CONSTITUTIONAL COURT PROCEEDINGS AND THE OMBUDSMAN'S ACTIVITY: THE FIRST STEPS IN PRACTICE ON THE BASIS OF THE BASIC LAW

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The development of the Constitutional Court proceedings is linked to the tendency of developing correctional mechanisms and constitutional balancing bodies in Europe after the era of authoritarian systems. The institutions of the Constitutional Court proceedings ensure the democratic development of the Italian, Austrian, Spanish and post-communist regimes as well as the post-apartheid regimes in South Africa.[2] The origins of ombudsman institutions do not lie in post-authoritarian systems but actually in stabile democracies: Sweden, Finland, Denmark and New Zealand.[3] These first generation ombudsman institutions provide the revision and correction of the constitutionality of administrative decisions as a "soft" type of mechanism possibly complementing and cooperating with administrative court proceedings. At this stage, ombudsmen are reactive; they commence proceedings based on complaints and their task is to control the decisions of administrative authorities. The Spanish ombudsman established in 1978[4] following the Franco regime, was the first post-authoritarian ombudsman institution at the time which exceeded its earlier reactive-administrative powers and could resort to the Constitutional Court. The Spanish ombudsman institution fulfilled proactive functions as well as he could initiate inquiries *ex officio*. Moreover, there was a shift in his functions towards constitutional court activities when human rights were at stake (e.g. human rights abuses). This model was adopted

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2 P. PACZOLAY (ed.), *Alkotmánybíráskodás – Alkotmányértelmezés* (Budapest 2003).

3 G. KUCSKO-STADLMAYR (ed.), *Európai Ombudsmani Intézmények* (Budapest 2010).

4 G. KUCSKO-STADLMAYR (ed.), *Európai Ombudsmani Intézmények* (Budapest 2010), pp. 237-245.

by ombudsman institutions emerging in various post-colonial and post-authoritarian systems. The first post-communist ombudsman was set up in Poland and operated during the entire time of the political/democratic transformation, even before the real function of the Constitutional Court came to life. Due to the impact of the Polish model,[5] in essence all post-communist systems, whether democratic or authoritarian, set up their own ombudsman institution, which could cooperate with Constitutional Courts widespread in post-communist countries as well.

In Hungary the Constitutional Court was created earlier in 1989, and assumed a creative and widely recognized role in reshaping the constitutional system of the political/democratic transformation, just as the ombudsmen elected in 1996 for the first time.[6] The ombudsmen in Hungary followed the Spanish-Polish model too; they all had proactive and reactive functions as well as administration controlling and constitution protection functions and functions institutionalizing the resort to the Constitutional Court. Moreover, they even had international human rights protection functions (proposal of *ex post* review of norms colliding with international treaties). Nevertheless, their organizational form was a "poor imitation of the Swedish model" according to the characterization given at the meeting on the Hungarian ombudsman in Brussels in 2007 with the participation of the European ombudsman, Nikiforos Diamandouros. In Sweden the system of the parliamentary ombudsman with deputies and ministerial ombudsmen in independent but lower positions, replacing the coexistence of parallel ombudsmen of the king and the Parliament, was translated by the Hungarians into the solution of a common office for four independent parliamentary ombudsmen. The contradiction of the constructive procedural and counterproductive organizational rules between 1996 and 2007 was softened by the solidarity among the ombudsmen and the relative conflict avoidance. However, in 2007 when another ombudsman position emerged (the one for future generations), the balance shifted towards special ombudsmen. This prompted my

5 G. KUCSKO-STADLMAYR (ed.), *Európai Ombudsmani Intézmények* (Budapest 2010), pp. 185-195.

6 B. HAJAS – M. SZABÓ, 'Az alapvető jogok legutóbbi húsz évéről (1988-2008)' in: M. SZABÓ (ed.), *Emberi Jogok - Alapvető Jogok? Esélyek és Veszélyek az Ombudsman Szemével* (Budapest 2011) pp. 110-133.

vigorous and public protest at the time against the position of three special commissioners who wished to settle the common affairs on the basis of the principle of majority rule.[7] The conflict that had arisen in various forms and had hindered the operation between the ombudsmen was terminated by a solution in the Basic Law. The Basic Law set up a single institution, that of the general commissioner ("Commissioner for Fundamental Rights") with two professional deputies also elected by two thirds of the Parliament in the fields of the rights of national minorities and the sustainability and environmental protection. The data protection and freedom of information ombudsman became an independent authority pursuant to the provisions of the Basic Law in compliance with EU law. The authority is entitled to levy fines of millions of HUF. It is another question that the EU still criticizes this Hungarian solution.

This transformation of the ombudsman system is not without precedent. In France, Norway, Sweden and Italy where there are only local ombudsmen, and also in Malta such centralizing trends have been prevailing in recent years due to the impact of the crisis in the ombudsman systems. In each of the Visegrád countries (Poland, Slovakia, Hungary and the Czech Republic) a single commissioner systems emerged, only the Hungarian solution was the "odd one out". The French reform is particularly comprehensive where the earlier independent commissioner for children's rights, the Equal Treatment Authority and the institutions similar to our Independent Police Complaints Board and which are mostly collectively managed and have extensive functions were merged under the management of a single ombudsman.[8] The trend is similar in Malta, too. Sweden, Norway and Lithuania carried out a coordination of rather an administrative nature and cost reducing rationalization by decreasing the number of commissioners.

