

Constitutional Complaints by State Organs? Changes in the Standing Requirements before the Hungarian Constitutional Court**

Abstract

Recently, the Hungarian Constitutional Court (HCC) upheld a constitutional complaint by the Government, arguing that the ordinary court had violated the Government's fundamental right. This decision, which fits in with the HCC's current practice, is clearly at odds with the concept of fundamental rights as a protection against the state's power. The paper explores the constitutional background to this controversial practice. It addresses the HCC's status and the introduction of the German type of constitutional complaint in Hungary. It points out that, due to its centralising effect, the constitutional complaint can only fulfil its purpose if the HCC's independence is guaranteed. Otherwise, it may undermine the ordinary courts' independence.

The paper examines the HCC's practice on the standing of public power-related bodies in constitutional complaint procedures. Since the constitutional complaint is an instrument of fundamental rights protection, the case-law shows a doctrinal tension between the fundamental rights concept and the constitutional complaint's actual purpose.

Finally, the paper links the findings on the constitutional complaint's function, the HCC's status and the interpretation of the standing requirements. It also considers that the HCC has extended the scope of the fundamental right to a fair trial to the incorrect interpretation of the law. The paper argues that administrative judicial review is centralised in the hands of the HCC, the independence of which has been compromised. The HCC's recent interpretation reverses the function of the constitutional complaint, which provides public bodies with an extra possibility for review instead of protecting citizens' fundamental rights.

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Keywords: constitutional court, constitutional complaint, fundamental rights protection, subject of fundamental rights, holders of fundamental rights

I Introduction

Recently, the Hungarian Constitutional Court upheld a constitutional complaint by the Government, which argued that the ordinary court had violated the Government's right, guaranteed as a fundamental right by the Fundamental Law of Hungary.¹ This decision, which fits in with the current practice of the Constitutional Court, is clearly at odds with the concept of fundamental rights as protection against the state's power; in other words, that state bodies are conferred with obligations, not entitlements, by fundamental rights.

The paper explores the constitutional background of this controversial practice by the Constitutional Court. (I) First, it briefly reviews how the regulation of the Constitutional Court's status has changed over the last decade and how this has affected its independence. (II) The second part deals with the impact of the introduction of the German type of constitutional complaint on the protection of fundamental rights. The link between the two factors is also important: a constitutional complaint can only fulfil its constitutional purpose if the independent status of the Constitutional Court is guaranteed. Otherwise, however, the constitutional complaint may undermine the independence of the ordinary courts. (III) The third part of the paper is based on the premise that the constitutional complaint is an instrument of fundamental rights protection; therefore, it can be used by those who are the holders of fundamental rights. This part examines the development of the Constitutional Court's practice about the standing of public power-related bodies in constitutional complaint procedures within this doctrinal framework. Another critical factor is how the Constitutional Court interprets the scope of the fundamental right to a fair trial in these cases. (IV) The analysis of the Constitutional Court's case-law reveals a doctrinal tension between the constitutional purpose of fundamental rights and the purpose of the constitutional complaint, which is discussed in the fourth part of the paper. (V) Finally, the paper links the findings on the constitutional complaint's function, the Constitutional Court's status and the interpretation of the standing requirements and the scope of the fundamental right to a fair trial. On this basis, it identifies the actual role of those constitutional complaint procedures that can be initiated by public bodies.

¹ Decision 3130/2022. (IV. 1.) AB.

II Judicial Independence in Hungary

The best-known aspect of the history of Hungary's public law over the past decade is probably the changes in the status and powers of the Constitutional Court and the ordinary courts.² Indeed, the state of judicial independence can be one of the main indicators of the state of constitutionalism and the rule of law.

Since, in Hungary's parliamentary form of government, the government depends on the parliament's political confidence, the executive and the majority in the legislature work in political unity. At the same time, as the Hungarian Constitutional Court pointed out in the first years of its operation, their political link and power needs to be balanced by neutral control institutions, granted independent status. While the legislature and the executive have a political nature, since they are driven by the political will of the majority, the judiciary and the Constitutional Court should be constant and neutral and, to this end, separated from the political influence of the majority.³ In the absence of independence, courts cannot perform their constitutional function: the judiciary cannot control the government if the former is dependent on the latter.

