



# Changes which Occurred in the Role of the Hungarian Constitutional Court in Protecting the Constitutional System<sup>1</sup>

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**Abstract.** The present article aims to briefly illustrate how the role of the Hungarian Constitutional Court in protecting the constitutional system changed after the Fundamental Law had entered into force compared to its role under the Constitution. Our findings are based on quantitative data, and we use statistical tools, with the help of which further conclusions are going to be drawn regarding the nature of the role of the Constitutional Court, fulfilled by it today and expected to be fulfilled by it in the following years. To this end, in the initial part of our study, we will firstly review the tasks that can be provided by the Hungarian Constitutional Court; then, in the second part, we will describe those main functions which actually determine the activity of the panel today, and we will examine the extent to which present-day tasks differ from the pre-2012 situation, also trying to review the main features of the general functioning of the panel, including the most important details of the current practice related to constitutional complaints. Finally, in the third part, we will summarize the conclusions that we can formulate on the basis of our analysis, which will make it possible for us to draw estimative statements regarding the very probable future evolution of the defence practice of the Constitutional Court concerning constitutional and fundamental rights.

**Keywords:** constitutional adjudication, competencies and practice of the Constitutional Court of Hungary, real constitutional complaint

## I. Methods for Protecting the Constitution

The bodies empowered to exercise judicial review can basically fulfil two functions in any legal system: (1) on the one hand, they can provide protection for the constitutional order, in particular for the constitution (i.e. constitutional

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<sup>1</sup> The present article was written and the underlying research was carried out with the support of the Bolyai János Scholarship of the Hungarian Academy of Sciences.

norms) – this is an objective function that manifests itself in the maintenance of the integrity of the constitutional order and in ensuring the general application of the constitution; (2) on the other hand, they can provide protection for the fundamental rights of citizens (or other natural persons such as refugees, stateless persons, and in some cases legal entities and other non-natural entities). The latter is a subjective function that provides individual legal protection.<sup>2</sup> *In Hungary, the Constitutional Court provides objective constitutional protection mainly through abstract control exerted upon legal norms, while the protection of individual rights is provided by the so-called ‘real constitutional complaint’; in the case of specific norm control competences (to varying degrees), the elements of objective constitutional protection and those of the subjective protection of fundamental rights are intermingled.*<sup>3</sup>

The main form of the objective constitutional protection provided by the Constitutional Court is therefore the control of legal norms (I), meaning the constitutional review of the laws and legal provisions. If, while exercising this power, the Constitutional Court determines that a certain law in its entirety or a legal provision contained within it runs contrary to the Constitution – or to the Fundamental Law –, it will annul the respective law or its provisions in such a manner that it is deprived of legal effect after the annulment enters into force.

Otherwise, the annulment, which results in the expiry of the law, may, as a general rule, produce effects: *ex nunc*, meaning that it is effective from the day following the publication of the Constitutional Court’s decision in the Official Journal; *ex tunc*, meaning that it is effective retroactively, from the date of the entry into force of the law (or, exceptionally, from its promulgation); *pro futuro*, that is, from a future date (in this case, the law is still to be applied in legal relations until such future date elapses). There can be other legal consequences as well that are different from annulment – thus, *the establishment of the existence of a violation* of the fundamental law caused by the legislator through failure or neglect (in which case the Constitutional Court will call the defaulter to fulfil its legislative task, also indicating a deadline); *the prohibition of the application of the law* if this does not result directly from the law; *the establishment of a constitutional requirement* by which the Constitutional Court may determine the constitutional meaning of a certain law as well as the requirements that the application of the law by the courts or other organs have to comply with. In addition, it is possible to order the review of a criminal procedure that has been closed by a final

2 Besides these, of course – differing from country to country –, a variety of other powers can also be exercised by the constitutional panel, but these are not directly connected to the tasks related to the constitutional protection role of the panel empowered to exercise constitutional rights, and so the analysis of this topic is not relevant in the case of our study.