The organizational reforms do not necessarily concern the relationship of the Constitutional Court and the ombudsman. In the countries concerned,

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7 B. HAJAS – M. SZABÓ, 'Az alapvető jogok legutóbbi húsz évéről (1988-2008)' in: M. SZABÓ (ed.), *Emberi Jogok - Alapvető Jogok? Esélyek és Veszélyek az Ombudsman Szemével* (Budapest 2011) pp. 169-174, 187-191.

8 E. P. SOÓS, 'Ombudsman à la Française – Adalékok egy Reformhoz' in: B. HAJAS – M. SZABÓ, *Az Ombudsmani Intézmények Újraszabályozása a 21. Században Magyarországon és Európában* (Budapest 2012) pp. 106-120.

there is not even a Constitutional Court everywhere either, or if there is one, the ombudsman institution does not have a duty in that regard. In Hungary the ombudsmen could resort to the Constitutional Court *ex officio* within their sphere of competence in order to eliminate constitutional improprieties. The number of such actions was not high; the general commissioners did not submit more than an average of five petitions annually. The special ombudsmen who could resort to the Constitutional Court on the basis of some specific legal rules such as the Act on National Minorities, the Environmental Protection Act and the Data Protection and Freedom of Information Act submitted even less petitions.

The Constitutional Court did not deal with the ombudsmen's petitions as star cases despite the fact that priority is set out in their rules of procedure. For years they were not even put on their agenda either. This was done in the context of the so-called *actio popularis* which, as justice Mihály Bihari stated, proceeded with about 800 citizens' petitions for *ex post* review of norms annually, which was deemed appropriate. No uniform processing was made in the course of decades about the fate of thousands of petitions submitted or, at least, it was not made public. It can be concluded that before the deadline of resubmission of the petitions to the ombudsman, 1 April 2012, their fate was disappearance in the archives of the Constitutional Court, that is, the oblivion, the disappearance in the Lethe River. I think that the view of László Sólyom, former President of the Constitutional Court and that of others are wrong stating that *actio popularis* was an efficient constitutional safeguard. On the input side yes, it is true that all citizens "could go to Donáti street" where the Constitutional Court was located, but it seemed useless as the petitions had no real impact or processing. On the output side the Constitutional Court was unable to deal with this colourful multitude of petitions during the time available. The permissive input side was not proportional to the output efficiency resulting from it, as a consequence of which not many initiatives could benefit from the numerous petitions in compliance with the criterion of people's democracy. A*ctio popularis* could take a role in softening the utility efficiency of the numerous legal actions as a political protest, the number of citizens' petitions submitted to the Constitutional Court to a great extent. (All these assumptions would certainly be justified only if one could analyse at least 100-200 randomly selected

petitions per year to see how they impacted the Constitutional Court's work. Our generous assumption may be that giving preference to certain subjects the Constitutional Court might have served the public taste as a consequence of the nature of the large number of the petition filing trends designating the directions of the civil dissatisfaction due to public pressure. Nonetheless, is this the function of the Constitutional Court in post-authoritarian democracies? Let us just think of the assessment of the death penalty in the Constitutional Court's decisions and in the pressure of the public opinion).

Against this "people's democratic" position of the Constitutional Court (which only Hungary represented apart from Bavaria), in my view, the respective organization of the Constitutional Court proceedings follows explicitly professional elitist models. Constitutional courts are the highest, highly qualified, special forums entirely independent from politics which make binding decisions. They are neither the spokespersons of the contemporary political majority nor that of the social majority's opinion. These latter tasks are taken by the Parliament and civil society. Constitutional Courts have to ensure a decision based on solely constitutional-professional arguments balancing majority democracy and majority society. Their decisions are based on constitutional, therefore legal arguments rather than the public opinion. Constitutional court proceedings may take advantage of the people's feedback, but relying on it is not obligatory. If thousands or ten thousands of petitions object to the pension issue, however they contain merely lay arguments, what can the Constitutional Court proceedings do with them?

On the basis of the citizens' complaints since the beginning of 2012, my view is that legally qualified or trained helpers have contributed to drafting the majority of the relevant complaints, no matter if they were submitted by individuals or civil organizations. Consequently it is not the amount of petitions but the quality of the argumentation with which society may help the constitutional corrections in the Constitutional Court proceedings. For this purpose not the unconstrained use of the direct *ex post* review of norms would be necessary, since comprehensive processing may not be expected from the jurist elite organization doing the Constitutional Court proceedings, but an organization is needed with a suitable screening

function and which is experienced in handling civil complaints and has the appropriate level of constitutional law expertise such as the ombudsman.

This solution is included in the Basic Law instead of *actio popularis* which opens, however, two more channels of much more of a political nature which currently do not fulfil the function of forwarding civil complaints to the Constitutional Court as a consequence of the current two-thirds governmental majority and the divided opposition. The head of government authorized by a two-thirds supermajority is unlikely to be uncertain regarding at least the legislation by his own government and Parliament in order to resort to the Constitutional Court for *ex post* review of the norms. For instance, this way the international organizations' criticisms may be "tried" through the internal constitutional control institutions by the head of government. This is much more likely in a divided coalition government, though; in this case the coalition cooperation agreement may limit using this opportunity. Another channel is the one quarter of the representatives, this does not work under the current political division, however in principle this can be easily accomplished by two cooperating parties which may bring this way their voters' demands as a result before the Constitutional Court in a permanent offensive. Based on the very short experience of the 18 months, neither the government nor one quarter of the representatives is likely to challenge acts at the Constitutional Court. (I emphasize that this situation may change owing to many reasons even within one legislation period as well, so the current situation after the *actio popularis* placing the ombudsman to the front may quickly transform.) The other two channels of the constitution may gain substance and at the same time with the emergence of the proceedings the civil complaints may disperse towards the head of government and/or the cooperating parties of the opposition. It is noteworthy that the Fourth Amendment to the Basic Law authorized the president of the Curia and the Supreme Prosecutor to request *ex post* review of laws. However, they have not taken this opportunity yet.

