Fruzsina Gárdos-Orosz: The transformation of the Hungarian Constitutional Court

1. Introduction

The Hungarian Constitutional Court was established on 1 January 1990 right after the democratic transition of 1989-1990. In the period after 1990, and in the years following the change of regime the Constitutional Court, maybe in a way worthy of criticism for activism (Szente 2015), took a significant role in forming the constitutional democracy in Hungary (Vincze, Csuhány, Sonnevend, Jakab). The new constitution of Hungary, known as the 'Fundamental Law', entered into force on 1 January 2012 and replaced the former Constitution[1]. The governmental forces, gaining a two-thirds constituent majority at the 2010 elections, envisaged a new role for the constitutional court (Paczolay 2012). The regulation of the new Constitutional Court had been adopted in several steps with the first regulations taking place as early as in 2010. The aim of the transformation, according to the official reasoning, was to give more emphasis on the subjective protection of fundamental rights in the individual cases and, on the other hand, to abolish the possibility of *actio popularis*, in which that anyone could turn to the Constitutional Court without any particular interest in order to initiate the annulment of a piece of legislation deemed unconstitutional (Paczolay 2012). Concerns were however significant that the constituent majority will reconsider the central role of the institution in maintaining the rule of law in Hungary. In spite of the worries, the Constitutional Court has remained to be a constitutional institution, it has kept its significant competences and the concept has survived that it is the Constitutional Court that has the final say about the contents of the Fundamental Law and the constitutionality of laws (Tóth 26). The structurally separate Constitutional Court has the power to annul laws. Given the two-thirds constituent majority, however, neither the constituent majority, nor the newly elected Judges of the Constitutional Court themselves had a reason to believe that they had the real autonomous power to interpret the Fundamental Law. This was partly due to a political and legal pressure as in 2010-2013, the constituent (constitution-amending) majority overrode the Constitutional Court's decisions in many cases by amending the Fundamental Law.[2] The relationship of the governmental majority and the Constitutional

[1] The Act XX of 1949 on the Constitution of the Republic of Hungary was substantially re-created in 1989 by a general amendment of the socialist constitution and by further amendments during the democratic transition.
[2] For the analysis of the amendments to the Constitution before 2012 see e.g. Stumpf 299-317; Chronowski 4.

Court is tense in many other countries[3] but the Hungarian situation was special because before 2010, the Constitutional Court enjoyed general and stable legitimacy and had significant say in constitutional matters. Whilst the constitutional principle of the separation of powers was being respected, the only branch with which the desired level of cooperation was not reached was perhaps the judiciary. Research has shown that the judicial practice rarely reflected the constitutional arguments or the Constitutional Court's decisions, but on the other hand the law making powers has mostly conformed with it.[4]

The details of the envisaged complete transformation of the Constitutional Court's competences unfolded in the course of the drafting of the constitution. Pursuant to Article 24 of the Fundamental Law, the Constitutional Court shall be the principal organ for the protection of the Fundamental Law. The Constitutional Court shall examine adopted but not yet published Acts for conformity with the Fundamental Law. It shall review immediately but no later than within ninety days any piece of legislation applicable in a particular case for conformity with the Fundamental Law at the proposal of any judge. It shall review, on the basis of a constitutional complaint, the conformity with the Fundamental Law of the rules of law applied in a particular case and of a judicial decision. It shall review any piece of legislation for conformity with the Fundamental Law at the proposal of the Government, one-fourth of the Members of the National Assembly, the President of the Curia, the Prosecutor General or the Commissioner for Fundamental Rights. In addition, the Constitutional Court shall examine whether rules of law are in conflict with international treaties, and whether the Fundamental Law and its amendments have been adopted constitutionally in terms of compliance with procedural rules. The Fundamental Law itself allows the Constitutional Court to exercise further functions and competences as laid down in a cardinal Act.

Pursuant to Section 13 (5)-(6) of the cardinal Act CLI of 2011 on the Constitutional Court, in addition to the procedures of abstract posterior norm control, specific posterior norm control, preliminary norm control and constitutional complaint procedures, the competences of the

[3]A much cited example consists of the initial hardships of political acceptance of the German constitutional court, see Pócza 111-131.
[4] Overviewing the relevant basic researches see Gárdos-Orosz 154-189.

Constitutional Court also include the abstract interpretation of the Fundamental Law; the preliminary and posterior examination of laws for compliance with international treaties; the posterior constitutional examination of local government ordinances; normative decisions and orders; decisions on the uniform application of the law; the examination of conflicts of competence between state organs; removal of the President of the Republic from office; giving opinion on the operation of a religious community contrary to the fundamental law; examination of the decision of the National Assembly concerning the acknowledgment of organisation performing religious activity; examination of a parliamentary resolution related to ordering a referendum and giving opinion if a municipal council operates contrary to the Fundamental Law.[5]

