



Issues of fundamental procedural rights and procedural constitutionality in the Fundamental Law

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Abstract

The Fundamental Law of Hungary entered into force on 1 January 2012, introducing several new constitutional rights, one of it is the right to fair administrative procedure. This paper aims to present a comprehensive analysis of that new constitutional right. The first part of the study is devoted to explain the legal background and the constitutional tradition behind the right to fair procedure (by authorities). We should note that Constitutional Court's decisions had already specifically affected legal regulations of a procedural nature before the declaration of the fundamental right to fair procedure. These decisions – examined in the paper – have been pivotal for Hungary's legal system and procedural law. Secondly, the current practice of the realization of the right to fair administrative procedure is presented. Through the Constitutional Court's practice, we also describe the partial rights/authorizations of this fundamental right. Finally, the right to legal remedy and to fair judicial procedure are analysed in detail.

Keywords

right to fair administrative procedure, legal remedies.

1. Fundamental procedural rights, the Fundamental Law, and the National Avowal (or National Commitment)

It is no exaggeration to state that Hungary's Fundamental Law ushered in significant changes in the fundamental rights defining the requirement of fair legal procedures. In fact, *the right to fair administrative procedures*, as stipulated in Article XXIV, is one of several *entirely new* constitutional rights, which was basically introduced in the Fundamental Law.

One issue closely related to this right is the requirement and declaration of a state that serves its citizens or, in other words, provides “good administration”, as expressed in sentence 20 of

the National Avowal.¹ This is part of the notion and requirement of the right to good public administration; however, in agreement with Csaba Erdős, it should be emphasised that “a state providing good administration is actually a state bound by law, where there is no room for arbitrary administration.” (Erdős, 2019, 351) The novel constitutional basis for the requirement of fair administrative procedures is the following sentence: “We proclaim that true democracy exists only where the State serves its citizens and administers their affairs justly and without abuse or bias.” According to Paragraph (3) of Article R) of the Fundamental Law, the National Avowal is not only a declaration, but it also serves as a framework for the interpretation of other, normative provisions of the Fundamental Law.²

Even after its reforms aimed at compliance with the rule of law in 1989/90, the previous Constitution stipulated no similar right, even though the Constitutional Court defined a few requirements (which are now seen to be related to the above-mentioned right) by citing other provisions, and primarily the rule of law clause.³ The requirement stated in Paragraph (1) of Article XXIV clearly concerns *public administration* as the active segment of *exercising the powers of the state*. According to that Article, “Everyone shall have the right to have his or her affairs handled impartially, fairly and within a reasonable time by the authorities.” Furthermore, authorities must justify their decisions as required by law. As a further fundamental right, authorities must compensate citizens for any damage caused by the unlawful conduct of those authorities.

Another fundamental right that is very closely connected to the above-mentioned new and itemised constitutional norm is the right to *fair procedures*, or in other words, the right to the court. This fundamental right was adopted in Hungary sooner, upon the constitutional amendment of 1989, when it replaced Paragraph (1) of Article 57 (which had stated the entitlement of citizens of the People’s Republic of Hungary to the protection of life, physical integrity, and health). The new text had originally been inserted in Section 34 of Act XXXI of 1989 amending Act XX of 1949 on the Constitution of the People’s Republic of Hungary (which was first amended and standardised in Act I of 1972 and for the last time in 1989)⁴. According to the

¹ Concerning the dilemma of the terminology in the National Avowal (operative provisions, thesis, terms), see: Patyi (2019, 9).

² According to Paragraph (3) of Article R) of the Fundamental Law, “The provisions of the Fundamental Law shall be interpreted in accordance with their intended purpose, with the Fundamental Law’s National Commitment, and with the achievements of our historical Constitution”.

³ “The Constitution (Act XX of 1949 amended by Act XXXI of 1989) did not specify fair procedures *expressis verbis*, but the Constitutional Court deduced the notion from the Constitution based on the mutual relevance of procedural guarantees arising from legal certainty [Paragraph (1) of Section 2 of the Constitution] and the right to impartial jurisdiction [Paragraph (1) of Section 57 of the Constitution]. In its decision, the Constitutional Court took into consideration the relevant provisions of the international treaties which served as examples for Section 57 of the Constitution (i.e. Article 14 of the International Covenant of Civil and Political Rights, and Article 6 of the European Convention on Human Rights.” CC decision 21/2014 (VII. 15.), Statement of Reasons [57]

⁴ In its quoted decision, the Constitutional Court points out that the requirement of fair procedures originated from earlier times: the codes of procedural law introduced after the so-called Compromise (between Hungary and Austria, in 1867), i.e. civil jurisdiction as well as the subsequent civil and criminal procedures) granted the right to a court procedure, the impartiality and independence of judges (through exclusion and conflict-of-interest rules), as well as the right to legal remedy. In this way, elements of the right to fair procedure (as defined in the Constitution and the Fundamental Law) were already present in the legal system of the previous historical constitutional period. Cf.: CC decision 21/2014 (VII. 15.) *ibid*.

Statement of Reasons of Section 34 of the draft Act to amend the Constitution, “by acknowledging international human rights treaties, such as the Universal Declaration of Human Rights, the International Covenant of Economic, Social and Cultural Rights, and the International Covenant on Civil and Political Rights, Hungary assumed an obligation to acknowledge general human rights and fundamental values. In the spirit of those treaties, the Proposal re-regulates fundamental rights and obligations.”⁵ In addition, the Statement of Reasons states that “judicial procedures aimed at deciding whether a person is guilty or innocent are especially significant. Consequently, it must be stipulated in the Constitution that every person’s case shall be adjudicated by an independent and impartial court. The Constitution also prescribes equitability and publicity, and emphasises the presumption of innocence, i.e. everybody’s right to be deemed innocent until they are declared guilty in a final court ruling.”⁶