The present analysis based on the experience of a few months may not assert a right to the task of recording long term results and trends. The current trend may change or be modified even within this legislation

cycle. Nevertheless, currently the ombudsman is the exclusive addressee of the citizens' petitions requesting *ex post* review of norms.

One of the first petitioners put it in a reserved manner and reasoned his petition by stating that he resorted to the ombudsman because he had been deprived of his right to petition. There is no doubt that citizens and civil organizations in the absence of interest were deprived of this right. They cannot turn to the Constitutional Court for an *ex post* review of norms against every law. However, the Venice Commission's proposal opened a new channel which forwards civil petitions for *ex post* review of norms to a politically independent organization, the Commissioner for Fundamental Rights due to the strict regulation of conflict of interests in Hungary today. The other two currently theoretically existing channels are, however, entirely of a political hue, open through either the government or one quarter of the representatives. So it is up to one's choice whether one may resort to a politically neutral channel or a channel committed to the government or an opposition oriented one for an *ex post* review of norms unless one has a direct interest. Consequently, the triad of mediation, which cannot be considered scarce and which contains various alternatives, appears in the Basic Law. The ombudsman's new types of petitions gain considerably more opportunities for a hearing by the Constitutional Court than the previous annual approximately eight hundred individual petitions. Since if the current trend goes on, the Constitutional Court encounters a few dozen of prioritized ombudsman's petitions annually, serving as appropriate starting points in the perspective of the analysis.

The workload of the Constitutional Court is, however, so huge already now before the end of the year that it is almost certain that the petitions, some of which affect many people and are of existential importance in many cases, may not be discussed in a hearing and not at all decided in the current year, the year of submission by the Constitutional Court. The experience gained in the first quarterly has to be added to the fact that there was almost no petition of this new type and the petitioners did not even attempt to maintain the old ones. Consequently, we resubmitted the previous ombudsmen's petitions and the preparation of the own new petitions was going on in this period. At the beginning, we were highly uncertain due to the many slashing crisis management measures, the

reregulation of basic public services and the unfolding of the practice of the new constitution all predicted the possibility of a massive petition submission with which such organizations had to cope, without having had direct experience beforehand. The first quarterly break favoured the preparation of the ombudsman institution suffering from the difficulties of the restructuring. The real first swallows appeared in the second quarterly, and the first petition on the Transitional Provisions gained so much press and media publicity together with the first remarkable amendment of the Basic Law responding to it that is remarkable in all respects that following this the petitions began to arrive massively, in groups and frequently to the ombudsman. These were in many cases organized protest campaigns and legal actions as part of campaigns organized by civil organizations.

The petitions arriving after this confirmed their dynamics. Consequently, the petitioners' expectations have been increasing up to this very moment; they have not been apparently rejected by the Constitutional Court. Regarding the petitions to the Constitutional Court, we faced a "wildfire" mobilization for the third quarterly. New significant types of conflicts and civil campaigns appeared following one another at the ombudsman submitting their petitions seeking publicity for their demands and to obtain a legally binding nature through a positive decision by the Constitutional Court. As a result, the number of initiations reached the number of 800 since 2012. (However, if one counts with the possibility of real constitutional law petitions, then the decrease by 150-200 may also reach the previous level of petitions as a matter of fact, namely petitions against the court rulings may have been numerous among *actio popularis* without a mandatory legal representation. This is, however, only an assumption.) For us, the current level and rate of the petitions seems to be manageable; the department established for this purpose could catch up with the rate so far. This is easier since multiple petitions are formulated with the same text in the framework of several hundreds of coordinated legal protesting actions.

Mostly in the protest culture of the Federal Republic of Germany and Austria where parliamentary petition committees existed, the campaigns of white hot mobilizations have long been the standard means, where the

occurrence of "collective petitions" supplied with the signature of even more than a million people joining online is not a rare example.

Our work with respect to the Constitutional Court has been performed on different levels as of 1 January 2012;

a) maintenance of the previous ombudsman petitions;
b) the submission of own petitions;
c) preparation of petitions on the basis of the civil petitions;
d) monitoring of the follow-up of the petitions.

It is the ombudsman who knocks on the door of the Constitutional Court instead of citizens.

As of 1 January 2012, not every citizen has *actio popularis* at his/her disposal for initiating the abstract *ex post* review of norms, which was a distinct "Hungaricum", existing only in this country, in Hungary. The supreme authoritative forum of the jurist elite is not mistaken for a general complaints forum anywhere else, which has never even worked as such in practice.[9] The nine-month-long experience shows that those initiatives are able to provide basis for the ombudsman's petitions to the Constitutional Court in which the professional legal expertise had played an important part from the beginning. The mass of "lay" complaints means in itself an important confirming and guiding feedback, however no directly constructive or critical fundamental law arguments are derived from them (though such arguments can be formulated through experts' deductions). The colloquial problem interpretation may be of a symptomatic value; however, it requires further professional elaboration.

