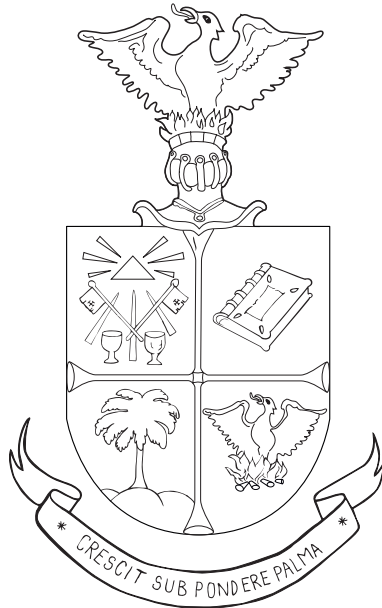


Glossa Iuridica

X. évfolyam, 1-2. szám



Budapest, 2023

Károli Gáspár Református Egyetem Állam- és Jogtudományi Kar

Patrocinium Kiadó

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Olvasószerkesztő:

Nagy Péter

ISSN 2064-6887

Kiadja:

A Károli Gáspár Református Egyetem Állam- és Jogtudományi Kara

Felelős kiadó: Prof. Dr. Miskolczi Bodnár Péter, dékán

A kiadvány nyomdai munkálatait előkészítette:

Patrocinium Kiadó

ON AN ABSURD MODEL OF CONSTITUTIONAL COURT – CAN A ONE-MAN (I.E., SINGLE-JUDGE) CONSTITUTIONAL COURT SERVE IN A CONSTITUTIONAL STATE?

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Abstract

In my view, the fact that if a position is shared by more than one person can also create a kind of separation of powers, i.e. referring specifically to the different bodies. Namely: can a single-judge constitutional court be conceptually constitutional and democratic if all the constitutional requirements of a constitutional state are met? During the covid period, many boards did not meet regularly, or at most approved proposals online.

In principle, I see a very significant difference between having one or even three members, because the requirement of collective wisdom means that three members is a body. Rather, in the case of a genuine constitutional complaint, we can conclude that the constitutional court acts as a court of law, a body of one does not meet the requirements of a co-judicial body.

Keywords: constitutional court, single judge, constitutional requirements, genuine constitutional complaint

Absztrakt

Véleményem szerint az tény, hogy ha egy pozíciót többen osztanak meg, az egyfajta hatalommegosztást is létrehozhat, kifejezetten a különböző testületi szervekre gondolhatunk.

Lehet-e egy egyszemélyes alkotmánybíróság fogalmilag alkotmányos és demokratikus, ha a jogállam minden alkotmányos követelménye teljesül? Az evidens válasz, hogy aligha. A covid időszakában számos testület nem ülésezett rendszeresen, vagy legfeljebb online hagyott jóvá javaslatokat.

Elvileg nagyon jelentős különbséget láthatunk aközött, hogy az Alkotmánybíróság egy vagy akár három tagú, mert a kollektív bölcsesség követelménye miatt 3 fő az már testületnek számít. Inkább a valódi alkotmányjogi panasz esetén állapíthatjuk meg, hogy az alkotmánybíróság bíróságként jár el, egy

egyszemélyes testület nem felel meg a társasbíráskodás követelményeinek.

Kulcsszavak: alkotmánybíróság, egyesbíró, alkotmányos követelmények, valódi alkotmányjogi panasz

The author of this essay once had a very inspiring professional debate with a proofreader¹ while writing an academic paper. His criticism was that the division of power does not equal with the separation of powers.² In my view, the fact that if a position is shared by more than one person can also create a kind of separation of powers, i.e. referring specifically to the different bodies. The position of my colleague, however, was that it is not equivalent to the separation of power. My immediate reaction was to consider what the academic professional consensus would be if only one person was appointed to a collective body, i.e., if there was only one, single member of a 'body', for example, the Constitutional Court had only one judge.³ My colleague could not, of course, rebut this, but the then-way of thinking planted the seeds of a very interesting doubt in the mind of the writer of this essay. Namely: can a single-judge constitutional court be conceptually constitutional and democratic if all the constitutional requirements of a constitutional state are met?⁴

1 See CSERVÁK, Csaba: A hatalmi ágak megosztásának XXI. századi kérdései az Alaptörvényt követően. *Pro Futuro*, 2015/2, 24–37.

