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Agnes F. Czine
Károli Gáspár University of the Reformed Church in Hungary
Faculty of Law
czine@mkab.hu

THE ROLE OF THE FAIR TRIAL PRINCIPLE RESPECTING TO THE HUNGARIAN CONSTITUTIONAL COMPLAINTS

Abstract: *Having entered into force of the Hungarian Fundamental Law, a new type of constitutional complaint was created, which allows the Hungarian Constitutional Court to examine constitutional aspects in a specific court proceeding. In practice, however, applicants and their legal representatives try to use this legal institution to review the results of lawsuits that are unfavourable for them from their point of view. The most common ground for this review is Article XXVIII (1) of the Hungarian Fundamental Law that stipulates the principle of fair trial.*

This study provides an overview about the main features of the new type of constitutional complaint and the partial rights of the right to a fair trial. The author concludes that, if applicants deal with this remedy rightly, it can indeed be an effective and important tool to ensure the constitutionality of court proceedings.

Keywords: *right to a fair trial, constitutional complaint, Hungarian Fundamental Law, obligation of a judge to state reasons, right to a decision within a reasonable time.*

1. INTRODUCTION

The Constitutional Court of Hungary (hereinafter: the Court) has been able to exercise a much stronger influence on the constitutional practice followed by ordinary courts since the legal institution of the constitutional complaint was applied due to the entry into force of the Hungarian Fundamental Law. This article seeks to present some elements of this influence in respect of certain sub-rights of the fair trial.

The Court is the supreme body for the protection of the Fundamental Law in Hungary. Its task is interpreting the Hungarian Fundamental Law and ensures that laws and court decisions are in conformity with it. Exercising its functions, it is entitled to conduct a number of proceedings that could influence legislation and judicial practice, too. Among the proceedings of the Court the procedures of norm control could impact on legislation, because they ensure constitutional criticism of legislative provisions. Another field of the Court's competence is the adjudication of constitutional complaints and ordinary courts petitions, in which courts and citizens have the opportunity to initiate a review of unconstitutional legal provisions applied in judicial proceedings. In order to understand the role of constitutional court proceedings, it is important to say a few words on the operation, history and competences of the Court.

The amendment to Act XX of 1949, which we consider to be the first constitution of the Hungarian democracy, and the Act XXXII of 1989 on the Constitutional Court were passed by the last socialist parliament in 1989. The Court started its work on the 1st of January 1990. The first act on Constitutional Court conferred broad competences on the Court to create a political balance between the different branches of power. Most of the petitions aimed at posterior constitutional review, and were submitted by individuals, thus, at that time, the main competence of the Court was to conduct norm-control-type proceedings.

The new constitution, the Fundamental Law entered into force on the 1st of January 2012, and in 2011 the new Act CLI of 2011 on the Constitutional Court was also adopted by the Parliament. The new rules of these laws reinforced the individual level of constitutional protection instead of the former abstract norm control. It also extended the constitutional review not only to legislation, but to judicial decisions.

According to the new rules of the Fundamental Law, there are five main fields of the Court's competences:

The first competence of the Court is the so-called prior or *ex ante* norm control, which means the prior review of compliance with the Fundamental Law before the entry into force of an act. The President of the Republic may refer the adopted act before its entering into force to the Court for examination of its conformity with the Fundamental Law. This is also called presidential veto.[1]

The second one is the posterior norm control, that is, *the ex post* review of conformity with the Fundamental Law, which allows the Court to guard the democratic principles. Upon the initiative of the Government, a quarter of the Members of Parliament, the President of the supreme court that is called Curia of Hungary, the Prosecutor General or the Commissioner for Fundamental Rights the Consti-

[1] Fundamental Law-FL, *Hungarian Official Gazette*, No. 43/11, art. 6, it. 2, art. 6, it. 4 .

tutional Court should review the compatibility of legislation with the Fundamental Law.[2]

The third type of norm control is the procedure on examination of consistency between international treaty and national law. A quarter of the members of Parliament, the Government, the President of the Curia of Hungary, the Prosecutor General and the Commissioner for Fundamental Rights may initiate proceedings.[3]

Another large group of constitutional court proceedings are those that can be initiated by a judge in a particular case and by citizens or legal persons. A judge may initiate proceedings before the Court if, in the course of adjudicating on an individual case pending before him, a law is found to be in conflict with an international treaty. The other judicial right is the so-called judicial initiative to review legislation applied in concrete lawsuits. In this case if a judge is required to apply unconstitutional or apparently unconstitutional legal rules in adjudicating a case before him, he may suspend the legal proceedings. After the suspension, the judge may request the Court to determine whether the application of the complained legal rules is contrary to the Fundamental Law.