It is not part of the ombudsman's task to translate general political criticisms into the language of the Constitutional Court. The Basic Law gives the opportunity to the political forces having one quarter of the mandates to initiate the proceeding of *ex post* review of norms at the Constitutional Court. This has not led to the cooperation of the opposition with a common petition yet. This opportunity may arise with a changing parliamentary composition in which the comprehensive critical attitude

[9] See the summary of the critical junctures for *actio popularis*: P. PACZOLAY, 'Megváltozott Hangsúlyok az Alkotmánybíróság Hatásköreiben' (2012) 1 *Alkotmánybírósági Szemle* 67.

of the opposition is likely to appear in the submission of petitions. Compared to this, the ombudsman, within his or her competence, focuses on partial questions, single issues. The petitions do not challenge the legal institutions but their partial aspects, for example, the types of pension, but not the whole of the pension system, certain anomalies of the education system, but not the foundations of the education system.

1. The previous ombudsmen's petitions

In February 2012 upon the request of the Constitutional Court, I *maintained* all the petitions that I submitted before 1 January 2012 as parliamentary commissioner for the citizens' rights with a reference to the Basic Law.[10]

Pursuant to the new Act on the Constitutional Court, the commissioner for fundamental rights had to make a declaration on the maintenance of the previously independent special ombudsmen's petitions. I maintained the ongoing petitions of the parliamentary commissioner for the interests of the future generations regarding site authorization rules[11] and regarding the regulation of noise emission of cultural festivals.[12] I partially maintained and complemented the petitions regarding the Dunakeszi Marsh and the Páty golf-course project.[13]

[10] Pursuant to Subsections (1) and (2) of Section 71 of the Act on the Constitutional Court upon the entry into force of the new Act on the Constitutional Court only the ongoing procedures will be terminated which concern the *ex post* review of the unconstitutionality of the legislation set out in Subsection (1) of Section 24 and which was submitted by not the petitioner set out in Clause e) of Subsection (2) of Section 24 of the Basic Law.

[11] Government Decree 358/2008 (XII. 31.) regarding the site authorization procedure and rules of notification.

[12] The value limits of noise pollution deriving from certain activities as regards protected areas are regulated by Appendix No. I-II of KvVM-EüM Joint Ministrerial decree No. 27/2008 (XII. 3).

[13] Since the commissioner for the protection of the interests of the future generation referred to the collision of the disapproved local government decrees with other legal rules as well and the Constitutional Court has no competence to judge it pursuant to the new Act on the Constitutional Court, I resorted to the Government Office by writing a letter in order to request the examination of the issue if the local government decrees affected by the petitions and the resolutions (construction procedure) are in compliance with the higher level legislation.

I submitted in my own name the petitions submitted before 1 January 2012 by the commissioner for data protection and which had not been heard by the Constitutional Court until that time (with two exceptions), since the Hungarian National Authority for Data Protection and Freedom of Information was not entitled to turn to the Constitutional Court.[14]

The Constitutional Court only partially heard these previously maintained petitions until the completion of the present manuscript. The petition requesting the annulment of Subsection (2) of Section 3 of the Strike Act was rejected by the Constitutional Court with its decision 30/2012. (VI. 27.) CC. The Constitutional Court also rejected in its decision the petition in terms of Subsection (1) of Section 6 of the Act XLVII of 2009 on the system of criminal records, the records of court sentences issued against Hungarian citizens by the courts of European Union member states and the records of criminal and policing biometric data.[15]

The Constitutional Court rejected the petitions regarding the Páty and Dunakeszi local government decrees on the grounds that it examines their compliance with the Basic Law if the subject of the examination is exclusively the establishment of the compliance of the local government decree with the Basic Law without the examination of its collision with other legislation. The compliance with the Basic Law of the decrees and the normative resolutions challenged in the petitions can be heard only together with their collision with other legislation, for which I also turned to the competent government office seeking remedy for the infringement. As a result, the petition has become devoid of purpose.

The Constitutional Court also rejected my petition requesting for the annulment of the provisions of the decree of the Józsefváros (Budapest VIII. District) local government on sanctioning scavenging because the

[14] http://ajbh.hu/allam/aktualis/htm/kozlemeny20120423.htm [07.06.2015].

[15] What is distinct in this case is that according to its file number (3255/2012. (IX. 28.) CC) it is a ruling, however, the operative part makes it clear that it was passed as a decision by the acting council.

representative body repealed the legislation in compliance with the new Act on Misdemeanours.[16]

It can be clearly established from the above that some of these petitions seem to be new cases, however, they meant in many cases the confirmation of 3-4 year old petitions and as such they are the petitions of the previous ombudsmen.

Since 2007 as the parliamentary commissioner for citizens' rights, depending on the result of the examinations that I conducted, I turned to the Constitutional Court 3-5 times. In the first nine months of the year, I turned only twice to the Constitutional Court *ex officio* for ex post review of norms on the basis of the "old" ombudsman's competence to submit a petition: when I challenged the provisions of the Act on Misdemeanours allowing the detainment of minors,[17] and when I requested the annulment of the provisions on child-care allowance.[18] In both cases, I put forward a number of proposals for legislation.