3 The division is, of course, idealistic since, on the one hand, abstract norm control also serves the enforcement of individual fundamental rights, while, on the other hand, the ‘real’ constitutional complaint provides the general enforcement of the provisions of the Constitution, as well.

decision taken on the basis of a law that was contrary to the Fundamental Law if the accused has not yet been released from the disadvantageous consequences of the criminal record or the execution of the sentence or the enforcement of the punitive measure has not yet been completed or is still enforceable;<sup>4</sup> further, it is possible to order the review of an infringement procedure closed by a legally binding decision based on a law that has contravened the Fundamental Law if the punishment or the measure imposed is in progress or the perpetrator has been listed in the offence record related to the case under review;<sup>5</sup> in such a case, the prosecutor has to submit – *ex officio* – an application for revision.

There are basically two types of norm control: the abstract and the concrete norm control. *Abstract norm control* (I/A) means that – based on the proposal of the entitled entity – the Constitutional Court examines the consistency of a norm with the Fundamental Law without reference to a specific case or procedure, whereas in the case of *concrete norm control* (I/B) there is a specific case or procedure related to which the unconstitutionality of a legal or regulatory provision arises.

There are two types of abstract norm control: preliminary and posterior review. *Preliminary abstract norm control* (I/A.a) is carried out before the promulgation of the given act. A petition in this sense can be submitted currently by the Parliament, and if the national assembly has not exercised this right, then the President of the Republic may submit such a petition; *Posterior abstract norm control* (I/A.b)<sup>6</sup> is the review of laws for constitutionality after promulgation *since, as of the 1<sup>st</sup> of January 2012, the possibility of initiating an action without legal interest (actio popularis) has<sup>7</sup> ceased to exist*, wherefore persons who are claiming the unconstitutionality of a legal or statutory provision without justifying their own legal interest can no longer appeal to the Constitutional Court; as an option, however, it is possible to report to the Ombudsman any suspicion of a violation of the fundamental law. The ombudsman, if he/she agrees, may then initiate, in his/her own name, the annulment of the relevant law(s) or segment(s) of law(s) by the Constitutional Court.

4 Act XIX of 1998. Article 416. § (1) letter e).

5 Act II of 2012. Article 133. § (1), (2) letter d).

6 According to Article 24. par. (2) letter e) and according to Article 24 and 37 of the Act on the Constitutional Court, the CC shall review the conformity with the Fundamental Law of the public (i.e. statutory) law and of any legal regulation (including local government by-laws). According to Article 24 § par. (2) letter f) and according to Article 32 § (1) and Article 37 § of the Act on the Constitutional Court, the CC shall examine any legal regulation (including the local government by-laws) for conflict with any international treaty to which Hungary is a party. According to Article 24. § par. (5) and according to Article 24/A § par. (1) of the Act on the Constitutional Court, the CC may proceed to the posterior review the Fundamental Law or the amendment of the Fundamental Law only if the procedure is initiated by: the Government (the Cabinet), one-fourth of the Members of the National Assembly, the President of the Curia, the Prosecutor General, or the Commissioner for Fundamental Rights, having no connection with any specific case.

7 For details about these issues and their impact, see: Tóth 2012.

However, those who have their own legal interest in establishing the unconstitutionality of a certain act still have a direct right of initiative (the tool of which is the concrete norm control presented in part I/B).<sup>8</sup> The concrete norm control has three forms: The first form (I/B.a) is *the constitutional complaint linked to the 'old' norm control* as described in Article 26 § (1) of the Act on the Constitutional Court, according to which<sup>9</sup> if, due to the application of a legal regulation contrary to the Fundamental Law, during judicial proceedings someone's rights enshrined in the Fundamental Law were violated, the harmed person may request the establishment of the norm's non-constitutional character and therefore the annulment of the law, act, or any legal provision underlying a court resolution or proceeding provided that the other ordinary remedies had been exhausted or the petitioner had not been afforded a remedy. The second form (I/B.b) is *the direct constitutional complaint* as described in Article 26 § (2) of the Act on the Constitutional Court, which may be referred to 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. The third form (I/B.c) is *the judicial initiative for norm control in concrete cases* (described in Article 25 of the Act on the Constitutional Court). This tool cannot be used by the person concerned but only by the proceeding court.

