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CONSTITUTIONAL COMPLAINTS AGAINST THE ADMINISTRATIVE AND LABOUR COURTS' DECISIONS FROM 2012¹

I. Introduction

In this paper, my aim is to examine the constitutional complaints submitted against the Administrative and Labour Courts' decisions. To understand the legal framework of these decisions, first we have to look at the changes in the Hungarian constitutional system after the Fundamental Law of Hungary entered into force in 2012. The main changes in the functions of the Constitutional Court have to be examined as well as the new three-prong system of the constitutional complaints. After having laid out this framework, can one really study the types of constitutional complaints submitted against the Administrative and Labour Courts' decisions, especially the ones that are constitutionally significant.

The Fundamental Law of Hungary entered into force the 1st January 2012. Significant changes were introduced to the legal system in relation with several institutions.² New institutions and new procedures emerged as old ones disappeared. For instance, the system of the ombudsmen was transformed to the Commissioner for Fundamental Rights³ as

¹ This research was supported by the project nr. EFOP-3.6.2- 16-2017- 00007, titled Aspects on the development of intelligent, sustainable and inclusive society: social, technological, innovation networks in employment and digital economy. The project has been supported by the European Union, co-financed by the European Social Fund and the budget of Hungary.

² Gárdos-Orosz Fruzsina - Szente Zoltán (szerk.): *Alkotmányozás és alkotmányjogi változások Európában és Magyarországon*, Nemzeti Köszolgálati és Tankönyv Kiadó Zrt., Budapest, 2014. 245-282. p. And a series of publications decided to examine these changes, in particular the Constitutional Changes series by the Hungarian Academy of Sciences Institute for Legal Studies, to mention some of these papers, by the way of illustration: BÓCZ ENDRE: *Sarkalatos átalakulások 2010-2014 – az ügyészség* 1-11. p.; MTA Law Working Papers 2014/07 Hungarian Academy of Sciences Budapest ISSN 2064-4515 <http://jog.tk.mta.hu/mtalwp> (15.05.2017.); DARÁK PÉTER: *Sarkalatos átalakulások A bíróságokra vonatkozó szabályozás átalakulása* 2010-2014 1-3. p MTA Law Working Papers 2014/39, Hungarian Academy of Sciences Budapest, <http://jog.tk.mta.hu/mtalwp> (15.05.2017.); GANCZER MÓNIKA: *Sarkalatos átalakulások: az állampolgársági jog átalakulása* 1-16. p. MTA Law Working Papers 2014/63 Hungarian Academy of Sciences Budapest ISSN 2064-4515 <http://jog.tk.mta.hu/mtalwp> (15.05.2017.); PAP ANDRÁS LÁSZLÓ: *Sarkalatos átalakulások – a nemzetiségekre vonatkozó szabályozás* 1-16. p., MTA Law Working Papers 2014/52 Hungarian Academy of Sciences Budapest <http://jog.tk.mta.hu/mtalwp> (15.05.2017.);

³ Such as: TAKÁCS ALBERT: *Az ombudsman eszméje és megvalósulásának formái*, Pro Publico Bono 2015/2, 39-61. p. 47-54. p.

well as the legal position of the local governments changed.⁴ The Constitutional Court of Hungary (hereinafter: the CC) was one of the affected institutions.

II. The Main Changes in the Functions of the Constitutional Court after 2012

The Fundamental Law of Hungary defined the functions of the CC, and the Act CLI of 2011 on the Constitutional Court laid down the details.⁵ The changes affected the judges, the institution itself and the jurisdiction of the CC.⁶ Several researchers decided to form an opinion related to the new system.⁷

The main changes in the functions of the CC could be listed as following.

II.1. The review power of the CC on the amendment of the constitution

The question of unconstitutional constitutional amendments⁸ could have been examined before the fourth amendment of the Fundamental Law of Hungary, although it was clear until the 45/2012 (XII. 29.) The examination of the constitutional amendments is not

Some opinions have firm criticism against the new system, especially: MAJTÉNYI LÁSZLÓ: *A független ombudsman intézményeket helyre kell állítani, az alapvető jogok biztosától pedig továbbra is elvárható a jogállami jogvédelem* 9-7. p. MTA Law Working Papers 2014/47., Hungarian Academy of Sciences <http://jog.tk.mta.hu/mtalwp> (2017. 05. 15.); JÓRI ANDRÁS: *Az adatvédelmi és adatnyilvánossági szabályozás átalakítása* 7-9 p., MTA Law Working Papers 2014/34 Hungarian Academy of Sciences Budapest <http://jog.tk.mta.hu/mtalwp> (15.05.2017.)