2. Petitions based on citizens' initiatives

Nearly 800 petitions arrived to the Office of the Commissioner for Fundamental Rights until 1 June 2013, in which the petitioners put forward constitutionality objections partially or entirely against legislation. To be more precise, on one hand these are outnumbered by the abstract review of norms petitions under *actio popularis* submitted to the Constitutional Court. On the other hand, the petitions submitted had a considerably similar content or they were of similar nature (on various pension rules

[16] Apart from these, the Constitutional Court rejected the petition of the parliamentary commissioner for the protection of the interests of the future generations regarding the partial annulment of the Act on the commissioner for fundamental rights (Ruling 3002/2012. (VI. 21.) CC), and the petition of the previous ombudsman for data protection for the establishment of the unconstitutionality and the annulment of the specified text of the Subsection (2) of Section 17 of the Act XLIII of 2010 on the central state administrative organs and the members of the government and the legal status of the state secretaries and the specified text of Clause 83 of the government resolution on the rules of procedure of the Government 1144/2010. (VII. 7.)

[17] Case AJB-3298/2012 (precedent: Case AJB-5980/2010).

[18] Case AJB-1041/2012 (precedent: Case AJB-2293/2011).

or the insulin supply) and approximately one third of the letters was the mass of the same petitions and/or their additions criticizing the rules on the election of the president and the members of the Media Council (made on the basis of a simply forwardable form letter available on the Internet).

I submitted a petition upon public initiative 27 times in the first 18 month. The issues described in the petitions are various. I am going to present only some of them being significant for citizens' rights and obligations.

One of them is the petition concerning the Transitional Provisions of the Basic Law, initiating the annulment of the whole Transitional Provisions or some of their provisions. According to this petition, the Transitional Provisions have not become part of the Basic Law in spite of its peculiar self-definition, as a consequence of which the Constitutional Court may examine them.

In my view, the principle of the rule of law and legal certainty is violated by the uncertain systemic status of the Transitional Provisions. If the Constitutional Court interpreted the Transitional Provisions as the amendment of the Basic Law, then they should be declared ineffective in public law since the Transitional Provisions were accepted contrary to Article S) of the Basic Law.

While Subsection (3) of the Closing Provisions of the Basic Law gives authorization for adopting the Transitional Provisions related to the Basic Law, the word "transition" is used in a different context in the first part of the Transitional Provisions (the part entitled as the Transition from Communist Dictatorship to the Democracy). However, the second part of the Transitional Provisions titled T*ransitional Provisions related to the entry into force of the Basic Law* contains rules of non-transitional nature as well *(designation of a court other than the courts of general competence*, *cardinal Acts on churches and nationalities, provisions on constitutional complaints, the right of government offices to apply to a court, the organization of the National Bank of Hungary, the Day of the*

Basic Law). The petition secondarily aimed at the annulment of these non-transitional provisions.[19]

In its decision 45/2012. (XII. 29.) CC the Constitutional Court found the ombudsman's petition well-founded. The Court pointed out that the Parliament overstepped its constitutional authorisation when it implemented regulations to the Transitional Provisions having no transitional character. The formal rules for legislation are binding also for the constituent power. Therefore the Constitutional Court annulled the regulations the ombudsman challenged.

It is contrary to the Basic Law that while a mandatory legal representation is set out in the Act on the Constitutional Court for the constitutional complaint proceedings, the use of legal aid is excluded in the Act LXXX of 2003 on Legal Aid. For people in disadvantageous social situation this means the violation of their right of remedy. This discriminates those, based on their financial situation, who are unable to bear the legal expenses, however, they have the constitutional complaint as the only legal remedy at their disposal. In this respect, the state fails to meet its obligation of objective fundamental right protection and that of ensuring equal access to the procedure and equal opportunities.[20]

Upon the petition the Constitutional Court held the provision of the Act on Legal Aid which excluded people from socially deprived backgrounds from being able to use gratuitous legal assistance necessary for the effective enforcement of their rights in the course of constitutional complaint proceedings unconstitutional and annulled it (Decision 42/2012. (XII. 20.) CC).

In my petition related to the Government Decree regulating Student Contracts, I initiated the annulment of Section 110, Subsection (1), item 23 of Act CCIV of 2011 on Higher Education (hereinafter: "HEA") and Government Decree 2/2012 (I. 20.) on Student Contracts to be Concluded with the Beneficiaries of Full and Partial Hungarian State Scholarships

[19] Case AJB-2302/2012.
[20] Case AJB-1961/2012.

(hereinafter: "Decree") and suggested that the Constitutional Court should suspend the Decree's entry into force pending the Court's review of my petition. Under and outside the authority of the HEA, the Decree regulates the rules governing student contracts, together with the rights, obligations and the legal consequences of possible non-performance. Students are obliged to obtain their degree within an adequate period of time and within 20 years after having received that degree, to establish, maintain and continue an employment in Hungary for a period twice as long as their studies under full or partial state scholarship. Failing to do so, the former students shall reimburse the full or partial amount of the stipend. It is a restriction of the graduates' right to self-determination and the right to freely choose their work and profession. The right to work is also violated since in the case of the students' majority the element of voluntariness will be missing when concluding an employment contract. The decree-level regulation of this issue is incompatible with the Basic Law as state support to high-level studies should have been regulated in an Act. The restriction of rights stipulated by the student contract may not be qualified as indispensably necessary and even as an appropriate instrument for the domestic employment of the graduates, and it is not proportional either.