In Hungary, however, more than a decade ago, the government gained a two-thirds majority in the National Assembly; apart from a short period, it has managed to keep it since the 2010 elections. Having a supermajority in the Hungarian parliament puts the government in an extraordinary position, where it can even shape the constitutional limitations of its own operation. The qualified majority lost its function as the protector of the minority interests against the governing majority's unilateral decisions. The latter is able to amend the constitution and even to pass a new one,⁴ as happened in 2011.

² Pál Sonnevend, András Jakab, Lóránt Csink, 'The Constitution as an Instrument of Everyday Party Politics: The Basic Law of Hungary' in Armin von Bogdandy, Pál Sonnevend (eds), *Constitutional Crisis in the European Constitutional Area: Theory, Law and Politics in Hungary and Romania* (Hart/Beck 2015, London, 33–109) <https://doi.org/10.5771/9783845261386-46>; Bernadette Somody, 'Theme with Variations: Lessons from the Recent History of Judicial Administration in Hungary' in Piotr Mikuli (ed), *Current Challenges in Court Administration* (Eleven International Publishing 2017, The Hague, 143–68); Zoltán Sente, Fruzsina Gárdos-Orosz, 'Judicial deference or political loyalty? The Hungarian Constitutional Court's role in tackling crisis situations' in Zoltán Sente, Fruzsina Gárdos-Orosz (eds), *New Challenges to Constitutional Adjudication in Europe: A Comparative Perspective* (Routledge, 2018, New York, 89–110) <https://doi.org/10.4324/9781315164632-7>; Fruzsina Gárdos-Orosz, Kinga Zakariás, 'Organisational, functional and procedural changes of the Hungarian Constitutional Court 1990–2020.' in Fruzsina Gárdos-Orosz, Kinga Zakariás (eds), *The main lines of the jurisprudence of the Hungarian Constitutional Court: 30 case studies from the 30 years of the Constitutional Court (1990–2020)* (Nomos 2022, Baden-Baden, 17–43) <https://doi.org/10.5771/9783748929826-17>; Bernadette Somody, 'Power Politics versus the Rule of Law in Hungary: A Case Study' in Sławomir Redo (ed), *The Rule of Law in Retreat: Challenges to Justice in the United Nations World* [Rowman and Littlefield, Lanham (MD) 2022, 147–159].

³ The Hungarian Constitutional Court's interpretation of the principle of the division of powers. Decision of 38/1993. (VI. 11.) AB.

⁴ Formally, the two-thirds majority in Parliament can act as a constituent and constitution-amending power, even if theoretically they are distinct from the legislative power. According to art S) para (2) of the Fundamental Law of

The new Fundamental Law of Hungary entered into force in 2012 and, since its adoption, it has been amended eleven times. The two-thirds majority is sufficient to pass and amend so-called cardinal acts;⁵ among others those on the judiciary and the Constitutional Court. Since 2010, the governing majority has been in the position to elect the members and the president of the Constitutional Court, the chief justice of the supreme court (the President of the Curia) and the head of the judicial administration (the President of the National Office for the Judiciary).⁶ The regulation of the courts, even at the constitutional level, and the appointment of persons to leading judicial positions became up to the government.

As regards the Constitutional Court, by 2015, even according to moderate critics, it was alive but severely impaired.⁷ The crucial factor was the composition of the Constitutional Court. Already in 2010, the two-thirds governing majority amended the Constitution and changed the composition of the parliamentary committee responsible for the nomination of the members of the Constitutional Court, who are elected by the aforementioned qualified majority. Until 2010, the candidates were nominated by a parliamentary committee, in which each faction had one representative; after that, the committee's composition reflected the proportions of the parliamentary groups. While the previous manner of nomination required a compromise between the ruling parties and the opposition, according to the new regulation, the governing majority could unilaterally nominate and elect its own people to the Constitutional Court. Some months later, the supermajority applied the technique of 'court packing', and increased the number of justices from 11 to 15, which enabled them to elect five new judges. By 2016, the nine new judges elected since 2010, a solid majority in the Constitutional Court, were chosen by the governing majority. As empirical research proved, there is an extremely strong correlation between the voting behaviour of the judges and the political standpoints of their nominating parties; the judges support the political parties that nominated them.⁸

Hungary, for the adoption of a Fundamental Law or for the amendment of the Fundamental Law, the votes of two-thirds of the Members of the National Assembly shall be required. There are no further criteria or restrictions.

