29 Decision of the Constitutional Court on the Act on the Procedural Code of Public Administration (Taken Prior to the Act's Promulgation)

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29.1 The Antecedents and the Motion

(a) The government legislated on *the procedural code of public administration* with Government resolution 1011/2015. (I.22.), followed by resolution 1352/2015. (VI.2.) on certain tasks connected with the preparation of the act on the procedural code of public administration and the act on general administrative regulations. It was along the principles laid down in these two resolutions that further acts were prepared: Act T/12233 concerning general administrative regulations and the Act concerning proposals on the restructuring of the court system, and Act T/12234 on administrative regulation. The acts on administrative regulation and on the procedural code of public administration were sent for debate to the National Assembly together, and were both passed with a simple majority on December 6, 2016 (the Act on the procedural code of public administration was passed with 115 yes votes, 36 no votes and 21 abstentions). The Act concerning the restructuring of the court system was finally not sent to the Assembly, as when the above mentioned two acts were passed, the Ministry of Justice was still conducting political negotatiations with the representatives of the parliamentary parties.

(b) The *president of the republic* - based on Art. 6 par. (4) of the Constitution - has requested the Constitutional Court to rule on the constitutionality and compatibility with public law of Art. 7 par. (4) and Art. 12 par. (2) pts. a) and c) of the Act on the procedural code of public administration passed by the National Assembly on December 7, 2016, but not yet promulgated. The president of the republic furthermore advised the Court to evaluate the constitutionality of the promulgation of the above questioned legislative proposals. The legislation evaluated by the Constitutional Court is the following:

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> "Art. 7. [Courts acting in administrative proceedings]
> […]
> (4) The Budapest-Capital Regional Court acts as the supreme court in administrative proceedings".

Art. 12. (2) Except trials related to the legal relationships of public servants, the court acting as supreme court in administrative proceedings handles trials relating to the administrative activities of the following:

> "a) an independent regulatory agency, an independent state administration agency or a government office, as per the act on central state administration agencies
> […]
> c) the electoral commission."

(b1) The presidential motion dated December 16, 2016 cites Art. 25 par. (8) of the Constitution, as per which the detailed instructions regulating the organization and administration of courts, as well as the supervision of the central administration of courts in Hungary is laid down in a fundamental law, which fundamental law is presently Act CLXI of 2011 (henceforth Act CLXI) on the organization and administration of courts. As per Art. 16 of Act CLXI, justice can be exercised on the territory of Hungary by the following types of courts: the Curia (the Supreme Court of Justice), the Court of Appeals, the tribunal, the district court and the administrative and labour court.

The presidential motion points out that Art 7. par. (4) of the Act on the procedural code of public administration mentions a court which is not included in Act CLXI, the so called administrative supreme court, the attributes of which are held by the Budapest-Capital Regional Court. Thus, while the Act on the procedural code of public administration does not formally modify Act CLXI, it does however widen its content by adding a new court, furthermore, this legislative change is the result of a law passed by the National Assembly with a simple majority.

Therefore, the presidential motion specifies that although the role of the newly 'created' administrative supreme court is fulfilled by the Budapest-Capital Regional Court this does not change the fact that the court system laid down by Act CLXI is enlarged with a new type of court. This is further underlined by the provisions which outline the functions and authority of the administrative supreme court [Art. 7 par. (1) pt. b), Art. 7 par. (2) pt. b), Art. 12 par. (2)-(3), Art. 15 par (3) pt. a), Art. 36. par. (2) pt. a)], define its structure [Art. 8 par. (6)] and specify regulations which differ from the 'general procedural order' of the Budapest-Capital Regional Court [for example regarding representation and compulsory legal representation in Art. 27 par. (1)].

The president of the republic makes it clear in his motion that

> "these provisions unequivocally lead to the creation within the court system of a new court by the name of administrative supreme court, independent of the fact that the functions of the court are held, temporarily or permanently, by the Budapest-Capital Regional Court."

With regards to the methodology of the legislative solution he considers it likely that the qualified majority needed to modify Act CLXI was missing.

The motion put forward by the president of the republic refers to the contents of Constitutional Court decision 16/2015. (VI.5.) (Constitutional Court Gazette, 13, 741):

> "[39] … The scope of fundamental laws is defined by the Constitution in two ways: firstly a) with regards to certain subject matters- quasi with general character-it states that these subject matters, and in some cases the 'detailed regulations' of these subject matters are defined by fundamental law (…) on the other hand, b) in certain cases the Constitution can define further subject matters contained within the above-mentioned ones, which require legislation by fundamental law (…)
>
> [40] The requirement of fundamental legislation (for which, as per Art T) par. (4) a majority of three thirds of the present MPs is required) is thus not restricted to particular laws, but refers expresly to general regulatory (legislative) subjects. The legislator chose the solution as per which, with regards to a fundamental law, or a law containing fundamental provisions, they shall include in the closing provisions the mention of considering the entire law or specified provisions as fundamental.
>
> [41] The matter of fundamental legislation, and the related matter of public law incompatibility, can thus be be approached from different sides: a) on the one hand, if a certain subject matter, as per the Consitution, belongs unequivocally to those regulated by fundamental law, a regulation passed with a simple majority will become null as per public law however, b) on the other hand, the question arises as to whether a law in which a subject matter has been defined as fundamental by a legislator other than the original constitutional legislator can be later modified only by a majority of two thirds."