It should be noted that the original text of the Constitution did not specify the right to *fair procedures* or, in the wording of the European Convention on Human Rights, to a *fair trial*. In general, the Constitution made few references to equality before a court. Paragraph (1) of Section 49 of the original Constitution of 1949 should be noted; this provision, transferred to Paragraph (1) of Section 61 after 1972, merely stated that “citizens of the People’s Republic of Hungary are equal before the law, and enjoy equal rights”. The lack of the right to fair procedures stemmed not only from the Stalinist-Bukharinist Soviet constitution, which had served as the underlying example. (It contained merely token democratic provisions besides a Soviet-type power structure, and had a decisive impact on the structure and contents of Socialist constitutions after World War 2.⁷) Another reason was that “guarantees of Anglo-Saxon origin only became known internationally after the Convention of 1950”.⁸ Hungary joined this Convention only in the early 1990s, but its text had obviously been known at the time of the major revision of the Constitution in 1972. However, neither this fact nor the existence of the International Covenant on Civil and Political Rights (ICCPR), adopted at Session XXI of the UN General Assembly on 16 December 1966, affected the amendment to Hungary’s Constitution in 1972, which continued to eschew the right to a fair procedure (trial). Then again, our country ratified the ICCPR in 1974, and it was only promulgated in Law-decree No. 8 of 1976.⁹

All this is important because the text of Paragraph (1) of Section 57 of the Constitution is an almost verbatim equivalent of the relevant provisions in Article 14 of the ICCPR, which stipulate the following: “All persons shall be equal before the courts and tribunals. In the de-

⁵ Statement of Reasons, Article 1

⁶ Statement of Reasons, Article 4

⁷ Regarding the Soviet Constitution on which Hungary’s Constitution of 1949 was based, see: Kovács (1990).

⁸ Hollán et al. (2009). According to the Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and promulgated in Hungary in Act XXXI of 1993:

“Right to a fair trial: 1. In the determination of his civil rights and obligations or any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.”

⁹ The deed of confirmation by the Presidential Council of the People’s Republic of Hungary was deposited with the Secretary General of the United Nations on 17 January 1974; pursuant to Paragraph 1 of Article 49, the Covenant took effect on 23 March 1976.

termination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.” Paraphrasing minimally, Paragraph (1) of Section 57 of the Constitution states that “In the Republic of Hungary everyone is equal before the law and has the right to [...]” The equivalent provision in the Fundamental Law (Paragraph (1) of Section XXVIII), *contains one term less*, as equality before the law is stipulated in Paragraph (1) of Section XV. However, the Fundamental Law *adds a term* to the detailed requirements of fair procedure, noting that a court must adjudicate a charge or right in litigation “within a reasonable period of time”.

Naturally, these two fundamental rights do not constitute an exhaustive list of the requirements defined in constitutional norms regarding public procedures (related to the powers of the state). It is the requirement (clause) of the rule of law that constitutes both the source of and an overall framework for these requirements.¹⁰ Even though the constitutionality of the procedures (or procedural constitutionality) may have various requirements and principles depending on the type of procedure, there is no democratic constitutional procedural law without honouring the principle of equality, the principle of (or fundamental right to) fair procedure, and an opportunity for the effective enforcement of one’s rights. The following principles can be derived beside the need for fairness arising from human dignity (a general freedom of action), based on the rule of law clause: predictability, lawfulness; the due exercise of rights; and the right to a decision taken within a reasonable time. Furthermore, from the principle of democracy, the following can be deduced: the democratic legitimacy of public decision-making entities; majority decision-making; and transparency.¹¹

2. The constitutional tradition behind the right to fair procedure (by authorities)

The right to fair procedure by authorities (or, in other words, to *fair administration*) basically defines the requirements for public administration and also provides guarantees, mostly of a procedural nature, i.e. regarding the way and method of exercising the powers of the state. As mentioned above, several decisions by the Constitutional Court had already specifically affected legal regulations of a procedural nature before the declaration of the related fundamental right. These decisions have been pivotal for Hungary’s legal system and procedural law, as they basically created a new quality of procedural rights, adding several guarantees to them. For example, it was the Constitutional Court that enforced the judicial review of administrative decisions and the re-codification of the law on infractions (minor offences), as well as true and effective legal remedies against the silence of authorities.¹² The Constitutional Court also ruled on legal remedies that, while formally allowing for judicial control, limited substantive and effective legal procedures.¹³ Several decisions by the Constitutional Court examined the notion and applicability of administrative cases; in other words, the substantive scope of administrative procedure. As another constitutional issue, cases based on their contents (characteristics) were administrative cases, but were not subject to the law on administrative procedure. This

¹⁰ As to the comprehensive analysis of the notion of rule of law, see, for example: Varga (2015). Standard definitions for the rule of law are specifically provided on pages 93–108; furthermore: Györfi et al. (2009).

¹¹ See a detailed description of procedural constitutionality in: Chronowski & Petrétei (2016), and Chronowski (2019).

¹² CC decisions 32/1990 (XII. 22.), 63/1997 (XII. 12.), 72/1995 (XII. 15.).

¹³ CC decision 39/2007 (VI. 20.).

question of constitutionality may also arise as a result of erroneous (limiting) legal interpretation by an authority (and the court reviewing it). The Fundamental Law created an opportunity for the review of the constitutionality of these cases by introducing so-called full constitutional complaints Article 24 (2).

In the Constitutional Court's practice, it is an indispensable requirement for the *lawfulness of public administration* that such administration shall operate within a *legally regulated* procedural framework, and any authorisation to limit rights needs to be specified accurately by law.¹⁴ Fundamental rights primarily provide guarantees to and protect the rights of the legal entities concerned; in contrast, the lawfulness of administrative decisions is *an interest of a state under the rule of law*, which must also be served by the legal regulation of administrative procedure, *regardless of the client's interests*.¹⁵ The application of law by public administration (authorities) serves the enforcement of legal regulations, not only aimed at individuals' interests protected by subjective rights and the effective legal regulations, but also the rights and lawful interests of the public or a community, as well as generally protected legal objectives such as the protection of public order and safety, and also the protection of individuals' lives, safety and rights. As such, an authority's unlawful decision not only infringes the rights of the affected party entitled to seek legal remedy but also the community's rights and interests protected by legal regulations. Ultimately, an unlawful decision violates the Fundamental Law as well, because that law prohibits any authorisation for unlawful decisions. An unlawful decision means that the relevant public administration authority did not proceed while subordinated to the law when making the decision concerned. The two aspects – the interest of an individual versus the interest of the community – may also be opposite to each other, that is, a decision may be favourable to the individual but violates the law.¹⁶ “A decision that is favourable to the client but is unlawful may violate the public interest and others' rights and lawful interests protected by administrative law (for example, a building permit issued without regard to the applicable environmental protection regulations violates the rights and lawful interests of the entities whose health those regulations aim to protect).”¹⁷ A public administration authority is obliged to *pass a decision* in the legally stipulated cases; and, for reasons of predictability, that decision must be passed within a certain (prescribed and respected) *deadline*.¹⁸ Guarantees for a *fair procedure*