2 For the concept, see CSINK, Lóránt: *Mozaikok a hatalommegosztáshoz*. Budapest, Pázmány Press, 2015, 22–25.

3 The issue of single or corporate leadership is, in my view, not sufficiently developed in the constitutional law literature in relation to its importance. It is rather dealt with in publications on administrative law. Accordingly, in the case of bodies under one-man management, the head of the body is the addressee of the functions and powers. On this basis, the head of the body has the right to decide on any matter or to determine the content of the decision by order or otherwise (in my view, this is also the case in constitutional law, but the body itself is the depositary of public law and state power, not of purely administrative powers). JÓZSA, Zoltán: *A közigazgatási szerv és szervezet, szervtípusok; a közigazgatási szervezet felépítésének általános elvei*. Budapest, Nemzeti Közszerzői Egyetem, 2018, 7. On one-man and corporate governance in other jurisdictions, see ARATÓ, Balázs: A családi vállalkozások utódlásának és vagyonmegóvásának jogi aspektusai. *Glossa Iuridica*, 2020/1–2, 141–147. In constitutional law, it is usually only mentioned in connection with the office of head of state and ombudsman. See LAJOS, Edina: The protection of human rights or the remedy of maladministration? *KRE-DIt*, 2022/1, 8.

4 The uncertainty of the answer is increased by the fact that the concept of the „rule of law”, which has undergone a significant historical evolution, is used by some policy makers as a quasi „free card”. Cf. VARGA Zs., András: *Eszményből bálvány? – A joguralom dogmatikája*, Budapest, Századvég Kiadó, 2015, 228. or ORBÁN, Balázs – PALKÓ, Attila:

The immediate answer is that it obviously cannot. However, the essence of scientific thinking is questioning.

The problems occurred during the pandemia have made some of these ideas even more realistic. During the period of the COVID, many bodies did not meet regularly, or at most made their decisions online. During these times the functions of the apparatuses and the heads and leaders who oversee them gets even more important.⁵ During the covid period, many boards did not meet regularly, or at most approved proposals online. The role of the apparatuses and the presidents who oversee them becomes even more important.⁶ From a socio-legal point of view, the preparers become the decision-makers, and decision-making in the body is merely formal.

Are we sure that, under any circumstances, a single-judge constitutional court cannot be considered constitutional? If we list the arguments of pro and contra, then here we have the conclusion: The virtue of such a body would be uniform interpretation of the constitution, no dissenting opinions, no inconsistent practice. (Constitutional Court decisions are the result of compromises. It is possible that the draft text of the presenter constitutional judge could be ‘broken apart’ and, as a gesture, elements that do not fit the original concept could be incorporated from the ideas of other constitutional judges.) Indeed, there would be no clash of views and no danger that, if, say, an eight-to-seven constitutional court decision were to be implemented, and the seven dissenting opinions would into drawer and the whole decision would depend on a single vote, without it resulting a completely different decision of the court. In other words, the bracketed dissenting opinions could, if there

A Jogállami Universum Tágulásáról és Ennek Veszélyeiről. *Kommentár*, 14/2, 31–40. or SÜLYÖK, Márton: Átes(t)ünk a „law” túloldalára? – a jogállamisági kérdés margójára. *A Mathias Corvinus Collegium tudásbázisa*, <https://corvinak.hu/vilag/2020/10/28/ates-t-unk-a-law-tuloldalara-a-jogallamisagi-kerdes-margojara> (2023. 02. 10.) especially 1., SÜLYÖK, Márton: Compromise(d)? – Perspectives of Rule of Law in the European Union. *Central European Journal of Comparative Law*, 2021/1, 1–21., VARGA, Csaba: *Jogállamiság – viták közegében*. Budapest, Ludovika Egyetemi Kiadó, 2022, especially 19–34.

