Evelin Burján,[1] Boldizsár Szentgáli-Tóth[2]

Three novelties of the Hungarian constitutional system: valuable experience for all Central-European countries

Abstract:

Our analysis aims to enlighten the background of three recent changes to the Hungarian constitutional system and attempts to envisage their potential consequences. All three novelties have sparked intense professional and political discussion in Hungary, with many experts claiming that these measures had primarily populist motivations. As legal experts, our task is to analyse which arguments and counterarguments are legally reasonable and to conceptualize the real character of the amendment of the act on the Hungarian Constitutional Court in December 2019, with particular regard to the well-established concept of separation of powers.

Keywords: populism, constitutional complaint; involvement, legal unity complaint, judicial recruitment

1. The main points of the amendment of the act on the Hungarian Constitutional Court

In recent years, the Hungarian Government aimed to establish a separate administrative high court and a separate judicial order. However, due to the serious concerns that have been expressed by international and national experts, this plan was finally withdrawn.[3] Nevertheless, in December 2019, the Hungarian Parliament passed a bill that amended several acts on the judiciary, amongst others, the act on the Constitutional Court was also concerned. The new act introduced three main novelties that affect the status of the Constitutional Court directly.

1.1. Judicial recruitment

[1] Ph.D student, Eotvos Loránd University, Department of Constitutional Law.
[2] Research fellow, Hungarian Academy of Sciences, Institute for Legal Studies; and Eotvos Loránd University, Department of Constitutional Law.
[3] Evelin Burján, Boldizsár Szentgáli-Tóth, 'A cursory glance on the Hungarian administrative system after two main reform attempts' (*Dublin Law & Politics Review*, 2020) <https://dublinlpr.ie/2020/09/15/a-cursory-glance-on-the-hungarian-administrative-system-after-two-main-reform-attempts/> accessed 11 October 2020.

Firstly, the amendment stipulates that after the termination of their mandate, the Constitutional Court's former members may request their appointment as judges. This paper aims to evaluate the effect of this amendment on the basic principles of constitutional law.

1.2. The partial introduction of a precedent system

Secondly, by modifying the rules of several procedural laws, it gave a unique role to the decisions of the Curia of Hungary (the Supreme Court), by which it introduced the so-called limited case law system and created a new legal remedy, the legal unity complaint.

1.3. The constitutional complaint of public authorities

Lastly, the new legislation reconsiders the concept of constitutional complaint remarkably, as it opens the possibility for public authorities to submit such initiatives to the Constitutional Court, not only for the protection of their fundamental rights but also their constitutional and statutory competencies. This approach is based on the recent practice of the Hungarian Constitutional Court, which has vested certain state authorities with standing to submit constitutional complaints. This new practice idea invigorated the discussion on constitutional complaint during the last months in Hungary, several arguments and counterarguments have been raised.

Our argumentation is based on three strands of the literature, which have been rarely used in such an integrated manner. Firstly, the traditional literature of constitutional complaint will be kept as a background of the analysis. Secondly, numerous authors will be cited, who provide a deeper understanding of the constitutional standards of an independent judicial system. Thirdly, those Hungarian contributions will also be considered, which have reflected specifically on the recent Hungarian developments.

2. The appointment of former members of the Constitutional Court of judges to the Curia

A dialogue between the Curia and the Constitutional Court has already existed, but it has been especially lively since the introduction of the constitutional complaint against any judicial decision. Their activities naturally affect each other. Despite this dialogue between them, their positions in the system of the branches of power are different. The Curia, as part of the three classical branches of power, as the supreme body of the judiciary, must be separated from the

political branches and from the Constitutional Court too. The Constitutional Court, however, is not one of the branches of power; its task would be to guard the principle of rule of law, human rights, and the delicate balance between the traditional branches of power. In Hungary, the Parliament elects the members of the Constitutional Court with a two-thirds majority,[4] and since the governing party currently owns the two-third of the parliamentary votes, the selection process is pretty straightforward, because the participation of independent experts or the opposite party is not possible in practice. On the other hand, in the judiciary, by the principle of the separation of powers, judicial appointments could not be made directly by the government.[5] This political independence can be traced back to the constitutional principles governing the exercise of public power.