⁴ PÁLNÉ KOVÁCS ILONA: *Az önkormányzati rendszer és a területi közigazgatás átalakulása 2010-2013.*, 1-4. p., MTA Law Working Papers 2014/02 Hungarian Academy of Sciences Budapest ISSN 2064-4515 <http://jog.tk.mta.hu/mtalwp> (15.05.2017.); BALÁZS ISTVÁN: *Az önkormányzatokra vonatkozó szabályozás átalakulása*, MTA Law Working Papers 2014/03 1-4. p. http://jog.tk.mta.hu/uploads/files/mtalwp/2014_03_Balazs_Istvan.pdf (15.05.2017.); SIKET JUDIT: *A helyi, területi önkormányzatok közigazgatási autonómiája Magyarországon. Történeti és nemzetközi kitekintéssel, figyelemmel a Helyi Önkormányzatok Európai Chartájára*. PhD értekezés, 2017. 95. p.; HORVÁTH M. TAMÁS: *Helyi sarok Sarkalatos átalakulások – A kétharmados törvények változásai 2010–2014: Az önkormányzatokra vonatkozó szabályozás átalakulása*, 1-10. p., MTA Law Working Papers 2014/04 Hungarian Academy of Sciences Budapest, <http://jog.tk.mta.hu/mtalwp> (2017. 05. 15.); SZENTE ZOLTÁN: *Sarkalatos átalakulások – Az önkormányzati rendszer 1-4 p.*, MTA Law Working Papers 2014/29 Hungarian Academy of Sciences Budapest ISSN 2064-4515 <http://jog.tk.mta.hu/mtalwp> (15.05.2017.)

⁵ The whole Act CLI of 2011 on the Constitutional Court is available on the following website in English: <http://hunconcourt.hu/rules/act-on-the-cc> (2017. 06. 05.)

⁶ SZAKÁLY ZSUZSA: *Az alkotmányjogi panasz elmúlt öt éve*. in: Jogvédelmi kaleidoszkóp, A jogvédelem elmúlt öt éve (2009-2014) Magyarországon, szerk: Pongó Tamás - Szakály Zsuzsa, *Lectiones Juridicae* 12, Pólay Elemér Alapítvány, 2015, 59-60. p.

⁷ Especially: TILK PÉTER: *Az Alkotmánybíróság az Alaptörvényben*, in: *Közjogi Szemle*, 2011/2, 5-14. p.; SPULLER GÁBOR: *A Magyar Alkotmánybíróság – a törvényhozás második kamarájából az európai alkotmányos rendszer (europäischer Verfassungsbund) bírósága?* *Alkotmánybírósági Szemle*, 2014/1. 99-104. p.; PACZOLAY PÉTER: *Megváltozott hangsúlyok az Alkotmánybíróság hatásköreiben*, *Alkotmánybírósági Szemle* 2012/1, 67-69. p.; CHRONOWSKI NÓRA: *Az alkotmánybíráskodás sarkalatos átalakítása*, MTA Law Working Papers 2014/08, 7-12. p. http://jog.tk.mta.hu/uploads/files/mtalwp/2014_08_Chronowski.pdf (15.05.2017.)

⁸ ROZNAI, YANIV: *Unconstitutional Constitutional Amendments. The Limits of Amendment Powers*, Oxford University Press, 2017 5-10; ROZNAI, YANIV: *Unconstitutional Constitutional Amendments—The Migration and Success of a Constitutional Idea* 61(3) *American Journal of Comparative Law (AJCL)*, 2016, 713-719. p.; BARAK, AHARON: *Unconstitutional Constitutional Amendments*, *Israel Law Review*, Vol. 44. 2011. 332-338. p.

part of the jurisdiction of the CC.⁹ Since 2013 that decision established the possibility for the examination, although the Fourth Amendment of the Fundamental Law precluded this opportunity. However, the question is still preferred in academic discourse.¹⁰ While previously the actual possibilities for an unconstitutional constitutional amendment were minimal and without example, almost every author agreed on the absurdity of the annulment of a constitutional amendment. After the events which raised the question¹¹ the picture became more ambiguous. As *Tímea Drinóczi* examined, the events made the scholars think differently in some ways.¹² The scope of the examination that can be conducted by the CC is limited, and the changes in judicial appointments made after 2012 clarified the opinions of the new judges meaning that they will not turn to an activist action like what one can find in some decisions of the Constitutional Court of Turkey¹³ or the Supreme Court of India.¹⁴