The motion points out that the referenced Constitutional Court decision also states that amending legislation with fundamental content likewise requires a majority of two thirds, furthermore the motion invokes Constitutional Court decision 1/1999. (II.24.) (Consti-

tutional Court Gazette 1999, 25, 40-41.), also referenced by the above court decision, in which it is stated that:

> "The requirement of a qualified majority applies not only to the creation of the immediate law which enforces the constitutional provision, but likewise to the amendments of this law (amending or supplementing provisions) and to its eventual repeal. A law passed by a qualified majority as per constitutional provision cannot be amended or repealed with a simple majority […]
>
> As per the position of the Constitutional Court, the direct (itemized) amending of laws passed by a majority of two thirds through legislation which regulates similar, or partially identical subject matters, but which was passed with a simple majority, or through the creation of new laws is constitutionally unacceptable. This approach would lead to a situation in which, although the law passed through a majority of three thirds would remain formally unaltered, it would lose its fundamental law nature with regards to the new amendments or laws which were passed with a simple majority."

Based on all the above, the president of the republic states that according to his position

> "the creation of a new court falls into the legislative scope of Act CLXI, which requires the majority of three thirds constitutionally required for fundamental legislation. New courts cannot be constitutionally created through a law which requires only a simple majority to be passed."

As such, he finds Art. 7 par. (4) of the Act on the procedural code of public administration to contravene Art. T) par. (4) and Art. 25 par. (8) of the Constitution.

(b2) The president of the republic also finds Art. 12 par. (2) pts. a) and c) of the Act on the procedural code of public administration to lack consistency with the Constitution.

With regards to trials concerning an independent regulatory agency, an independent state administration agency or a government office, which as per Art. 12 par. (2) of the Act on the procedural code of public administration fall in the scope of the administrative supreme court, the president requested the analysis of the situation created by the legal status of the National Media and Infocommunications Authority (Nemzeti Média- és Hírközlési Hatóság, hencefroth NMHH).

As per par. (6) of Act XLIII of 2010, which regulates administrative bodies, and the legal status of members of government and secretaries of state, the NMHH is an independent regulatory agency, while Art. IX par. (6) of the Constitution stipulates that legislation regulating the freedom of press and the supervisory body of media services, publications and the communications market is considered fundamental legislation. It is in

compliance with this constitutional regulation that Act. CLXXXV of 2010 concerning media services and mass communication places the judicial review procedure of NMHH decisions under the exclusive jurisdiction of the Budapest-Capital Administrative and Labour Court. Based on the above, the president of the republic concludes:

> "The jurisdiction rule defined by Art. 12 par. (2) of the Act on the procedural code of public administration amends (withdraws) the function of judicial review from the scope of the administrative and labour court, and from the exclusive jurisdiction of the Budapest-Capital Administrative and Labour Court, and thus contravenes Art. T) par. (4) and Art IX. par. (6) of the Constitution."

Art. 12 par. (2) of the Act on the procedural code of public administration places trials related to the administrative function of electoral comissions under the jurisdiction of the administrative supreme court, and thus the Budapest-Capital Regional Court. However, Art. 229 par. (1) of Act XXXVI of 2013, which is, as per Art. 2 par. (1) and Art. 35 par. (1) of the Constitution, a fundamental law, states that the petition for review of an electoral commission decision is to be handled by the regional Court of Appeals of the electoral commission where the second instance decision was taken. Based on the above, the president of the republic concludes that

> "Art. 12 par. (2) of the Act on the procedural code of public administration modifies, with a regulation passed with a simple minority, the jurisdiction defined by a law passed with a qualified majority, namely, it places the administrative trials of electoral commissions under the jurisdiction of the administrative supreme court- in practice, the Budapest-Capital Regional Court- instead of the jurisdiction of their regional Court of Appeals. This contravenes Art. T) par. (4), Art. 2 par. (1) and Art. 35 par. (1) of the Constitution."

(c) Following the motion of the president, as per Art. 57 par. (1b) of Act CLI of 2011 on the Constitutional court, the *minister of justice* forwarded his resolution on the matter, dated December 20, 2016, to the Constitutional Court. The minister of justice debated the nullity under public law and the constitutional incompatibility of the provisions highlighted by the president. In his argumentation the minister points out that the presidential motion is untimely, furthermore, that the possible future incompatibility with the Constitution would not be caused by the act itself, but by eventual insufficiences of subsequent legislation.