The amended Act CLI of 2011 on the Constitutional Court provides that a member of the Constitutional Court may, through the President of the Constitutional Court, request his/her appointment to the Curia (Supreme Court) as a council leader judge. The President of the Constitutional Court shall inform the President of the National Court Office of the request, while at the same time it is also forwarded to the President of the Republic. The President of the Republic then appoints the former member of the Constitutional Court as a judge.

2.1. General terms

In Hungary, according to the current legal framework, the members of the Constitutional Court hold their office for twelve years,[6] so there is a legitimate expectation to presume, that a lawyer with twelve years of experience as a member of the Constitutional Court can also do an excellent job at the Curia, his/her work would meet the highest professional standards. On the other hand, under the current regulations, these twelve years do not have to be completed; even after one year of service as a member of the Constitutional Court, one may decide to transfer to a judicial seat by resigning from his/her position as a constitutional judge. The main problem of the opponent is, that when the member of the Constitutional Court, who have

[4] The Fundamental Law of Hungary [25.04.2011] Art 24 par. (8).
[5] The Fundamental Law of Hungary declares in Art. 26 para (2) that judges shall be independent and shall answer only to the law. Judges may not be instructed in relation to judicature. Judges may be removed from office only on grounds and according to procedures specified in an implementing act. Judges may not be members of political parties and may not engage in political activities. The Hungarian Constitutional Court in Decision 51/1992 (X. 22.) AB of the Constitutional Court of Hungary (ABH 1992, 253, 255.) emphasized, that the function of the judicial branch requires independence from the political branches of the power.
[6] Katalin Kelemen, 'Az alkotmánybírák újraválaszthatósága és hivatalviselési ideje' [The re-election of the constitutional judges, and the length of their mandate] (2011) 5 Pázmány Law Working Papers <http://plwp.eu/docs/wp/2012/2011-05.pdf > accessed 11 October 2020.

been elected by the Parliament can be automatically appointed as a judge, the dividing line between these two bodies becomes blurred – constitutional judges originally elected by the governmental side can move to the Curia and may decide on cases, even on politically sensitive matters, as supposedly independent judges.[7] The former members of the Constitutional Court are not likely to be appointed to the Curia, but to a district court somewhere in the countryside, therefore this issue may not have been sufficiently highlighted, as these judges would have a much greater influence on the judiciary as a whole.

It is also worthy of consideration that electing judges from the Curia to the Constitutional Court had already been an existing practice, although not an automatic one; court judges had to participate in the same selection procedure as anyone else. Therefore, only a small number of Curia judges gained a seat at the Constitutional Court. However, this is no longer the case; a member of the Constitutional Court can be a judge without any previous judicial experience: in 2019, the Parliament also amended the eligibility criteria for the Chief Justice of the Supreme Court. Beforehand, at least five years of judicial experience in the ordinary court system was required for becoming president of Hungary's highest court. After the amendment – in calculating the period of a judge's service relationship – the experience gained while serving as a judge, a senior consultant or a constitutional court judge in an international organization of the judiciary, or as a senior consultant in the Office of the Constitutional Court shall be taken into consideration as well.[8]

In the 2020 Rule of Law Report, the European Commission raised several concerns regarding this aspect of the amendments of the judicial system of Hungary. The report states that the new rules allow for the appointment to the Supreme Court of members of the Constitutional Court, elected by Parliament, outside the normal procedure, and lower the eligibility criteria for the Supreme Court President. As a result, in practice, the election by Parliament to the Constitutional Court, which does not entail the involvement of a body drawn in substantial part from the judiciary, can itself lead to the automatic appointment as a judge of the Curia if requested by the judge concerned."[9] This might be a remarkable risk factor for separation of

[7] András Kovács, Gergely Barabás, 'Why Judicial Independence Matters? Administrative Judiciary: The Transmission Point Between National and EU Law' (2018) 2 ELTE Law Journal <https://eltelawjournal.hu/why-judicial-independence-matters-administrative-judiciary-the-transmission-point-between-national-and-eu-law/> accessed 6 November 2020.
[8] Act CLXI. of 2011 on the Organization and Administration of the Courts Art. 104. para (2).
[9] European Commission 2020 Rule of Law Report - Country Chapter on the rule of law situation in Hungary <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52020SC0316#footnoteref34> accessed 7 November 2020.

powers, as there would be a direct personal link between two completely different constitutional actors, and as the legislation would have a significant impact via indirect means on the composition of the largest judicial body of the country.