¹⁴ Original wording: “entities exercising the powers of the state shall carry out their activities within the organisational framework and according to the operating procedures defined by law, pursuant to regulatory limitations that are predictable and knowable by citizens.” [CC decision 56/1991 (XI. 8.), ABH 1991, 454, 456]. The original wording was confirmed and completed by the following CC decisions: “Public administration subordinated to law – a basic requirement arising from the principle of rule of law”, CC decision 6/1999 (IV. 21.), ABH 1999, 90., 94.; CC decision 19/2004 (V. 26.), ABH 2004, 321., 353. Decisions passed after the entry into force of the Fundamental Law: “in connection with the operation of public administration entities, it is a requirement arising from the principle of rule of law that public administration should be subordinated to law. Public administration entities intervening in social relations based on their public powers shall make their decisions within a legally defined organisational framework, according to legally regulated procedures, and within the framework of substantive law.” Statement of Reasons [72] of the decision 38/2012 (XI. 14.), and Statement of Reasons [20] of CC decision 25/2018 (XII. 28.).

¹⁵ CC decision 2/2000 (II. 25.), ABH 2000, 25., 28–29.

¹⁶ Küpper & Patyi (2009, 1763).

¹⁷ CC decision 2/2000 (II. 25.), ABH 2000, 25., 28.

¹⁸ CC decision 72/1995 (XII. 15.), ABH 1995, 351., 354.

must be enforced in an administrative procedure as well; in particular, an authority cannot be its own client; the two roles must be separated;¹⁹ and the interested party must be heard (if that party wishes to exercise that right). These guarantees are weaker than those in a judicial procedure, but the basic ones must also be enforced in administrative procedures. On the other hand, the protection of legal relations closed with a final ruling and the protection of acquired rights must also be taken into consideration pursuant to the principle of legal certainty, in addition to the goals of providing procedural guarantees and lawful public administration.²⁰

As indicated above, the Constitutional Court has derived the basic requirements for the operation of public administration from the principle and clause of the rule of law, a key notion in Hungary's constitutionality. According to the standard practice of the Constitutional Court formulated over a period of three decades, the *subordination of public administration to the law* is deemed as an element of the rule of law in connection with the activities of public administration entities.²¹

These decisions by the Constitutional Court – as well as most of the Court's other decisions referred to in this study – are logically based on the text of the previous Constitution instead of the Fundamental Law. I use them in view of the fact that the Constitutional Court declared the following about repealing, through the fourth amendment to the Fundamental Law, Constitutional Court decisions made before the Fundamental Law had taken effect: “arguments, legal principles and constitutional connections in previous decisions may be used in addressing constitutional questions in new cases, provided that nothing prevents the application of those items based on the equivalence of the contents of the relevant Section in the Fundamental Law with the Constitution, its equivalence with the context of the Fundamental Law as a whole, the rules of interpreting the Fundamental Law, and the specific case at hand, and provided that it is necessary to insert those items into the Statement of Reasons of the decision to be made.”²² I have also considered that, for the above-mentioned reasons, these requirements are closely related to the historic constitution, i.e. they involve a certain *constitutional tradition* which should be emphasised in connection with the new provisions of the Fundamental Law as well.

Regarding a state that provides “good administration and services”, it is a basic requirement for the rule of law that *entities exercising the powers of the state* shall carry out their activities within the organisational framework and according to the operating procedures defined by law, pursuant to regulatory limitations that are predictable and knowable by citizens. Hence, the

¹⁹ CC decision 10/2001 (IV. 12.), ABH 2001, 123., 147.

²⁰ CC decision 349/B/2001, ABH 2002, 1241., 1273.

²¹ The following CC decisions, already quoted and to be quoted below: 56/1991 (XI. 8.), ABH 1991, 454., 456.; 31/2010 (III. 25.), ABH 2010, 178., 191., 29/2011 (IV. 7.), ABH 2011, 181., 200.

²² {CC decision 13/2013 (VI. 17.), Statement of Reasons [32]} The Constitutional Court ruled that Paragraph (1) of Article B), which stipulates the relevance of the Fundamental Law to the rule of law, has the same content as Paragraph (1) of Section 2 of the previous Constitution, and that the rules of interpreting the Fundamental Law must not lead to a conclusion that goes against a previous position taken by the Constitutional Court. {CC decision 32/2013 (XI. 22.), Statement of Reasons [70]} For that reason, I consider the arguments, legal principles and constitutional connections defined in previous CC decisions referred to in connection with the rule of law still applicable. The practice referred to in CC decision 56/1991 (XI. 8.) was expressly confirmed in (Statement of Reasons [36] of) CC decision 5/2013 (II. 21.) after the Fundamental Law had taken effect. As to the Constitutional Court's practices concerning the usability of decisions based on the previous Constitution, see: Téglási (2014); Téglási (2015a); Téglási (2015b).

Constitutional Court inferred the subordination of public administration activities to the law from the constitutional principle of the rule of law, stipulating that the Constitution's rules permeate the entire legal system; consequently, the subordination of administrative acts to the law also means that they are tied to the entire legal system and the Constitution's rules, and primarily to constitutional rights.²³ According to the interpretation by the Constitutional Court, the subordination of public administration activities to the Public Administration Act, which stems from the principle of the rule of law, means that public administration entities intervening in social relations in possession of the powers of the state shall make their decisions within the legally defined framework, according to legally defined procedures, and within the organisational framework defined by substantive law.²⁴ All that means that *the institutional system of administrative law procedure* must, when making decisions while applying the relevant laws, enforce both requirements stemming from the rule of law (i.e. the lawfulness of administrative decisions) and legal certainty. The Constitutional Court considers the subordination of public administration to the law as a requirement of the rule of law, which *must be ensured by courts* through the verification of the lawfulness of administrative decisions.²⁵ The requirement of subordinating public administration to the law was defined by the Constitutional Court primarily as the need for the lawfulness of administrative acts passed when in possession of the powers of the state.²⁶ Under the Fundamental Law as well, the Constitutional Court deemed the requirement of subordinating public administration to the law (for the overall rule of law) as a general principle.²⁷ The three most important Constitutional Court decisions on judicial control were related to the review of authorities' decisions, namely CC decisions 32/1990 (XII. 22.), 63/1997 (XII. 12.) and 39/1997 (VII. 1.).