According to Act CLI of 2011 on the Constitutional Court of Hungary, since the 1<sup>st</sup> of January 2012, there exists a new form of individual protection of fundamental rights. This is the *'real' constitutional complaint* (II) described by Article 27 §<sup>10</sup> of the Act on the Constitutional Court, the essence of which is that persons or organizations affected by court decisions contrary to the Fundamental

8 Of course, an exception is the procedure of judicial initiative for a specific norm control, in which case – as mirrored by the name of the legal institution – the acting judge or council of judges may initiate a judicial review; the person concerned in the proceedings can only submit a motion to the judge to suspend the proceedings and to appeal to the Constitutional Court.

9 Act on the Constitutional Court of Hungary (Act no CLI of 2011).

10 Interestingly, the introduction of the constitutional complaint against 'real' court judgments has already been proposed during the change of regime; however, due to the resistance of the Supreme Court and the indifference of the Opposition Roundtable (as they considered the introduction of an *erga omnes* procedure, which makes it possible for everyone to initiate a posterior abstract norm review rather than the model of the 'real' constitutional complaint that would serve as the means of individual – basic – legal protection), it was eventually removed from the agenda of constitutional issues being debated at the time (see: Sólyom 2003, 19). After this, the idea of introducing the 'real' constitutional complaint has surfaced from time to time and was raised by the Constitutional Court and its President, who formulated at the beginning of the constitutional process the need to provide for an institution that would protect individual legal rights – concurrently with the abolition of the possibility of posterior abstract norm control. Thus, the constitutional body would be the one that resolves the 'real' constitutional complaint (for details, see: Paczolai 2010). The introduction of this legal institution was also promoted by several other constitutional lawyers (see, for instance: Halmai 1994, 45–50; Kovács 2011, 93–99; Bihari 1999, 200–214); others were sceptical regarding its introduction into the Hungarian legal system (see, for example: Csehi 2011, 100–109).

Law may submit a constitutional complaint to the Constitutional Court not only if they consider that the act based on which the decision was made was contrary to the Fundamental Law but also if they consider that the resolution itself or the judicial proceedings as a result of which the resolution had been given was unconstitutional.<sup>11</sup>

## **II. The Operation of the Constitutional Court in the Light of the Figures**

As of January 1, 2012, there were three very important changes in the role of the Constitutional Court in protecting the constitutional system: on the one hand, the possibility of submission by anybody (without any legal interest) of the posterior norm control was abolished, and, on the other hand, the former constitutional complaint [as regulated by Article 26 § (1) of the Act on the Constitutional Court of Hungary] was completed by the direct constitutional complaint [settled by Article 26 § (2) of the Act on the Constitutional Court of Hungary] linked to the norm control and by the ‘real’ constitutional complaint submitted against a specific judicial decision [settled by Article 27 § of the Act on the Constitutional Court of Hungary].<sup>12</sup> Of course, besides the former-type, the direct, and the real complaints, it is still possible for the party to request the Court to initiate a specific (i.e. individual) norm control procedure connected to any uncompleted case, but the actual initiative continues to depend on the proceeding court’s discretion, and so it will be launched exclusively if the court before which the procedure is ongoing itself considers that the law or statutory provision applicable to the individual case is unconstitutional.<sup>13</sup>

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11 To differentiate between these (and other) functions of the constitutional courts and their competences, see, for example: Kukorelli 2007. 452–467, Legény 2006. 211–280, Téglási 2014. 135–148, Balogh 2012. 343–374, Cservák 2015. 59–66.

12 With this shift in emphasis, the legislator declared that the individual legal protection function of fundamental rights (e.g. judicial review of a specific case) is much more important than before, while the norm control function of constitutional jurisdiction (e.g. control over political legislation) is less emphatic or less desirable. With this, the Hungarian Constitutional Court was closer to the case-law than before. See, for example: Rixer 2012, 85. However, it is not true that the Constitutional Court would become a ‘de facto court of justice’ (such a statement was made, for example, by: Bobek 2007. 18).

13 There is another significant difference between the ‘old’ complaint and the individual judicial norm control: while in the case of the former the party concerned may submit a complaint for the establishment of the unconstitutional character of a law based on which the final court decision was made in his/her case, only if the law violates any of his fundamental rights provided by the Fundamental Law, in the case of the latter, the motion for norm control submitted by the judge is not limited to the violation of a fundamental right, the judge may turn to the Constitutional Court for alleged violations of any other provisions of the Fundamental Law. This also means

It can be stated that from 2012 onwards, the Constitutional Court's characteristic power (instead of posterior abstract norm control) has become the constitutional complaint.