On 3 July 2020, the President of the Republic appointed eight justices of the Constitutional Court as ordinary judges; they can take up a position in the judiciary when they please. Only two of them (Ágnes Czine and Ildikó Hörcherné Marosi) had served as ordinary court judges before their nomination to the Constitutional Court. The other six justices (Imre Juhász, Balázs Schanda, Tamás Sulyok, Marcel Szabó, Péter Szalay and András Zs. Varga) have no relevant judicial experience, they had worked previously in other fields, i.e. they were attorneys, legal officers, university professors and so on. On 5 October, the President of the Republic nominated András Zs. Varga to be the next Chief Justice of the Supreme Court who became eligible to the post only as a result of the legislative changes enacted last year.[10]

2.2. The partial introduction of the precedent system

To gain a better understanding of the relevance of the role of President of the Curia and the election of Varga, the Act CXXVII of 2019 effect on the court's interpretation of the law will be summarised in the following.

On 17 December 2019, the Parliament adopted Act CXXVII of 2019 on the Amendment of Certain Acts Related to the Establishment of Single Instance Administrative Procedure, which made significant changes in the domestic system of ensuring the unity of judgment: by modifying the rules of the Act, it gave a unique role to the decisions of the Curia of Hungary, by which it introduced the so-called limited case law system and created a new legal remedy, the legal unity complaint.[11]

The precedent effect of the decisions is enshrined in Act CXXVII of 2019 of the three judicial procedural codes[12] by amending its provisions in two rounds. One of the amendments created an obligation for the courts to provide explicit justification in case they wish to deviate in

[10] Viktor Z. Kazai, Ágnes Kovács, 'The Last Days of the Independent Supreme Court of Hungary?' (*VerfBlog*, 13 October 2020) <https://verfassungsblog.de/the-last-days-of-the-independent-supreme-court-of-hungary/> accessed 20 October 2020.

[11] András Osztovits, 'Törvénymódosítás a bírósági joggyakorlat egységesítése érdekében – jó irányba tett rossz lépés? ' [For the unification of the judicial practice. A wrong step in a good direction?] (2020) 2 Magyar Jog <https://hvgorac.hu/Osztovits_Andras_Torvenymodositas_a_birosagi_joggyakorlat_egysegesitese_erdekeben_jo_iranyba_tett_rossz_lepes> accessed 10 November 2020.

[12] The Act I of 2017 on the Code of Administrative Litigation, the Act CXXX of 2016 on the Code of Civil Procedure, and the Act XC of 2017 on the Code of Criminal Procedure.

questions of law from a decision of the Curia published earlier in the Register of Court Decisions. The other amendments opened the possibility for the parties to appeal against court decisions that deviated from the published decision of the Curia.

It did not directly oblige the courts to apply the Curia's decisions, but as the court has a duty to state reasons in case of a deviation from the decision of the Curia, the decisions of the Curia are of paramount importance in the interpretation of judicial law and judicial decision-making.[13] Besides this, an incorrectly or insufficiently reasoned court decision may be annulled by the Curia. In this procedure, the President of the Curia has a vital role to play, as the complaint is assessed and decided by the Legal Unity Council of the Curia, chaired by the President (or Vice-President) of the Curia and nine other judges appointed by him/her.[14]