According to Constitutional Court decision 32/1990 (XII. 22.), judicial control *extends to all types of administrative decisions*, including those that do not result in claims for the violation of fundamental rights or were not made in connection with the performance of basic obligations. This CC decision annulled the previous legal provisions (in laws and Council of Ministers' decrees) which limited judicial review to a short list of administrative cases by authorities. Pursuant to this highly significant CC decision, the individual provisions of the Council of Ministers' decree that allowed for review were not unconstitutional in themselves. Was unconstitutional that the review was limited to the administrative decisions specified in the de-

²³ In CC decision 56/1991 (XI. 8.) (ABH 1991, 454., 456.), a text that had become independent of the specific constitutional passage (and the underlying constitutional issue, namely that the municipality of a Budapest district had failed to draft organisational and operating regulations) became a true norm and is now a very frequently quoted and referenced text: over 50 decisions are based on it (*ratio decidendi*), and it is referred to in several minority opinions, with only one *orbiter dictum* situation recorded. As László Sólyom reminds: if a phrase becomes a formula, then fact becomes fiction (Sólyom, 2001, 717).

²⁴ CC decision 56/1991 (XI. 8.), ABH 1991, 454., 456. CC decision 2/2000 (II. 25.) refers to the original text as if the Court had declared it with that content, i.e. the "phrase" has been modified. ABH 2000, 25., 28. See also: CC decision 38/2012 (XI. 14.), Statement of Reasons [72]; CC decision 14/2018 (IX. 27.), Statement of Reasons [23].

²⁵ CC decision 24/2015 (VII. 7.), Statement of Reasons [19], [20]; CC decision 30/2017 (XI. 14.) Statement of Reasons [85]; CC decision 14/2018 (IX. 27.), Statement of Reasons [24].

²⁶ CC decision 8/2011 (II. 18.), ABH 2011, 49., 79.

²⁷ CC decision 5/2013 (II. 21.), Statement of Reasons [37]; CC decision 24/2015 (VII. 7.), Statement of Reasons [20]; CC decision 30/2017 (XI. 14.), Statement of Reasons [85]; CC decision 3223/2018 (VII. 2.), Statement of Reasons [32].

cree. Based on Constitutional Court decision 32/1990 (XII. 22.), the National Assembly finally passed *Act XXVI of 1991 on the extension of the judicial review of administrative decisions*. However, that act left misdemeanour decisions and procedures “untouched”, as it did not allow for the review of final misdemeanour decisions before a court, apart from those that changed a fine to detention. However, according to the Constitutional Court, “authorities dealing with misdemeanours are administrative authorities, and decisions in misdemeanour cases constitute administrative decisions. If a misdemeanour authority rules to punish a conduct against public administration based on the content of the decision or the bearings of the case, then an opportunity to verify the lawfulness of the decision must be provided, pursuant to the rules of administrative justice.”²⁸ At the same time, the Constitutional Court pointed out that the rule of law requires not only the acts of public administration authorities to be subject to law, but also all acts involving decisions *affecting the addressees’ fundamental rights*.²⁹ The contents of this legally regulated framework depend on further constitutional circumstances, and especially on the fundamental rights regulated in the Fundamental Law.

3. The fundamental right to fair public administration procedures in Hungary’s Fundamental Law

As noted above, the Fundamental Law guarantees everybody’s fundamental right to *fair public administration procedures*, i.e. to have their official affairs “handled impartially, fairly and within a reasonable time by the authorities”. Consequently, as confirmed by the Constitutional Court’s decisions described below, *the main principles of administrative procedure have been essentially elevated to a constitutional level*. The Fundamental Law was thus involved in the process of fair public administration procedures becoming a basic requirement in the European Union; this process started with the European Code of Good Administrative Behaviour and the Charter of Fundamental Rights, and ended with the Lisbon Treaty. The “principles [arising from the fundamental right] are related to the notion of good public administration, as well as

²⁸ CC decision 63/1997 (XII. 12.), ABH 1997, 365., 368.

²⁹ In connection with this, the Constitutional Court pointed out that the dismissal of a public or government official involves a decision by the person exercising the rights of the employer (a public administration entity) which affects the official’s constitutional rights. In view of the subordination of public administration to law, the frameworks of the employer’s decision under substantive law must be legally defined. The subordination of public administration to law also results in the obligation to regulate the legal position of public administration officials. For lawful administrative decisions, the legislator must, when regulating the legal position of officials, provide guarantees to ensure that public administration officials shall make highly professional and unbiased decisions without any influence and regardless of party policy, solely based on the applicable laws. One element of this guarantee system is the relative stability of public service officials’ legal positions. On that basis, the Constitutional Court established that the legal conditions and guarantees, as well as the possibility of employers’ decisions without citing the reason for them, violate the requirement of subordination to law as stipulated in Paragraph (1) of Article B) of the Fundamental Law. CC decision 8/2011 (II. 18.), ABH 2011, 49, 79–80, confirmed – after the Fundamental Law had taken effect – by CC decision 5/2013 (II. 21.), Statement of Reasons [37]. In addition, the possibility of dismissal without citing a reason violates the neutrality of administrative decisions from the perspective of party politics, their freedom from influence, their impartiality, and thus their lawfulness. CC decision 29/2011 (IV. 7.), ABH 2011, 181., 200.

to the common European principles of the law of administrative procedures”.³⁰ In essence, the acknowledgement (in Article XXIV of the Fundamental Law) of the right to *fair* administrative procedures as a fundamental administrative right constitutes an expression of the above-mentioned rule-of-law requirement. The acknowledgement of the *right to fair administrative procedures (by authorities) as a fundamental administrative right* means that everybody is entitled to be heard before a decision that is detrimental to them is passed, to access the related documents, and to have the reasons for the administrative decision explained to them.³¹ The legal protection related to the fundamental right, as stated in Article XXIV, extends to administration by authorities impartially, fairly and within a reasonable time [Paragraph (1) of Article XXIV], as well as to compensation for any damage caused by public administration [cf.: Paragraph (2) of Article XXIV].³²