5 Cf. SIMICSKÓ, István: Veszélyhelyzet van. *KRE-DIt*, 2020/1, 1–8.; TRÓCSÁNYI, László: *A különleges jogrend elméleti kérdései*. In: NAGY, Zoltán – HORVÁTH, Attila: *A különleges jogrend és nemzeti szabályozási modelljei*. Budapest, Mádl Ferenc Összehasonlító Jogi Intézet, 2021, 26–36. and STUMPF, István: Állam és alkotmányosság a járvány hálójában. In: PONGRÁCZ, Alex (ed.): *Ünnepi tanulmányok a 65 éves Cs. Kiss Lajos tiszteletére. Ut vocatio scientia*. Budapest, Ludovika Egyetemi Kiadó, 2021, 435–452.

6 Cf. RIXER, Ádám: *A jó vezető*. In: HOMICSKÓ, Árpád Olivér – KOVÁCS, Róbert – PÓNUSZ, Mónika (eds.): *70 Studia in Honorem Lóth László*. Budapest, Károli Gáspár Református Egyetem Állam- és Jogtudományi Kar, 2020, 141–148.

were one more vote, lead to a in a completely different direction as the of the Constitutional Court in a very serious case. In the event that its legitimacy is extremely enhanced and strengthened by the way in which the constitutional judge is elected, it is then asked whether it might be more constitutional to have a single-judge constitutional court rather than a not-so-democratically elected body. Here we can think of the extremely strict nomination criteria: at present, a constitutional judge can only be appointed if he or she has either 20 years' professional experience or is a university professor or a doctor of academia. The current wording of the law does not even make it compulsory for 20 years' experience to be outstanding, although it could obviously be defined in this way if it is interpreted correctly. However, being a university professor is not necessarily constitutionally relevant either.⁷ What if, so we might ask, a member or president of this single-judge constitutional court, by whatever name we call it, were to be appointed according to even stricter professional criteria, such as 20 years of outstanding experience in constitutional law, and a university teacher qualification in a field specifically related to fundamental rights. What would be the selection procedure? The current 2/3 parliamentary election reflects the will of the people in the sense that the parliament is the embodiment of popular sovereignty, and the two-thirds decision of the parliament is the depository of consensus regardless of time and place. Given the current parliamentary balance of power, which has prevailed for 13 years now, it might be interesting to consider what would happen if, say, a four-fifths majority were required to elect a single constitutional judge (I argue that simply increasing the required vote share for election by a unicameral parliament is not a sufficient guarantee). Because what will happen if, *ad absurdum*, a single party alliance wins 80% of the seats in the Parliament?) The possibility of election by the people, based on the American model, has been raised in professional academic workshops. Of course, it would be a chillingly alien concept to continental European legal traditions to have candidates collect signatures and campaign, but such a serious confirmation could be achieved by putting the person elected by parliament to the vote at the same time as, say, another election for local government or the European Union, and allowing voters to vote yes or no. In this case, this person would have such a strong status that we can say that his or her legitimacy would be greater than that of the current constitutional judge. If we take the practical aspects of legal sociology as a starting point,

7 See LAJOS, Edina: *Az Alkotmánybíróság státusza*. Manuscript, 4–5.

we must conclude the following: In the Constitutional Court, the work done by the advisers is extremely important and takes an extraordinary burden off the shoulders of the constitutional judges. If the constitutional court were a single judge body, *ad absurdum*, the role of the advisers would even be greater.⁸ So essentially the decision-making level would be a single-judge-like, but the preparatory level would be even broader than it is now. I can compare it a little bit to the Ombudsman's Office or the State Audit Office, where reports and submissions are made by the apparatus, but all decisions and reports have to be signed by the Commissioner for Fundamental Rights or the President of the State Audit Office in the final stage. Of course, in a body of this kind, which does not take decisions that can be enforced, but only makes recommendations, this may be much more justified. In the case of a single-judge constitutional court, the advisers would have relative independence (as an alternative, it could be a working group of 3 advisers, with the president approving the decision, and thus having a quasi-veto.) It is very interesting that, for example, if we compare the patronage power of the President of the Constitutional Court with that of the President of the Curia, we can see that the President of the Constitutional Court has no power to nominate judges of the Constitutional Court, but the President of the Curia can nominate judges of the highest court, who are appointed by the President of the Republic. Even if looking at the criteria so far, we can point out that we have built a great many safeguards into the legislation in principle, but still not enough to justify and legitimize a single-judge constitutional court. In this context, it could be argued that this body would have joint decision-making powers with, say, another body, for example, the right of sending back the bill to the Parliament along with the Head of State in the case of preliminary review of legislation, and that it could not annul but only send back⁹. And in the case of a constitutional complaint, the Curia would act together with the judges, so that the constitutional complaint could only be accepted if this single-judge headed constitutional court, together with