II.2. The judges

Before the Fundamental Law, the CC had 11 members who were elected for nine years.¹⁵ At the moment, the CC has fifteen judges, each elected for twelve years.¹⁶ The judges elected the president among themselves until 2012, since then the Members of the National Assembly elect the President of the CC.¹⁷ *The possible forms of operation have changed as well. Before 2012, only plenary sessions were the form of activity for the CC. After*

The well-known examples of court case-law can be found in the practice of the Indian Supreme Court and the Turkish Constitutional Court.

⁹ Constitutional Court Decision 1260/B/1997 ABH 1998, 816. p.

¹⁰ CHRONOWSKI NÓRA - DRINÓCZI TÍMEA - ZELLER JUDIT: *Túl az Alkotmányon... Közjogi Szemle*, 2010/4., 7-9. p.; DRINÓCZI TÍMEA: *Gondolatok az Alkotmánybíróság 61/2011. (VII. 12.) AB határozatával kapcsolatban*. JURA 2012/1, 38-39. p.; ZSUGYÓ VIRÁG: *Az Alkotmánybíróság határozata az alkotmánymódosítások alkotmányossági felülvizsgálatáról Fogalmilag kizárt-e az alkotmányellenes alkotmánymódosítás? Jogesetek Magyarázata 2011 hallgatói különszám*, 59-62. p.; KOC SIS MIKLÓS: *Az Alkotmánybíróság határozata az alkotmányellenes alkotmánymódosítások ügyében*. Jogesetek Magyarázata, 2011/3, 9-16. p; SZENTE ZOLTÁN: *Az „alkotmányellenes alkotmánymódosítás” és az alkotmánymódosítások bírósági felülvizsgálatának dogmatikai problémái a magyar alkotmányjogban*, *Közjogi Szemle*, 2014/3. 3-11. p., CSINK LÓRÁNT - FRÖHLICH JOHANNA: *Egy alkotmány margójára - Alkotmányelméleti és értelmezési kérdések az Alaptörvényről*, *Gondolat Kiadó Kft.*, 201259-62. p; DRINÓCZI TÍMEA: *Többszintű alkotmányosság működésben – alkotmányos párbeszéd Magyarországon*, MTA Doktori Dolgozat, 2016. 234-288. p.; BRAGYÓVA ANDRÁS – GÁRDOS-OROSZ FRUZZSINA: *Vannak-e megváltoztathatatlan normák az Alaptörvényben?*, *Állam- és Jogtudomány*, 2016/3, 56-62. p.

¹¹ The regular amendments of the constitution which were created to nullify the decisions of the Court related to questions of importance.

¹² DRINÓCZI 2016, 236-237.

¹³ ROZNAI, YANIV – YOLCU, SERKAN: *An Unconstitutional Constitutional Amendment - The Turkish Perspective: A Comment on the Turkish Constitutional Court's Headscarf Decision*, 10(1) *International Journal of Constitutional Law (I-Con)*, 2012, 182-189. p.

¹⁴ ROZNAI, 2017 42-46. p.

¹⁵ Act XX of 1949 on the Constitution of Hungary Article 32. (4).

¹⁶ Fundamental Law of Hungary 25 April 2011 Article 24. (8).

¹⁷ Fundamental Law of Hungary 25 April 2011 Article 24. (8).

2012, beside the plenary sessions, panels of five and a single judge can also decide on a limited number of issues.¹⁸

II.3. The new functions of the CC

As there were many modifications in this respect, the following is just a list of some of the new powers given to the CC: Examination of the Decision of the Parliament Concerning the Acknowledgment of Organisation Performing Religious Activity, Opinion on the Dissolution of a Local Representative Body Operating Contrary to the Fundamental Law, Examination of Local Government Decrees, Normative Decisions and Orders, and Decisions on the Uniform Application of the Law. The CC's functions have changed in several ways; entirely new functions can be found as well as old ones with minor changes related to the experience of the two decades of the functioning of the CC.