The Constitutional Court did not review the contents of the Decree, but in its decision 32/2012. (VII. 4.) CC the Court stated that both the provisions of the Decree and the authorization by HEA[21] were *formally incompatible with the Basic Law*. In that decision the Court did not examine the challenged regulations in merits. Consequently, the Parliament amended HEA by incorporating the earlier, decree-level regulations into the Act, therefore I raised an objection against these new regulations of HEA as well.[22]

According to my petition initiating the annulment of certain regulations of Act CLXXIX of 2011 on the Rights of Minorities (hereinafter: "MRA") within the frameworks of an *ex post* review of norms and the establishment of incompatibility of some of its regulations with an international treaty,

[21] Through deleting the expression – "on terms defined by the Government" – from Section 39, Subsection (3) of HEA.

[22] See Motion AJB-2834/2012.

one of the major problems was, since there is no way to list them all here, that by allowing only organizations of public benefit to have candidates, the MRA restricts, in violation of the Basic Law, the rights of national minorities to form their local and national self-governments and it wrongfully discriminates among organizations of national minorities[23] in violation of the requirement of equal treatment.

On the basis of nearly 150 petitions of identical content I requested the annulment of certain regulations of Act CLXXXV of 2010 on Media Services and Mass Media (hereinafter: "MA"). According to my petition the rules governing the election of the Media Council of the National Media and Info-Communications Authority (hereinafter: "Media Council") are in breach of the Basic Law, because not only is the Chairperson of the Media Council simultaneously the Director of the Authority, but the functions are interwoven as well, and furthermore, several provisions of the MA regulating the election, legal status and termination of the mandate of the Chairperson of the Media Council together are uninterpretable and inapplicable. This may lead to the breach of the requirement of legal certainty deriving from the rule of law and mock the proper functioning of the Media Council, leading subsequently to the infringement of the obligation of objective institutional defence in connection with the freedom of expression. After the submission of the petition the Parliament amended the MA.[24]

In my petition initiating the annulment of Section 92, Subsections (1) and (4) of Act C of 1997 on Electoral Procedure I raised an objection to the fact that the per capita campaign budget of candidates during parliamentary elections had been limited, for about 15 years, to HUF 1 million not counting the support from the central budget, while the political parties' expenditures had significantly increased. The amount stipulated by the law is clearly not enough for substantial campaigning, thus limiting the parties' ability to contribute to forming the people's will and forcing them to operate outside the boundaries of the rule of law and, at the same time, discriminating a well-defined group of – non-parliamentary – parties.[25]

[23] See Motion AJB-2709/2012.
[24] See Motion AJB-3299/2012.
[25] See Motion AJB-2303/2012.

In my petition initiating the annulment of Sections 7 and 8 of Act CCXI of 2011 on the Protection of Families (hereinafter: "FPA") and the suspension of its entry into force I draw the attention to the fact that the concept of family, based on marriage between man and woman as set out in the FPA, constitutes discrimination on the basis of a different aspect, sexual orientation, in connection with the rights to private and family life and to human dignity, and unnecessarily and disproportionately restricts the rights to human dignity and to private and family life of those living not in marriage but in some other form of partnership. It may cause uncertainty that, according to the intestate succession specified in the Civil Code, a spouse and a registered partner shall inherit on the same level, while the FPA recognizes the concept of family exclusively as based on marriage.

In its decision 31/2012. (VI. 29.) CC the Constitutional Court, as a new measure stipulated by the new Act on the Constitutional Court, suspended the entry into force of Section 8 of the FPA scheduled to 1 July 2012.[26] Later on decision 43/2012. (XII. 20.) CC annulled the pertaining regulations. The Constitutional Court held that no direct or indirect discrimination was allowed among children irrespective to the fact that their parents lived in marriage or some other kinds of partnership. The Court also pointed out that the regulations of the Act pertaining to succession were so incompatible with the Civil Code that the situation infringed legal certainty.

The right to fair procedure and the right to legal remedy are infringed when the Parliament adopts a decision on the recognition of an association conducting religious activities as a church so that the act does not define the criteria of deliberation, the Parliament is not obliged to justify its decision to reject, and there is no legal remedy against such a decision. That is the reason why I initiated the establishment of the violation of the Basic Law and the annulment of certain provisions of Act CCVI of 2011 on the Right to Freedom of Conscience and Religion and on the Legal Status of Churches, Religious Denominations and Religious Communities. Furthermore, it runs contrary to the principle of separation of powers that

[26] See Motion AJB-4159/2012.

the Parliament assumed the right to decide a matter that is alien to the political character of the supreme representative body.[27]

The Act on Elimination of Early Retirement Schemes, Early Pensions and Service Dues entered into force on 1 January 2012. Allowances established earlier are continued to be paid under another legal title, as so-called early retirement allowances, e.g. transitional miners' allowance or in case of the armed forces as service allowance. In my petition I requested the annulment of certain provisions of the Act. The reason for this is that the Act stipulates the reduction of the monthly amount of certain allowances (e.g. early retirement allowance to Members of the Parliament or service allowance) by the amount of the personal income tax, when the provisions of the Act stipulating to burden the nominal amount of old age pensions with public dues, i.e. deductions, are in breach of a requirement deriving from the rule of law. The Act defines the suspension of the service allowance as an automatic, "supplementary punishment-like" legal consequence to certain crimes. Since it comes from the Basic Law that the state may not arbitrarily use the instruments system of penal law, I also initiated the annulment of these provisions.