Prior to the appointment of a new President of the Curia, the National Judicial Council (NJC) can express its own position on the nomination of the candidate. The appointment of Zs. András Varga was not supported by the NJC (in a ratio of 13-1) and in its opinion, it noted: "[…] despite Varga's merits as a member of the Constitutional Court, the candidate has not previously performed any judicial activity in the judicial system, has no courtroom experience, and has not been previously involved practically in litigation and judicial administration. It has been a long-term and continuously followed tradition that only such a person could hold the office of Supreme Court President, who has previously served as a judge for years. Dr. Zsolt András Varga's candidacy was made possible by two recent statutory amendments, and it is at least dubious, whether these amendments are in conformity with that well-established constitutional requirement that a person who appears to be impartial and independent of other branches of power should be at the top of the judicial system.".[15] The consent of the NJC is not required by law for the election, and the Hungarian Parliament elected Varga on the 19th of October 2020 as the new President of the Curia.

Our point is that this amendment doesn't serve the principle of the separation of power, it is particularly harmful to the independence of the judiciary and it will probably have even more

[13] 'Úton a precedens jog felé? ' [Towards the introduction of precedent law?] (SmartLegal, 2020) <https://smartlegal.hu/hu/publikaciok/uton-a-precedensjog-fele-reformtorveny-a-birosagi-eljarasokban-> accessed 7 November 2020.
[14] Act CLXII of 2011 on the Legal Status and Remuneration of Judges Art. 41/A.
[15] Opinion of the National Judicial Council on the appointment of Zs. András Varga, 09 October 2020, <https://orszagosbiroitanacs.hu/az-obt-velemenyezte-a-kuriai-elnokenek-javasolt-szemelyt/?fbclid=IwAR2W2n7UWwwKVdHl6oJKyTnUxmLwpzWV6xJ79mI7vn6qO1VeRIUFYXJwkZM> accessed 7 November 2020.

serious consequences on Hungarian constitutionalism in the foreseeable future than it has already had.

3. The constitutional complaint of public authorities

In the following chapter, we focus on the extended notion of a constitutional complaint. This is not unitary in the region, Poland and Romania also use this concept.[16] From other parts of Europe, Switzerland,[17] Germany[18] and Spain[19] might be mentioned as examples. During the discussion of the planned amendment, Máté Szabó, one of the leaders of the Hungarian Civil Liberties Union expressed his counterarguments about the intended amendment.[20] As a response, Balázs Orbán, a high officer of the governmental administration in Hungary published an article and strongly opposed the views of Szabó.[21] Finally, Dániel Karsai, a well-known constitutional lawyer in Hungary, published a contribution, in which he accepted the basic concept of constitutional complaints of public authorities, but considered it a risky idea given the current Hungarian circumstances.[22]

On the grounds of the aforementioned discourse, we raise the main competing views on the constitutional complaint of public authorities, and finally, we draw our own conclusion about the matter.

3.1. Arguments for this concept

[16] Marta Kłopocka-Jasińska, Adam Krzywoń, 'On the Right of Public Law Entities to Lodge a Constitutional Complaint in the Light of the Jurisprudence of the Polish Constitutional Tribunal' (2017) 6 (1) Wroclaw Review of Law, Administration & Economics <https://content.sciendo.com/view/journals/wrlae/6/1/article-p45.xml> accessed 21 September 2020.
[17]Andreas Auer, Giorgio Malinverni and Michel Hottelier, *Droit constitutionnel Suisse* (3rd edn, Stämpfli Verlag AG 2000) 335.
[18] Wolfgang Rüfner, 'Grundrechtsadressaten' in Josef Isensee, Paul Kirchhof (eds.) *Handbuch des Staatsrechts, Allgemeine Grundrechtslehren* (C.F. Müller 2011) 793.
[19] Germán Fernández Farreres, 'El recurso de amparo según la jurisprudencia constitucional' (*Marcial Pons* 1994) 9; Ángel Gómez Montoro, 'Titularidad de derechos fundamentals' in Cesar Aguado Renedo' in Manuel Aragón Reyes (eds.), *Temas Básicos de Derecho Constitucional – Derechos fundamentales y suprotección.* (2 edn, Civitas 2011) 56.
[20] Máté Dániel Szabó, 'Az állampolgárt védje az alkotmány, vagy az államot? ' [Should the constitution protect the state, or the citizen?] (*Index*, 20 November 2019) <https://index.hu/velemeny/2019/11/20/allamvedelmi_alkotmany/> accessed 11 September 2020.
[21] Balázs Orbán, 'A magyarok jogainak és szabadságainak védelmében' [For the protection of the rights and freedoms of Hungarians] (*Index* 25. November 2019) <https://index.hu/velemeny/2019/11/25/orban_balazs_velemenycikk_alkotmany_feladata_vita/?fbclid=IwAR2YdkMj2PbPZH7KrS6g-ceJKwabBU8clg4qJmU-Rf06TsLRC7Tc6_HRWzs&utm_source=mandiner&utm_medium=link&utm_campaign=mandiner_202011> accessed 11 September 2020.
[22] Dániel Karsai, 'Kié az Alkotmánybíróság?' [Who dominates the Constitutional Court?] (*Index* 05 December 2019) <https://index.hu/velemeny/olvir/2019/12/05/kie_az_alkotmanybirosag/> accessed 11 September 2020.