The number of cases filed with the Constitutional Court between 1990 and 2011, i.e. under the Constitution, was an average of 1,400 (more exactly 1,399) per year. The average number of cases dealt with by the plenary panel of the CC or by a three-member panel was 298 per year (the total number of completed/closed cases was 1,329). Compared to this, after 2012, the number of cases judged (including plenary refusals) was: 640 in 2012, 256 in 2013, 369 in 2014, 322 in 2015, 332 in 2016, and 449 in 2017 – an average of 393 per year.

By comparing in detail the pre- and post-2012 data, the nature of change becomes evident. In the last year of the Constitution, which represents the average annual number of cases, and therefore may be considered to be a good point of reference, that is in 2009,<sup>14</sup> 1,452 new cases were submitted. Of these, the number of cases resolved 'otherwise' was 695, and the number of cases assigned to a judge-rapporteur was 757. Of the 757 cases, there were 368 cases of posterior abstract norm control (9 of which submitted by one of the ombudsmen and 359 were *actio popularis*), 98 cases of judiciary specific norm control, and 51 cases of constitutional complaints (of course, with norm control since this was the only type then). The proportion of posterior abstract norm control initiatives in all cases was 49.8% (of which, the ratio of cases initiated per *actio popularis* to all cases was 48.6%). The proportion of the judiciary specific norm control was 12.9%, and the rate of constitutional complaint (with norm control) was 6.7%.

Of the 7,233 cases solved between 1 January 2012 and 29 January 2018 (which do not include the cases disposed of by the Secretary-General or by the Judge's Chamber)<sup>15</sup>, 63 were cases of posterior abstract norm control, which accounted for

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that if the person(s) or organization(s) involved in the case consider that the (applicable) law has not violated a constitutional right but rather a constitutional value or principle, he/she (they) cannot directly rely on this infringement, they can only request the judge to submit a motion for individual norm control. In the latter case, however, they cannot wait for the final judicial decision because the motion for individual norm control submitted by the judge can only be conducted in a pending case. Furthermore, it is also an important difference between the two legal institutions that, according to Article 29 of Act on the Constitutional Court of Hungary, 'the Constitutional Court shall admit constitutional complaints if a conflict with the Fundamental Law significantly affects the judicial decision or the case raises constitutional law issues of fundamental importance', while in the case of the judge's norm control initiative such a restriction is not provided for; the judge may, therefore, suspend the proceedings in a case pending a decision by the Constitutional Court and may request a decision from the Constitutional Court, which in turn will neither affect the judicial decision substantively nor 'should be considered a decision having the character of constitutional law issue of fundamental importance'.

14 In 2010 and 2011, there were a lot of cases that involved a specific problem, namely the imposition of parking surcharges, and therefore relevant general conclusions cannot be deduced from the data of these years.

15 It was 2,726.

0.9% of all cases solved. In the specific norm control procedure,<sup>16</sup> 446 decisions were made, corresponding to a 6.2% ratio. In the constitutional complaint procedure, the panel made 6,666 decisions (92.2%).

Of the 6,666 resolved complaints cases between 1 January 2012 and 29 January 2018, 3,895 were constitutional complaints connected to norm control [as described by Article 26 (1) and (2) of the Act on the Constitutional Court of Hungary], which constitutes 58.4% of all complaints; the number of the ‘old’ type of complaints [as described by Article 26 (1) of the Act on the Constitutional Court of Hungary] was 968 (14.5%), and the number of ‘direct’ complaints referred to in Article 26 (2) of the same Act was 2,927 (43.9%). The number of cases completed according to the ‘real’ constitutional complaint (referred to in Article 27 of the Act on the Constitutional Court of Hungary) was 2,770, accounting for 41.6% of the total number of complaints solved.