Before 2012, the review of the decisions of the National Election Commission (*Országos Választási Bizottság*) and the examination of the unlawfulness of local government ordinances brought a high caseload for the Constitutional Court. Therefore, the legislator transferred these competences bearing the characteristics of administrative judicature to the municipal committee of the Curia (*Kúria*), which had been established partially for this particular purpose. The other competences specified in the cardinal Act will not be addressed in the following graphs due to reasons of scale. These include the abstract interpretation of the constitution, or the preliminary and posterior examination of the conflict of laws with international treaties, as these procedures, being insignificant in number, do not significantly contribute to the nature and characteristics of Hungarian constitutional judicature.[6] Nevertheless, it is worth noting here that in a European comparison, the scope of the Constitutional Court's functions and competences can be considered complex.[7]

The aims of this chaper, according to the focus of the framework Italian-Hungarian project, are quite modest, The critical analyses of the constitutional adjudication will left to other contribution e.g. Kovács-Tóth, Chronowski in this volume. However, this works focuses upon the establishment of the legal burdens on the constitutional adjudication and shows what the Constitutional Court does within the different procedures. The first part this chapter therefore

[5] Section 35 (5)
[6] www.mkab.hu/statisztika
[7] For a most detailed analyses see Sólyom 2016.

summarizes the basic changes in the regulatory environment and explains the trends of narrowing the relevance and the capacity of the court. The second part outlines the experiences of the first few years in respect of the most important competences of the Hungarian Constitutional Court.

2. The transformation

Not long after its constituent sitting, Parliament, by the two thirds Government majority adopted the "5 July 2010 amendment to the Constitution", which modified Section 32/A (4) of the Constitution so that he Judges of the Constitutional Court were no longer nominated by a parliamentary committee calling for an agreement between the opposition and the governing parties but by a committee reflecting the proportional headcount of the respective parliamentary groups. This meant that all new judges could be appointed and elected by the two thirds Fidesz-KDNP majority.

The parliamentary majority having the "constituent majority", an absolute two thirds majority, was empowered to adopt and amend the constitution in Hungary. They also decided in 2010 to decrease the influence of the Constitutional Court by limiting its competences. The Constitution was amended so that the Constitutional Court would not examine the contents of the laws relating to central finances which are of substantial importance in terms of governance.[8] The restriction persists in Article 37 (4)-(5) of the Fundamental Law[9], and, with a few distinctive

[8] Act CXIX of 2010 on the Amendment to the Constitution was promulgated in vol. 177/2010 of the Official Gazette (Magyar Közlöny). For a detailed analysis of the restriction see Bánkuti et. al.;

[9] "As long as the level of state debt exceeds half of the Gross Domestic Product, the Constitutional Court may, within its competence pursuant to points b) to e) of paragraph (2) of Article 24, review the Acts on the central budget, on the implementation of the budget, on central taxes, on duties and on contributions, on customs duties, and on the central conditions for local taxes for conformity with the Fundamental Law exclusively in connection with the rights to life and human dignity, to the protection of personal data, to freedom of thought, conscience and religion, or in connection with the rights related to Hungarian citizenship, and it may only annul these Acts for the violation of these rights. The Constitutional Court shall have the right to annul without restriction Acts governing the above matters if the procedural requirements laid down in the Fundamental Law for the making and publication of such Acts have not been observed." This limitation persists until the condition as per Article 37 (4) is met, that is, the level of state debt decreases to less than half of the Gross Domestic Product. According to current financial-economic analyses, this condition will hardly be met in the near future.

exceptions[10], the Constitutional Court has actually refused such petitions with reference to a lack of competence.

According to another amendment, "Parliament [...] shall elect the President of the Constitutional Court from among the members of the Constitutional Court by 31 July 2011, by a two-thirds majority of the Members of the National Assembly".[11] Earlier, the body itself elected its President for three years from among its members. The new rules meant that the National Assembly also elects the President from among the Judges of the Constitutional Court by a two-thirds majority and, moreover, the President is appointed until the end of their mandate, which may last for up to 12 years. The President's position has been traditionally strong, e.g., the President has a casting vote in the event of a tie and it is also the President who assigns the cases i.e., selects their respective rapporteurs. The rapporteur Judge has a particular influence on the result of the case and the final contents of the decision. Amongst the President's wide scope of tasks, it is also worth highlighting that it is the President who sets the agenda, i.e., determines when each case is discussed by the body. This also has a strategic importance.[12]

With the entry into force of the Fundamental Law, the number of the Judges of the Constitutional Court rose to 15 from 11, with the addition of new members elected by the two-thirds majority of the National Assembly[13]. This was also due to a modification of the procedure of the Judges' appointment.; At the same time, the mandate of the Judges of the Constitutional Court rose to twelve years from nine and the possibility of their re-election was abolished.[14]

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[10] Decision no. 184/2010 (X. 28.) and no. 37/2011. (V. 10.) of the CC on the unconstitutionality of the introduction of a special retroactive 98% tax.

11 Section 5 of Act LXI of 2011 on the amendment to Act XX of 1949 on the Constitution of the Republic of Hungary required for the adoption of certain transitional provisions related to the Fundamental Law

[12] For the competences of the President of the Constitutional Court please consult Section 17 (1) of the Act on the CC.