The framers of the amendment considered that within the current circumstances, it is a historically correct, although currently old-fashioned approach in constitutional law, that the primary function of the constitutional complaint is to protect individuals vis-à-vis the state authorities. Obviously, this is an important role of constitutional law; however, other private and international actors represent even more serious risk factors for the prevalence of constitutional rights than do public authorities. According to this line of argumentation, a number of significant factors should be taken into consideration to elaborate a more sophisticated approach of right protection. Firstly, the sovereignty of the states is limited remarkably by the rapidly increasing competencies of international organisations, such as the European Union. As a consequence, the national constitutional courts face a new task: the core element of sovereignty and the transferable competences of the state should be distinguished clearly on a constitutional basis. This challenge requires the right of public authorities to lodge constitutional complaints when, since their fundamental rights are not respected, they would be unable to exercise their constitutional competences.[23]

Moreover, as an important impact of globalisation, multi-national private stakeholders would have almost unlimited competences to influence the lives of citizens, to collect their personal data, and to undermine their social and economic, or even political rights. In light of these concerns, the competences of the public authorities should be seen as important guaranties of individual rights and should be covered by the concept of a constitutional complaint. Apart from this, public authorities represent the people and their power originates from the people.

The third main alleged risk factor is constituted by the media conglomerates, which dominate most of the platforms where the intense exchange of diverse views takes place. Facebook and other platform host companies filter the contents and may eliminate certain views or stakeholders from the most efficient channels of the public discourse. The media authority may exercise strong supervision over the functioning of these platforms, and these activities should also be safeguarded by constitutional protection.

Finally, terrorist attacks and migration are also seen as external sources of danger that justify the state's protection of fundamental rights also via the constitutional complaints of public authorities.[24]

[23] Orbán (n 22)
[24] ibid

What is more, state authorities represent the people; their powers are based on popular sovereignty. Therefore, each guaranty of the competences of public authorities would also indirectly strengthen the protection of individual rights.[25]

Following this line of argumentation, fundamental rights are relevant for all persons, including legal entities,[26] and amongst them, for public authorities.[27] However, the fundamental rights of the public authorities should be interpreted narrowly, and only those rights should be included within this concept that might be relevant for public authorities also, like the right to a fair procedure.[28] The extended definition of constitutional complaint should not undermine the protection of individual rights; the two aspects of right protection should be balanced.

The supporters of the amendment also stressed that this approach does not come from the legislation and that the Constitutional Court was the first to provide this opportunity for certain categories of public authorities.[29] The law-maker borrowed this idea from the practice of the constitutional court and incorporated a constitutional development into the legislative framework.

The underpinning arguments behind the constitutional complaint of public authorities are usually raised by the populist vision of constitutionalism, which operates with new instruments of constitutional law, or at least an updated version of already existing ones. The implementation of this idea forms part of such a broader concept.

3.2. Arguments against the amendment

The oppositional views describe the amendment as an intentional misunderstanding of the constitution. Certain constitutional experts highlighted that the constitutional complaint shall protect the people vis-à-vis the state.[30] It may also be right to accept a constitutional complaint from legal persons, as it is beyond doubt that these also constitute private entities.