As far as the way in which the complaints are completed is concerned, 306 decisions were made (this is 4.6% of the proceedings concerning the merits of the case), and only 81 of these were admitted,<sup>17</sup> i.e. the success rate of the complaints was a meagre 1% (more exactly 1.22%). In the cases of ‘real’ complaints (as set by Article 27 of the Act), the situation is more promising for the petitioners, but even thus the 55 annulments made in 2,770 cases represent only a 1.99% success rate, which is still more than three times that of the 0.59%<sup>18</sup> ‘success rate’ of the norm control complaints.<sup>19</sup>

This low ratio of proceedings on the merits of the claims and the even lower ‘success rate’ are not just Hungarian characteristics. Between 2005–2009, the German *Bundesverfassungsgericht* – according to its own statistics – out of 4,920, 5,985, 6,175, 6,090, and 6,051 complaints (regardless of the type and the solutions passed) turned down 4,667, 5,731, 5,885, 5,737, and 5 783 initiatives, respectively, and it completed proceedings on merits only in the case of 141, 145, 152, 115, and 128 complaints respectively. Out of the latter, the Court rejected a relatively

16 These are mainly ombudsman submissions: 56 out of 62 have been submitted by the Commissioner for Fundamental Rights, 4 by a total of one-fourth of Members of Parliament, one by the President of the Curia, and one by the Government (the Cabinet).

17 These cases ended either with the establishing of the unconstitutional character and annulment of the substantive law (6 cases) or with the annulment of the resolution given by the National Election Office (2 cases) or with the annulment of a court decision and/or decision of an authority (55 cases) or with total or partial annulment of a legal or statutory provision (17 cases).

18 During the judgment of the 3,895 cases related to constitutional complaint with norm control, only 23 annulling decisions were taken.

19 However, if we take into account the decisions that had been taken after the merging of the complaints received and that had admitted the norm control complaint (i.e. we will not take into consideration the total number of decisions taken but the number of initiatives based on which decisions were taken by the Constitutional Court), we must add these 60 merged cases to the above number – so, the Constitutional Court had given judgment upholding the submitted initiatives in the case of 83 petitions; this means a success rate of 2.13%, which is already corresponding to the success rate of the ‘real’ complaints (in fact, it even slightly exceeds that).

small number of complaints (8, 9, 4, 4, and 17 respectively) and upheld the submitted initiatives in 133, 136, 148, 111, and 111 cases respectively. The other cases – one to two hundred cases per year – ended mostly with the withdrawal by the petitioner and in smaller part in other ways. This means that between 2005 and 2009 95.1% (rounded) of the 29,221 complaints completed (exactly 27,803 initiatives) were rejected by the Panel; 2.5% (737) of the complaints were withdrawn by the petitioners, or the complaint procedure was terminated by other means (termination, relocation, etc.); 0.1% (42) were rejected by the Panel (always by one of the panels having 8 members), while 2.2% (639) of the petitions were admitted (most of them by a three-member chamber, some by one of the senates). So, the German practice sorts the petitions at the time they are submitted, and those admitted will be most probably upheld by the CC; the rejection subsequent to the analysis of the merits of the claims in the case of the German CC is exceptional.<sup>20</sup> In Spain, the practice of accepting the Amparos<sup>21</sup> – working as a special legal institution – is similar to that of the German CC: the Tribunal Constitucional formally rejected 47,705 complaints (90.5% of the 52,735 submitted) between 2008 and 2012, and only 1.3% (699) were judged on their merits.<sup>22</sup>

It is interesting to note that the ‘success rate’ has *risen* compared to 2015 [according to data, on 6 October 2015, out of the 3,399 complaints resolved, in 172 cases a decision was passed, and only 32 of them was such decision in the sense of upholding the claim, i.e. the success rate of the complaints was less than 1% (more exactly, it was 0.94%), but the number of complaints increased if we take into consideration the total number of cases (at the end of 2015, it was only 89.6%), and the proportion of ‘real’ complaints within the complaints increased as well, while the ratio of judiciary initiatives and abstract norm control has decreased (as compared to 2015)].<sup>23</sup>

Finally, to present the real impact of the constitutional complaint procedure, it is worth mentioning the legal bases according to which the annulment of decisions given in those ‘real’ complaint procedures that upheld initiatives was made, i.e. the type of complaints admitted by the Constitutional Court should also be taken in consideration to determine more exactly which are the rights conferred by the Fundamental Law<sup>24</sup> that are most commonly enforced in the