The *subject* of the fundamental right to fair administrative procedures is *the client*, the natural or legal person or organisation whose right or lawful interest is *directly affected by the case*.³³ Within the rule of law framework, which constitutes the primary constitutional background for administrative operations, *fairness* is a basic constitutional requirement applicable to all procedures based on the powers of the state. Thus, according to the Constitutional Court, “the requirements of fair procedures must be relevant to authorities’ procedures as well (taking into consideration the specific characteristics of public administration procedures), and these requirements must be enforceable as universal and ultimately fundamental rights by the subjects of those fundamental rights. The enforceability of these rights constitutes the limit of an authority’s operation and the measure of its lawful procedures.”³⁴ The right to fair administration; that is, the requirement of fair procedures by the authorities, is *not absolute but universal*; in other words, *it extends to everything*. According to the Constitutional Court, it “cannot be violated in any administrative procedure, despite possible variances in the requirements arising from paragraph (1) of article XXIV of the Fundamental Law across various types of administrative procedures, in view of their specific features”.³⁵ Similarly to the unconditional enforcement of the principles, “the individual procedural guarantees based on the right to a fair procedure represent a value, the infringement or disregard of which affects the merits of the case at hand, regardless of its outcome”.³⁶ The consequences derived from the Fundamental Law must consider the special aspects of individual administrative procedures, and the limitation of the partial authorisations (as procedural guarantees considered as parts of the right to fair procedure by authorities) can be examined in each procedure type, but the same fundamental right limitation test must be performed. As opposed to the content of Paragraph (1) of Article XXVIII, which stipulates the right to fair judicial procedures, the Constitutional Court did not indicate any systemic content and absolute right in connection with the fundamental right to fair administration. However, the Court did establish that several partial authorisations (previously rights guaranteed in laws) *were of a similar nature to fundamental rights*; these are focused on clients, and their enforcement is intended to serve the formal and substantive effectiveness (speed, pro-

³⁰ CC decision 3311/2018 (X. 16.), Statement of Reasons [26].

³¹ CC decision 3311/2018 (X. 16.), Statement of Reasons [26], [28].

³² CC decision 3223/2018 (VII. 2.), Statement of Reasons [29].

³³ CC decision 3223/2018 (VII. 2.), Statement of Reasons [57].

³⁴ *ibid*, Statement of Reasons [28].

³⁵ *ibid*, Statement of Reasons [34].

³⁶ CC decision 3311/2018. (X. 16.), Statement of Reasons [34].

fessionality and lawfulness) of review procedures, or their overall subordination to law. These partial authorisations endowed with a fundamental right's character belong to the fundamental right limitation regime referred to in Paragraph (3) of Article I of the Fundamental Law. But which partial authorisations are these specifically? According to the Constitutional Court decision 3223/2018 (VII. 2.), the *temporal dimension*³⁷ of an administrative procedure is one such partial authorisation related to decision-making within a reasonable time period, even though one of the referenced underlying decisions deemed the examined rule to be unconstitutional due to the so-called *deliberation right in the strong sense*, or in other words, a “discretionary decision without deliberation”.³⁸ “The deadline for legal remedy, together with the notification method and the submission conditions, must not be uncertain to the extent of actually depriving the entitled persons from the possibility of exercising that right, because that would go against the requirements of a fair procedure and reasonable time periods, as stipulated in paragraph (1) of article XXIV of the Fundamental Law.”³⁹ The *communication of decisions* was also classified as a procedural element related to a fundamental right, even though this was established by the Constitutional Court in connection with election procedures, and not concerning administrative procedural laws. The Court identified an omission violating Paragraph (1) of Article XXIV and Paragraph (1) of Article XXVIII of the Fundamental Law resulting from the legislator's failure to ensure in Act XXXVI of 2013 on the election procedure that a second-instance election committee and a review court should communicate its decision with everybody concerned by the resolution passed in an election-related legal remedy procedure.⁴⁰ The Constitutional Court also considered the *communication method* as a partial authorisation related to a fundamental right, noting that “persons entitled to take public administration actions must not be generally forced to monitor actions by public administration players and especially authorities, unless this is justified by a good reason (such as a high number of affected persons, or an affected person whose address is unknown). Failure to notify personally all known interested persons of the circumstances allowing for exercising their rights and the deadlines for taking action [...] clearly places the entitled persons in a difficult position, without any connection to any constitutional right or value.”⁴¹ The principle of *equality of arms* can also be considered as a part of Paragraph (1) of Article XXIV in administrative procedures involving counter-interested clients.⁴² However, the enforcement of a fundamental right cannot be decoupled from the general *characteristics* of the procedures of administrative authorities. The Constitutional Court maintained, under the Fundamental Law, the conclusion that “authorities' procedures are targeted, examina-

³⁷ Statement of Reasons [33], quoting [71]–[77] of the Statement of Reasons of CC decision 3/2014 (I. 21.); CC decision 17/2015 (VI. 5.), Statement of Reasons [108].

³⁸ CC decision 3/2014 (I. 21.), Statement of Reasons [75]–[76].

³⁹ CC decision 17/2015 (VI. 5.), Statement of Reasons [108].

⁴⁰ CC decision 6/2017 (III. 10.), operative provisions. “According to the Constitutional Court, it follows from Paragraph (1) of Article XXIV and Paragraph (1) of Article XXVIII of the Fundamental Law that a second-instance election committee's decision about an appeal, as well as a court's review decision, must also be communicated with those who incur any right or obligation arising from the decision, even if any decision made in a previous phase of the election-related legal remedy procedure did not have to be communicated to them.” Statement of Reasons [37].

⁴¹ CC decision 17/2015 (VI. 5.), Statement of Reasons [109], confirmed by CC decision 35/2015 (XII. 16.), Statement of Reasons [27], CC decision 3223/2018 (VII. 2.), Statement of Reasons [33].