However, the overwhelming majority of the case-load of the Court comes from the petitions for constitutional complaints proceedings. In 2012 the new type of constitutional complaint was very popular but nobody knew how to use it. The Court received many petitions, because the petitioners requested to review the final decisions of the ordinary courts and they thought that Court became the fourth level of the ordinary judicial system. In 2013 due to the decisions of the Court it became clear that the main competence of the Court was the examination of constitutionality. Since the entry into force of the Fundamental Law, 7090 constitutional complaints have been received by the Court.[4] It also shows how popular is the constitutional complaint.[5]

The impact on judicial practice and legislation depends on the legal consequences of the Court's decisions. So what are the legal consequences of the constitutional complaint procedure?

The Constitutional Court may

– reject the constitutional complaint because of its inadmissibility if it is not suitable for a substantive examination, because of some formal reasons (e.g: it has no constitutional justification, it was submitted late, etc.) or for substantive reasons (it does not raise unconstitutionality in respect of the judicial decision's merit or a matter of fundamental constitutional importance);[6]

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[2] FL, *Hungarian Official Gazette*, No. 43/11, art. 24, it.1, point e).

[3] FL, *Hungarian Official Gazette*, No. 43/11, art. 24, it. 2, point f), Act CLI of 2011 on Constitutional Court – ACC, *Hungarian Official Gazette*, No.136/2011, art. 32 it. 2.

[4] Statistics of the Constitutional Court, https://hunconcourt.hu/statistics/,5 March 2021.

[5] Agnes Czine, *Das Recht auf ein faires Verfahren*, LexisNexis, Wien 2021, 88-91.

[6] Resolution on Rules of Procedure of the Constitutional Court, No. 1001/2013. (II.27.) AB Tü. – RP, *Hungarian Official Gazette*, No. 33/13, para. 30.

– reject the complaint if, after a substantive examination, it finds that the statutory provision or judicial decision infringed therein is in conformity with the indicated fundamental right[7];

– annul the challenged legal provision or court decision in case of unconstitutionality;[8]

– find that there is an unconstitutionality caused by the legislator's omission with regard to the contested legal provision and may set a deadline for rectifying the deficiency;[9]

– determine with regard to a legal provision in the form of a constitutional requirement, the range within which the ordinary courts must interpret the provision in question.[10]

The key element of the complainants' reasoning is that the final judicial decision is not comply with the Fundamental Law, because it violates the right to a fair trial stipulated in Article XXVIII. The applicants consider that this fundamental right covers everything related to court proceedings. They are wrong because this right is not considered a jolly joker. Why? I will cover this in the next section.

2. RIGHT TO A FAIR TRIAL AS A JOLLY JOKER

Petitioners and their legal representatives very often request the Constitutional Court to re-examine the final judicial decision, so they consider the Court as a further instance of the judicial system. Although this is a constitutional procedure, they allege violations of discipline-specific legal rules, as they did in the proceedings before the Curia of Hungary or other superior court of review and not constitutional issues. In order to meet the requirements of complaints regulated in the Act CLI of 2011, they have to base their petition on a right that is enshrined in the Fundamental Law. The broadest procedural right, the right to a fair trial is an obvious choice, however, it is a very complex right made up of several elements. The Court therefore requires the petitioner to indicate the sub-right that has been violated by the trial court. First of all, let's sketch out these sub-rights!

