The Constitutional Court proceedings and the Ombudsman's Activity: The First Steps of the Practice on the basis of the Regulation of the Fundamental Law

Professor Dr. Máté Szabó is a representative of Doctors at the Hungarian Academy of Sciences, the Commissioner for fundamental rights. Dr. Barnabás Hajas is a contributor.[1]

The development of the Constitutional Court proceedings is linked to the tendency of developing correctional mechanisms, constitutional balancing bodies in Europe after the authoritarian systems. The institutions of the Constitutional Court proceedings ensure the democratic development of the Italian, Austrian, Spanish and post-communist regimes or the post-apartheid regimes in South Africa.[2] The origins of the ombudsman institutions are not the post-authoritarian but actually the stabile democracies: Sweden, Finland, Denmark and New Zealand.[3] These first generation ombudsman institutions mean the revision-correction of the constitutionality of administrative decisions as a "soft" type of mechanisms possibly complementing, cooperating with the administrative court proceedings. At this stage, ombudsmen are reactive, commencing a proceeding on complaints and their task is to control the decisions of the administrative authorities. The Spanish ombudsman established in 1978,[4] following the Franco regime, meant the first post-authoritarian ombudsman institution which exceeded its earlier reactive-administrative powers at the time and it could resort to the Constitutional Court. The Spanish ombudsman institution fulfilled proactive functions as well, that is, it could initiate inquiries *ex officio* and there was a shift towards the constitutional court activity in cases of human rights, that is, proactive and human rights abuse as well. This model was adopted by the ombudsman institutions emerging in the various post-colonial, post-authoritarian systems. The first post-communist ombudsman was set up in Poland and this way it operated during the entire time of the political/democratic transformation, even before the real function of the Constitutional Court came into being. Due to the impact of the Polish model,[5] in essence, all post-communist systems whether

---

[1] As of 1 January 2012, the petitions to the Constitutional Court are prepared by the Public Law Department in the Office of the Commissioner for fundamental rights. The chief-department is Barnabás Hajas who is an assistant professor at the Department of Constitutional Law of the Faculty of Law of the Pázmány Péter Catholic University.

[2] Paczolay Péter(szerk.): Alkotmánybíráskodás-alkotmányértelmezés.Rejtjel: Budapest.2003.

[3] Gabriele Kucsko-Stadlmayr(szerk.): Európai ombudsmani intézmények. ELTE Eötvös Kiadó: Budapest. 2010.

[4] Kucsko-Stadlmayer ibid pp. 237-245

[5] Kucsko-Stadlmayer ibid pp.185-195

democratic or authoritarian, set up their own ombudsman institution that could cooperate with the Constitutional Courts widespread in the 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 established later in Hungary followed a Spanish-Polish model as well; they all had proactive and reactive functions as well as administration controlling and constitution protection functions or functions institutionalizing the resort to the Constitutional Court and even 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 system in Brussels in 2007, with the European ombudsman, Nikiforos Diamandouros. In Sweden, the system of the single 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 the 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 (that of the parliamentary for future generations), the balance shifted towards the special ombudsmen. This prompted my vigorous and public protest at the time against the position of the 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 that had hindered the operation between the ombudsmen was terminated by a solution in the Fundamental Law which set up one 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 nationalities and the sustainability and environmental protection. The data protection and freedom of information ombudsman became an independent authority levying fines of millions of Forints pursuant to the provisions of the Fundamental Law in compliance with EU regulation. (It is another question that in this field

[6] Hajas Barnabás-Szabó Máté: Az alapvető jogok legutóbbi húsz évéről(1988-2008), In: Szabó Máté: Emberi jogok-alapvető jogok? Esélyek és veszélyek az ombudsman szemével.Kairosz Kiadó. Budapest.2011. pp.110.-133

[7] Szabó Máté: op. cit. pp. 169-174 and pp. 187-191

the EU still criticizes the Hungarian solution since the last commissioner for data protection, András Jóri, in their view, has not given the chance to fulfil the position of the president of the authority, whereas the general and the special ombudsmen Máté Szabó, Sándor Fülöp and Ernő Kállai could decide it if they would work together in the new set-up.)