20 Source: Bundesverfassungsgericht.

21 See, for example: Pokol 2003. 26, Cservák 2013. 224.

22 See: Tribunal Constitucional de España.

23 For details regarding the situation, see: Tóth 2016. 121–138.

24 In ‘borderline cases’, it depends on the interpretation of the Constitutional Court whether the specific case has or has not a fundamental legal nature (whether it deals with subjective judicial protection or not). Thus, for example, the Panel accepted (in one case) the reference to the principle of judicial independence, in a case when the judge’s rights were infringed, but only because the complainant was a judge; otherwise, judicial independence (which is a constitutional principle and not a right guaranteed by the Fundamental Law) cannot be invoked in the complaint procedure. Rule of law or constitutionality cannot be invoked either, except



practice of the CC (if you like: which rights enshrined by the Fundamental Law are most often violated by the courts).

By 29 January 2018, the Constitutional Court annulled judicial decisions in 55 ‘real’ complaint cases. Among these decisions, there is a large proportion of resolutions that established the violation of the Fundamental Law not due to the infringement of a substantive law but purely because of the violation of procedural fundamental rights. In a total of fourteen cases, the Constitutional Court annulled one (or more) judicial decision(s) for the reason of violating the right to a fair trial;<sup>25</sup> the vast majority of them (more exactly ten) found only violations of the right to a fair trial,<sup>26</sup> three decisions found the violation of the right to a fair administrative procedure,<sup>27</sup> and a further one found the violation of both.<sup>28</sup> One of the above-mentioned 13 cases, besides the violation of the right to a fair trial, referred also to the violation of the right to a legal remedy, and<sup>29</sup> nine further constitutional judicial decisions established the unconstitutional character of a court resolution explicitly and exclusively based on the violation of the right to a legal remedy.<sup>30</sup> This constitutes a total of twenty-three constitutional judicial decisions in which the Panel has found the violation of procedural fundamental rights. Since these account for more than 40% of all decisions, it might be stated that court decisions have been annulled mostly based on procedural violations of constitutional rights.

In addition, freedom of expression has also been a common cause for annulment (either merely in itself<sup>31</sup> – on six occasions – or combined with the violation

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for – based on the long-standing constitutional practice of the Constitutional Court – the cases when the requirement of sufficient time for preparation and the prohibition of retroactive legislation were infringed (amongst 51 cases, there was only 1 which established the violation of the latter). Finally, according to the Constitutional Court, the right to a referendum can be invoked by parties as well, not only by the natural entities entitled to vote (this was the basis for two of the body’s decisions).

25 CC Decision 21/2014. (VII. 15.); CC Decision no 3081/2015. (V. 8.); CC Decision no 19/2015. (VI. 15.); CC Decision no 3124/2015. (VII. 9.); CC Decision no 3007/2016. (I. 25.); CC Decision no 21/2016. (XI. 30.); CC Decision no 5/2017. (III. 10.); CC Decision no 10/2017. (V. 5.); CC Decision no 20/2017. (VII. 18.); CC Decision no 3241/2017. (X. 10.); CC Decision no 3305/2017. (XI. 24.); CC Decision no 3353/2017. (XII. 22.); CC Decision no 3354/2017. (XII. 22.).

26 CC Decision 21/2014. (VII. 15.); CC Decision no 3081/2015. (V. 8.); CC Decision no 3124/2015. (VII. 9.); CC Decision no 3007/2016. (I. 25.); CC Decision no 21/2016. (XI. 30.); CC Decision no 20/2017. (VII. 18.); CC Decision no 3241/2017. (X. 10.); CC Decision no 3305/2017. (XI. 24.); CC Decision no 3354/2017. (XII. 22.).

27 CC Decision 5/2017. (III. 10.); CC Decision no 10/2017. (V. 5.); CC Decision no 3353/2017. (XII. 22.).

28 CC Decision 19/2015. (VI. 15.).

29 CC Decision 3124/2015. (VII. 9.).

30 CC Decision 3064/2014. (III. 26.); CC Decision no 12/2015. (V. 14.); CC Decision no 14/2015. (V. 26.); CC Decision no 24/2015. (VII. 7.); CC Decision no 9/2017. (IV. 18.); CC Decision no 11/2017. (V. 26.); CC Decision no 18/2017. (VII. 18.); CC Decision no 22/2017. (IX. 11.); CC Decision no 3285/2017. (XI. 14.).