8 In the current system, Béla Pokol criticises the fact that individual judges do not exercise full employer power over their advisers. Members of the panel cannot, *ad absurdum*, terminate the employment of their subordinates even if they radically contradict them and regularly prepare decisions in flagrant contradiction to their instructions. See POKOL, Béla: *Alkotmánybíráskodás. Szociológiai, politológiai és jogelméleti megközelítésekben*. Budapest, Kairosz Kiadó, 2014, 24.

9 For international experience of norm control, see СУЛҮОК, Тамás: Az osztrák Verfassungsgerichtshof és a magyar Alkotmánybíróság utólagos normakontrollt érintő hatáskörei. *Alkotmánybírársági Szemle*, 2011/1, 110–116.

the Curia's acting council, could rule that the judicial decision challenged in the lawsuit violated fundamental rights.

In principle, I see a very significant difference between having one or even three members, because the requirement of collective wisdom means that three members is a body. Furthermore, because of the extended possibility of a constitutional complaint based on the German model,¹⁰ we must point out that a single-judge constitutional court does not meet the principle and requirement of co-judiciary, that is to say that if the constitutional court is judging a specific case, a single-judge body would not be acceptable as a court in terms of international criteria. There is also a much greater theoretical risk of unbiasedness being compromised. It should be added that it would have a different effect if a single-judge constitutional court were to be introduced 'out of the blue', say as a part of a legal reform following a dictatorship, or if a single-judge constitutional court were to be transformed *ad absurdum* into a single-judge constitutional court.

If we are looking for a compromise, we could say that the President of the Constitutional Court could also have the right to nominate constitutional judges, and it might be worth to think about of this system, necessarily, that the decisions of the Constitutional Court could only be taken by the President of the Constitutional Court, that is, for example, a decision to declare a law to be against the Constitution should be taken by a panel, or, of course, the decision to consider and adopt a constitutional complaint should be subject to a panel decision, but no such decision should be taken without the President of the Constitutional Court.¹¹ If we take into account all the criteria that have

10 Cf. ARATÓ, Balázs: *Alkotmányjogi panasz a német jogrendben, különös tekintettel a befogadhatóság kérdésére.*

Az Alaptörvény érvényesülése a bírói gyakorlatban II.: Alkotmánybírósági panasz – hatáskörrel kapcsolatos kérdések, Budapest, HVG-ORAC, 2019, 502–515. and FARKAS, György Tamás: Az alkotmányjogi panaszok befogadása központi problémaköréről. *KRE-Dit*, 2021/Jogtudományi Különszám, 1–16.

11 If you look at the detailed rules, the structure of the European Court of Human Rights has almost moved in this direction. There, the role of the President and the advisers, who are exclusively subordinate to him (and not to the judges), is too strong. The judges themselves do not have their own staff; the person asked to act as rapporteur is assisted by someone from the central staff. There is a strict hierarchy in the structure of the pre-decision teams, with registry lawyers being given a one-year mandate, renewable for a maximum of four years. As a quasi-promotion, they can be made permanent after four years and become permanent registry lawyers, until retirement. The person appointed as judge-rapporteur for a case is assisted by a junior registry lawyer appointed by the competent head of division, but this does not imply subordination to the judge, as