⁵ According to art T) para (4) of the Fundamental Law of Hungary, Cardinal Acts are Acts, the adoption and amendment of which requires the votes of two-thirds of the Members of the National Assembly present.

⁶ Zoltán Pozsár-Szentmiklósy, 'Supermajority in Parliamentary Systems – A Concept of Substantive Legislative Supermajority: Lessons from Hungary' (2017) (3) *Hungarian Journal of Legal Studies* 281–290, 286–289. <https://doi.org/10.1556/2052.2017.58.3.3>

⁷ Sonnevend, Jakab, Csink (n 2) in Armin von Bogdandy, Pál Sonnevend (eds), *Constitutional Crisis in the European Constitutional Area* (Hart Publishing 2015, Oxford, 33–111) 88.

⁸ Zoltán Sente, 'The Political Orientation of the Members of the Hungarian Constitutional Court between 2010 and 2014' (2016) 1 (1) *Constitutional Studies* 123–149, 131.

III Introduction of the Full-fledged Constitutional Complaint and Its Centralising Effect

The constitutional changes affected not only the status of the Constitutional Court and the courts but also their powers. In the last decade, the most significant change in the Hungarian system of fundamental rights protection undoubtedly was the introduction of a fully-fledged constitutional complaint, modelled on the German legislation, which allows the Constitutional Court to exercise constitutional control over the judgments of the ordinary courts. Since 2012, the Fundamental Law of Hungary has provided that the Constitutional Court shall review the conformity of judicial decisions with the Fundamental Law on the basis of a constitutional complaint: any person or organisation is entitled to submit a constitutional complaint to the Constitutional Court if the ordinary court's judgment violates their rights laid down in the Fundamental Law and the possibilities for legal remedy have already been exhausted.⁹ Prior to the entry into force of the Fundamental Law, citizens could lodge a constitutional complaint with the Constitutional Court if the law applied by the court violated their fundamental rights. As of 2012, they can also lodge a constitutional complaint if it is not the law applied but its interpretation that causes the violation of their fundamental rights. The extension of the constitutional complaint's scope has certainly been considered as strengthening the system of fundamental rights protection: citizens can now submit a constitutional complaint to the Constitutional Court as an extraordinary remedy if a final court decision has infringed their fundamental rights.

The extension of the constitutional complaint's scope also centralises the protection of fundamental rights. Since not only the law applied but also the interpretation of the law by the judiciary can be challenged by a constitutional complaint, the Constitutional Court has the final say on fundamental rights issues in all cases. If a judicial decision is contrary to the Fundamental Law, the Constitutional Court annuls it and, in court proceedings following the annulment of a judicial decision, as to the constitutional issue, the ordinary courts are obliged to follow the Constitutional Court's decision.¹⁰

The introduction of the fully-fledged constitutional complaint was also explicitly intended as a kind of 'centralisation'. Through constitutional complaint procedures, the Constitutional Court's practice can more effectively develop and unify the interpretation of fundamental rights by ordinary courts in individual cases. This 'centralisation' of the interpretation of fundamental rights is part of the essence and the constitutional purpose of the constitutional complaint. The constitutional complaint is not only the means of enforcing subjective fundamental rights and remedying individual fundamental rights violations but also has an objective function of protection and promotes the application of the law by ordinary courts in general in accordance with fundamental rights. On the

⁹ Fundamental Law of Hungary art 24 para (2) item *e*); Act CLI of 2011 on the Constitutional Court s 26–27.

¹⁰ Act CLI of 2011 on the Constitutional Court s 43.

one hand, the Constitutional Court remedies the violation of the complainant's rights by annulling the ordinary court's judgment and issuing guidelines to the court. On the other hand, the interpretation of fundamental rights on which the Constitutional Court's decision is based goes beyond the specific case and develops the ordinary courts' practice in general.