II.4. Restrictions

“As long as the state debt exceeds half of the Gross Domestic Product, the Constitutional Court may [...] review the Acts on the central budget, [...] for conformity with the Fundamental Law exclusively in connection with the rights to life and human dignity, to the protection of personal data, to freedom of thought, conscience and religion, or the rights related to Hungarian citizenship, and it may annul these Acts only for the violation of these rights.”¹⁹ The size of state debts can affect the jurisdiction of the CC in exception with some different sort of rights. When these declarations became part of the constitution, the debate surrounding unconstitutional constitutional amendments peaked again in relation with the possible restrictions imposed on the CC. While the results could have been different, the CC decided to go along with the original interpretation and not examining the amendments of the constitution.²⁰ However, the possibility is still available to the CC to broaden the scope of examination as the CC itself did in the beginning of the 90's.²¹

III. The Constitutional Complaint

The constitutional complaint was one of the procedures of the CC from 1990, however, it was rarely used until 2012. In the system of the Constitution (before the Fundamental Law), the most important form of the procedure was the *actio popularis*, i.e. general ex post control of constitutionality of legal norms.²² Constitutional complaints between 1990-

¹⁸ Act CLI of 2011 on the Constitutional Court Article 47. (1).

¹⁹ Fundamental Law of Hungary 25 April 2011 Article 37.

²⁰ DRINÓCZI 2016, 235-236. p.

²¹ SÓLYOM LÁSZLÓ: *Az alkotmánybíráskodás kezdetei Magyarországon*, Osiris Kiadó, Budapest, 2001. 445-462. p.

²² GÁRDOS-OROSZ FRUZSINA: *The Hungarian Constitutional Court in Transition – from Actio Popularis to Constitutional Complaint*, Acta Juridica Hungarica 53, No 4, 2012, 303-307. p.;

2011 were almost insignificant, unfortunately, only a few important decisions arose from this type of the procedure.²³

The new Constitutional Court Act created two new procedures. Before 2012, it was only possible to file a complaint against the application of a legal norm contrary to the constitution as part of a judicial proceeding (now academically called: 'old' constitutional complaint). One of the new types is academically referred to as 'real' constitutional complaint, possible to be submitted against judicial decisions in violation of the Fundamental Law, while the other one is called a 'direct' constitutional complaint against the application of a legal provision contrary to the Fundamental Law, or when such legal newly adopted provision becomes effective causing a violation of fundamental rights contained in the Fundamental Law, without a judicial decision.²⁴

These three types of constitutional complaints became very popular, and due to the elimination of the *actio popularis* rule under the new Constitutional Court Act, the constitutional complaint has become the most favoured type of procedure in the practice of the CC.²⁵

Year	Arrived	Decided
2009	91	20
2010	144	29
2011	51	4
2012	728	752
2013	199	27
2014	333	311
2015	286	288
2016	388	284

1. All Types of Constitutional Complaints arrived and decided (2009-2016). Source: statistics on the website of the Court. <http://www.alkotmanybirosag.hu/dokumentumok/statisztika/2017> (05.06.2017.)

The constitutional complaints submitted in a year and the constitutional complaints decided in the same year have connection in between the numbers. As one can see, the most complaints were submitted in 2012, because the elimination of *actio popularis* allowed the petitioners to submit their petitions for *a posteriori* (*ex post*) control of constitutionality in the form of constitutional complaints if they were affected by the challenged legal norm.²⁶ After the more than seven hundred cases of 2012, there was a downturn in 2013 only with 199 cases. Nonetheless, after 2014 the numbers increased again.

The decisions on the constitutional complaints demonstrate the same pattern: great increase in 2012, because of the wave of the several former *actio popularis* motions

²³ Jánosi-case: Constitutional Court Decision 57/1991 (XI. 8.) ABH 1991, 279. p.; *Az alkotmányjogi panasz kézikönyve*, (Bitskey Botond – Török Bernát szerk.), HVGÖrcs Kiadó, Budapest, 2015, 36-46. p.

²⁴ Act CLI of 2011 on the Constitutional Court Articles 26-27.

²⁵ From the statistics on the website of the Court. <http://www.alkotmanybirosag.hu/dokumentumok/statisztika/2017> (06.05.2017.)

²⁶ GÁRDOS-OROSZ 2012, 307. p.

resubmitted in the new form of the constitutional complaint, then a downturn and a stabilisation.