[13] The Fidesz-KDNP coalition gained an absolute two-thirds majority in the National Assembly in both 2010 and 2014, obtaining the power to act as a constituent assembly pursuant to the Constitution. Article S (2) of the Fundamental Law also provides that for the amendment of the Fundamental Law, the votes of two-thirds of the Members of the National Assembly shall be sufficient.

[14] In Section 15 (3) of the new Act on the CC, the legislator has also stipulated that the 12-year mandate of the Judge of the Constitutional Court in office shall be extended if the new Judge is not successfully elected by the relevant deadline. This provision, however, conflicted with Article 24 (8) of the Fundamental Law, and was repealed by Section 42 (3) of Act CCVII of 2013.

The position of the Judges of the Constitutional Court elected by the constitutional majority was definitively strengthened by an amendment to Act CVI of 2011 on the Constitutional Court ("Act on the CC", a cardinal act pursuant to the Fundamental Law) whereby the provision according to which the mandate of the Judges of the Constitutional Court expires at the age of 70, was deleted.[15] Consequently, if, for example, a person is elected a Judge of the Constitutional Court at the age of 68, their mandate expires at the age of 80. By 2017, no Judge elected before 2010 remained in the body.

After the rapid drafting of the constitution in 2010-2011, the Fundamental Law chose complex and, in certain respects, atypical solutions, which were subsequently further shaped in accordance with the will of the two-thirds constituent (constitution-amending) majority by way of the fourth amendment to the Fundamental Law and the amendments of the Act on the CC, which latter were adopted rather rapidly[16], in response to the current governmental challenges.

Given the new rules regarding competence, the composition of cases has changed completely. The procedure of abstract posterior norm control which could be initiated by anyone *(actio popularis)* and which had made up the majority of cases was abolished. Consequently, the list of those entitled to initiate abstract norm control has been radically narrowed. In addition, by today, a new package of constitutional complaints, also allowing for the review of judicial decisions, is available for those violated in their rights enshrined in the Fundamental Law, even if they wish to challenge the norm underlying the judicial decision. If, on the other hand, the constitutionality of the norm needs to be reviewed because the application or entry into force of the law leads to a direct violation of fundamental rights, the; person violated in their rights also has the opportunity to submit a constitutional complaint.[17]

Changes in competences 2009-2014

Competences	**2009**	**2010**	**2011**	**2012**	**2013**	**2014**	**2015**	**2016**
Number of cases submitted	*14*	19	18	11	71	95	36	47

[15] This provision was repealed by Section 42 (1) of Act CCVII of 2013, which entered into force as of 11/12/2013.
[16] By the end of 2014, 55 provisions of the Act on the CC were amended by altogether 6 Acts: Act CCI of 2011, Act CXXXI of 2013, Act CXXXIII of 2013, Act CCVII of 2013, Act CCXXIII of 2013 and Act CCXXXVIII of 2013.
[17] The detailed rules and experiences regarding the old and new competences will be addressed in the next part.

	52	94	25	00	4	2	3	0
Assigned to a rapporteur judge	757	1284	983	445[18]	264	390	364	355
Abstract posterior review of unconstitutionality	**466**	**1058**	**918**	25	13	3	6	3
Norm control initiated by a judge	98	440	556	65	49	54	69	58
Norm control initiated by the ombudsman	9	5	13	23	13	2	5	5
Norm control *actio popularis*	*359*	613	349					
constitutional complaint [Section 26 (1) of the Act on the CC, Section 48 of the old Act on the CC]	51	144	91	80	36	30	41	27
constitutional complaint as per Section 26 (2) of the Act on the CC				353	38	42	66	38
constitutional complaint as per Section 27 of the Act on the CC				295	125	161	181	209

Source: www.mkab.hu/statisztika, while as regards the data from before 2012, the Secretary General of the Constitutional Court, Botond Bitskey, has provided the information.

The table does not contain the petitions submitted in a massive number (several hundred or sometimes even several thousand) with basically identical text (except for the cases initiated by judges in 2011, which also shows the high number of petitions in parking cases).

It can be established that the new regulation clearly modified the rules of interaction between the constitutional institutions and the Constitutional Court. While earlier the connection could be considered intensive between the executive and the legislature, the legislator and the Constitutional Court, under the current regulation, it is rather the connection between the ordinary courts and the Constitutional Court that is getting continuously stronger.

As the result of the transformation, as from 2015 the majority of norm control cases has been initiated by judges, and the constitutional complaints as per Section 26 (1) of the Act on the CC

[18] The number also includes the 353 cases maintained as constitutional complaints from among the petitions filed for posterior abstract norm control before 2012.

(also known before 2012) or the constitutional complaints as per Section 26 (2) of the Act on the CC (which can also be initiated if judicial procedures are not available) generate the cases of substantial norm control.[19] The majority of cases, however, are made up of constitutional complaints as per Section 27 of the Act on the CC, in the framework of which the Constitutional Court examines the procedure and, ultimately, the decision of the ordinary court. In addition to a few annulments and prohibitions of application of a certain piece of unconstitutional law, the legal consequences expressed in the operational ruling part of the Constitutional Court's decisions include constitutional requirements in an increasing number of the cases, declare the constitutional interpretation of the affected law with an *erga omnes* effect, decidedly aimed to orient the judicial practice.