According to the position of the minister of justice, the Act on the procedural code of public administration accepted by the National Assembly can be amended, and these amendments can be promulgated before the Act itself comes into force:

> "the essential constitutional requirement is that sufficient time be allowed from the moment that legislation is passed for the necessary preparative work to be made, and that the legislator create all necessary further legislative requirements (amending, temporary and implementing provisions) by the time the law comes into force."

As per the above, the minister of justice considers that constitutional incompatibility, or incompatibility with the requirements of any other fundamental law cannot be brought into the discourse before the Act comes into force, even if certain of its provisions might seem to be conflicting, as "such an abstract grievance will not come to pass with compulsory nature in the foreseeable future."

With regards to the provisions brought into question on grounds that they enable the creation of the administrative supreme court as a new, separate court, the minister states that

> "the Act on the procedural code of public administration does not create a new court, it exclusively creates a concept for identifying the courts exercising first instance and second instance jurisdiction, respectively. As such, the questioned provisions define the scope and exclusive jurisdiction of the Budapest-Capital Regional Court with regards to administrative cases, which does not qualify as fundamental legislation."

(d) The Constitutional Court, in line with Art. 57 par. (2) of Act CLI, requested the declaration of the *Speaker of the National Assembly*. In his resolution dated January 5, 2015, the Speaker of the National Assembly informed the Constitutional Court that, as per the National Assembly diary, the acting speaker requested the house to vote according to the rules of simple majority voting, and the closing voting likewise happened along the same guidelines.

29.2 The Decision

The Constitutional Court, through Constitutional Court decision 1/2017. (I.17.) found Art. 7 par. (4) and Art. 12 par. (2) pts. a) and c) of the Act on the procedural code of public administration, passed by the National Assembly on December 6, 2016, to contravene the Constitution, and as such, unfit for promulgation.

The Constitutional Court made the decision public on January 13, 2017. The judge-rapporteur of the case was Tamás Sulyok, parallel argumentations were provided by constitutional court judges Imre Juhász, Béla Pokol, István Stumpf and András Zs. Varga, and a diverging opinion was provided by constitutional court judge Egon Dienes-Oehm.

29.3 The Argumentation of the Decision

29.3.1 The Majority Point of View

(I) Prior to evaluating the motion, the Constitutional Court conducted a brief review of the historical precedents of administrative jurisidiction in Hungarian lawmaking, as well as the legislative purpose of creating the Act on the procedural code of public administration, then proceeded to analyze the sections of the motion which state the nullity under public law of the Act.

Based on the motion, the analysis of the Constitutional Court extended to the following: 1. reviewing the legislative scope impacted by the law amendment, 2. analysing whether the law amendment is directed at modifying the content of the provisions of Act CLXI and, if so, 3). whether amending this fundamental law ocurred as per the required procedural order.

Upon reviewing the relevant regulations contained in Act CLXI, the Constitutional Court ascertains that, by mentioning an administrative supreme court, furthemore defining its scope of tasks and authority and defining procedural rules connected to the new denomination, and through this new denomination empowering the Budapest-Capital Regional Court to act as such, the Act on the procedural code of public administration legislates in matters which, as per Act CLXI, are considered subject to fundamental legislation.

The Constitutional Court points out that at this stage it does not bear relevance under public law that the new denomination is to be assumed, temporarily or indefinitely, by a court which already exists as per Act CLXI, however, it does bear relevance that the Act on the procedural code of public administration, passed under the procedural order of laws requiring a simple majority cannot create a new type of court, which is not specified in Art. 16 of Act CLXI.

The Constitutional Court points out that the Act on the procedural code of public administration- passed under the procedural order of laws requiring a simple majority- does not change the denomination of the Budapest-Capital Regional Court, instead it invests it with the powers of an administrative supreme court, a type of court which is not explicitly specified or nominated in Art. 16 of Act CLXI.

During its investigation, the Constitutional Court also touched upon the question of general jurisdiction and special courts. With regards to this, the Court found that Art. 7 par.(4) of the Act on the procedural code of public administration invests the Budapest-Capital Regional Court, a court regulated by fundamental law, with the judicial powers of an administrative supreme court, thus making it a court which has both general jurisdiction, and additionally acts as a special court.

In the context of analyzing the Act's nullity under public law, the Constitutional Court subsequently touched upon the matter of fundamental legislation. Here the court invokes Constitutional Court decisions 16/2015. (VI.5.) and 1/1999. (II.24.) (already cited above), which were also quoted by the presidential motion. Based on these, the court finds that Art. 7 par. (4) of the Act on the procedural code of public administration, passed along the procedural order of a simple majority, is content-wise directed at amending a fundamental law, and thus should have been passed according to the procedural order of legislation requiring a qualified majority.