The constitutional requirement of the fair trial was formulated by Article 57 (1) of the Constitution, which was in force until 31 December 2011. It says that „everyone is equal before the law and has the right to have the accusations brought against him, as well as his rights and duties in legal proceedings, judged in a just, public trial by an independent and impartial court established by law.„ As regards the substantive contents of the constitutional provision of the fair trial, the Article

[7] ACC.
[8] ACC, art. 41.
[9] ACC, art. 46, it. 1.
[10] ACC, art. 46, it. 3.

XXVIII (1) of the Fundamental Law of Hungary that came into force on January 1, 2012, is identical to Article 57 (1) of the former Constitution. It stipulates that "[e]veryone shall have the right to have any charge against him or her, or his or her rights and obligations in any litigation, adjudicated within a reasonable time in a fair and public trial by an independent and impartial court established by an act."

According to the scientific approach referred to the former Constitution, the source of the fair trial is the right to human dignity and it is in close connection with the right to equal treatment, but contains several other requirements applied not only in judicial process, but in other type of proceedings, too.[11]

The Court enlisted in its decision[12] the main sub-rights of the fair trial. According to the international documents – mainly the European Convention on Human Rights – the Court also elaborated an open-ended list, because the fair trial concept contains the equality of arms or the commitment of judicial reasoning that was not regulated textually in the former Convention. This solution is similar to the ECtHR's approach, because in contrast with the other guarantees the right to a fair hearing provides an opportunity for adding other particular rights not listed in Article 6 of the Convention that are considered essential to a fair hearing.[13]

The Parliament has placed the right to a fair trial among judicial procedural guarantees regulated by Article XXVIII of the Fundamental Law. A fair administrative procedure as a requirement is, however, appears in Article XXIV (1). However, this latter basic provision explicitly sets out the requirement of fairness for official proceedings. As a court procedural guarantee Article XXVIII (1) of the Fundamental Law is the correct reference. However, the right to a fair trial is not the only provision of Article XXVIII that the Court examines typically in connection with criminal proceedings. Other paragraphs of Article XXVIII provide for other procedural safeguards in the courts.

These procedural guarantees are:

– the presumptions of innocence [Article XXVIII (2)],

– the right to defence [Article XXVIII (3)],

– the principle of the nullum crimen sine lege and nulla poena sine lege [Article XXVIII (4)],

– the ne bis in idem principle [Article XXVIII (6)],

– the right to legal remedy [Article XXVIII (7)].

The fairness of proceedings in the ordinary sense also includes the enforcement of the judicial procedural guarantees as referred to in Article XXVIII (2) to

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[11] N. Chronowski *et al*, *Magyar alkotmányjog III., Alapjogok*, Dialóg Campus Kiadó, Budapest-Pécs 2006, 270.

[12] Decision 6/1998. (III. 1.) AB, *Hungarian Official Gazette* No.18/98, 91. (In the name of the Constitutional Court's decisions the abbreviation 'AB' means the 'Constitutional Court' itself.)

[13] Harris, O'Boyle & Warbrick, *Law of the European Court of Human Rights*, Oxford 2014, 409.

(7) of the Fundamental Law as the fulfilment of the requirements set out in Article XXVIII (1) as a right to a fair trial.

There is a significant difference between these rights from the aspect of restriction. While the procedural guarantees set out in paragraphs 2 to 7 are examined by the Court on the basis of the general rule of necessity and proportionality, the requirement of paragraph 1 requires a specific assessment.

In the practice of the Court the right to a fair trial is an absolute right over which no other fundamental right or constitutional purpose can be considered, since it is itself the result of discretion and thus the right to a fair trial could not be restricted. However, it is possible to examine within the meaning of fair proceedings the necessity and proportionality of the restrictions in respect of certain partial rights of the right to a fair trial. Partial rights can be limited and guarantee the fairness of the procedure in their entirety. The content of the right to a fair trial was formulated by the Decision 6/1998. (III. 1.) AB and these principles were confirmed by the Constitutional Court later in a number of decisions[14].