Generally, if a complaint is admissible, one of the panels will decide on this, with the exception of cases when different circumstances result in the decision of the plenary session.²⁷ The new rules on the constitutional complaints created serious discussions in academic discourse. Different opinions were formed as an increasing number of decisions were submitted.²⁸

IV. Real Constitutional Complaints against the Administrative and Labour Courts' Decisions

Within the above context, following the introduction, I chose the 'real' constitutional complaints as the topic of my detailed analysis. From 2012, a total of 119 such complaints were submitted against the Administrative and Labour Courts' decisions according to the database of the CC.²⁹ I decided to examine these as they paint a more colourful picture, and the question of direct constitutional complaints in the practice of the CC was examined as well as the old constitutional complaints.³⁰

A total of sixteen 'real' complaints were lodged in labour law issues on a variety of topics from old-age pension to termination without notice. If petitioners find a legal hiatus in the administrative court decision they wanted to question, the possibility of submitting a review in the Administrative and Labour Court is open to them. If the petitioner finds this decision unlawful, then the possibility of submitting a real constitutional complaint becomes available. The scope of the real constitutional complaints that have been filed is quite broad as Table 2 shows below.

The majority of the complaints are in relation with the gaming machines. In Hungary, the operation of gaming machines is forbidden without a special licence.³¹ After this law

²⁷ Act CLI of 2011 on the Constitutional Court Article 49. (6) Issues on the agenda of the panel shall be submitted for decision-making to the plenary session, if

a) in the matter examined on the merits by the panel the Act must be annulled, or

b) the conditions specified in Section 50 (2) f) are met, and

ba) the majority of the members of the panel initiates it,

bb) the President orders it, or

bc) five Members of the Constitutional Court who are not members of the given panel initiate it.

50 (2) f) in all cases where a decision of the plenary session is required by the social or constitutional importance or complexity of the case, by upholding the unity of constitutional jurisprudence or by other important reason.

²⁸ VISSY BEATRIX: *Megkötözött szabad kezek*, Fundamentum 2014/1-2, 81-84. p.; TILK PÉTER: *Az új típusú alkotmányjogi panasz előzményei és az eljárási renddel kapcsolatos egyes szabályozási elvárások*, Alkotmánybírósági Szemle 2011/2, 85-90. p.; NASZLADI GEORGINA: *Veszélyben az alkotmányjogi panasz jogorvoslati jellege*, Fundamentum 2013/1. 81-83. p.

²⁹ The website showed this statistic 20 April 2017.

³⁰ TILK PÉTER: *Az alkotmányjogi panasz, mint a bíróságok és az Alkotmánybíróság eljárásának kapcsolódási pontja*, Bírák Lapja, 2002/12. 59-61. p.; HALMAI GÁBOR: *Az alkotmányjogi panasz – jelen és jövő?*, Bírák Lapja, 1994/3-4. 45-48. p.; KÖBLÖS ADÉL: *A "rég" típusú alkotmányjogi panasz az új Abtv.-ben*, Alkotmánybírósági Szemle, 2012/1. 83-88. p.

³¹ Act XXXIV of 1991 on the Gaming Operation Article 12. (2)

entered into force, several enterprises tried to operate only with online gambling, and when the National Tax and Custom Administration decided against their petitions in accordance with the law,³² they tried to find remedy by submitting a constitutional complaint. It happened in thirty cases. The arguments of the petitions vary, e.g., in the Decision 3028/2016 (II. 23.), the CC pointed out that the petitioner argued that the lack of a forensic expert resulted in the wrong decision, because important questions of the information technology were neglected.³³

The next group of nine decisions can be categorized under the keyword of 'review of administrative decisions'. These are general cases, where no other important point was emphasised such as significant human rights or the right to the fair trial -, but the petitioner argued at the core of the complaint against the decision-making itself.

Complaints submitted in tax law questions form the next group (ten cases). Several complaints were lodged against decisions in connection with land (agricultural land) –forests, constructions, line easement, etc.-. In some cases, the main point of the complaint was an important human right, such as the right to assembly or equal treatment. Finally, there is the category of 'other complaints', the cases not fitting into other categories: fines, cases concerning judicial enforcement officers, campaign contributions, etc.

V. Main objects of the complaints

Main Objects of the Complaints	Number of Complaints
Gaming machines	30
Labour law	16
Tax law	10
Review of administrative decisions	9
Procedural law	8
Right to assembly	7
Construction cases	6
Equal treatment	4
Competition law	4
Forest cases	3
Protection of property	3
Land use	2
Fine	2
Others ³³	15

2. Main objects of the complaints. Source: statistics on the website of the Court. <http://www.alkotmanybirosag.hu/dokumentumok/statisztika/2017> (05.06.2017.)