However, we must also see that, through constitutional complaints, the activity of the courts is subject to the control of the Constitutional Court. Although this control is only partial and only covers the constitutional aspects of the cases, it is the Constitutional Court that ultimately determines what is to be considered a matter of constitutional importance in a civil, criminal or administrative case. Therefore, for a constitutional complaint to serve its constitutional function properly and to promote the enforcement of fundamental rights by ordinary courts, the independence of the Constitutional Court is a prerequisite. Failing this, if a constitutional complaint gives control over the judiciary to a body that is not sufficiently independent, the independence of the ordinary courts may be compromised.

IV State Organs as Complainants before the Constitutional Court¹¹

The constitutional complaint is a means of protecting fundamental rights. If one feels that an ordinary court's judgment has violated their fundamental rights, they can appeal to the Constitutional Court after the final decision of the ordinary court. The purpose of the constitutional complaint necessarily implies that only those who are the holders of fundamental rights are entitled to lodge a constitutional complaint and claim the enforcement of their rights. However, the text of constitutions is rarely explicit on the question of the legal capacity to fundamental rights. As such, who can lodge a constitutional complaint is usually not clear from the text of the constitutions; it depends on the interpretation of the Constitutional Court. It also follows from the above that, when the Constitutional Court finds a constitutional complaint admissible, it also recognises the complainant as a holder of fundamental rights.

The Hungarian Fundamental Law, in addition to recognising the fundamental rights of human beings, contains an explicit provision on the fundamental rights status of non-human entities. It states that fundamental rights which, by their nature, do not only apply to human beings, shall also be guaranteed to legal entities established on the basis of an

¹¹ This part draws heavily on the results of the fundamental rights concept of legal capacity (FULCAP) research project, in particular the work of Lívia Bottlik-Grányák and Dominika Kincső Hollós. Lívia Bottlik-Grányák, 'Do Human Rights Belong Exclusively to Humans? The Concept of the Organisation from a Human Rights Perspective' (2019) (2) ELTE Law Journal 17–24; Lívia Bottlik-Grányák, 'A szervezetek mint alapjogi jogosultak a magyar Alkotmánybíróság gyakorlatában' (2021) (22) Jogi Tanulmányok 135–148; Dominika Kincső Hollós, 'Vannak az államnak alapjogai? Közhatalmat gyakorló szervek alkotmányjogi panaszhoz való joga az Alkotmánybíróság gyakorlata alapján' in Veronika Szikora (ed), *Díjnyertes gondolatok* (DE ÁJK 2021, Debrecen, 139–166).

act.¹² This provision did not constitute a change, since the practice of the Constitutional Court prior to the entry into force of the Fundamental Law recognised organisations and legal persons as the holders of fundamental rights. Although the status of entities connected to public power has never been a completely decided question, the related practice of the Constitutional Court has undergone a conceptual change.

1 Early Practice: Rejection Except for the Protection of Autonomy

As mentioned above, the constitutional complaint has been part of the Constitutional Court's catalogue of competences since the transition to democracy. However, between 1990 and 2011, it only existed in a restricted form that allowed for the possibility of challenging and reviewing the legislation on which the ordinary court's decision was based, but not the interpretation and the application of the norm by the ordinary court. During these two decades, this power was not a prominent competence in the practice of the Constitutional Court. This was due to the fact that, until the end of 2011, citizens were entitled to initiate an abstract constitutional review of norms on the basis of *actio popularis* – without any specific personal legal interest. However, the question already arose during this period of whether a constitutional complaint procedure can be initiated by bodies that exercise or are connected with public power.

In its previous practice, the Constitutional Court consistently rejected constitutional complaints by bodies exercising public power. This interpretation also prevailed in the years after the entry into force of the Fundamental Law, when the aforementioned provision of the Fundamental Law explicitly provided for the recognition of the fundamental rights of so-called legal entities established on the basis of an act:

The petitioner [...] is a public body (tax office), and therefore has no fundamental right to be infringed. A public body cannot be a holder of the 'right guaranteed by the Fundamental Law' [...], even if it is a legal person. Article I(4) of the Fundamental Law provides that '[a] legal entity established on the basis of an act shall also be guaranteed fundamental rights [...] which, by their nature, are not limited to the individual', but the Constitutional Court has consistently held that 'a public body vested with public powers does not have a constitutional right that constitutes a guarantee against the State and entitles it to lodge a constitutional complaint'.¹³

The Constitutional Court reasoned that, since public bodies do not have fundamental rights, they cannot lodge a constitutional complaint to enforce them. The Fundamental Law's provision explicitly guaranteeing the fundamental rights of legal persons does not change this interpretation, since it does not apply to public bodies.