⁴² CC decision 10/2017 (V. 5.), Statement of Reasons [61]–[63].

tive procedures by public entities possessing the powers of the state.” As a material circumstance from the perspective of the enforcement of a fundamental right, an administrative procedure is differentiated from a civil or criminal procedure by its obligatory *examinative* nature. The authority involved in the procedure in the interest of the public, without any individual (personal) interest, must identify and prove the facts underlying the decision. It is the administrative entity that decides which factual elements are required for decision-making, and which are irrelevant. However, in view of the fundamental right involved and the rule of law requirement, no procedure may be prescribed that violates the right to a *fair* procedure by a public administration authority and fully ignores the interests of the client and other stakeholders.⁴³ In other words, “an administrative authority’s specific procedures aimed at applying the law must not ignore the clients’ rights, and must concurrently fulfil the functions of protecting the interest of the public and providing subjective legal protection.” During the (administrative) procedure, exercising the stakeholders’ rights and fulfilling their obligations require basic *information*: the clients / stakeholders must know the cases that concern them, as well as the facts of those cases and the legal regulations governing them. It is in this sense that the Constitutional Court placed the requirements for the communication of decisions under protection, due to their relevance to a fundamental right. However, the mere communication of a decision cannot satisfy all requirements arising from the fundamental right; that may also require familiarity with the entire case documentation held with the authority. The inspection of *documents* is basically related to the requirement of allowing clients to exercise their rights and meet their obligations. Arising from the principle of equality of arms (which is interpreted as part of the fundamental right), this right ensures in examinative procedures that clients can formulate their declarations, remarks and proposals vis-à-vis the authority’s legal position, as well as (even more importantly) their own *defence* in *ex officio* procedures aimed at establishing any liability. Consequently, the right to make statements and the *right to defence* constitute integral parts of the right to fair administrative procedure. (The right to defence is relevant in specialised administrative procedures involving retrospective verification and the potential application of adverse legal consequences, such as a fine.)

If the *right to make statements and the right to defence* are to be enforced, clients must have an opportunity to know the authority’s evidential procedure and to review the related documents and other evidence on which the authority’s decisions affecting them are based. The right to inspect documents is not only a legal guarantee for the lawful operation of the administrative entity concerned, but it also serves as the basis for the clients’ effective participation in the administrative procedure. For that reason, “through the right to make statements and the right to defence, the right to inspect documents necessarily belongs in the sphere of interpretation of the right to fair administrative procedures”.⁴⁴ In this way, the *right to effective defence* is obviously a partial authorisation within fair administrative procedure;⁴⁵ consequently, violating the right to inspect documents constitutes the limitation of a fair administrative procedure insofar as it infringes the client’s right to make statements and defend himself/herself.

As an indispensable condition for the verifiability of lawfulness and the avoidance of arbitrariness, the entities applying the law must issue justifications to provide the reasons for their

⁴³ Cf.: CC decision 165/2011 (XII. 20.), ABH 2011, 478., 520.; confirmed by CC decision 3342/2012 (XI. 19.), Statement of Reasons [13], as well as CC decision 3223/2018 (VII. 2.), Statement of Reasons [30]–[31].

⁴⁴ CC decision 3223/2018 (VII. 2.), Statement of Reasons [37].

⁴⁵ CC decision 3223/2018 (VII. 2.), Statement of Reasons [36]–[37], [59].

decisions.⁴⁶ Besides the right to fair administrative procedures, authorities' obligation to justify their decisions is also elevated to a fundamental right's level in Hungary's Fundamental Law. According to the second sentence in Paragraph (1) of Article XXIV of the Fundamental Law, authorities must justify their decisions as determined by law. Failure to do so constitutes a legal violation and is against the Constitution; in this case, a procedure may be initiated before an ordinary court or, ultimately, before the Constitutional Court. In addition, the justification obligation is important for the predictability of future decisions by entities applying the law;⁴⁷ that is, it promotes legal certainty (and thus the rule of law) as well. Since Albert Venn Dicey's staple work, the definition of the rule of law has involved the state's liability before a court for any legal violation causing damage to a private person.⁴⁸ The rule of authorities' liability for any damage caused was elevated to a constitutional level in the Fundamental Law, which stipulates that every person has the right to statutory compensation for any unlawful damage caused by authorities while performing their duties.⁴⁹ This liability is not objective but based on culpability (imputability); but the compensation obligation cannot be avoided if the authority's decision is proved unlawful, provided that defence on the grounds of reasonable expectation fails.

4. Tradition of the right to a fair judicial procedure and to legal remedy

In specific procedures of the Constitutional Court, the right to fair administration (which continues and significantly extends the above-mentioned, decade-long constitutional tradition through specific provisions in the Fundamental Law) is often coupled with the right to *fair procedure*, especially if the Constitutional Court's procedure was preceded by an administrative and court procedure (usually a lawsuit in a case involving public administration). Both fundamental rights are traditionally connected to the right to legal remedy as well, because the client's rights and the relevant authority's decisions are assessed in a lawsuit following (or for want of) an administrative procedure. These two latter rights were often quoted in conjunction in Constitutional Court decisions based on the old Constitution (which did not stipulate the right to fair administration).

As explained in the introduction, the right to a fair judicial procedure (i.e. to a fair hearing) has always been part of the rule of law, as a constitutional requirement that can be deduced from that principle. While this fundamental right is, logically, not solely relevant to *administrative lawsuits* or other judicial procedures related to public administration, it serves as the "parent right" for the review of administrative decisions by courts, and thus has a direct impact on the regulation of authorities' procedures. *As early as in 1997*, the Constitutional Court declared – as

⁴⁶ Györfi et al. (2009, 164).

⁴⁷ Györfi et al. (2009, 164, footnote 127).

⁴⁸ The notion of the rule of law became known in the world, and also in Hungary, after its formulation by Albert Venn Dicey. In his view, the rule of law has the following *three basis components*. Firstly, no government has discretionary power, i.e. the law takes precedence to power, which requires institutional guarantees. Secondly, every man is subject to ordinary law and the jurisdiction of ordinary courts, i.e. everybody is equal before the law. (Public officials are also not exempted from accountability before ordinary courts, and consequently there should be no dedicated administrative court to adjudicate their decisions.) Thirdly, the general rules of constitutional law are derived from the country's ordinary law, i.e. the Constitution is (before the courts) the outcome of a struggle for individuals' rights. Dicey (1995).