³² Act XXXIV of 1991 on the Gaming Operation Article 26. (1)

³³ Constitutional Court Decision 3028/2016 (II. 23.) ABH 2016, 874, [7]

³⁴ Cases of the „others” category: refugee, public procurement, expropriation, media cases, judicial enforcement officials, mine cases, land registry, line easement, campaign contribution, custody, gambling, family doctor business licence, membership contributions, traffic offence, carrier cases

V. Some Cases

I chose some cases to describe few of the more interesting problems mentioned in the complaints and to show that even a complaint against a decision of the public administration could result in an important decision of the plenary session of the CC and could even lead to the rectification of unconstitutionality caused by legislative omission.³⁵

V.1. Freedom of Assembly

Several cases were examined by the CC in relation with the freedom of assembly mainly because of the Act III of 1989 on the freedom of assembly. This act was a great achievement in 1989 (at the time of the transition),³⁶ yet several problems arose since then in the practice built on its regulation.³⁷ For instance, according to the act, the planned assembly has to be announced three days in advance, which cannot be applied to spontaneous assemblies, in line with the recommendations of the OSCE as well.³⁸ The precise rules of the process were not specified so the authorities had to decide without proper constitutional guidelines, one can find many different decisions in judicial practice.³⁹ According to *Barnabás Hajas*, it would be enough if some of the provisions would be amended or supplemented, then the Act could be adequate.⁴⁰

If someone intends to organise an assembly, it must be announced to the police.⁴¹ The police will decide if the planned event can comply with the conditions of the law. There are some conditions in the Act which can result in the prohibition of the assembly beforehand,⁴² and some conditions which can result in the prohibition during the assembly, leading to its dissolution.⁴³ The decision of the police can be petitioned to be reviewed in the Administrative and Labour Court.⁴⁴

The CC then can examine the decision of the Administrative and Labour Court in case a real constitutional complaint is filed by the person or organization affected by the judicial decision and “a) their rights enshrined in the Fundamental Law were violated, and b) the possibilities for legal remedy have already been exhausted or no possibility for legal remedy is available.”⁴⁵

³⁵ Constitutional Court Decision 13/2016 (VII. 5.) ABH 2016. 253. p.

³⁶ BADÓ KATALIN: *A gyülekezési jog értelmezése az Alkotmánybíróság döntéseinek tükrében*, Rendészet és emberi jogok – 2011/2. 4. p.

³⁷ HAJAS BARNABÁS: *Megjegyzések a gyülekezési jog gyakorlatának irányváltásaihoz*, Iustum Aequum Salutare, XII. 2016. 4. 45. p.

³⁸ ‘It is therefore important that the law does not stifle spontaneous demonstrations by unnecessarily restrictive provisions, including those concerning the requirement of prior notice.’ OSCE.

³⁹ HAJAS 2016, 44-45. p.

⁴⁰ HAJAS BARNABÁS: *A gyülekezési jog egyes aktuális elméleti és gyakorlati kérdései*, Doktori értekezés, 2012., 245-248. p.

⁴¹ Act III of 1989 on the Freedom of Assembly Article 6.

⁴² Act III of 1989 on the Freedom of Assembly Article 8.

⁴³ Act III of 1989 on the Freedom of Assembly Article 14.

⁴⁴ Act III of 1989 on the Freedom of Assembly Article 9.

⁴⁵ Act CLI of 2011 on the Constitutional Court Article 27. (1)

In the examined case, Decision 13/2016 (VII. 5.), the petitioners organised an assembly in more than ten places during a day and three of them were prohibited by the police. They initiated a review of the police administrative decisions in the Administrative and Labour Court.

One of the venues was in front of the Curia of Hungary, which could be prohibited, because the Act allows the prohibition if the operation of the parliament or the courts is under direct and serious threat. The CC examined this condition in Decision 30/2015 (X. 15.) and stated that this condition is necessary, but not automatic.⁴⁶

The other two prohibited venues were in residential areas, and they said that it would disturb the right to privacy of the owner of the house and the neighbours.⁴⁷ The CC recognised the dilemmas created by the regulation of the Act again, and decided to take action. The CC declared legislative omission that results in violating the Fundamental Law, and called upon the Parliament to comply with its duties to remedy this situation until the end of 2016. The collision of two human rights (assembly and privacy) resulted in a constitutional conflict of the rights, and the CC decided to refer the question to the law-maker, who has the power to act in this situation and it became the responsibility of the Parliament to adopt a new and proper act on the freedom of assembly until the end of 2016.⁴⁸

Due to the priority adoption of more extensive procedural laws in the field of administrative, civil and criminal procedure laws, the new bill still has not been submitted to Parliament, but codification is under way in the Ministry of Justice and it is hoped that the legislator will be able to fulfil the obligation imposed by the CC.