This transformation of the ombudsman system is not without precedent. In France, Norway, and Sweden and in Italy, where there were only local ombudsmen, and in Malta such centralizing trends have been prevailing in the recent years due to the impact of the crisis in the ombudsman systems. In each of the Visegrád countries, one commissioner systems emerged, only the Hungarian solution was "an 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 as well. 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 did not go together with the transformation of the relationship of the Constitutional Court and the ombudsman everywhere. In the countries concerned, there is not even a Constitutional Court everywhere, either, or if there is one, the ombudsman institution does not have a duty with regard to that everywhere. 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 too high; the general commissioners did not submit more than five petitions on the average annually, either. The special ombudsmen who could resort to the Constitutional Court on the basis of some legal rules, the Nationalities Act, 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, according to Miháy Bihari constitutional court, proceeded with those of the about 800

[8] Soós Eszter Petronella: Ombudsman a la francaise- adalékok egy reformhoz, in: Hajas Barnabás - Szabó Máté: Az ombudsmani intézmények újraszabályozása a 21. században Magyarországon és Európában. Országgyűlés Hivatala: Budapest. 2012. pp. 106-120

citizens' petitions of 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. However, in the absence of that it can be concluded that before the deadline of resubmission of the petitions in the past to the ombudsman, 1 April 2012, their fate was the 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 and that of others are wrong stating that the actio popularis would have been an efficient constitutional safeguard. On the input side yes, all citizens "could go to Donáti street," but for what reason, since their petitions could be gathering dust without any impact and processing. On the output side, the Constitutional Court was unable to deal with this colourful multitude of the 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 too many initiatives could benefit from the numerous petitions in compliance with the criterion of people's democracy. The actio popularis could take a role of 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 we could analyse if not all but 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 the 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. The Constitutional Courts are the highest, entirely independent from politics, highly qualified, special forums making binding decisions. They are neither the spokesperson of the contemporary political majority nor that of the social majority's opinion. For that purpose there is the Parliament and the civil society. The organization of Constitutional Court proceedings has to ensure a decision based on solely constitutional-professional arguments against the pressure of the majority

democracy and the majority society. For this no permanent people's participation is required but the assessment of the constitutional law argumentations based on the result of the discourse of those constitutional argumentations. Consequently, the Constitutional Court proceedings may take advantage of the people's feedback, but using 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 it?

On the basis of the citizens' complaints in the past 10 months, 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 the 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 Fundamental Law instead of the 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 third government majority and the divided opposition. The head of government authorized by a two third 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. There has not been an example for it during the last ten months, though, logically it cannot be excluded. 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 clienteles' demands as a result before the Constitutional Court in a permanent offensive. Based on the very short experience of the 10 months, neither the head of government nor one quarter of the representatives has taken advantage of the current 2010-2014 parliamentary composition except the ombudsman. (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. 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 modify 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 that he was induced to resort to the ombudsman because he had been deprived of his right to petition. There is no doubt that the 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 the civil petitions for ex post review of norms to a politically independent organization, the Commissioner for Fundamental Rights due to the strict regulation of the conflict of interests in Hungary today. The other two currently theoretically existing channels are, however, entirely of a political hue, either the head of 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 you have a direct interest. Consequently, the triad of mediation that cannot be considered scarce and that contains various alternatives appears in the Fundamental 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 annually a few dozen of prioritized ombudsman's petitions serving as appropriate starting points in the perspective of the analysis.

The work load of the Constitutional Court is, however, so heavy 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 preparation of the own new petitions was going on in this period. At the beginning, we were highly uncertain as the many slashing crisis management measures, the reregulation of the 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 Fundamental law responding to it that is remarkable in all respects that following this the petitions began to arrive massively, in groups and frequently at the ombudsman. These were in many cases organized protest campaigns and legal actions as part of the campaigns organized by civil organizations.

The petitions arriving after this confirmed their dynamics, none of which has been rejected yet by the Constitutional Court. 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. If more spectacular rejecting gestures do not come from the Constitutional Court until the end of the year, then the number of the petitioners may approach or even reach the previous level of 800. (However, if we count 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 the 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 made easier by the existence of the multiple petitions with the same text in the framework of several hundreds of coordinated legal protesting actions.