[25] Aleksandra Kustra, 'Legitymacja podmiotów publicz nych do wniesienias kargi konstytucyjnej' [Legitimacy of Public Entities to Lodge a Constitutional Complaint] Zagadnienia Sądownictwa Konstytucyjnego (2011) 2 90.
[26] The Fundamental Law of Hungary [24.04.2111], Art. I. par. (4).
[27] Kłopocka and Krzywoń (n 17).
[28] Tamás István Manhertz, 'Az alkotmányjogi panasz magyarországi helyzete' [The situation of the constitutional complaint in Hungary] (2018) 14 (1) Iustum Aequum Salutare 263-88.
[29] Decision 23/2018. (XII. 28.) AB of the Constitutional Court of Hungary.
[30]Piotr Tuleja, Marian Grzybowski, 'Skarga konstytucyjna jako środek ochrony praw jednostki w polskim systemie prawa' [Constitutional Complaint as a Mean of Protection of Individual Rights in Polish Legal System] in Wiesław Skrzydło (ed), *Sądyi Trybunały w Konstytucjii praktyce* [The Courts and Tribunals in the Constitution and in Practice] (Wydawnictwo Sejmowe 2005) 106.

There might also be legal persons in between the public and the private sectors, such as political parties, which may also be vested with the right to lodge constitutional complaints.[31] However, it is not the task of the constitutional complaint to safeguard the entirety of the public power; by contrast, the constitutional complaint shall protect the people from the public power. The clearly defined use of constitutional complaint is an essential element of rule of law, to provide a sufficient standard for the protection of fundamental rights. If we were to open this possibility without clear bounds, this would result in a distorted interpretation of constitutional complaint, which would undermine the whole system of right protection.[32]

The standing for the individuals to submit constitutional complaints serves the balancing of their marginalised situation: due to the human and material resources available for the public authorities, the citizen has remarkably less chance to successfully initiate a legal controversy against a state organ.[33] Due to these inequalities, constitutional law should introduce certain instruments for the citizen to enable them to outweighs the over strong position of the state in these proceedings. The constitutional complaint is one of these instruments, and this should preserve its original function. If we accepted this too extensive approach of constitutional complaint, this concept would add a further legal means for the state to look for remedies against its own citizens. If we followed this tendency, individuals would have less chance to reinforce their fundamental rights and the whole legal security might be threatened by the arbitrary decisions of the public authorities, which would be reviewed in the final instance by an inherently political body, the pro-governmental constitutional court.[34]

Moreover, the enemies of this idea argue that the constitutional complaints of public authorities may be allowed in a very narrow circle to avoid the spread of the constitutional court with the initiatives of these entities.[35] The act on the constitutional court does

[31]Decision 23/2018. (XII. 28.) AB of the Constitutional Court of Hungary; Decision 1/2014. (I. 21.) AB of the Constitutional Court of Hungary.
[32]Szabó (n 21).
[33]Kłopocka and Krzywoń (n 17).
[34]Szabó (n 21).
[35]'Az állampolgárnak rosszabb lesz, hogy az államnak jobb legyen' [It will be worst for the citizen to favour the government] (*Szakszervezetek.hu*, 03 December 2019).
<https://szakszervezetek.hu/dokumentumok/munkajog/20655-a-polgarnak-rosszabb-lesz-hogy-a-kormanynak-jobb-legyen> accessed 12 September 2020.

differentiate between the diverse types of public authorities and between the fundamental rights that might be relevant for these potential initiators.[36]

It has also been rumoured that the basic idea would not be dangerous in its original form; however, within the current Hungarian circumstances, it may further strengthen the marginalisation of the municipalities.[37] The constitutional court is composed of such judges who have been nominated and elected exclusively by the current governmental parties with a two-thirds majority. The constitutional court is supposed to be dominated more directly by the governmental majority than the ordinary courts; therefore, as the outcome of a remedy governmental side.[38] It has also been raised that constitutional complaint would also be available for the municipalities with oppositional dominance, which might be used by the government as a political instrument.[39] All in all, the critical voices saw this amendment as an important step towards obtaining political control over the ordinary tribunals through the constitutional court.[40] The basic goal of administrative justice is to protect the people from the state and not the public authorities from the individuals,[41] as this amendment stipulates.