By virtue of the Act, old age pension shall be terminated if the person entitled engages in, in lay terms, "black work" (undeclared gainful activity). The Act links two unrelated issues: the payment of the old age pension-type allowance to the entitled and his/her failure to comply with the obligation to pay tax on the income from such undeclared work. Therefore, this provision is also in breach of the requirements of the rule of law.[28]

Having analyzed all the petitions and hundreds of complaints, one can state that the group of petitioners is rather diverse, ranging from university professors, self-governments of nationalities, members of the European Parliament to private citizens. In the course of submitting petitions based on the complaints on file and other related requests (establishment of default, proposition of provisional measures) several substantial issues

[27] See Motion AJB-2784/2012.
[28] See Motion AJB-4744/2012.

and dilemmas have emerged that we have to refrain from introducing here due to the limited scope of this paper.

Among the petitions of 2013 the most apparent was the one challenging the Fourth Amendment to the Basic Law. In this Amendment the Parliament overwrote certain decisions of the Constitutional Court while explicitly declared regulations at the Basic Laws that were found as unconstitutional. The Commissioner claimed that such an "over-constitutionalisation" disrupts the coherence and unity of the Basic Law. Such a situation occurred in the cases of the criminalisation of the homeless, the supervision of financial issues of universities, the regulation on churches, the retroactive criminalisation of political offences committed under the communist dictatorship and the restriction of political campaigns in the media. Furthermore, the repeal of the previous decisions of the Constitutional Court also violates the principle of legal certainty. The Constitutional Court refused the petition; it held that the petition contained substantial issues that could not be regarded in merits upon the Basic Law.

Conclusions

The changes have promoted the institution of ombudsman in Hungary becoming more efficient and more European, and today the results at hand confirmed the direction of those changes. The active, sometimes even hyper-active functioning of the ombudsman and other internal correction mechanisms is not aimed at curtaining off Hungarian democracy, in search of its own ways, from the external, international correction mechanisms; it offers quicker, closer to the problem itself and more efficient solutions. It may also take the edge off the too frequent activities of various international forums trying to chip at the legitimacy of the Hungarian constitutional system. However, we should not be shy: we are a new democracy searching for our own way, trying to find our own equilibrium.

Between 1990 and 2011 Hungary was the least changing among the new democracies; we did not even have a new constitution. The years 2010-11 have brought about a radical change: time has come for extremely quick and substantial changes where the internal instruments of finding an

equilibrium have become more important than ever before – it all has been reckoned with by the Basic Law: they have been strengthened and given new functions (as in the case of the ombudsman), their elected tenure in office has been extended, or the number of their members has been increased (the number of the justices of the Constitutional Court from eleven to fifteen).

What effect will the new Parliament have on all this, consisting of fewer members but completed with the representatives of ethnic minorities, elected in 2014 with the participation of a significant number of Hungarian citizens living abroad? As far as the ombudsman is concerned, I think it will be *even more appreciative of the role played by the commissioner for fundamental rights as an institution assisting the Parliament and controlling the government and the public administration*. In my opinion, decision-makers should pay more attention than before to the messages of a more vocal ombudsman in their search for equilibrium. The ombudsman shall avoid being stuck in an "ivory tower" and strengthen cooperation with non-governmental organizations.[29] The actors are formed by the new rules, and the actors shall form the roles they are playing, adjusting to the public's expectations.

[29] On 1 October 2012 the post of Coordinator for Civil Affairs was created in the Office of the Commissioner for Fundamental Rights – this post is filled by Ms. Timea Csikós, legal officer, whose main task is to maintain contact with non-governmental organizations and document the results of this interaction.

Statistics: Petitions to the Constitutional Court

1. Ex officio

	Date of initiation	File	Subject	Decision of the CC	Reaction of the legislator
1.	15/04/2012.	AJB-3298/2012	Detention of minors	In process	None
2.	24/05/2012.	AJB-1041/2012	Family allowances	In process	None
3.	28/10/2012.	AJB-6980/2012	Law enforcement measures against truancy	In process	None
4.	05/12/2012.	AJB-4492/2012	Environment protection in investment cases (problem of single decision of the authority)	In process	None

2. Upon submission

	Date of initiation	File	Subject	Decision of the CC	Reaction of the legislator
1.	13/03/2012.	AJB-2302/2012	Transitional Provisions of the Basic Law	Annulment	Amendment to the Basic Law
2.	22/03/2012.	AJB-1961/2012	Free legal aid concerning the submission of constitutional complaint	Annulment	None
3.	30/03/2012.	AJB-2834/2012	Government decree on student contract	Annulment (due to formal causes)	Amendment to the Act on Higher Education
4.	27/04/2012.	AJB-2709/2012	Rights of minorities	Rejection	Amendment to the Act on Minorities
5.	04/05/2012.	AJB-3299/2012	Election of the Media Council	In process	Amendment to the Media Act
6.	10/05/2012.	AJB-2303/2012	Party and campaign financing	In process	None
7.	24/05/2012.	AJB-4159/2012	Family protection	Annulment (previously the entry into force was suspended)	None
8.	26/06/2012.	AJB-2332/2012	Rules of taxation	Refusal	None
9.	28/06/2012.	AJB-4436/2012	Insulin supply for people suffering from diabetes	In process	None
10.	19/07/2012.	AJB-2523/2012	Public education	In process	None

