

Conclusions of the summary report on the enforcement of the requirements of the Fundamental Law of Hungary in the courts' jurisprudence

With the entry into force of the Fundamental Law of Hungary (“the Fundamental Law”), *constitutional complaint* has become dominant Constitutional Court competence, whereas abstract *ex post facto* norm control has become exceptional. This change in the Constitutional Court's competences has also entailed a change in the status of this body in the state organisation: while earlier the Constitutional Court functioned, by following the Kelsenian model, as a kind of “negative legislator”, nowadays, due to its competence of adjudicating individual cases, it functions much more as a court. The precise interpretation of ‘genuine constitutional complaint’ competence is not so simple as the interpretation of ‘normative complaint’ competence, because genuine constitutional complaint inevitably entails a difficulty in identifying clearly the boundary line between the independence of the judiciary and the activities of the Constitutional Court. The Constitutional Court must exercise its new competence with special care, by paying due regard to international experiences as well, and by practising a kind of self-restraint. It must not attempt to make private law dogmatics, or criminal or administrative adjudication similar to constitutional law by ignoring the traditions of those bodies of law. Section 27 of the Act on the Constitutional Court declares the constitutional reviewability of ordinary court decisions. In exercising this competence the Constitutional Court shall examine the conformity with the Fundamental Law of the law interpretation given by an ordinary court in its decision, that is, it shall examine whether in applying the law the ordinary court has enforced the constitutional contents of the rights involved in the adjudicated case and ensured under the Fundamental Law. Where in a case brought under constitutional review the adjudicating court has failed to take into consideration the Fundamental Law-related aspects of the case and, consequently, its law interpretation in the case has not been in conformity with the constitutional contents of the examined rights, the Constitutional Court may find the court decision to be contrary to the Fundamental Law.

The basic aim of *ex post facto norm control upon judicial initiation* is to assess, by a constitutional body related to the justice system and vested with the task of protecting constitutionality, whether the interpretation or application by a court of a norm in a case brought before it fits, or does not fit, the legal system and is, or is not, in conformity with the Fundamental Law – which assessment will, in turn, basically determine the court's interpretation and, hence, the adjudication of the case. According to the Fundamental Law, in delivering their decisions judges are subject solely to “the law”, that is, the legal order, more specifically, the constitutional legal order. Hence, judges may not pass judgments that are based on laws or legal norms that are contrary to the Fundamental Law. Since the power of establishing nonconformity with the Fundamental Law is vested with the Constitutional Court, *judicial initiation* is practically a legal institution which creates connection and dialogue between the ordinary courts and the Constitutional Court.

The jurisprudence-analysing working group has found that references to the Fundamental Law were made in only hardly more than half of the examined civil, administrative and criminal decisions and, as to their nature, they were mostly not substantial references but rather invocations of general principles.

The Curia of Hungary must clearly endeavour to develop a court practice incorporating and strengthening the spirit of the Fundamental Law, the more so since this was the explicit aim of the constitutionalising power when in Article 28 of the Fundamental Law it provided that in the course of the application of the laws the text of the laws shall be interpreted by the courts in accordance with the Fundamental Law.

The jurisprudence-analysing working group has been of the opinion that fundamental rights-related aspects should be more pronounced and manifest in judicial thinking; such a shift, however, requires judicial courage, as the traditions of Hungarian judicial practice are not in accord with certain legal institutions and rules of the Fundamental Law. Whether a case has, or does not have, fundamental rights-related aspects must be examined by the courts not only when a fundamental right actually arises in a case but also in general, in the interpretation of the laws. In cases involving certain fundamental rights – in particular, the right to freedom of speech and expression, the right to freedom of assembly and the right to fair trial – special attention should be devoted to the constitutional ramifications of the given case and to the jurisprudence related to the given fundamental rights; all the more so because such court judgments may well be expected to be subjected to constitutional review.