¹² Fundamental Law of Hungary art I para (4): 'Legal entities established on the basis of an act of Parliament shall also have these fundamental rights, and they shall also be bound by those obligations which, by their nature, are not only applicable to human beings.'

¹³ Decision 3307/2012. (XI. 12.) AB [7].

During this period, the Constitutional Court ruled that a body connected to public powers could only lodge a constitutional complaint in exceptional cases. This is only possible if this body is closely linked to the exercise of fundamental rights, in particular if it is established for the express purpose of enabling individuals to exercise their fundamental rights, if its rights and autonomy are the institutional guarantees of individuals' fundamental rights.¹⁴ This applies to constitutional complaints brought by public universities in defence of their autonomy, since the autonomy of universities is a guarantee of freedom of learning, education and science.¹⁵ In addition, the Constitutional Court has accepted constitutional complaints from local self-governments to prevent the state from taking steps that make the powers that guarantee local government autonomy meaningless.¹⁶

2 Differentiation between Exercising Public Power and Acting as Private Entities

As mentioned above, the entry into force of the Fundamental Law in 2012 brought significant developments: it introduced a fully-fledged constitutional complaint and made an explicit provision on the fundamental rights of legal entities established on the basis of an act. However, the change in the public bodies' right to lodge a constitutional complaint was not brought about by the entry into force of the Fundamental Law but a couple of years later, in 2016. At this time, as described above, the independence of the Constitutional Court was seriously compromised. This was when the premise that public bodies are obliged by fundamental rights but cannot be right-holders at the same time began to be relativised.

In its landmark decision, the Constitutional Court argued that neither the Fundamental Law nor the Act on the Constitutional Court excluded public bodies from turning to the Constitutional Court to claim the protection of their fundamental rights. On the basis of the Fundamental Law's provision on the fundamental rights of legal entities established on the basis of an act, public bodies, even if only to a very limited extent, can also enjoy fundamental rights. This applies to where the public bodies act as private entities and do not exercise public power in the legal relationship. In particular, they may enforce their rights to property. The Constitutional Court stated that it has to be examined on a case-by-case basis whether the public body acted as a public authority or as a private entity (e.g. as the owner) in the underlying legal relationship, and the admissibility of the complaint must be decided accordingly.¹⁷

¹⁴ Decision 198/D/2008. AB.

¹⁵ Decision 62/2009. (VI. 16.) AB.

¹⁶ Decision 3381/2012. (XII. 30.) AB.

¹⁷ Decision 3091/2016. (V. 12.) AB.

3 Current Practice: From Exception to Rule

In 2018, the Constitutional Court found the Hungarian Central Bank's constitutional complaint admissible in a case where the ordinary court annulled the Central Bank's decision concluding a supervisory procedure regarding an investment company's operation.¹⁸ A significant departure from the previous approach is that, in this case, the complainant, the Central Bank, did not act as a private legal entity but as a supervisory authority. Despite the fact that the complainant exercised public power, the Constitutional Court acknowledged its standing and found that its right to a fair trial had been violated.

In the history of the constitutional complaints of state organs, a landmark event was the amendment to the Act on the Constitutional Court in 2019. Under the new provisions, a person or organisation that has been a party to the court proceedings is considered a person or organisation affected by the decision and this way is entitled to lodge a constitutional complaint against it, regardless of its legal status. The amendment also added that, in the case of a petitioner exercising public authority, it must be examined whether the right guaranteed by the Fundamental Law, as stated in the complaint, is granted to them.¹⁹

On the basis of the statutory provision, the Constitutional Court confirmed its position that the exercise of public power does not exclude the possibility of lodging a constitutional complaint:

Section 27 para (3) of the amended Act on the Constitutional Court provides, as an additional statutory condition for petitioners exercising public power, that it shall be examined whether the right guaranteed by the Fundamental Law, as indicated in their complaint, is granted to them. According to the practice of the Constitutional Court, some fundamental rights are by their very nature only applicable to human beings, while other fundamental rights are also granted to legal persons, including bodies exercising public power. [...] the right to a fair trial invoked by the petitioner [Article XXVIII para (1) of the Fundamental Law] is a right guaranteed by the Fundamental Law which, by its nature, does not apply only to human beings. In view of this, the petition meets the statutory condition laid down in Section 27 para (3) of the ACC...²⁰

¹⁸ Decision 23/2018. (XII. 28.) AB.