According to the practice of the Court, in particular, these partial rights are the following[15]:

a) The right of access to court: This right imposes an obligation on the legislature, namely to provide a judicial remedy for the settlement of disputes. However, as the Court has pointed out, the right of access to court is not a fundamental right that cannot be restricted. Consequently, it is not unconstitutional for the legislature to regulate litigation in procedural law. However, when regulating obstacles to litigation, the legislator must also take into account the exercise of the right of access to court as an obligation of the state. This follows from Article XXVIII of the Fundamental Law and Article 6 (1) of the Convention[16].

b) The court established by law: According to the Court' decision[17], the requirement for an ordinary court established by law includes the right to a legal judge, i.e. to act in a specific case in accordance with the general rules of jurisdiction and jurisdiction established in the procedural laws. The order of case allocation is established by the president of the court in the previous year in order to ensure objectivity and impersonality, to exclude arbitrariness, which can be changed in the current year only for service reasons or for important reasons affecting the operation of the court.[18] It follows that the assignment of a judge and a case can

[14] Decision 5/1999. (III. 31.) AB, *Hungarian Official Gazette* No. 27/99; Decision 14/2002. (III. 20.) AB, *Hungarian Official Gazette* No. 36/02; Decision 15/2002. (III. 29.) AB, *Hungarian Official Gazette,* No. 41/02; Decision 35/2002. (VII. 19.) AB, *Hungarian Official Gazette,* No. 100/02.

[15] Agnes Czine, *A tisztességes bírósági eljárás, Audiatur et altera pars*, hvgorac, Budapest 2020, 156-192.

[16] Decision 36/2014. (XII. 18.) AB, Justification [71], *Hungarian Official Gazette*, No.179/14.

[17] Decision 36/2013. (XII. 5.) AB, *Hungarian Official Gazette*, No. 202/13.

[18] Act CLXI of 2011 on Organisation and Management of Courts – OMC, *Hungarian Official Gazette*, No.143/2011, para. 9, it. 1.

be constitutionally made only on the basis of objective rules determined in advance.[19]

c) The requirement for judicial independence and impartiality: In determining the content of the principle, the Court distinguished between the external and internal aspects of judicial independence. The Court has ruled in principle that the application of law includes both the establishment of the facts and the applicable law, as well as the determination of the legal consequences. This complex process, regardless of procedural periods, involves the objective exploration, summary, evaluation and knowledge of legal issues of legally relevant facts. The internal certitude of a judge, which enables him to make a decision in accordance with his conscience, protected by the constitutional principle of judicial independence, is formed as a result of these factors.[20]

In the practice of the Constitutional Court, the right to a fair trial includes the requirement of impartiality, which reflects the requirement of an impartial procedure against the persons participating in the proceedings. The requirement of impartiality has a subjective side, inherent in the conduct of the judge, and an objective side, manifested in the regulation. In accordance with the requirement of impartiality, any situation which gives rise to a legitimate doubt as to the impartiality of a judge must be avoided.[21]

d) The fairness of the hearing: The constitutional law cannot provide a subjective right to the enforcement of material (real) truth, nor does it guarantee that no court judgment is unlawful. These are the aims and tasks of the rule of law, which, in order to achieve them, it must establish appropriate institutions, in particular those which provide procedural guarantees, and guarantee the rights of the individuals concerned. The fairness of the hearing grants a subjective right to legal proceedings and does not guarantee that the result will be correct in all cases.

e) The requirement to public hearing and the public announcement of the judicial decision: An important principle is the requirement of the transparency. On the one hand, it ensures the transparency and controllability of the operation of justice. The possibility of social control provided by law, in turn, contributes to ensuring that the courts and other officials involved in the proceedings act in a truly independent and impartial manner, subject only to the law. This is in the interests not only of the parties of the proceedings, but of society as a whole. However, the principle of publicity does not apply without restraint. E.g. in the course of criminal proceedings, interests may arise, such as, in particular, the data which are the subject of the proceedings, the protection of the rights of the persons

[19] Decision 36/2013. (XII. 5.) AB, Justification [32], *Hungarian Official Gazette,* No. 202/13.

[20] Decision 20/2005. (V. 26.) AB, *Hungarian Official Gazette*, No. 69/05.