Complaint as per Section 27 of the Act on the CC

	2012	2013	2014	2015	2016
Decisions on the merits in total	1	9	17	23	26
Annulment of a judicial decision	0	3*	9*	*11	10
Declaration of a constitutional requirement	0	4	1	2	1
Rejection on the merits	1	3	8	10	15

Source: www.mkab.hu

In several cases, the decisions contain annulment, a declaration of a constitutional requirement and rejection etc. as well; their coding may differ in the various registration systems, and therefore these data are only suitable for indicating the trends.;

In spite of all declarations[20] the Constitutional Court has become an appellate body in terms of the constitutionality of the application of law. Conducting the procedure, and therefore making

[19] The new complaint procedure is presented in the next part.
[20] e.g. Decision no. 3037/2014 (III. 13.) of the CC.

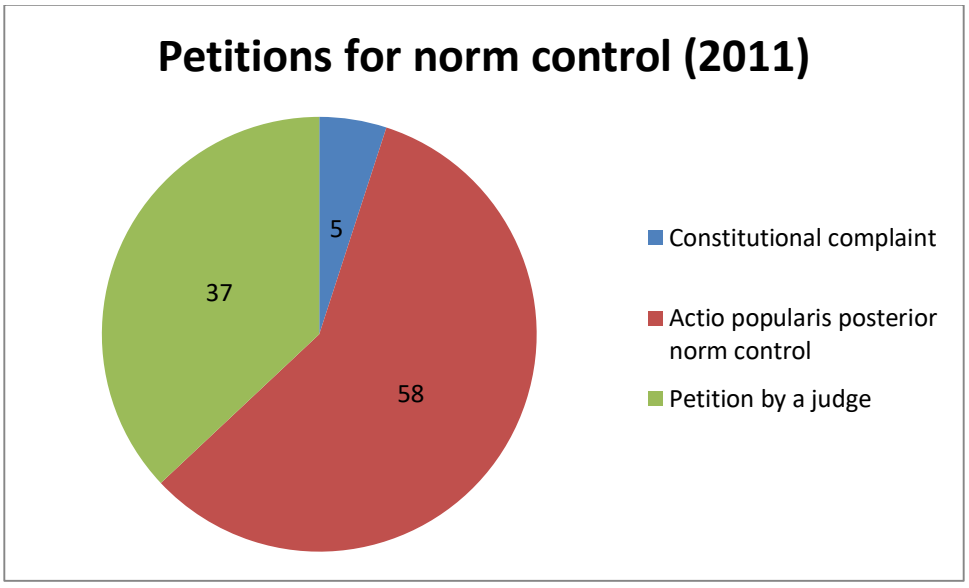
decisions, in line with the Fundamental Law is a constitutional responsibility of all ordinary courts. Accordingly, in the framework of the procedure as per Section 27 of the Fundamental Law, the Constitutional Court examines something that should be expected from ordinary courts in a constitutional democracy. It examines as an appellate body whether the judge acting in the case has made its decision in harmony with the Fundamental Law. Of course, the Constitutional Court's decisions also have increased significance in that they go beyond the specific cases and shape the judicial practice and, ultimately, the legislation and the application of the law in general – objective protection of the constitutional order. Due to their position among the sources of law, the Constitutional Court's decisions are shaping the legal order with an *erga omnes* effect even through individual cases. The special procedural law applied by the Constitutional Court also proves that the law-forming function of the Constitutional Court is between the functions of legislation and judicature. The concept according to which the Constitutional Court has already become widely known is a "negative legislator", however, in light of its new competences,; it is also to be acknowledged that, in the particular cases, the Constitutional Court is ultimately the 'lawful judge' of the parties.[21] In constitutional complaint procedures, the Constitutional Court acts as an appellate judge in terms of the constitutional aspects of the particular litigation case. The scope of review in terms of constitutionality, however, is limited in the individual cases.[22]

Before 2012, the posterior abstract norm control procedure, based on the rules of *actio popularis*, could be initiated by anyone, without having to prove their interests and without the need for a previous court proceeding, could file a submission with the Constitutional Court. It was apparent from the text of the submissions that the majority of the individual petitions were based on individual interests or violations of rights or interests. The procedural order did not require the preliminary enforcement of rights in the way it has done so since 2012. It was simple to have