¹⁹ Act CLI of 2011 on the Constitutional Court s 27 para (3)–(4). According to S. 27 para (1) item a), a constitutional complaint can also be filed if the ordinary court's decision curtails the petitioner's powers under the Fundamental Law. However, the Constitutional Court does not typically base its decisions on this part of the provision but on the violation of public organs' fundamental rights. Although constitutional complaints based on the curtailment of powers would not raise the problem of the public organs' entitlement to fundamental rights, it would also stretch the concept of the constitutional complaint as a means of protecting fundamental rights (see the next part of the paper).

²⁰ Decision 3130/2022. (IV. 1.) AB [18].

The fundamental right found to be infringed in the above decisions is also a crucial element of the Constitutional Court's practice. In the cases cited, the Constitutional Court based the annulment of the ordinary courts' judgements on the violation of the right to a fair trial:

On the basis of such a complaint, the Constitutional Court examines the conformity of the interpretation of the law contained in the judicial decision with the Fundamental Law; whether, in addition to the enforcement of the constitutional content of the rights guaranteed by the Fundamental Law, the court, in applying the law, has taken into account the purpose of the law to the extent constitutionally required [...]. The application of the principles of interpretation of the law laid down in the Fundamental Law is undoubtedly part of the minimum constitutional requirements for the interpretation of the law in a fair judicial procedure [...] 'arbitrary judicial interpretation of the law may infringe the right to a fair trial enshrined in Article XXVIII para (1) of the Fundamental Law. [...] An error of interpretation of the law becomes arbitrary *contra constitutionem* when the court expressly disregards the rules of interpretation of the law contained in Article 28 of the Fundamental Law'.²¹

The principle behind the Constitutional Court's decision is that an interpretation of the law that excludes an examination of the purpose of the law or otherwise disregards the rule of interpretation of the law contained in the Fundamental Law may violate the right to a fair trial. This principle may lead the Constitutional Court down a slippery slope, in that any interpretation of the law that is considered incorrect; ultimately the fact that the Constitutional Court disagrees with the decision of the ordinary court, may constitute a violation of a fundamental right and justify the annulment of the judgment of the ordinary court.²² This phenomenon, namely acting as a supreme re-examination court (*Supervisionsgericht*) is not limited to administrative judicial review, but it is a common concern regarding the constitutional courts' practice in Hungary and in other countries as well.²³ However, it is a specific case when it is linked to state organs' legal standing before the Constitutional Court.

²¹ Decision 3130/2022. (IV. 1.) AB [27]–[28].

Fundamental Law Article 28: 'In the course of the application of law, the courts shall in principle interpret the laws in accordance with their objective and with the Fundamental Law. The objectives of a law shall in principle be determined relying on its preamble, and/or on the explanatory memorandums of the relevant legislative or amendment proposal. When interpreting the Fundamental Law or any other law, it shall be presumed that they are reasonable and of benefit to the public, serving virtuous and economical ends.'

²² Nóra Chronowski, Attila Vincze, '23/2018. (XII. 28.) AB határozat – közhatalmi szervek alkotmányjogi panasz' in Fruzsina Gárdos-Orosz, Kinga Zakariás (eds), *Az alkotmánybírósági gyakorlat. Az Alkotmánybíróság 100 elvi jelentőségű határozata 1990–2020. Második kötet* (HVG-ORAC – TK JTI 2021, Budapest, 881–900) 882, 896.

²³ Decision 3325/2012. (XI. 12.) AB, Decision 20/2017. (VII. 18.) AB, Decision 23/2018. (XII. 28.) AB.

V State Organs' Standing: A New (Dys)Function of the Constitutional Complaint?