Besides these considerations, the opposing views estimate it necessary to safeguard the competences of state authorities. However, for this purpose, a separate constitutional instrument should be established and these controversies shall not be covered by the concept of a constitutional complaint.[42]

Finally, it is also worth contemplating that any proposed reform with such important consequences may be enacted only after a long-term and open public debate. However, in this case, the bill was prepared almost secretly. According to a further approach, this idea may not

[36]Lóránt Csink, Johanna Fröhlich, 'Mire lehet alkotmányjogi panaszt alapítani?' [What might be a proper ground of constitutional complaint?] (2017) 25 MTA Law Working Papers <https://jog.tk.mta.hu/uploads/files/2017_25_Csink_Frochlich.pdf> accessed 23 August 2020.
[37]Karsai (n 23).
[38]Péter Szepesházi, 'Minden kerülőút az Alkotmánybírósághoz vezet, avagy hogyan keríti be a NER a tisztességes bírói ítélkezést?' [All paths lead to the Constitutional Court? Or how the government undermine the fair judicial proceedings?] (*Mérce* 12 December 2019) <https://merce.hu/2019/12/12/minden-kerulout-az-alkotmanybirosaghoz-vezet-avagy-hogyan-keriti-be-a-ner-a-tisztesseges-biroi-itelkezest/> accessed 21 August 2020.
[39] Karsai (n 23).
[40] Kálmán Sperka, 'Alternate title: Quo Vadis Administrative Jurisdiction? Challenges Connected to the Reform of the Structure of the Administrative Courts' (2019) Acta Humana 123-39.
[41] Herbert Küpper, 'Magyarország átalakuló közigazgatási bíráskodása' [The changing system of administrative judiciary in Hungary] (2014) MTA Law Working Papers 31 <https://jog.tk.mta.hu/uploads/files/mtalwp/2014_59_Kupper.pdf> accessed 21 June 2020.
[42]Konstantin Polovchenko, 'Constitutional Court as Constitutional Complaint Institution: Evidence from Serbia' (2020) 1 Law and Development Review.

be also in compliance with the constitutional identity of Hungary, therefore, such reform would require at least a constitutional amendment.[43]

3.3. Our view of the issue

In our view, both conflicting ways of assessment include some valuable elements; however, in light of the international literature on this issue, neither of them should be seen as professionally well-grounded.[44] We believe that the idea of differentiation may bring us closer to a constitutionally reasonable regulation of this issue.[45] The standing of public authorities to submit constitutional complaints shall not be treated as a framework inherently alien to the rule of law, certain fundamental rights, such as the right to a fair trial, should also be provided to public authorities in any judicial proceeding.[46] However, the amendment, which was enacted by the Hungarian Parliament, distinguished neither on the grounds of the fundamental rights concerned, nor the authority that submitted the particular complaint. Several bodies with diverse statuses and functions are authorized by this rule to lodge constitutional complaints, while in reality the broad circle of public authorities does not constitute a unitary category. Although the fact that the Constitutional Court only acknowledged the standing of a narrow circle of public authorities, such as the national bank, the amendment has not detailed, which categories of public authorities may have access to the constitutional complaint. For instance, the situations of the autonomous central authorities, the political parties, the municipalities,[47] or the state-owned companies[48] are not comparable in this regard. Moreover, it should have been also designated exhaustively, the violation of which fundamental rights may be invoked by the public authorities in their constitutional complaints.

[43] Nóra Chronowski – Endre Orbán – Pál Sonnevend 'Diskurzus az alkotmányos identitás fogalmának alkalmazásáról. Chronowski Nóra és Sonnevend Pál opponensi véleménye Orbán Endre „Államszervezet és szubszidiaritás mint az alkotmányos identitás sarokpontjai az Európai Unióban" című doktori értekezéséről – a szerző válaszával.' [Discourse on the application of the concept of constitutional identity. Opponent opinion of Nóra Chronowski and Pál Sonnevend on the doctoral dissertation of Endre Orbán entitled „State Structure and Subsidiarity as Cornerstones of Constitutional Identity in the European Union" – with the author's reply] (2020) 3 Közjogi Szemle 110-122.