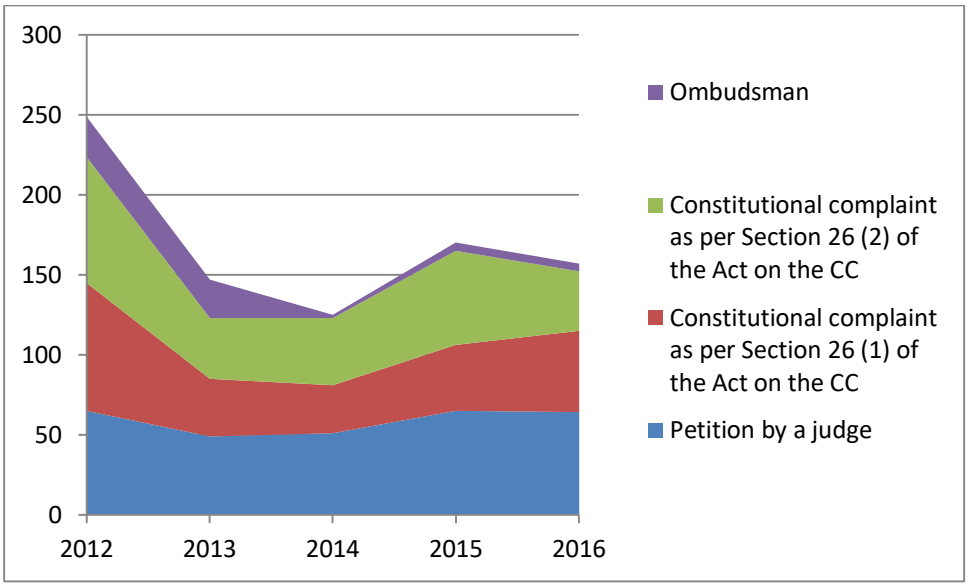
[21] The fact that the Constitutional Court does not decide on the litigation case, does not invalidate this suggestion. According to Chapter XXIV of Act III of 1952 on the Code of Civil Procedure, for example, the decision of the CC shall be followed by a repeated judicial proceeding, except if the Curia or the party concerned deems it unnecessary. In many cases, the ordinary judicial appellate forum cannot decide on the dispute either, but it can only e.g. order the court of first instance to conduct a new procedure.

[22] E.g. in a constitutional complaint, the only valid ground for reference can be the violation of a right enshrined by the Fundamental Law (Order no. 3252/2012. (IX. 28.) of the CC); an issue regarding the application of the law having an "exclusively civil law nature" cannot have substantial importance in terms of constitutional law (Order no. 3072/2012. (VII. 26.) of the CC); The Constitutional Court may not revise the ordinary court decision that was made on the basis of case-by-case assessment: the Constitutional Court is not entitled to "review the judicial assessment pertaining to the results of the evidentiary procedure" (Order no. 3237/2012. (IX. 28.) of the CC); The Constitutional Court has no competence to review the direction of the judicial decision or the judicial assessment of evidence, nor has it competence to adjudicate how the ordinary courts assessed the various facts, in other words, it may not fully review the totality of the judicial proceeding (Order no. 3359/2012. (XII. 5.) of the CC).

direct recourse to the Constitutional Court. The Fundamental Law terminated the institution of *actio popularis* and after January 2012, persons and organisations intending to take action in order to protect the constitutional order but who are not directly affected by a specific case can inform the Constitutional Court of their constitutional position only in the form of *amicus curiae* i.e. in connection with a specific pending case, or in the form of a petition to the fundamental rights commissioner who can decide on further initiating the procedure of the Constitutional Court. Citizens, however, have no right to submit a petition to the Court.
In 2010, 545 *actio popularis* petitions were pending before the Constitutional Court whilst in 2013, there were 74 constitutional complaints including petitions for norm control submitted by affected persons and organisations, and 198 constitutional complaints filed against judicial decisions, before the Constitutional Court. However, there were only 38 decisions on the merits of constitutional complaint cases in 2013. The table above shows that on the whole, the number of submissions has not significantly decreased after 2012, but the distribution according to the competences, as well as their screening, has changed.



Norm control procedure after 2012



The figures have been prepared based on a presentation by Botond Bitskey titled 'The role of posterior norm control since the entry into force of the new Act on the CC (Institutional guarantees in practical terms, from the Ombudsman to the Constitutional Court, Workshop, Pázmány Catholic University 22 April 2015).

Thus, it can be stated that the transformation between 2010-2013 has essentially been a fundamental change to the order that had characterized the cooperation of constitutional institutions and persons with the Constitutional Court. This change is not only perceivable in the context of the protection of individuals' rights and a general, objective protection of rights. The general, objective protection of rights can also indirectly realise the protection of individuals' rights. The change has been a shift from control over legislation to control over the application of law in the current system. Before 2012, the Hungarian constitutional legal literature had often pointed out that it would be important to introduce the constitutional complaint known in German law (Gárdos-Orosz) In contrast, after 2012, the literature has often stressed that it would be important to exercise actual and efficient constitutional legal control over the legislature and the changes to the constitution (Gárdos-Orosz and Szente). The two directions of constitutional

protection are not alternative but supplementary – both ensure the realization of the constitutional ideal of a self-restraining power.