[21] Decision 36/2013. (XII. 5.) AB, Justification [48], *Hungarian Official Gazette,* No. 202/13, Decision 3242/2012. (IX. 28.) AB, Justification [13], *Constitutional Court's Official Journal,* No. 10/12.

involved in the proceedings, which necessitate the temporary restriction or even exclusion of the public. Given that this is a principle of constitutional guarantee, the cases of restriction or exclusion of the public are determined at the level of act, but the court must decide on the issue of restriction or exclusion in each case by a reasoned decision.

d) The requirement for decision made within reasonable time: It has also been emphasized by law enforcement, the legislature and society that court proceedings should be completed within a reasonable time. Precisely in order to ensure that the proceedings are not protracted and that there is no inactive period in the court proceedings and that the writing of the judgment does not increase the length of the procedural time limits. The Fundamental Law has established the requirement of a reasonable time in Article XXVIII (1) as a partial right to a fair trial.

e) The sub-rights not mentioned in wording in the Article XXVIII (1) are the equality of arms and commitment of judicial reasoning. The rule is de facto not fixed, but according to the interpretation of the Court, it is part of a fair trial to ensure the equality of arms in the proceedings.[22] According to the practice of the Court, the right to the reasoned judicial decision also to be regarded as a part of the right to a fair trial.[23]

In the vast majority of cases, constitutional complaints misinterpret these sub-rights and present only the same arguments that have already been made in their appeal or review motion. And these are mostly non-constitutional reasons. Let us now take a look at some of the cases in which a sub-right of the fair procedure has been rightly invoked, i.e. the legal violation has risen to a constitutional level.

3. CASE STUDIES

3.1 Justification of judicial decisions

The Constitutional Court annulled the final judgment only in exceptional cases due to weaknesses in the judicial reasoning. Unlike ordinary courts, the Court does not examine the fulfilment of the courts' obligation of reasoning from the aspect of review, and refrains from ruling on issues belonging to dogmatic of different legal fields or solely on the problem of legal interpretation[24]. The Court examines the essence of reasoning and its constitutional framework. Let' see an example in this field!

[22] Decision 8/2015. (IV. 17.) AB of the Constitutional Court, Justification[63], *Hungarian Official Gazette,* No. 53/2015.

[23] Decision 7/2013. (III. 1) AB of the Constitutional Court, Justification [34], *Hungarian Official Gazette,* No. 35/13.

[24] Order 3003/2012. (VI. 21.) AB, Justification [4], *Constitutional Court's Official Journal,* No. 2/2012.

The petitioner was subject to an ex-post audit by the state tax authority[25], the so-called wealth accumulation audit, for the 2004 and 2005 tax years. It found that the petitioner's income was disproportionate to the expenses incurred during the period under review and therefore made the tax base probable using an estimation method. As a result, the appellate tax authority uncovered a tax difference and imposed a corresponding tax fine and a late payment allowance. The petitioner challenged the legality of the procedure of the tax authority acting in the case and initiated a judicial review of the decision of the second instance tax authority. The court dismissed the petitioner's action in a final judgment in respect of all claims.

In his constitutional complaint, the petitioner argued that the court had not adjudicated on the merits of certain parts of his claim, i.e. that the reasons given by the court for rejecting his claim had not been substantiated by the court.

The constitutional requirement about obligation of judicial reasoning derived from Article XXVIII (1) of the Fundamental Law and examined by the Constitutional Court constitutes a restriction on the court's freedom of decision, because it has to provide the necessary number of reasons for its decision in accordance with procedural law. Subject to the provisions of the procedural acts, the constitutional requirement of a fair trial against judicial decisions in any case sets out the minimum requirement that the court examine the observations of the parties to the proceedings on the merits of the case with due diligence and report on its assessment. In order to assess this, the Court examines the nature of the dispute, the provisions of the applicable procedural law, the requests and observations submitted by the parties in the given case, and the relevant issues requiring an answer in the case.

In the concrete case assessing the reasoning of the court's judgment, the Constitutional Court concluded that the court had not disregarded the examination of the material issues raised in the petitioner's application in its review, and therefore rejected the constitutional complaint.