(II) In the second part of the decision, the Constitutional Court analyzes the incompatibility with the Constitution of Art. 12 par (2) of the Act.

Regarding Art. 12 par. (2) point a), the Court has found that it invests that Budapest-Capital Region Court with a jurisdiction which had previously been assigned, through the fundamental legislation of the Media act, to the exclusive scope and authority of another type of court (administrative and labour court), more specifically to the Budapest-Capital Administrative and Labour Court. The exclusive scope of jurisdiction and authority which had been assigned through fundamental legislation cannot be changed or amended through legislation passed along the procedural order of a simple majority. It is thus concluded that the currently discussed provision is unconstitutional.

With regards to Art. 12 par. (2) point c), the Constitutional Court invoked the argumentation presented in the presidential motion, and concluded that, along the same line of reasoning as Art. 12 par. (2) point a), this point is unconstitutional as well.

(III) In the recapitulative section of the decision, the Constitutional Court emphasized- evidently in response to the stance of the minister of justice- that the subject case of our present study was subjected to a prior review of constitutionality, along the lines of the presidential motion, that is, the analysis concerns a law which has been accepted, but not yet promulgated. As such, the Constitutional Court pointed out that the Act on the procedural code of public administration, like any other piece of legislation, could not have materialized before being promulgated, independently of the content of the Court's decision. Therefore, the Court sees its own role in the present case solely as meant to point out that fact that, should the Act be promulgated, it would become null under public law due to it having been passed according to an incorrect procedural order. Consequently, at this point in time the Court exercised a prior review of constitutionality, the purpose of which is to prevent that a piece of unconstitutional (and as such, null under public law) legislation become a part of the legal system.

29.3.2 Parallel and Diverging Opinions

(P1) In *his parallel argumentation, Béla Pokol* debates the majority point of view with regards to the justification of the fundamental nature of the legislation. He indicates that

the majority point of view does not take into account the fact that the new Constitution diverges on this matter from the previous one. While the previous Constitution simply states, regarding certain subject matters, that they are to be regulated through a majority of three thirds, the new Constitution makes further differentiations. The differentiation is made based on the depth to which each regulatory subject falls into the scope of fundamental legislation. He ascertains that, from the point of view of defining fundamental legislative requirements, the new Constitution poses stricter prerequisites, and includes in this scope not only the basic rules of the subject matter, but also the creation of the detailed regulatory system. In instances where it wishes to diverge from this principle, it clearly specifies the narrowing of the requirements to the basic rules (as in the above indicated Art. 40) or it does not record the inclusion of the detailed regulatory system (as in the case of the data protection authority). In Pokol Béla's opinion, due to this differentiated constitutional approach, the Constitutional Court can no longer apply the wider interpretational freedom of previous constitutional judges, as the Constitution does not allow for it anymore.

Based on the above, Béla Pokol finds the analysis of the provisions considered in the presidential motion, and the verdict of unconstitutionality limited to them, insufficient. Referring to par. (4) of Art. 24 of the Constitution, he considers that it would have been justified to likewise analyze the provisions not included in the presidential motion, inasmuch as they are closely linked content-wise to the disputed provisions. Namely, in the present case, Art. 175 of Act CLXI should have also been analyzed, as it contains the clause on fundamental legislation. In his opinion, in the present case, the Constitutional Court would have fulfilled its role regarding the analysis of fundamentality only were it to make this inclusion.

At the end of his parallel argumentation, Béla Pokol concluded that, after the above described inclusion, it would have been necessary to annul the fundamentality clause contained by Art. 175 of Act CLXI, based on the above mentioned constitutional narrowing, and declare that based on Art. 25 par. (8) of the Constitution the entire law it to be considered fundamental going onwards.

(P2) In his parallel argumentation, István Stump finds the provisions under scrutiny to be unconstitutional in a manner diverging from the majority opinion.

(P2-I) In the first section of his parallel argumentation, István Stumpf indicates that the majority point of view is based, with regards to fundamentality, on Constitutional Court decision 16/2015. (VI.5.), to which Imre Juhász added a parallel argumentation, in which he provides a detailed analysis of the role held by fudamental laws in our constitutional system, and their importance. István Stumpf himself adhered to this argumentation.

According to the opinion of István Stumpf, if the Constitutional Court analyzes a legal provision in order to verify whether it fulfils the requirements of fundamentality as per the Constitution, then the decisive testing measure has to be the analysis of the Constitu-

tion's relevant provisions, and not primarily whether it is in conflict with the provisions of a law passed with a qualified majority (and marked as such in the law's fundamentality clause).

Therefore, in the present case, from the point of view of deciding on unconstitutionality, the decisive factor is not that 'Art. 7 par. (4) of the Act on the procedural code of public administration, passed under the procedural order of legislation requiring a simple majority is directed at changing the content of fundamental legislation', which Art. 175 of Act CLXI states to be fundamental, but the fact that, in the context of Art. 7, it legislates in a subject matter which, in the interpretation of the Constitutional Court, is considered to be fundamental based on par. (8) of Art. 25.