At the birth of the new Constitutional Court, the self perception of the body's role is manifested in the declaration issued on 28 October 2010 regarding the above-mentioned envisaged self-restraining amendment to the Constitution. "The Constitutional Court of the Republic of Hungary is a major institution and a guarantee of the democratic rule of law, the main duty of which is to protect constitutionality and the citizens' fundamental rights. (...) With regard to posterior norm control, there are two basic requirements on constitutional judicature. On the one hand, constitutional control should cover all acts of law, regardless of the regulated subject matter, on the other hand, the Constitutional Court should be given the power to annul any act of law deemed unconstitutional." The declaration stresses that the functions and responsibilities of constitutional judicature are permanent by nature. Contrary to that, the attitude of the Constitutional Court in 2015 is more of an adaptation to the changing circumstances, aptly described by the following thoughts expressed by Barnabás Lenkovics, then President of the Constitutional Court, in an interview: "Constitutional judicature is not independent of time and space, either. We need to keep up with the changing circumstances. The same benchmarks elaborated and applied by the Constitutional Court against the legislator under stable or at least seemingly stable circumstances cannot be applied unchanged under substantially different historical circumstances. This would result in lifting some benchmarks to the state of dogma, paralyze legislation, governance, and even the operation of the rule of law, which would make crisis management impossible. This is the reason behind the transformation of the content and set of criteria of fundamental rights in the Fundamental Law, as well as the significant changes made to the competences of the Constitutional Court, the shift towards the protection of the individual's fundamental rights."[23]

[23]Interview with Barnabás Lenkovics in the online journal Jogi Fórum. http://www.jogiforum.hu/interju/122. As opposed to this view, see Sólyom, former president of the Constitutional court, 5-9.

3. Some consequences of the transformation concerning major competences

A general rule is that the procedure of the Hungarian Constitutional Court can be initiated by a petition.[24] Thus, the petitioner's role and responsibility is crucial to what is examined by the Constitutional Court in Hungary. Therefore, in the following, besides presenting the substance of the output of the constitutional court procedure, an attempt will be made to also assess the input.

A significant part of the petitions, especially the constitutional complaints are not suitable for examination on merit. With regard to the organization and operation of the Constitutional Court, individual judges have appeared as a new institution as opposed to earlier practice, who are authorized to reject petitions with formal defects if the petitioner has not accepted the information provided by the Secretary General and the single judge evaluates the petition as unsuitable for being the basis of further examination.

Pursuant to Section 50 (1) of the Act on the CC, the five-member-panel has become the typical forum for the examination of cases. In the majority of cases, the five-member-panel examines the admissibility of constitutional complaints and this is the forum which may reject petitions without examination on the merits. Section 50 (2) rules that only those cases which are not to be adjudicated by the five-member-panel pertain to the exclusive jurisdiction of the plenary session. The five-member-panel may not annul an act but may annul a court decision and may also establish an omission on behalf of the National Assembly or a constitutional requirement giving the constitutional interpretation of the law.

3.1 Constitutional complaint

According to the justification of the Fundamental Law, the constitutional complaint regulated in Section 27 of the Act on the CC is to be regarded as a brand new competence of the Constitutional Court, which "opens up a whole new era in the protection of fundamental rights", since "petitioners who have already exhausted their effective legal remedies are provided with an additional special legal remedy, which ensures that in the most serious cases of violations of

[24]It can be mentioned as an exception that as of 2012, the Constitutional Court may only establish unconstitutional legislative omission *ex officio;* this may not be requested by petition. The Constitutional Court may also initiate the examination of conflicts with international treaties *ex officio*.

fundamental (constitutional) rights, there is a possibility for arriving at a decision in conformity with the Constitution".

Pursuant to Article 24 (2) c) of the Fundamental Law, on the basis of a constitutional complaint, the Constitutional Court reviews the conformity with the Fundamental Law of the rules of law applied in a particular case. Pursuant to Article 24 (2) d) of the Fundamental Law, on the basis of a constitutional complaint, the Constitutional Court also reviews the conformity with the Fundamental Law of a judicial decision. Based on the rules set out in the Fundamental Law, the Act on the Constitutional Court has established three categories of constitutional complaints.

Pursuant to Section 26 (1) of the Act on the CC "[i]n accordance with Article 24 (2) c) of the Fundamental Law, persons or organisations affected by a concrete case may submit a constitutional complaint to the Constitutional Court if, due to the application of a legal regulation contrary to the Fundamental Law in their judicial proceedings, their rights enshrined in the Fundamental Law were violated, and the possibilities for legal remedy have already been exhausted or no possibility for legal remedy is available". This type of constitutional complaint had already been a functioning institution of Hungarian law before 2012. In 2011 there were a total of 51 pending cases of this kind.

Pursuant to Section 26 (2) of the Act on the CC, by way of derogation from the previous case, Constitutional Court proceedings may also be initiated – by exception – if, due to the application of a legal provision contrary to the Fundamental Law, or when such legal provision becomes effective, rights were violated directly, without a judicial decision and there is no procedure for legal remedy designed to repair the violation of rights, or the petitioner has already exhausted the possibilities for remedy. This type of complaint is frequently named direct constitutional complaint in the relevant literature.