been applied so far, i.e., the method of nomination, the method of election, the criteria for becoming a candidate or the rules for the decision, we still conclude that a one-member Constitutional Court does not meet constitutional requirements. The author of this paper does not usually accept the argument that it does not look right, or we do not usually do it that way, but in this case, we must nevertheless conclude that, if all the criteria were to be made part of the legislation, it would still not meet the requirements of the rule of law to make the constitutional court a single-judge institution. It would certainly not meet international standards either. Let us add that the creation of a body for the protection of fundamental rights is a necessary corollary of state sovereignty, and we should not be establishing or judging the right system on the basis of international criteria, but to change the current model would be seriously controversial from all points of view. And in such a way that it would have no benefits or advantages and we could say that we have seen, by means of indirect proof, that a one-man constitutional court does not meet the requirements of constitutional democracy,¹² nor could we judge it to be equivalent to a collegial constitutional court if all other criteria were met. Rather, in the case of a genuine constitutional complaint, we can conclude that the constitutional court acts as a court of law,¹³ a body

the appointed assistant remains subordinate to the senior registry lawyers of his/her original group. They have permanent control over the drafting process. If the rapporteur proposes changes to the draft prepared by the assistants in his or her own opinion, the draft is passed through the said superiors of the assisting junior lawyer before being passed on. The resulting draft decision is then submitted to a panel of the European Court of Human Rights. (If refused, it is submitted to one of the three-member bench, if substantive and positive, it is submitted to the seven-member chamber of the section.) In the internal system, the deviation from case law is recorded and the „offender” is ordered to report. Most strikingly, if the rapporteur judge stick to his version of the draft despite repeated warnings, the case is ultimately taken away from the rapporteur judge and even the chamber concerned and assigned to another one, on the advice of the jurisconsult apparatus. POKOL, Béla: *Az európai jurisztokrácia*. Budapest, Dialóg Campus Kiadó, 2018, 22–24.

- 12 For the relevant aspects of the concept, see STUMPF, István: *Alkotmányos hatalomgyakorlás és alkotmányos identitás*, Budapest, Gondolat Kiadó, 2020, especially 127.
- 13 VARGA, Zs. András: Hatalommegosztás, állam- és kormányforma. *Pázmány Law Working Papers*, <http://plwp.eu/evfolyamok/2013/52-2013-05>, (10. 09. 2015.), and JUHÁSZ, Imre: *Az Alkotmánybíróság és a rendes bíróságok kapcsolata, különös tekintettel a polgári bíróságokra*. In: ZAKARIÁS, Kinga (ed.): *Az alkotmánybírósági törvény kommentárja*. Budapest, Pázmány Press, 2022, 59–77., and JUHÁSZ, Imre: *Az Alkotmányjogi panasz eljárási jogi vetületének néhány aspektusa*. In: VARGA, István (ed.): *Codificatio processualis civilis: Studia in Honorem Németh János II.*, Budapest, ELTE Eötvös Kiadó, 2013, 119–132.

of one does not meet the requirements of a co-judicial body. Even though, of course, a huge apparatus would be working under the President of the Constitutional Court,¹⁴ but these staff would be preparatory staff, if one or other member is not equal in decision-making, it does not comply with the principle of co-judging and judicial independence.¹⁵ Even if their removal is subject to strict conditions. The exercise of employer's rights, the reward mechanisms, etc., create a kind of dependency.) Thus, a one-man board and any conceptual contradiction would not be acceptable in any case in relation to the constitutional complaint. And with regard to the control of norms, there would also be serious concerns if such an officer could declare a law passed by the whole parliament unconstitutional, even if they were deciding together with, say, the president of the republic or with another body. A further insoluble problem arises when there is a conflict of interest in a case against the only person entitled to take a decision.

I think that all this has shown that the very important element of the separation of powers is to have more than one person in a body – it is very rare to have an 'independent professional body' where one person is justified and the more professional, the more we are talking about making decisions not of a political nature, not of expediency but of legality, the more justified it is to have more than one person in a position in the spirit of collective wisdom.

14 On the current status of the President of the Constitutional Court, see NÉMETH, Ágnes: *Az Alkotmánybíróság elnöke és elnökhelyettese*. In: ZAKARIÁS, Kinga (ed.): *Az alkotmánybírósági törvény kommentárja*. Budapest, Pázmány Press, 2022, 196–199.

15 On a notion, pls. see CZINE, Ágnes: *Tükörkép a bírói függetlenségről és pártatlanságról az Alkotmánybíróság gyakorlatában*. *Alkotmánybírósági Szemle*, 2018/2, 2–8.