V.2. The Role of the Court

Several petitioners tried to seek legal remedy against the unfavourable decisions of the Administrative and Labour Courts. The CC drew a line in the sand and decided that there would not be a 'super-court', a court of fourth instance for the petitioners.⁴⁹ A *per se* erroneous decision of a court is not enough and the constitutional aspects of the challenged judicial decisions would need to be examined, in case the complaints meet formal and material conditions (admissibility criteria).⁵⁰

The alternative material conditions are:

- if the merits of the judicial decision are significantly affected by a conflict with the Fundamental Law;
- or the case raises constitutional law issues of fundamental importance.⁵¹

⁴⁶ Constitutional Court Decision 30/2015 (X. 15.) ABH 2015, 774, [43]

⁴⁷ Constitutional Court Decision 13/2016 (VII. 5.) ABH 2016, 253, [4]

⁴⁸ Constitutional Court Decision 13/2016 (VII. 5.) ABH 2016, 253, [56]

⁴⁹ Constitutional Court Decision 3325/2012. (XI. 12.) ABH 2012, 1808, [14]

⁵⁰ DELI GERGELY: *A formai és tartalmi követelmények vizsgálata a befogadás visszautasítása során*, Forum. Acta Jur. et Pol., 2015/2, 38. p.; SÜLYÖK TAMÁS – SZAKÁLY ZSUZSA: *Az alkotmányjogi panasz jogorvoslati jellegének bővülése*, in: Számadás az Alaptörvényről, Tanulmányok a Szegedi Tudományegyetem Állam- és Jogtudományi Kar oktatóinak tollából, Balogh Elemér (szerk.), Magyar Közlöny Lap- és Könyvkiadó, 2016, 362-366. p.;

⁵¹ KARSAI DÁNIEL: *A bírói döntést érdemben befolyásoló alaptörvény-ellenesség és az alapvető alkotmányjogi jelentőségű kérdés az Alkotmánybíróság gyakorlatában*, Forum. Acta Jur. et Pol., 2015/2, 71-72. p.;

In Decision 3077/2016 (IV. 18.), the petitioner tried to establish the complaint on the fact that he was not informed properly about the difference between an appeal and a supplement by the public authorities but the CC did not find this argumentation sufficient to admit the complaint.⁵²

The principle of legal certainty was cited by several petitioners,⁵³ but the CC stated several times that the principle of legal certainty itself is not enough for a successful constitutional complaint, only under special circumstances, e.g. in the case of the retroactive effect of legislation or the absence of the time for preparations to apply a piece of legislation.⁵⁴

V.3. The Principle of Equal Treatment

The principle of equal treatment was used in the reasoning of four constitutional complaints which are examined hereunder. One of them is remarkable as in this case the petitioner was a company which managed a lounge. The establishment introduced a discount favouring women (ladies' night). One of the male guests decided to lodge a complaint because of the perceived lack of equal treatment in the company policy introducing the gender-based reduction. The practice applied by the establishment was indeed found to be discriminatory at first instance by the Equal Treatment Authority.⁵⁵ The owner of the establishment then decided to lodge a review against the decision of the Equal Treatment Authority in the Administrative and Labour Court. The Administrative and Labour Court confirmed the Authority's decision.⁵⁶ The owner then decided to submit a constitutional complaint against the court's decision and he alleged that the decision was discriminative, violated the right to property, the right to human dignity and the freedom of enterprise. He argued that he just wanted to compensate the lower working wages of women with the advantages in his bar and prevent discrimination with the measures he introduced.⁵⁷

In his decision on this complaint, the CC examined the freedom of enterprise, the rights of the legal persons and the possible restrictions of the freedom of property and found against petitioner, which means that based on the facts of the case, it is constitutionally discriminative to create discounts for female costumers based on their gender. In this case the CC declared significant principles regarding the rights of the legal persons and the possibility of gender-based discrimination against men.

Another case related to the principle of equal treatment was filed and examined in relation to the rights of the child. In a bathing area, the presence of the children under the age of sixteen was forbidden in a designated area of the facility that offered these services (quiet wellness). The mother of a four-year-old child decided to turn to the Equal Treatment Authority, and after the refusal of her complaint, to the Administrative and Labour Court. Following the refusal of her case by the Administrative and Labour Court, she filed a constitutional complaint to the CC. The CC also found no proper argumentation

⁵² Constitutional Court Decision 3077/2016 (IV. 18.) ABH 2016, 1243, [38-39]

⁵³ Such as in the case of Decision 3124/2015. (VII. 9.) ABH 2015, 2139, in relation with competition law.