Pursuant to Section 27 of the Act on the CC, in accordance with Article 24 (2) d) of the Fundamental Law, persons or organisations affected by judicial decisions contrary to the Fundamental law may submit a constitutional complaint to the Constitutional Court if the decision made regarding the merits of the case or other decision terminating the judicial

proceedings violates their rights laid down in the Fundamental Law, and the possibilities for legal remedy have already been exhausted by the petitioner or no possibility for legal remedy is available for them. This competence for the constitutional review of judicial decisions is often called the "real" constitutional complaint in Hungarian technical jargon.

The new competences were presumably introduced as a consolation for the abolition of *actio popularis*. However, as a general rule, procedural laws set a rather high standing criteria for procedures aiming at the protection of individuals' right. The primary aim of the constitutional complaint types is to provide remedy for the violation of law by way of annulling the judicial decision and the unconstitutional legal norm. A peripheral effect of such procedures is that the unconstitutional norm is eliminated from the legal order, or – as in Hungarian law – the establishment of a generally binding constitutional requirement has a constitutive effect.

The examination of admissibility of constitutional complaints is a new phase of the Constitutional Court procedure; the examination of format and content so as to decide whether the petition is suitable for being adjudicated on the merits. In Hungary, according to the new rules of the Act on the CC, similarly to the constitutional court procedure in the region following the German model (Jakab 64-74), prioritises the principle of equality above all. The declared main focus of the regulation is the screening principle, i.e., when the Constitutional Court decides on admissibility, it only examines the existence of the format and content requirements set out in the Act on the CC regarding the particular case; in principle, no other aspects may be considered. Nevertheless, the considerations for selection appear in Section 29 of the Act on the CC, which states that in order for a petition to be admissible, it must be demonstrated that the conflict with the Fundamental Law significantly affects the judicial decision or the case raises constitutional law issues of fundamental importance. Similar screening criteria for constitutional law issues of fundamental importance also exist in other countries, e.g. in German (*Specifisches Verfassungsrecht*, Zakariás 98-104) or in Spain, which applies the institution of *amparo*.[25] Still,

[25]In Spain, amparo was introduced by the Organic Act 2/1979 on the Constitutional Court (Ley Orgánica 2/1979, de 3 de octubre, del Tribunal Constitucional; LOTC). The Organic Act 6/2007 modified the LOTC, which significantly affected the rules of acceptance, among others. An additional criterion similar to the constitutional issues of fundamental importance was introduced, which enables the Constitutional Court to accept those petitions only which have fundamental constitutional importance. The Constitutional Court explained this criterion in detail in the constitutional court decision STC 155/2009.

in Hungary, it did not help the popularity of the new constitutional complaint that the scope of admissible petitions had been extremely limited.

The Constitutional Court ruled several times that it considers the purpose of the constitutional complaint to be the remedy for the violation of law,[26] which, due to the person affected, eventually distinguishes this competence from that of posterior abstract norm control. Nonetheless, it also acknowledged that the constitutional complaint aimed at the annulment of the act also has an objective, general function of protecting the constitutional order, as a result of which legal consequences are determined in a way that goes beyond the individual case.

3.2. Posterior abstract norm control

In 2011 there were 969 pending norm control cases, 558 of which aimed at posterior abstract norm control. 545 were *actio popularis* petitions, while 13 were petitions by the Ombudsman. As of 1 January 2012, the cases initiated by an *actio popularis* petition were terminated unless they could be transformed to a constitutional complaint under Section 26 of the Act on the CC. This had to be expressly requested by the petitioner by submitting an addition to the petition according to the criteria of the new Act on the CC and the Rules of Procedure of the Constitutional Court, which was virtually a new petition. The proportion of cases continued as constitutional complaints was insignificant.

Under the new rules, posterior abstract norm control, the constitutional review of a law after its publication not connected to the violation of a right enshrined in the Fundamental Law or a specific case, may only be initiated, as mentioned earlier, by the Government, one-fourth of the Members of the National Assembly, the President of the Curia, the Prosecutor General or the Commissioner for Fundamental Rights.

In 2011, 58% of posterior norm control procedures were posterior abstract norm control procedures, 37% were petitions submitted by judges, while only 5% were constitutional complaints. Of the 58%, little more than 2% were submitted by the ombudsman. However, after

[26] Order no. 3367/2012 (XII. 15.) of the CC, Reasoning [11],[13]; Decision no. 6/2013 (III. 1.) of the CC, Reasoning [214]