[44] Sarah Joseph, 'Scope of Application' in Daniel Moeckli, Sangeeta Shah, Sandesh Sivakumaran (eds.), *International Human Rights Law* (3rd edn, Oxford University Press 2010) 153.

[45] Ruling 4/1998 of the Polish Constitutional Tribunal [24.02.1999], Ruling 12/1998 of the Polish Constitutional Tribunal [08.06.1999], Ruling 6/2001 of the Polish Constitutional Tribunal [21.03.2001].

[46] Csink and Fröhlich (n 37).

[47] László Potje, 'Az önkormányzatok indítványozói jogosultsága az újabb alkotmánybírósági döntések tükrében' [The constitutional complaints of municipalities in the light of the latest jurisprudence] (2019) 2 Alkotmánybírósági Szemle 12-20.

[48] Kamil Sikora, *Samodzielność gminy w aspekcie oddziaływań nadzorczych* [Independence of Municipalities in Terms of Supervisory Interactions] (Wyższa Szkoła Handlowa w Radomiu 2010) 15.

In addition to this, a third direction of differentiation would be advisable: whether the public authority is involved in the proceedings in its capacity as a public authority, or the particular legal relationship has an inherently private character.[49] We are convinced that in conformity with the existing model of most of the relevant European countries only such legal controversies might be covered by the constitutional complaints of public authorities where state organs take part as private stakeholders. This solution is recommended only in those proceedings where the parties are at least deemed to be on an equal footing. So, the idea of opening up the possibility of a constitutional complaint to state organs is worthy of implementation; however, only through more detailed and elaborated statutory provisions.

It is also noteworthy that constitutional complaint shall cover only fundamental right violations, the competences of the public authorities should be protected via a separate constitutional instrument, which might be called 'the conflicts of competences'. If it is dubious, whichever authority is responsible for the particular matter, it is up to the constitutional court to make a final decision. Moreover, the constitutional court may also assess whether certain activities of private stakeholders would be in conflict with the proper exercise of public tasks.

Conclusion

We outlined the discussion about a recent amendment of the act on the Hungarian Constitutional Court and we attempted to demonstrate that this amendment should be treated as an element of a broader populist trend of the European constitutional development. This tendency is based on valuable constitutional ideas. However, the implementation of these tools is often distortive or oversimplified. In this concrete case, either the placement of former constitutional judges into the supreme court of the country or the constitutional complaints of public authorities may serve legitimate purposes. However, both concepts should be surrounded by a complex system of constitutional safeguards and a more sophisticated and detailed framework of statutory provisions. One year after the entry into force of the amendments, we may conclude, that the concerns were exaggerated as regards the constitutional complaint, the new types of cases have not overwhelmed the Constitutional

[49]Christopher McCrudden, 'Human Dignity and Judicial Interpretation of Human Rights' (2008) 19 (4) The European Journal of International Law 722.

Court.[50] Nevertheless, some retired members of the Constitutional Court have been appointed as council leader judges to the Curia, moreover, the new president of the Curia will be a person who could not fulfil the legal requirements of that position without these recent amendments. Therefore, the separations of powers worries have been proved to be well-grounded.

In several countries, the constitutional complaints of public authorities have been elaborated by the constitutional practice, and this was also relevant to Hungary until the end of 2019. That the legislation has attempted to establish a codified set of rules should be welcomed, and this might be an example for other Central-European countries to follow. Nevertheless, it should also be kept in mind that each proposed reform with constitutional relevance requires inclusive prior discussion, a sufficient level of precision and differentiation, and the standard of fundamental right protection should not be undermined.

[50]See for example: Decision 3030/2020. (II. 24.) AB of the Constitutional Court of Hungary; and Decision 3221/2020. (VI. 19.) of the Constitutional Court of Hungary.