional legal order and directly detached from concrete litigation, became a decisive actor in the adjudication of cases brought before the judiciary as a result of the influence of the factors that have influenced its development. This chapter also guides the reader through the history of the development of the role of the Hungarian Constitutional Court in the judiciary, which is full of twists and turns and contradictions with an eye to the question of to what extent this developmental path fits with the international trends.

The second structural unit of the thesis systematises the jurisdictional limits of constitutional court review of judgments. It uses the outlined system to frame the thinking on the definition of the judicial protection function. Within the system of jurisdictional limits, the analysis outlines the theoretical options for prioritising the judicial protection function of a complaint and the theoretical difficulties of choosing between the options. Already here, the paper begins to identify the main aspects that can be assessed as indicators of coherence in defining the legal protection function of a complaint. However, this set of aspects is only completed in the last chapter, which gives content to the coherent function of the complaint.

The third and final chapter has a dual purpose: (i) to give substance to the objective legal protection function of the complaint and (ii) to demonstrate that the review power, which is primarily set up for objective legal protection, fits in, without contradiction, into the system of dual judicial protection of fundamental rights. It seeks to fulfil the first task by specifying the purpose and subject matter of the constitutional court review serving the objective legal protection function. In the second task, the paper rationalises the appropriateness of prioritising the objective legal protection function over the subjective one by identifying and applying coherence indicators.

(2) Key findings

1. The thesis presents, on a theoretical basis, a possible typology of competence limits applicable to the review of judicial decisions by the constitutional court. In the system setup, the jurisdictional limits are of two types: material legal limits and functional legal limits.

In reviewing judicial decisions, the constitutional court is bound not only by the material legal limits derivable from the fundamental rights norms of the Constitution but also by normative limits that derive from the function of the complaints procedure as a mechanism for the protection of rights. The analysis refers to these latter constraints as 'functional legal' constraints. In doing so, it follows German jurisprudence but only partially. While the German legal literature derives functional legal barriers from a state-organizational perspective, the systematisation presented in this thesis arrives at the two categories by distinguishing between fundamental rights and legal protection concepts.

According to the definition of functional legal limits given in the thesis, these are jurisdictional (procedural) limits whose legal justification is not provided by the rule designating the substantive legal basis for the assertion of claims before the constitutional court but by the legal protection function attributable to the review. This definition defines functional legal limits in relation to and with regard to material legal limits. The reason for this is that, in a broad sense, material legal limits can also be interpreted as functional legal limits since their justification is ultimately rooted in the fundamental rights protection function of the complaints procedure. In the above definition, however, the logical category of material *and* functional legal limits is empty: a competence limit can be material or functional. It cannot be both.

2. The extent to which the constitutional complaint duplicates or differentiates the judicial protection of fundamental rights depends on the functional legal limits enforced in legislation and practice.

The material and functional legal limits are the key to ensuring that the constitutional court does not take on the role of a super-review court. These limits determine how the constitutional review of judicial decisions differs from ordinary judicial decision-making. The substantive legal constraints limit examining the validity of judicial decisions to a narrow aspect of legality, the enforcement of fundamental rights, thus differentiating the substantive legal scope of the legal protection provided by ordinary courts and the constitutional court. However, functional legal constraints can ensure that the legal protection available before the ordinary courts and the constitutional court differs not only in substantive law but also in procedural law. One such functional legal barrier is the criterion in the legislation of several countries that only allow the admissibility of petitions on fundamental rights issues of fundamental importance.

3. The thesis – by further developing previous research results – outlines a possible methodology and doctrine to identify whether a dispute submitted to the complaint procedure is affected by fundamental rights.

The concept developed in detail in the paper is inspired, among others, by the well-known German Lüth decision. The concept outlined in the thesis recognises that fundamental rights permeate civil law relationships by weaving an objective value system but excludes the theoretical possibility of the constitutional court deciding on a case where fundamental rights relationship can be identified in the facts of the case.