2012, from among the dedicated petitioners, hardly anyone other than the Ombudsman submitted any petitions[27]. These led to several important Constitutional Court decisions, often with a very high degree of division, as shown by the dissenting opinions and concurring opinions attached to the decisions. Examples include decisions on the registered partners' right to inherit, on the declaration of the unconstitutionality and annulment of Sections 7 and 8 of Act CCXI of 2011 on the Protection of Families,[28] the annulment of the legal provisions on the right of the homeless, the minor offence sanctioning the use of public spaces for habitation and other legal provisions[29], on the use of legal assistance in constitutional complaint procedures, the declaration of unconstitutionality and annulment of Section 3 (3) c) of Act LXXX of 2003 on Legal Assistance[30], on the unconstitutionality and annulment of certain provisions of the Fundamental Law[31]. In 2013, fewer decisions were passed at the initiative of the ombudsman, but among them was, for instance, the review of constitutionality of the Fourth Amendment to the Fundamental Law[32], which has been crucial to the shaping of the nature of constitutional judicature. The matter of prison cells size and the decision on the declaration of unconstitutionality and annulment of certain provisions of the Decree IM no. 5/1998 (III. 6.) of the Minister of Justice on the healthcare service provided to convicts has had an undeniably positive influence on the enforcement of convicts' rights. The decision on the detention of minors in administrative offence cases[33] constitutes a step backwards in the protection of fundamental rights as it narrows down the previous definition of the content of the fundamental right under investigation. As a result of the way new ombudsman has self interpreted their role, the number of motions has radically decreased by the year 2016, and the other persons with the power to initiate procedures have not indicated too many cases of unconstitutionality.; A petition of the Government or one-fourth of the MPs is basically a political act while petitions of the Curia and the Prosecutor General could rather be responsive to constitutionality matters affecting their own organisation and operation, or those arising in the course of the application of law. The Government would only be interested in initiating a posterior abstract norm control procedure in order to cause

[27]The Prosecutor General and the President of the Curia were only given the petition right later, in 2013, as a result of international pressure.
[28] Decision no. 43/2012 (XII. 20.) of the CC.
[29] Decision no. 38/2012 (XI. 14.) of the CC.
[30] Decision no. 42/2012 (XII. 20.) of the CC.
[31] Decision no. 45/2012 (XII. 29.) of the CC.
[32] Decision no. 12/2013 (V. 24.) of the CC.
[33] Decision no. 3142/2013 (VII. 16.) of the CC.

annulment of an act passed in previous cycles of governments by a two-thirds majority. In all other cases, it is able to eliminate unconstitutionality on its own initiative or by a legislative act of the National Assembly featuring a majority identical with the Government. As regards decrees and ordinances, in cases of conflicting interests, the unconstitutionality of decrees of the President of the Central Bank of Hungary or the President of an independent regulatory authority, or that of local government ordinances may be initiated in the future.

Analyses on the case law of the Constitutional Court show that even among the substantial decisions passed within the competence of posterior abstract norm control, there have been very few cases where, by annulment, or the establishment of omission or a constitutional requirement, the Constitutional Court actually and finally imposed a constitutional restriction on the legislator's will (Halmai 105-150).

3.3 Preliminary abstract norm control

The role of preliminary norm control was particularly dominant at the time of László Sólyom's mandate between 2005 and 2010. Neither before nor after 2010 was there a significant number of petitions for preliminary norm control filed with the Constitutional Court. The President of the Republic decides, at least in practice, freely whether to exercise a political veto or a constitutional veto, also in cases of constitutional concern. Hence, they may decide to instruct the National Assembly, in the form of a political veto, to adopt a new resolution before the publication of the act.[34]

Pursuant to Article 24 (2) a) of the Fundamental Law, the Constitutional Court shall examine adopted but not yet published Acts for conformity with the Fundamental Law. In addition to this, the Act on the CC also extends the possibility of preliminary norm control to other acts, such as the preliminary review of conformity with the Fundamental Law of certain provisions of international treaties and the preliminary review of the provisions of the Parliament's Rules of Procedure if contained in normative decisions. The Constitutional Court decides on the petition

[34] Among the competences of the President of the Republic, Article 9 (3) i) states that the head of state may send adopted Acts to the Constitutional Court for a review of conformity with the Fundamental Law or may return them to Parliament for reconsideration.

out of turn, within thirty days.[35]

The Fundamental Law deviates from the text of the Constitution on several points. In addition to the President of the Republic, pursuant to Article 6 (2), also the Parliament, the Government and the proponent of the bill may initiate the preliminary norm control procedure. This may virtually force the Constitutional Court into the position of a sounding board but no such motion has yet been submitted.

Since 1 January 2012, two decisions were passed upon the motion of the President of the Republic: Decision no. 16/2015 (VI. 5.) of the CC regarding the unconstitutionality of the Act on the Amendment of Certain Acts on the Management of State-Owned Land, and Decision no. 1/2013 (I. 7.) of the CC on the review of certain provisions of the Act on the Electoral Procedure [voter registration]. The National Assembly has not yet initiated a preliminary norm control procedure.

4. Conclusions

The Constitutional Court was having a hard time in the period 2010-2016. The Constitution to be applied has undergone fundamental changes: The composition of the body has changed, the applicable cardinal rules on the Constitutional Court have changed and moreover, the Fundamental Law, which forms the basis, and the legal environment have been constantly altered by the parliamentary majority. Consistency problems can be perceived in the relevant rules both from legal technical aspect and with regard to the protection of fundamental rights. This is reinforced and made even more uncertain by the theoretical debate of the ‘old and new’ approaches. The question is, to what extent the new Constitutional Court will be able to set a foot on the slippery slope of the current constitutional system and whether it will be able to pave the way to a judicially developed European constitutionalism, which would also follow from the Hungarian constitutional traditions.

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[35] Section 40 (4) of the Act on the CC

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