The practice of the Constitutional Court before 2016 was basically coherent in that, as a general rule, public bodies' legal capacity to fundamental rights was considered to be excluded, while the public bodies' claim for fundamental rights protection required specific justification – such as the protection of autonomy in the early practice of the Constitutional Court, and the private party status of the public body in the later case-law. The doctrinal background of this practice is the purpose of fundamental rights, which is to guarantee citizens' freedom by limiting the powers of public authorities. This implies that entities exercising public power cannot be the holders of fundamental rights. Since the constitutional complaint is a means of enforcing fundamental rights before courts, only those who are the holders of fundamental rights are entitled to lodge one with the Constitutional Court. State organs' constitutional complaints, as a general rule, cannot be admissible.

The current case-law of the Constitutional Court seems to reverse the relationship between the general rule and the exception. The established practice of the Constitutional Court and, since 2012, the Fundamental Law itself, state that fundamental rights that, by their nature, are not exclusively applicable to human beings, can also be claimed by legal persons and, as the Fundamental Law puts it, by entities established on the basis of an act. Recently, the Constitutional Court has included legal persons exercising public power in this category without further explanation. In this interpretation, the exception – where a public body is not entitled to claim a fundamental right – is where the fundamental right in question applies only to human beings.

However, the current interpretation of public bodies' standing in constitutional complaint procedures creates tension in the practice's doctrinal background. In this interpretation, the constitutional purpose of fundamental rights (limiting public power), in other words, the reason that public bodies are not entitled to fundamental rights, and the purpose of the constitutional complaint (enforcing fundamental rights) cannot be true simultaneously. If public bodies cannot be the holders of fundamental rights, their constitutional complaints cannot be considered a means of enforcing their fundamental rights. If the constitutional complaint serves the enforcement of the petitioner's fundamental rights, we can no longer sustain the premise that public bodies cannot claim the protection of fundamental rights.

Obviously, and logically, this contradiction can be resolved by accepting that, at least within a limited scope, public bodies are also entitled to fundamental rights, and therefore are allowed to claim the enforcement of these rights, as is suggested by the amendment of 2019 to the Act on the Constitutional Court. However, there are strong arguments against this interpretation. As mentioned, the Amendment of 2019, on which the Constitutional Court bases its reasoning, provides that when assessing admissibility, the Constitutional Court must examine whether the petitioner exercising public authority is entitled to the fundamental

right claimed in the complaint. However, this is a procedural rule provided in an act which should not override the purpose of fundamental rights deriving from the Fundamental Law itself.²⁴

In contrast to the above option, not reinterpreting the constitutional purpose of fundamental rights but the actual purpose of the constitutional complaint in the current Hungarian public law seems more acceptable. In other words, we have to accept that, in the practice of the Hungarian Constitutional Court, the constitutional complaint not only serves to protect the citizens' fundamental rights against public power but also plays another role. What is this new additional role of the constitutional complaint? As we have seen, under the Constitutional Court's current practice, if the judicial review of administrative decisions is unfavourable to the public body concerned, the public body may appeal to the Constitutional Court. If the Constitutional Court finds that the ordinary court has not interpreted the law correctly, this may constitute a violation of the right to a fair trial, and the Constitutional Court may annul the ordinary court's judgment on this basis. All in all, the Constitutional Court will have the final say in the judicial review of administrative decisions.

VI Conclusion

In recent years, the Constitutional Court has found the public bodies' constitutional complaints admissible in an increasingly wide range of cases, most recently without a specific justification. In recent case-law, if the fundamental right in question can be applicable to legal persons (legal entities established on the basis of an act), it can also be claimed by a public body. The extension of the circle of the initiators of the constitutional complaint procedure has been combined with the extension of the scope of fundamental rights violation. The interpretation of the right to a fair trial has paved the way for an interpretation of the law, according to which a much wider range of misinterpretations of the law by the ordinary courts can constitute a fundamental rights violation.

As a result of these two factors, the Constitutional Court can function as an administrative supreme court, another judicial level above the actual Supreme Court (the Curia). In this way, administrative judicial review is centralised in the hands of a Constitutional Court whose independence has been compromised.

Public bodies can challenge before the Constitutional Court administrative court decisions that are unfavourable to them but ensure protection for citizens' rights. The Constitutional Court's recent interpretation reverses the function of the constitutional complaint, which in this way provides public bodies with an extra possibility of review instead of protecting citizens' fundamental rights.

²⁴ Bottlik-Granyák (n 11) 138–139.