4. The legal protection function of a constitutional complaint is not a one-time and for-all given. It may change in space and time and be given different emphases - depending on the current political environment and emerging social needs. However, this does not mean that the legal protection function of a complaint can take any form.

Defining a constitutional complaint's legal protection function is difficult for everyone, including the legislator, the constitutional court and legal scholars. The main reason for this, as the thesis claims, is that the logic of the constitutional order does not require its existence: we cannot point to any legal need that would *compellingly* justify a constitutional review of judicial decisions. If there were such a legal necessity, there would be no doubt about the function to be served by the complaint. This is why we can see that the function of the complaint is in spectacular flux in some legal systems (Germany, Spain). Only a legal protection function can be assigned to the complaint, which integrates it coherently into the system of fundamental rights protection by the judiciary institutionally divided between the ordinary courts and the constitutional court.

5. The thesis places the theoretical possibilities of the legal protection function attributable to the complaint on a scale ending with "subjective" and "objective" poles. The analysis shows that the opposite poles of the scale are well described and provide for different constitutional protection.

The paper concludes that on a logical basis, the dominance of any of the functions of legal protection inherent in the complaint cannot be identified, and the definition of the legal protection function thus appears as a matter of degree on a scale drawn with subjective - objective poles. The analysis illustrates how the character of the review of judicial decisions changes depending on which pole of the scale the complaint function is closer to.

Suppose the constitutional court wishes to prioritise the subjective legal protection function of the complaint over objective legal protection. In that case, it must be open to individual (case-by-case) decision-making. If, on the other hand, it is to serve primarily the objective legal protection function, it must seek to ensure that the impact of its decisions extends beyond the specific case giving rise to the decision, which it cannot or can only barely achieve if it goes as far as a particularistic decision. For its decisions to have a socially measurable impact and thus to provide objective legal protection, the constitutional court must maintain a certain level of abstraction in its

interpretation of the law, which is not conducive to individual legal protection. It must also screen motions in such a way that the cases received for decision are capable of answering fundamental rights questions that go beyond the specific case.

6. The thesis outlines the content of the objective legal protection function of the complaint primarily by specifying the possible purpose of the review. It identifies two of such purposes: one (1) to clarify the meaning of abstract constitutional norms in the context of individual disputes and the other (2) to ensure the unity of fundamental rights adjudication.

(1) The constitutional court, if it is in the service of objective legal protection, is to concretise the fundamental rights requirements and standards that can be derived from the abstract provisions of the Constitution in the context of individual legal disputes. In doing so, the tribunal develops concepts that bridge the gap between the highly abstract terms of the constitution and judicial decisions based on the specific facts of individual cases. If we define the legal protection function of a constitutional complaint in this way, we generate a striking functional difference between the activities of the ordinary courts and those of the constitutional court: whereas in the proceedings of the ordinary courts, the interpretation of the constitution is always only a means to the resolution of a specific dispute, in the proceedings of the constitutional court it is an end in itself.

(2) If the legal system entrusts the judicial function to the dualism of ordinary courts and the constitutional court, while at the same time it does not create the power to review judicial decisions by the Constitutional Court, there is no institutional guarantee that the ordinary courts will make decisions in conformity with the interpretation of the law by the Constitutional Court. A system of constitutional organisation in which the ultimate constitutional interpretative role of the constitutional court is questionable is not optimal. However, the constitutional complaint, which provides a basis for the review of judicial decisions by the constitutional court, offers a remedy: This legal instrument optimises the jurisdictional structure of the constitutional interpretation function, which is inherently divided between the constitutional court and the ordinary courts because it institutionally guarantees legal unity in the interpretation of fundamental rights by the two courts. This is perhaps the strongest argument in favour of a centralised system of constitutional adjudication that should include a constitutional review of judicial decisions. At the same time, this argument does not support a constitutional complaint with a subjective legal protection function, but one with objective protection of fundamental rights: by its decisions, which are intended to ensure the unity of fundamental rights, the constitutional court promotes the general enforcement of fundamental rights affected by divergent jurisprudence and enforces the requirements of legal certainty and equality before the law in general.