31 CC Decision 13/2014. (IV. 18.); CC Decision no 31/2014. (X. 9.); CC Decision no 5/2015. (II. 25.); CC Decision no 9/2015. (IV. 23.); CC Decision no 19/2016. (X. 28.); CC Decision no 20/2016.

of the freedom of the press –<sup>32</sup> on other six occasions),<sup>33</sup> altogether in twelve cases, the petitioner's request being accepted by the constitutional body based on these reasons. In addition, in four cases, the right to know public interest data,<sup>34</sup> three times the prohibition of discrimination (i.e. the violation of the principle of equality in front of the law and that of non-discrimination)<sup>35</sup>, and three times the violation of the right to peaceful assembly<sup>36</sup> and of the right to property<sup>37</sup> (in one case,<sup>38</sup> together with the right to inheritance) gave rise to the annulment of a court decision. The violation of the right to participate in the referendum<sup>39</sup> occurred twice as a basis for annulling a CC decision, while the violation of the right to the freedom of religion<sup>40</sup>, the prohibition of retroactive legislation<sup>41</sup> (an

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(X. 28.). With regard to the last two decisions, it should be mentioned that both in the case of Decision 19/2016 and 20/2016 (which essentially contained the same constitutional dilemma in the case of different petitioners) the CC referred as a legal basis for its decisions to Article IX (1) of the Fundamental Law (i.e. in general to the freedom of expression) and not to the right included in Article IX (2) of the Fundamental Law, that is the freedom of the press – though it would have been more appropriate for the situation in question. Yet, for the interpretation of this right [i.e. par. (1) of Article IX], the motivation of both decisions also includes paragraph (3) on the conditions for the publishing of political advertising [par. (3) of Article IX of the Fundamental Law: 'In the interest of the appropriate provision of information as necessary during the electoral campaign period for the formation of democratic public opinion, political advertisements may only be published in media services free of charge, under conditions guaranteeing equal opportunities, laid down in a cardinal Act.']. According to the Constitutional Court, the legal basis for the two annulling decisions is precisely 'the broadcaster's freedom to edit the media content', as settled by Article IX par. (1). See: CC Decision 19/2016. (X. 28.); CC Decision, Motivation [52], 20/2016. (X. 28.) CC Decision, Motivation [57].

- 32 CC Decision 28/2014. (IX. 29.); CC Decision no 3/2015. (II. 2.); CC Decision no 16/2016. (X. 20.); CC Decision no 17/2016. (X. 20.); CC Decision no 3/2017. (II. 25.); CC Decision no 34/2017. (XII. 11.).
- 33 In five of the six cases, the Constitutional Court has explicitly invoked both the freedom of expression in its general terms [Article IX (1) of the Fundamental Law] and – as part of it – the freedom of the press [Article IX (2)]. But in one case [CC Decision 34/2017. (XII. 11.)] the CC decided that the explicit reason for the annulment was directly and explicitly the violation of the freedom of the press, without the prejudice of the general right to freedom of expression, in two further cases this being the reason for the annulment. Since freedom of the press is an immanent part of the freedom of expression, in this case, in fact, not only the freedom of the press but also the freedom of expression itself was violated; the fact that the Constitutional Court omits this element is due to the reason that the subject of the procedure was merely the interpretation of the 'constitutional mission of the press', namely the constitutional status of the press.
- 34 CC Decision 21/2013. (VII. 19.); CC Decision no 5/2014. (II. 14.); CC Decision no 25/2014. (VII. 22.); CC Decision no 6/2016. (III. 11.).
- 35 CC Decision 3086/2013. (III. 27.); CC Decision no 3087/2013. (III. 27.); CC Decision no 9/2016. (IV. 6.).
- 36 CC Decision 3/2013. (II. 14.); CC Decision no 30/2015. (X. 15.); CC Decision no 14/2016. (VII. 18.).
- 37 CC Decision 15/2014. (V. 14.); CC Decision no 5/2016. (III. 1.); CC Decision no 3012/2017. (II. 8.).
- 38 CC Decision 5/2016. (III. 1.).
- 39 CC Decision 31/2013. (X. 28.); CC Decision no 1/2014. (I. 21.).
- 40 CC Decision 35/2014. (XII. 18.).
- 41 CC Decision 13/2015. (V. 14.).