As per his point of view, Art. 25 par. (8) of the Constitution, defining the 'detailed rules for the administration and organization of courts', as a subject matter to be regulated by fundamental law, also refers to the detailed regulation system of fundamental provisions included in Art. 25 par. (4). Consequently, fundamental legislation is required for defining the different organisational levels of the court systems- besides the Curia- both at a general jurisdiction and special court level, and, within this framework, of regulating the mutual relationships between courts set up in this system.

Analyzing par. (4) of Art. 7 of the Act on the procedural code of public administration, and taking into consideration the entirety of Art. 7 and comparing it to Act CLXI, and particularly to Art. 21 on tribunals, it is concluded that, as per Act CLXI, appeals brought against the rulings of administrative and labour courts are handled by the tribunal, namely by the regional tribunal of each county. Art. 7 of the Act on the procedural code of public administration diverges from this, as it entrusts the authority to rule over first instance administrative cases as a single administrative supreme court, with exclusive appeals jurisdiction, to one single court (opposed to Act CLXI, which grants this jurisdiction to tribunals, that is every single tribunal separately, and does not contain exclusive jurisdiction clauses). Therefore, in István Stumpf's opinion, the Act on the procedural code of public administration would modify the alignment to general jurisdiction of administrative and labour courts, as special courts, which falls in the scope of fundamental legislation, thus the provision infringes Art. T) par. (4) and Art. 25 par. (8) of the Constitution.

(P2-II) According to István Stumpf, Art. 12 par. (2) pts. a) and c) of the Act on the procedural code of public administration should have also been analyzed in direct relation with the provisions of the Constitution which regulate the scope of fundamental laws, and not primarily with regards to the fundamentality clauses of the Media Act and the Act on electoral procedure.

At this stage, István Stumpf indicates that as nullity under public law can be determined if 'it can be decided, without any doubt, as based on the Constitution, that a certain subject matter can be regulated exclusively by fundamental law', and the provisions of the

Media Act and the Act on electoral procedure, which have been accepted as fundamental, can theoretically go beyond what in the Constitution is considered to be a fundamental subject matter, therefore, according to his point of view, the nullity under public law of Art 12. par. (2) points a) and c) of the Act on the procedural code of public administration could have been declared only inasmuch as it can be proven in the argumentation that the requirement of fundamentality extends to the nomination of the court acting as a legal remedy forum. In the absence of above, he considers that unconstitutionality can be declared only based on the conflict with Art. B) of the Constitution, as a clash between norms which impacts legal certainty.

(P3) *Imre Juhász* concurred with the first section of István Stump's parallel argumentation.

(P4) *In his parallel argumentation András Zs.Varga* concluded that he considers the grounds for unconstitutionality to be not the breach of fundamentality, but a simple mistake in codification.

(P4-I) In contrast to the majority point of view, according to his opinion it cannot be deducted from the accepted text of the Act on the procedural code of public administration that it leads to the creation of a new court, on the contrary, the terminology 'court acting as a supreme court', introduced in Art 7. par. (1) and then consistently used as such, suggests the exact opposite. Namely, it suggests the fact that the Act is deliberately not creating a new court, only concentrating the scope of administrative appeals jurisdiction, and this it can do without fundamental legislation, subsequently, it can nominate an already existing court, the Budapest-Capital Regional Court, to exercise this concentrated jurisdiction: exclusive and concentrated jurisdiction does not by itself make a court a special court, nor does this create a new type of court either.

According to András Zs. Varga, 'the court acting as supreme court' is merely an intermediary concept, which, although possibly decreasing the consistency of the legal system, is not unconstitutional per se. In concordance with this, the presidential motion- in accord with its contents- should have been treated purely as a question of legistics. Therefore, it can be concluded that Art. 7 par. (4) of the Act on the procedural code of public administration, is, as a designating rule, not unconstitutional by itself.

(P4-II) With regards to Art. 12 par. (2) pt. a), András Zs. Varga finds it uncostitutional based on the fact that it contains a jurisdiction rule which (even if only partially) cannot be reconciled with the jurisdiction rule of the Media Act, as the Budapest-Capital Regional Court cannot act as a supreme administrative court under any interpretation. Nevertheless, this conflict is independent of the fundamentality of the Media Act.

(P4-III) András Zs. Varga also argues against the unconstitutionality of Art. 12 par. (2) pt. c) on the grounds that it lacks independent content (it is the element of a law, but not an autonomous norm).