7. The paper presents three concepts from the legal literature that delimit the scope of judicial review by placing the legal protection function of the complaint in the dimension of objective legal protection.

In German and Hungarian jurisprudence, the view has been formulated that reviewing judicial decisions is a basis for 'norm review'. In Germany, Ekkehard Schumann's theory on the subject has gained general recognition, and in Hungary, András Bragyova's theory. The two concepts have entirely different theoretical foundations, but they arrive at the same conclusion that the review of judicial decisions is the basis for norm control.

A further development of the Schumann concept is Gunnar Folge Schuppert's concept of behavioural control, which assumes and justifies that, sometimes, even norm control leaves too much room for particularistic decision-making. In these cases, his theory offers a solution to constitutional courts essentially trying to avoid particularist decisions.

Finally, the thesis builds on the arguments of Tamás Gyórfi, who, through the distinction between interpretation and qualification, arrives at the distinction between the categories of rule-based and particular decisions. The paper assesses that applying this concept can also help keep the complaints procedure within the dimension of objective legal protection.

E) List of publications on the research subject

1. A loophole to becoming a super-review court? Reviewing judicial decisions for equality before the law.
In For the freedom-loving man: Liber Amicorum István Kukorelli (ed. Nóra Chronowski, Zoltán Pozsár-Szentmiklósy, Péter Smuk, Zsolt Szabó), Budapest, Gondolat Kiadó, 2017.
2. Constitutional review of judicial decisions as a means of limiting political power?
In On the border between law and politics: constitutional review in Hungary after 2010 (eds. Fruzsina Gárdos-Orosz, Zoltán Sente), Budapest, HVG-Orac, 2015.
3. The legitimacy of a genuine constitutional complaint from the perspective of Hans Kelsen.
Public Law Review, 2015/3.
4. Points of reference for determining the scope of a genuine constitutional complaint.
Public Law Review, 2014/2.
5. Free hands tied. The presence of the Hungarian constitutional administration.
Fundamentum, 2014/1-2.
6. The prospects for individual fundamental rights protection in constitutional law. Where does the compass of the constitutional complaint point?
Hungarian Public Administration, 2012/2.
7. Fundamental rights adjudication or who should be responsible for remedying individual violations of fundamental rights?
In: Prize-winning papers of the Section of Political Science and Law of the XXIXth National Conference of Students of Law I-II (ed. Király, Miklós; Varga, István). Budapest, ELTE Eötvös Kiadó, 2011.
8. Protection of fundamental rights.
Co-authored by Bernadette Somody
In: Internet Encyclopaedia of Legal Studies (Constitutional Law section, edited by Eszter Bodnár, András Jakab)
9. The ordinary enforcement of constitutional court decisions: normative expectations - actual practice
Co-author: Bernadette Somody
MTA Law Working Papers 2018/6.

10. Handbook on fundamental rights adjudication.
Co-authors: Bernadette Somody, Máté Szabó
HVG-Orac, Budapest, 2013.
11. The institutional and jurisdictional model of individual judicial protection of fundamental rights in Hungary.
Co-author: Bernadette Somody
In *Fundamental Rights in Judging* (ed. Bernadette Somody)
L'Harmattan, Budapest, 2013.
12. Fundamental rights claims, fundamental rights rules: a concept of fundamental rights adjudication
Co-authors Bernadette Somody, Dániel Szabó Máté, Tamás Szigeti
In *Fundamental Rights Adjudication* (ed. Bernadette Somody)
L'Harmattan, Budapest, 2013.
13. Citizens' Role in Constitutional Adjudication in Hungary: From the Actio Popularis to the Constitutional Complaint.
Co-authored by Bernadette Somody
In: *ANNALES Universitatis Scientiarum Budapestinensis de Rolando Eötvös Nominatae, Sectio Iuridica* (2012)