important element of the rule of law), the right to good repute,<sup>42</sup> and the right – as a right guaranteed by the Fundamental Law – to the judicial independence of the judges<sup>43</sup> (i.e. Article 26 of the Act on CC) each constituted once the reason for the annulment of a Constitutional Court decision. In addition, in one of its decisions (i.e. the constitutional review of the Curia decision authorizing the referendum submitted in the so-called case of ‘Man 40’),<sup>44</sup> Article XV (5) of the Fundamental Law (‘By means of separate measures, Hungary shall protect families, children, women, the elderly and persons living with disabilities.’) and the second sentence of Article XIX (4) (‘The conditions of entitlement to state pension may be laid down in an Act with regard to the requirement for stronger protection for women.’) gave the reason for declaring a judicial decision to be unconstitutional.

It is interesting to note that 20% (11 decisions) of the 55 annulment decisions were passed by the council panel and ‘only’ 44 were passed by the plenary panel of the fifteen constitutional judges. According to the procedural rules, the decision to annul a resolution of the Curia can only be decided by the plenary of the judges (a decision on the annulment of a resolution given by the Curia has been made in 21 cases out of 55), but in the cases in dispute – in practice – we always deal with a decision given by the Constitutional Court. However, whether the plenary court or a five-member panel has taken a decision in a particular case is in fact irrelevant and does not have any practical consequences. The panels of the Constitutional Court act on behalf of the Constitutional Court, and any of the panels that makes decisions does this on behalf of the Constitutional Court, i.e. the decision is always being taken by the Constitutional Court. The decisions passed by the Council have the same effect as the ones passed by the plenary sessions. This is so because if there are five judges who do not agree with the direction of a draft regarding a case on the agenda of the Council they may request that the case be submitted to the plenary session (and more than that, the President of the Constitutional Court may, at his own discretion, include the case on the agenda of the plenary session as well); a decision taken by the Council therefore also means that there were no five constitutional judges out of the fifteen who would have opposed the draft on the agenda of the Council.

### III. Conclusions

After 2012, the constitutional complaint became the typical scope of authority of the Constitutional Court: over 90% of the cases in the last six years were complaints. Cases initiated in the post-2012 period based on Art. 26. § (1) and

42 CC Decision 1/2015. (I. 16.).

43 CC Decision 4/2014 (I. 30.).

44 CC Decision 28/2015. (IX. 24.).

(2) of the Act on CC constituted 53.9% of all cases and 58.4% of all complaints; however, among the successful complaints, there are many more ‘real’ complaints submitted against judgments than against the law on which the judgment was based (see: ‘real complaint’ as settled by Article 27 of the Act on CC). On the other hand, the rate of concrete judicial norm control has decreased compared to the period when the previous constitution was in force: roughly, it was halved (from 12.9% to 6.2%).<sup>45</sup> Lastly, although the number of judgments on merits and especially that of the successful complaints may appear to be low at the first glance, we must admit that, on the one hand, this is similar to the practice of foreign jurisdictions with longer-standing tradition of such an institution, and, on the other hand, the period of time in which the successful constitutional complaints were submitted makes it evident that, compared to the cautious abstinence of the first two years, the Constitutional Court has got ‘accustomed’ – since the end of 2013 (especially in the case of the ‘real’ complaint, which was a novelty for it, too) – to the changed rules of jurisdiction (and had established and later consolidated its<sup>46</sup> reception and decision-making practice) and has since continued to use the tool of annulment. Thus, if this tendency is going to continue, we can count on a higher success rate of the complaints in the coming years.

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45 The number of judicial initiatives was 446 between 1 January 2012 and 29 January 2018.

46 For details on the analysis of the admission practice of the Constitutional Court in ‘real’ complaint cases, see: Tóth 2014. 224–238.

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