⁵⁴ Constitutional Court Decision 3062/2012. (VII. 26.) ABH 2012, 604, [86-91]

⁵⁵ Decision of the Equal Treatment Authority EBH/545/13/2013.

⁵⁶ Budapest-Capital Administrative and Labour Court Decision 21.K.30.042/2014/15.

⁵⁷ Constitutional Court Decision 3001/2016. (I. 15.) ABH 2016, 647, [17]

is support of the material conditions that we mentioned above, and upheld the arguments of the Authority and the Administrative and Labour Court. They both alleged that the use of a designated area of a bathing facility is not a basic human right, and the practice of the facility therefore was not discriminative.⁵⁸

VI. Conclusion

To summarize, we can conclude that the CC decided on several real constitutional complaints against the decisions of the Administrative and Labour Courts after 2012. The more than a hundred cases are extremely divergent, as we could have seen from the analysis as well.

The new possibility of filing these complaints was (and still is) quite popular among the petitioners, however, their initial success rate was quite low. This is not surprising, though, if we examine the statistics of other European constitutional courts, like that of the Federal Constitutional Court of Germany. The German court's jurisprudence has always been an example for the Constitutional Court of Hungary from the beginning as well as in the formulation of the new method of assessing the admissibility of the new types of constitutional complaints.⁵⁹

The divergence of the possible processes of the public administration can be found in the cases as well. The judicial review of public administration decisions is one of the cornerstones of the rule of law in a democratic society. The new possibility, that the decisions of the regular courts, even the decisions of the Administrative and Labour Courts can be examined by the CC created a new step in the system in 2012. Several cases were only attempts to find a fourth instance for their case, but these were declined. The CC decided against becoming a 'super-court', and committed to the principle of only examining the constitutional aspects of complaints. As the CC stated in its Decision 3325/2012 (XI. 12.), "Neither the abstract definition of the rule of law, neither the basic right of the fair trial, neither the prohibition of discrimination could create a basis for the Constitutional Court to enter in the role of a "Super-Court" which is above the court system and act as an ordinary forum of legal remedy."⁶⁰

However, one error of public administration can be enough to find serious constitutional violations. As we could have seen, the CC has declared legislative omission in violation of the Fundamental Law in the case of the freedom of assembly.

The possible ways of the development of the examination of the constitutional complaints are depending on several factors, particularly on future petitioners, future petitions and the future decisions of public administration these will be based on. The new Act I of 2017 on the Code of Administrative Procedure will fundamentally change the system of reviewing

⁵⁸ Constitutional Court Decision 3185/2014. (VI. 27.), ABH 2014, 2171.

⁵⁹ NASZLADI GEORGINA: *A német alkotmányjogi panasz hatása a hazai szabályozásra és az alkotmánybíróági gyakorlatra*, JURA 2014/1. 236-240. p.; ZAKARIÁS KINGA: *Az alkotmányjogi panasz objektív és szubjektív funkciója*, Forum. Acta Jur. et Pol., 2015/2. 153-154. p.; VISSY 2012, 205-209. p.; CSEHI ZOLTÁN: *Kérdések és felvetések a német típusú alkotmányjogi panasz magyarországi bevezetése kapcsán*, Alkotmánybíróági Szemle 2011/1. 103-108. p.

⁶⁰ Constitutional Court Decision 3325/2012. (XI. 12.) 1 ABH 2012, 808, [14]

the decisions of public administration,⁶¹ and it could affect the practice of the CC in terms of constitutional complaints against the decisions of the Administrative and Labour Courts, but it is still early to state any more than this.

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⁶¹ BALÁZS ISTVÁN: *A közigazgatási hatósági eljárás és jogvédelmi rendszer új szabályozásához*, A Jogtudományi Intézet blogoldala <http://jog.tk.mta.hu/blog/2017/03/kozigazgatasi-hatosagi-eljaras-uj-szabalyozasa> (15.05.2017.); ROZSNYAI KRISZTINA: *Koncepcionális változások a közigazgatási perrendtartásban*, <https://jogszvilag.hu/rovatok/szakma/koncepcionalis-valtozasok-a-kozigazgatasi-perrendtartasban> (15.05.2017.)

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