3.2. Judicial decision made within a reasonable time

On 7 February 2017, the Constitutional Court dismissed the constitutional complaint seeking to establish and annul the unconstitutionality of the orders of the Curia of Hungary, the Tatabánya Tribunal of Second Instance and the Esztergom District Court of First Instance.[26]

The petitioner was sentenced by the courts to 1 year to 10 months imprisonment for several regular embezzlement offenses, the execution of which was suspended for a probation period of 4 years. The criminal proceedings against the petitioner lasted 10 years and 2 months, which violated his right to a trial within

[25] Decision 7/2013. (III.1.) AB, *Hungarian Official Gazette,* No. 35/13.
[26] Decision 2/2017. (II.10.) AB, *Hungarian Official Gazette,* No. 20/17.

a reasonable time, as provided for in Article XXVIII (1) of the Fundamental Law. Taking into account the length of the criminal proceedings, the trial courts reduced the sentence to 1 year's imprisonment and reduced the probation period to 3 years, taking into account the lapse of time as a mitigating circumstance. The petitioner nevertheless complained that the length of the criminal proceedings violated the requirement in Article XXVIII (1) of the Fundamental Law, which is a partial right to a fair trial, that a case should be decided within a reasonable time.

In this case the Constitutional Court has laid down a constitutional requirement for the application of this statutory provision, which the courts must follow in adjudicating. According to this, the constitutional requirement arising from Article XXVIII (1) of the Fundamental Law is that if the court mitigates the criminal sanction imposed on the accused due to the length of the proceedings, the reasons for the decision shall contain the length of the proceedings and the mitigation and extent of it.

In order to ensure that the purpose of the reduction of the sentence to remedy the length of the proceedings can be clearly established for the accused from the reasoning of the judgment, the Court considered it necessary to define this constitutional requirement related to the application of Section 258 (3) (e) of the old Criminal Code.[27] As a result of the decision, the Section 564 (4), b) of the new Criminal Code already contains this requirement established by the decision of the Constitutional Court, so the legislator has already raised it to the level of law.

4. SUMMARY

Summarizing the content of this article I could tell that the constitutional complaint based on ordinary court proceedings has become very popular. However, the essence of this legal institution is often misunderstood by applicants. They would like to request the Constitutional Court to decide the merits of a criminal, civil or administrative lawsuit as another instance for review, even though it is the task of the ordinary courts. The Constitutional Court's competence is not to review the final decision from the aspect of special legal field, but rather to monitor the constitutional guarantees. The applicants consider that the requirement of fair trial in Article XXVIII of the Fundamental Law entitles them to object to everything in their unfavourable decision. They often forget that they have to mark a fair trial sub-right that they think to be infringed. However, the complained legal violation must not interpret in the ordinary sense, but in the light of the constitutional principles established by the Constitutional Court.

[27] Decision 2/2017. (II.10.) AB, Justification [82], [88], [99] – [100], *Hungarian Official Gazette,* No. 20/17.

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Аїнеш Ф. Цине
Универзитет Кароли Гашпар у Будимпешти
Правни факултет
czine@mkab.hu

Улога поштеног принципа суђења у вези са мађарским уставним жалбама

***Сажетак**: Ступањем на снагу мађарског Основног закона појавила се нова врста уставне жалбе која омогућава Уставном суду Мађарске да испитује уставне аспекте у конкретном судском поступку. У пракси, међутим, подносиоци захтева и њихови правни заступници покушавају да искористе ову правну институцију за преиспитивање тужби које су по њих са стручне тачке гледишта неповољне. Најчешћи разлог за то је члан XXVIII Основног закона. Право на правично суђење како је дефинисано у члану 1 (1) и његова делимична права.*

Кроз представљање главних обележја ове нове врсте уставне жалбе и делимичних права на право на правично суђење, овај чланак даје представу о томе која питања је овај правни лек заправо погодан за разматрање. Закључује да ако се подносиоци представке позабаве овим правним леком, он заиста може бити делотворно и важно средство за обезбеђивање уставности конкретног судског поступка.

***Кључне речи**: право на правично суђење, уставна жалба, мађарски основни закон, мађарски уставни суд, право на законитог судију, обавеза давања разлога судији, право на одлучивање у разумном року.*

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