11.	24/07/2012.	AJB-2883/2012	Vocational training	Refusal	None
12.	27/07/2012.	AJB-2638/2012	Transformation of the Social Service System of the Disabled	Partial annulment	None
13.	10/08/2012.	AJB-2784/2012	Act on churches	In process	None
14.	30/08/2012.	AJB-2834/2012	Act on higher education (student contract)	In process	None
15.	04/10/2012.	AJB-6347/2012	The right of the Government Control Office to challenge contracts at courts	In process	None
16.	04/10/2012.	AJB-4744/2012	Pensions granted before the age of retirement	In process	None
17.	02/12/2012.	AJB-5695/2012	State property of documents previously owned by the Institution of Political History	In process	None
18.	14/12/2012.	AJB-6468/2012	Protection of labour legislation of pregnant women	In process	None
19.	14/12/2012.	AJB-7505/2012	Limitation of arbitration	In process	None
20.	21/12/2012.	AJB 7342/2012	Prohibition of the Operation of the Slot Machines	In process	None

21.	31/01/2013.	AJB-44/2013	Hungarian Academy of Arts	In process	None
22.	21/02/2013.	AJB-8476/2012	Copyright of prisoners	In process	None
23.	21/02/2013.	AJB-702/2013	Accessibility of public transport	In process	None
24.	23/04/2013.	AJB-2054/2013	Fourth Amendment to the Basic Law	partially rejected, partially refused	None
25.	03/05/2013.	AJB-5757/2012	Tax Execution	In process	None
26.	11/05/2013.	AJB-7272/2012	Procedural rules of the Media Act	In process	None
27.	16/05/2013.	AJB-726/2013	pension system, prohibition of dual allowances	In process	None

3. Petitions initiated before 2012 and upheld later on

	Date of initiation	**File**	**Subject**	**Commissioner**	**Decision of the CC**	**Reaction of the legislator**
1.	31/01/2012.	AJB-1878/2012	Rights of detainees	Commissioner for Fundamental Rights	In process	None
2.	15/02/2012.	AJB-700/2012	Environment protection; noise and oscillation load	Commissioner for Future Generations	In process	None

3.	15/02/2012.	AJB-1667/2012	Building rules of Dunakeszi	Commissioner for Future Generations	Annulment	None
4.	15/02/2012.	AJB-1925/2012	Concession of an establishment	Commissioner for Future Generations	In process	None
5.	15/02/2012.	AJB-1874/2012	Omission concerning the Act on strike	Commissioner for Fundamental Rights	Rejection	
6.	16/02/2012.	AJB-1040/2012	Sanctioning improper use of public areas	Commissioner for Fundamental Rights	In process	
7.	16/02/2012.	AJB-2078/2012	Dustbin scavenging	Commissioner for Fundamental Rights	Refusal (the local government withdrew its decree)	
8.	16/02/2012.	AJB-1877/2012	Misdemeanour; resisting police measures	Commissioner for Fundamental Rights	In process	
9.	19/04/2012.	AJB-2466/2012	Protection of classified data	Commissioner for Data Protection	In process	None
10.	19/04/2012.	AJB-2467/2012	System of criminal records	Commissioner for Data Protection	Rejection	None
11.	19/04/2012.	AJB-2469/2012	Act on Civil Procedure	Commissioner for Data Protection	In process	None
12.	19/04/2012.	AJB-2470/2012	National Security Services	Commissioner for Data Protection	In process	None

4. Petitions rejected or refused

	Date of initiation	File	Subject	Date of rejection
1.	19/04/2012.	AJB-2467/2012	System of criminal records	18/09/2012.
2.	15/02/2012.	AJB-1874/2012	Omission concerning the Act on strike	26/06/2012.
3.	16/02/2012.	AJB-2078/2012	Dustbin scavenging	26/07/2012. Refusal (the local government withdrew its decree)
4.	27/04/2012.	AJB-2709/2012	Rights of minorities	04/12/2012.
5.	12/07/2012.	AJB-2332/2012	Rules of taxation	19/04/2013.
6.	23/04/2013.	AJB-2054/2013	Fourth Amendment to the Basic Law	21/05/2013.
7.	24/07/2012.	AJB-2883/2012	Vocational training	27/05/2013.

5. Petitions the CC declared to be well-founded

	Date of initiation	File	Subject	Date of decision	Decision
1.	30/03/2012.	AJB-2834/2012	Government decree on student contract	03/07/2012.	Total annulment
2.	16/02/2012.	AJB-1040/2012	Sanctioning improper use of public areas	12/11/2012.	Annulment
3.	27/07/2012.	AJB-2638/2012	Transformation of the Social Service System of the Disabled	04/12/2012.	Partial annulment
4.	24/05/2012.	AJB-4159/2012	Family protection	17/12/2012.	Annulment (previously the entry into force was suspended)

5.	15/02/2012.	AJB-1925/2012.	Building rules of Dunakeszi	17/12/2012.	Annulment
6.	22/03/2012.	AJB-1961/2012	Free legal aid concerning the submission of constitutional complaint	18/12/2012.	Annulment
7.	13/03/2012.	AJB-2302/2012	Transitional Provisions of the Basic Law	28/12/2012.	Annulment

6. Petition upheld

	Date of initiation	**File**	**Subject**	**Date of maintenance**	**Reason of enquiry**
1.	13/03/2012.	AJB-2302/2012	Transitional Provisions of the Basic Law	27/09/2012.	Legal background altered

Number of submissions: 798.