(P4-IV) At the end of his parallel argumentation, András Zs. Varga concludes, that as per his point of view, Art. 7 par. (4) and Art. 12 par. (2) pts. a) and c) of the Act on the

procedural code of public administration are not unconstitutional when taken separately, they are however unconstitutional when regarded as a whole. In his opinion, this could have been easily avoided in both cases, as it stems from codification mistakes: if Art. 7 par. (4) were to contain a phrase along the lines of 'as far as not otherwise stipulated by the law', the Act would be aligned with the Constitution, and thus it could be promulgated.

(D1) Egon Dienes-Oehm's diverging opinion ascertains that he does not agree with the decision of the Constitutionl Court and with its argumentation, as per his point of view the presidential motion should have been rejected on grounds that the concerned legislation is not unconstitutional.

(D1-I) In Egon Dienes Oehm's opinion neither Art. 7 par. (4), nor Art. 12 par (2) pts. a) and c) of the Act on the procedural code of public administration need to be regulated as fundamental legislation. With regards to the administrative supreme court mentioned in Art. 7 par. (4), he ascertains that this is not a new type of court, or a new level of jurisdiction in the court system, unregulated by Act CLXI. The term 'the court acting as supreme court' is used simply to denominate one of the functions of the Budapest-Capital Regional Court (similarly to its functions as a court of company registration) and is therefore not a rule regulating court hierarchy. As per his point of view, the specific jurisdiction regulated in the Act on the procedural code of public administration does not alter the organization of the court system laid down in Act CLXI, similarly to all other regulations on the composition of courts and other special proceedings. The scope of the administrative supreme court's jurisdiction is merely meant as a complement to the specifications on court jurisdiction laid down in Act CLXI.

At the end of this section of his argumentation, Egon Dienes-Oehm ascertains his agreement with the majority argumentation in that non-fundamental legislation cannot lead to a change in the legal status of courts (and court types), to changes in the position held by each court in system and to the annulment of a court's jurisdiction if these were previously laid down in a fundamental law, he however makes it clear that the case currently discussed by the Constitutional Court does not apply to any of these situations.

(D1-II) With regards to Art. 12 par (2) pts. a) and c) of the Act on the procedural code of public administration, Egon Dienes-Oehm highlights the fact that fundamentality is not a requirement for each detailed regulation, it only concerns warranty provisions. As per his point of view, regulating which particular court serves as an appeal court for decisions brought in administrative matters by the NMHH does not belong to the category of these warranty provisions. He concludes the same regarding electoral jurisdiction as well: in his opinion, the law must codify the warranty provisions of the electoral process, but not the exact scope of jurisdiction of a particular court with regards to it. Thus, the jurisdictions laid down in the Media Act and the Act on electoral procedure are, from Egon Dienes-Oehm's point of view, not of fundamental nature as per the Constitution, therefore they can be passed or amended through legislation requiring a simple majority.

He finds the position of the presidential motion, and in the relation to it, the decision of the Constitutional court particularly problematic with regards to invoking Art. 352 par. (1) of the Act on electoral procedure, as they state that the closed category field of the Constitution regulating fundamental laws was expanded by the Act on electoral procedure, from which it follows that the text of the Constitution can be modified by another piece of legislation, and Egon Dienes-Oehm finds this interpretation unacceptable.

(D1-III) In the third section of his diverging opinion, Egon Dienes-Oehm specifies that, according to his point of view, the usage of the term 'the court acting as supreme court' as a mediating concept may give way to doubts, as it creates the impression that it refers to an autonomous court or court type. Moreover, he also mentions that the diverging court jurisdiction regulations to be found in the Media Act, the Act on electoral procedure and the Act on the procedural code of public administration respectively can all raise concerns about legal certainty. These concerns could however not be analyzed by the Constitutional Court at this point in the absence of a motion.

Egon Dienes-Oehm states at the end of his parallel oponion that he considers that legislators will be able to create a coherent framework for all the quoted pieces of legislation before it comes into force on Janury 1st, 2018.

29.4 The Critique of the Argumentation

Ad (I). The Constitutional Court, similarly to the presidential motion, presents the unconstitutionality of Art. 7 par. (4) of the Act on the procedural code of public administration in a clear and logical argumentation, with which one can broadly agree, as passing fundamental legislation with a simple majority does not agree either with the principle of the rule of law laid down in Art. 2 of the Treaty of the European Union nor with the Constitution, particularly with the requirements of fundamentality enclosed in Art. 25 par. (3). At this stage, the Constitutional court also makes references to decision 16/2015. (VI.5.), discussing fundamentality in a more detailed manner.