⁴⁹ Paragraph (2) of Article XXIV of the Fundamental Law

a constitutional requirement for the regulation of the judicial review of administrative decisions – that a court should be able to assess the merits of the litigated rights and obligations pursuant to the conditions of a fair procedure. The rule defining an administrative decision-making authorisation must specify an appropriate *aspect or standard* based on which the court can review the lawfulness of the decision.⁵⁰ The Constitutional Court has repeatedly confirmed the essence of that decision since the Fundamental Law took effect. In a decision passed in 2018, the Constitutional Court carried out the summary review of the main guarantee elements of the fundamental right to a fair procedure, and specifically the right to a *public hearing*.⁵¹ It should be noted that the Constitutional Court monitors and takes into consideration the relevant legal practices of the European Court of Human Rights, as Paragraph (1) of Article XXVIII of the Fundamental Law guarantees the right to a fair judicial procedure along similar procedural principles and approaches as Paragraph 1 of Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950, and promulgated in Act XXXI of 1993.⁵² The right to a fair procedure includes, beyond the enforcement of procedural guarantees, *the requirement of effective judicial legal protection*. This means the constitutional requirement of drafting legal regulations based on which a court can adjudicate the merits of the litigated rights. A merely formal opportunity to choose the judicial way is insufficient for the enforcement of the procedural guarantees prescribed in the constitutional rule, which are aimed at allowing a court to make what is intended to be a final decision on the merits of the case at hand. For that reason, the requirement of fair procedures includes the need for effective judicial legal protection, which primarily depends on what a court may review pursuant to the relevant procedural rules.

As noted above, it is a *constitutional requirement* concerning the regulation of the judicial verification of the lawfulness of administrative decisions that courts shall be able to adjudicate the merits of the litigated rights and obligations. Thus, according to the *basic paradigm consistently applied* by the Constitutional Court, the rules defining administrative decision-making rights must specify an appropriate aspect or standard based on which a court can review the lawfulness of a decision. Consequently, the judicial verification of the lawfulness of administrative decisions *cannot be constitutionally limited* to the examination of formal compliance. A court proceeding in an administrative lawsuit is not (and cannot be) bound by the facts established in the administrative decision, but instead may, from the perspective of lawfulness, overrule the administrative entity's deliberation. According to the Constitutional Court's standard practice, unconstitutionality is not limited to legal regula-

⁵⁰ CC decision 39/1997 (VII. 1.), ABH 1997, 263. The fundamental right that defined the constitutional requirements for the fairness of procedures was formulated in Paragraph (1) of Section 57 of the old Constitution, which was in effect until 31 December 2011, as follows: "Every person is equal before the court and has the right to have any charge against him or her, or any right or duty in litigation, adjudicated by a legally established, independent and impartial court in a fair and public hearing." Concerning the essential contents of the fundamental right, Paragraph (1) of Article XXVIII of the Fundamental Law that took effect on 1 January 2012 contains identical (almost verbatim) provisions: "Every person shall have the right to have any charge against him or her, or any right and duty in litigation, adjudicated by a legally established, independent and impartial court in a fair public trial within a reasonable period of time." Due to the essentially identical nature of the two provisions, the previous decisions of the Constitutional Court are still applicable.

⁵¹ CC decision 3027/2018 (II. 6.), Statement of Reasons [16]–[27].

⁵² *ibid*, Statement of Reasons [15].

tions that either expressly preclude judicial review beyond the legal question at hand or allow so little room for judicial review vis-à-vis the administrative deliberation that the merits of the case cannot be adjudicated with the required constitutional guarantees; in addition to these cases, those legal regulations which grant unlimited discretionary powers and specify no standard for courts to base lawful decisions on are also unconstitutional.⁵³ Consequently, through the requirement of effective judicial legal protection against administrative decisions, the right to a fair (judicial) procedure is very closely *connected to the right to legal remedy*; the Constitutional Court's main findings regarding this latter right are summarised as follows. According to Paragraph (7) of Article XXVIII of the Fundamental Law: "Everyone shall have the right to seek legal remedy against judicial, administrative or other official decisions, which infringe upon his or her rights or legitimate interests." This right means the opportunity to transfer a decision to a *different organisation* or to a *higher forum within the same organisation*,⁵⁴ which in turn means that the fundamental right to legal remedy is granted, provided that the law relevant to the procedure allows a stakeholder to have his/her case adjudicated by an organisation other than the one that proceeded in the original case.⁵⁵ The opportunity to redress a legal injury is a substantial element of the notion of legal remedy.⁵⁶ The legislator may establish various forms of and forums for legal remedies for the various procedures, and may define the number of levels in the system of legal remedies. Consequently, a single-instance legal remedy procedure fully meets the requirements of the Fundamental Law.⁵⁷ According to the Constitutional Court, the requirement of providing legal remedy is relevant to decisions on the merits of a case. What constitutes such a decision primarily depends on the subject of the decision and its impact on the person concerned; in other words. on whether or not the decision had a material effect on the affected person's situation and rights.⁵⁸ The right to legal remedy specifically means a right to *actual and effective* legal remedy: the fundamental right is not only infringed if legal remedy is entirely excluded,⁵⁹ but also if legal remedy is granted by law but cannot be actually and effectively realised for any other reason, for example due to provisions in detailed regulations, thus rendering the right to legal remedy meaningless and formal.⁶⁰ Notwithstanding the above,

⁵³ CC decision 6/1998 (III. 11.), ABH 1998, 91., 98–99., confirmed by CC decision 5/1999 (III. 31.), ABH 1999, 75.; CC decision 14/2002 (III. 20.), ABH 2002, 101., 108.; CC decision 15/2002 (III. 29.), ABH 2002, 116., 118–120., CC decision 35/2002 (VII. 19.), ABH 2002, 199., 211. After the entry into force of the Fundamental Law: CC decision 7/2013 (III. 1.), Statement of Reasons [24], CC decision 17/2015 (VI. 5.), Statement of Reasons [86]–[88], CC decision 14/2018 (IX. 27.), Statement of Reasons [19].

⁵⁴ CC decision 5/1992 (I. 30.), ABH 1992, 27., 31.; confirmed by CC decision 35/2013 (XI. 22.), Statement of Reasons [16], CC decision 10/2017 (V. 5.), Statement of Reasons [67].

⁵⁵ CC decision 513/B/1994, ABH 1994, 731., 734.