At the same time, the possibility of misunderstaning may arise in relation to the Constitutional Court decision which constitues the subject of this study, therefore in my opinion, when analyzing the unconstitutionality of Art. 7 par. (4) of the Act on the procedural code of public administration, it is important to rely on the help of legal interpretation methods, as the application of the law needs to be based primarily on the legislative text. Therefore, we can only decide on the requirement of fundamentality and, as a result, the possible unconstitutionality of the Act on the procedural code of public administration being passed with a simple majority, if we conduct a precise analysis of the contents and the meaning of the legislative text. Let us therefore analyze the legal provision 'The Budapest-Capital Regional Court acts as the supreme court in administrative

proceedings' (Hungarian original for reference: közigazgatási bíróságként eljáró Fővárosi Törvényszék) through the lens of the different legal interpretation methods.[1]

The simplest method of legal interpretation, namely the grammatical interpretation, that is the investigation of the exact semantic field of words, limits itself to uncovering the exact meaning of expressions used in a given provision. Therefore our first task is simply to analyze each word of the provision and decide whether they have an actual meaning. With regards to the expression 'administrative supreme court' we can ascertain that it qualifies a type of court which handles administrative cases, namely it reviews the decisions of administrative courts as an appellate court, or, if the system allows for it, a court of last resort, but never as an initial trial court. The term 'Budapest-Capital Regional Court' is the most precise and unequivocal, as it denominates an actual court, named by the already existing legislation and constituting a part of the accepted court system. Finally, the term 'acts' is also fairly straightforward: it covers the scrutiny of cases and the chain of actions sanctioned by law which leads to the delivery of a verdict. Thus, all the terms used in Art. 7 par. (4) have a generally well-defined meaning. The next step of grammatical analysis is to analyze whether the expressions used in the text of the provision match each other from a syntactical point of view. The phrase 'The Budapest-Capital Regional Court acts as the supreme court in administrative proceedings' contains a subject, a predicate and an adverbial structure of attributive nature, and thus complies with the 'classical' structure of the Hungarian language. Thus, from a grammatical point of view, the provision we scrutinized bears a definite meaning.

When it comes to the logical interpretation of the provision we must basically go beyond the grammatical and pin down its exact meaning. The president of the republic in his motion, and the Constitutional Court itself in the decision argues that Art. 7 par. (4) of the Act creates a new court. However, from my point of view, this does not derive logically from the formulation of the Act: the Act stipulates that 'The Budapest-Capital Regional Court acts as the supreme court in administrative proceedings', that is the subject (The Budapest-Capital Regional Court) is an actual, already extant court which in endowed with a new function through the adverbial structure 'as the supreme court'. Thus, the provision can be regarded more as widening the jurisdiction of the Budapest-Capital Regional Court than creating a new one. Do the phrases 'as a court of company registration' or 'as a court martial' create new courts? The majority reply to this question would most likely be no, as the court of company registration and the court martial function within the tribunal, as its 'departments', without structural autonomy. In analogy with this, in my point of view, the formulation of the provision does not create a new court.

1 For more on the methods of legal interpretation see Tóth J. Zoltán: "A dogmatikai, a logikai és a jogirodalmi értelmezés a magyar felsobírósági gyakorlatban" *MTA Law Working Papers* 2015/17. <http://jog.tk.mta.hu/uploads/files/mtalwp/2015_17_toth.pdf>.

The adverbial structure of the provision points exactly towards the fact that the legislator was 'cautious' and, even if initially they might have intended to create a new structural unit for administrative jurisdiction, they abandoned this plan during the codification phase, and placed the supreme court's tasks within the jurisdiction of an already existing court.[2] Thus, the act, strictly speaking, merely widens the jurisdiction of the Budapest-Capital Regional Court, which can be done through simple majority voting even in the case of fundamental legislation, as stated by Constitutional Court decision 16/2015. (VI.5.).

When making use of the historical interpretation we must analyze the precedents which may have been considered by the legislator when creating Art. 7 par. (4) of the Act. From this point of view I believe that the legislator intended to refer back (or even pay homage) to the functioning of the Hungarian Royal Administrative Court (1896-1949).[3] The Hungarian Royal Administrative Court handled cases as a single instance, without lower courts, therefore in my view the provision of the Act, mentioning an 'administrative supreme court' wishes to draw on historical precedents, and excludes its separation from the system of courts handling common and criminal law, and existence as an autonomous entity exactly by the formulation detailed in the grammatical-logical section (*as* an administrative supreme court). Therefore, based on the points discussed in that section I believe that we cannot talk about unconstitutionality from this aspect either.

In light of the historical interpretation we can take the analysis somewhat further by studying the provision from a teleological point of view, that is, trying to understand what was the purpose of the legislator when creating Art. 7 par. (4) of the Act. At this point, in my opinion, we can differentiate between the short and medium-term intentions on one side, and the long-term intentions on the other. In my view the long-term purpose was, by all means, the creation of an autonomous institution acting as a supreme court, also with respect to historical traditions. This view is also reinforced by the fact that sources belonging to both jurisprudence[4] and legislation[5] have confirmed the fact that the question did arise, especially in the preliminary stages of codification. Nevertheless- perhaps acknowledging their own limitation- the legislator conceded that the time has not yet arrived for this measure, therefore they integrated administrative jurisdiction into the present court system on a short and medium-term level, yet did not exclude, but rather prepared, by 'hiding it among the lines' the fundaments and possibility of the long-term measure, which would thus become easier to apply and require less amending. For achieving the long-term goal, the need for fundamentality is evident, however, it is not

2 For more detail, see discussion of the historical interpretation.

3 For more detail see: Patyi András: *Közigazgatási bíráskodásunk modelljei – Tanulmány a magyar közigazgatási bíráskodásról* (Budapest: LOGOD Bt. 2002) 31-58.