⁵⁶ CC decision 23/1998 (VI. 9.), ABH 1998, 182., 186., confirmed by CC decision 3064/2014 (III. 26.), Statement of Reasons [15], CC decision 10/2017 (V. 5.), Statement of Reasons [68].

⁵⁷ CC decision 1437/B/1990, ABH 1992, 453., 454.; similarly: CC decision 22/2014 (VII. 15.), Statement of Reasons [95], CC decision 3223/2018 (VII. 2.), Statement of Reasons [68].

⁵⁸ CC decision 1636/D/1991, ABH 1992, 515., 516.; CC decision 5/1992 (I. 30.), ABH 1992, 27., 31.; CC decision 4/1993 (II. 12.), ABH 1993, 48., 74.; CC decision 46/2003 (X. 16.), ABH 2003, 488., 502., CC decision 3223/2018 (VII. 2.), Statement of Reasons [66].

⁵⁹ CC decision 36/2013 (XII. 5.), Statement of Reasons [61].

⁶⁰ CC decision 36/2013 (XII. 5.), Statement of Reasons [28]–[31].

the fundamental right to legal remedy naturally does not mean that an organisation assessing a claim must grant it under any circumstances; what it definitely does mean is that a legal remedy procedure must be carried out pursuant to the relevant procedural rules, by examining the merits of the claim as specified by law.⁶¹

The entry into force of the Fundamental Law and the related Act on the Constitutional Court on 1 January 2012 signified the start of a new era concerning the above-mentioned constitutionality requirements and provisions related to fundamental rights. Previously, anyone could initiate a retroactive, abstract review by the Constitutional Court; meaning that anyone who was not personally affected, could also initiate the retroactive review of the constitutionality of any legal regulation. In addition, the Constitutional Court was not authorised to annul a specific, contested court decision, even in the so-called constitutional complaint procedure. Instead, the Court could only examine the constitutional compliance of the decision. When the Fundamental Law took effect, the possibility for anyone to initiate an abstract, retroactive constitutionality review ended, and the Constitutional Court gained a new authorisation, namely to review the constitutionality of the legal interpretation of judicial decisions.⁶² Until 1 January 2012, the Constitutional Court could review only the *constitutionality of a legal regulation applicable* to a specific case; but since the entry into force of the Fundamental Law, a person or organisation affected by a case may file a complaint with the Constitutional Court against a judicial decision that violates the Fundamental Law if the decision about the merits of the case or another decision concluding a court procedure violates his/her rights enshrined in the Fundamental Law, provided that his/her legal remedy options have been exhausted or he/she has no opportunity for legal remedy. From the perspective of public administration, this means that the Constitutional Court can no longer review just the legislative activities (general acts) of public administration entities, but may also review concrete decisions (individual acts) of authorities applying the law, as well as judicial decisions reviewing the lawfulness of those decisions (acts) by authorities. When repealing a judicial decision, the Constitutional Court may now also annul the underlying administrative decision(s) reviewed by the court. In recent years, the Constitutional Court has ruled in several cases on the judicial review of decisions made by authorities (and specifically public administration authorities). Many of these Constitutional Court decisions are referenced above, and several *important decisions* have been passed.⁶³

⁶¹ CC decision 9/2017 (IV. 18.), Statement of Reasons [21], CC decision 3223/2018 (VII. 2.), Statement of Reasons [69].

⁶² Between 1990 and 2011, the Constitutional Court overruled a specific judicial decision only once, at the beginning of the Court's operation, even though it was not authorised to do so based on the legal regulations in effect at that time. This CC resolution (57/1991 (XI. 8.)) was heavily criticised in legal literature; see: Pokol (2000).

⁶³ Besides establishing a constitutional requirement, CC decision 20/2018 (XI. 14.) also repealed the Curia's decision Kfv.II.37.800/2016/9, with a similar statement of facts to that in CC decision 18/2018 (XI. 12.), which repealed decision 24.Kf.20.623/2016/3 of the Budapest Environs Regional Court. Furthermore, CC decision 23/2018 (XII. 28.) on repealing the Curia's unconstitutional decision Kfv.I.35.676/2017/10; CC decision 3311/2018 (X. 16.) on repealing the Curia's decision Kfv.II.37.070/2016/7; CC decision 3179/2018 (VI. 8.) on repealing decision 35.Kpk.46.443/2016/4 of the Budapest Administrative and Labour Court (concerning the exercising of an attorney's profession); as well as election-related decisions: CC decision 3093/2018 (III. 26.) on the constitutional complaint against the Curia's decision Kvk.IV.37.251/2018/3 (election – suspension of immunity), CC decision 3130/2018 (IV. 19.) on repealing the Curia's decision Kvk.VI.37.414/2018/2 (election – billboards), CC decision 3154/2018 (V. 11.) on repealing the Curia's decision Kvk.V.37.466/2018/2 (election – mailed campaign notifications).

Conclusions (if any)

The Constitutional Court's new competence has already significantly transformed the general judgement of fundamental procedural rights, and reformed its interpretation. Those interpretations are now incorporated in specific legal relations and the system of constitutional requirements directly, through the Constitutional Court's decisions, instead of indirectly, through new procedural rules enacted by the legislator. This can be considered as a revolutionary change, if such a phrase is appropriate for the transformation of the legal system. The significance of traditions has been repeatedly emphasised in this study. I trust that I have managed to present the constitutional requirements that have evolved from precedent-like Constitutional Court decisions (built on and mutually reinforcing each other) into true traditions or achievements. The appearance of a new fundamental right and the National Avowal's ideal of a state providing "good administration" ushered in a major change in this system. But these achievements have turned out (or may turn out) to be deeply rooted in the ideals and requirements of the rule of law in the Austro-Hungarian era, as well as in the period after Hungary's transition from Communism to democracy. So the real lesson to be learned is that the truly or entirely novel features of the traditions of procedural constitutionality are presented by the introduction of constitutional complaints, as well as the direct enforceability and actual enforcement of old requirements (and increasingly stringent new requirements) by the Constitutional Court. This power of the Constitutional Court has confirmed the firm experience that ideals, norms and fundamental rights serve their true purposes in the everyday operation in a constitutional state through institutional forces (in this case, the competences and organisation of the Constitutional Court).

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