4 See: *Varga* Zs. András – *Fröhlich* Johanna: *Közérdekvédelem – A közigazgatási bíráskodás múltja és jövoje* (Budapest: PPKE JÁK – KIM 2011).

5 See: <www.parlament.hu/documents/10181/595001/Infojegyzet_2016_47_kozigazgatasi_biraskodas.pdf/278d227e-eb40-4357-89f3-41b46995eeb9>.

required for achieving the short and medium-term goals, therefore the provision of the act is not unconstitutional along this line of thought either. For the realisation of the short and mid-term goal it was obviously necessary to widen the jurisdicion of an already existing court, the Budapest-Capital Regional Court named in the provision as the supreme administrative court. As the jurisdiction of the Budapest-Capital Regional Court is defined by both fundamental and non-fundamental legislation, this widening of its jurisdiction cannot be considered unconstitutional either.

Based on the arguments presented above, my opinion is that Art. 7 par. (4) of the Act on the procedural code of public administration is not unconstitutional as per any of the methods of legal interpretation.

Ad (II). With regards to Art. 12 par. (2) pts. a) and c) it has to be made clear that, when it comes to analyzing their unconstitutionality, the two categories, that is, 'an independent regulatory agency, an independent state administration agency or a government office, as per the act on central state administration agencies' and 'the electoral commission', and their relationship to the Constitution and fundamental laws have to be handled separately.

I am in agreement with the presidential motion and the decision of the Constitutional Court with regards to Art. 12 par. (2) pt. a), as there is not doubt that when it comes to the case of the NMHH the Act modifies the provision of a fundamental law (the Media Act) with regards to exclusive jurisdiction, and is thus unconstitutional.

With regards to the electoral commissions mentioned in Art. 12 par. (2) pt. a) of the act, I also agree with the argumentation of the presidential motion, as this is also an attempt at amending through simple majority voting the provisions of a fundamental law, namely by entrusting jurisdiction over the administrative cases of electoral commissions to the administrative supreme court- in fact, the Budapest-Capital Regional Court- instead of their respective regional appeal courts, and this is evidently unconstitutional.

29.5 The Importance of the Case

Administrative jurisdiction, and within it the creation of an independent administrative procedural order has been cause for much excitement in the lawmaking community basically from the early 1990s, when control over administrative rulings became genuinely possible again. It is thus unsurprising that the codification of the Act on the procedural code of public administration was followed with interest, and the professional and scientific community gave regular updates on the status of the codification. Therefore, the fact that the president did not sign the Act passed by the National Assembly, but sent it to the Constitutional Court for evaluation instead caused a major stir.

Based on here discussed decision 1/2017. (I. 17.) of the Constitutional Court, the National Assembly eventually modified a number of provisions in the Act on the proce-

dural code of public administration and passed the law again, which was then promulgated on March 1, 2017 as Act I/2017 on the procedural code of public administration, and will become effective, as per initial plans, on January 1, 2018. The provisions analyzed by the Constitutional Court have been amended in the new Act as follows:

"Art. 7. [Courts acting in administrative proceedings]
(1) First instance decisions taken by
a. the administrative and labour court
b. in cases defined by law, the tribunal or the Curia

(2) Appeal decisions taken by
a. for cases handled by the administrative and labour court the tribunal and
b. for cases handled by the tribunal, the Curia
(3) Re-examinations are handled by the Curia.

12. § [Jurisdiction]
[…]
(2) Except trials related to the legal relationships of public servants, the tribunal handles trials relating to the administrative activities of the following:
a. in the absence of other legal provisions, an independent regulatory agency, an independent state administration agency or a government office, as per the act on central state administration agencies
b. the railroad administration agency and the aviation authority
c. public agencies
d. the Hungarian national bank."

We can thus see that the legislator, in conformity with the Constitutional Court decision, does not mention neither an administrative supreme court, nor a court acting as such: Art. 7 par (4) has been removed from the Act. As Art. 12 par. (2) pts. a) and c) had also been found to be unconstitutional by the court, pt. a) was modified by the legislator, using the suggestion made by András Zs. Varga in his parallel argumentation, by adding the phrase 'in the absence of other legal provisions', while the electoral commission previously included in pt. c) was removed altogether from the enumeration.

The Act on the procedural code of public administration has thus been promulgated in its new form, and seemingly does not contain any unconstitutional provisions: we shall soon find out how it fares in practice as well.