Mostly in the protest culture of West Germany and Austria where there were the parliamentary petition committees, the campaigns of white hot mobilizations have long been

the standard means, where the occurrence of the "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 January 1, 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 the follow-up of the petitions

In compliance with the abovementioned aspects we have considered our activity towards the Constitutional Court so far in the first 10 months of 2012 selectively in a demonstrative manner. The draft and the listing of the petitions in a tabular form was closed on November 1, 2012.

It is the ombudsman who knocks on the door in Donáti street instead of the citizens.

As of January 1, 2012, not every citizen has the 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 uppermost 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] A nine month long experience is 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 the "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 these can be formulated through experts' deductions). The colloquial problem interpretation may be of a symptomatic value; however, it requires further professional elaboration.

It does not belong to the ombudsman's task to translate the general political critics into the language of the Constitutional Court. The Fundamental 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 yet to an opposition cooperation with a common petition. This opportunity may arise with a changing parliamentary composition in

[9] See the summary of the critical junctures for the actio popularissal: Paczolay Péter: Megváltozott hangsúlyok az Alkotmánybíróság hatásköreiben. Alkotmányjogi Szemle 1/2012. p. 67

which the comprehensive critical attitude of the opposition is likely to appear in the submission of petitions. Compared to this, the ombudsman channel together with the strict form of a petition and the constraints of the ombudsman's competence leads to focus 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.

The previous ombudsmen's petitions

In February 2012 upon the request of the Constitutional Court, I *maintained* all the petitions that I submitted before January 1, 2012 even as parliamentary commissioner for the citizens' rights with a reference to the Fundamental 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 to the Constitutional Court. I maintained the ongoing petitions of the parliamentary commissioner for the interests of the future generations regarding the site authorization rules[11] and regarding the regulation of the noise emission of cultural festivals.[12] I partially maintained and complemented the petitions regarding the Dunakeszi Marsh and the Páty golf-course project.[13]

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

---

[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 Fundamental 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 with regards to 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 ACC, I resorted to the Government Office by writing a letter in order to request it to examine if the local government decrees affected by the petitions and the resolutions (construction procedure) are in compliance with the higher level legislation.

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

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 CC ruling 30/2012. (VI. 27.). 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 Fundamental law if the subject of the examination is exclusively the establishment of the compliance of the local government decree with the Fundamental law without the examination of its collision with other legislation. The compliance with the Fundamental 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 local government on sanctioning scavenging because the representative body repealed the legislation in compliance with the new Minor Offences Act.[16]

It can be clearly established from the above mentioned that for some 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

[15] What is distinct in this case is that according to its file number (3255/2012. (IX. 28.) AB) it is an order, however, the operative part of the decision makes it clear that it was passed as a resolution by the acting council.
[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 (3002/2012. (VI. 21.) AB végzés), 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.)

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 Minor Offences Act 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.

Petitions based on citizens' initiatives

410 petitions arrived to the Office of the Commissioner for fundamental rights until 10 October 2012, in which the petitioners put forward constitutionality objections partially or entirely against legislation. To be more precise, on one side these are outnumbered by the abstract review of norms petitions under actio popularis submitted to the Constitutional Court. On the other side, the petitions submitted had a considerably similar content or they were of similar nature (on various pension rules 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 internet).
I used my power to submit a petition 15 times until the middle of October 2012 (to be more precise 16 times as a consequence of challenging the student contracts again). The issues described in the petitions are rather various. I am going to present only some of these being significant for the citizens' rights and obligations.

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

In my view, the principle of rule of law and legal certainty is violated by the uncertain systemic status of the Transitional Provisions. If the Transitional Provisions were interpreted as part of the amendment of the Fundamental law by the Constitutional Court, then they

[17] AJB 3298/2012 (precedent: 5980/2010)
[18] AJB 1041/2012 (precedent: AJB 2293/2011)

should be declared as ineffective in public law concerns since the Transitional Provisions were accepted contrary to Article S) of the Fundamental law.

While Subsection (3) of the Closing Provisions of the Fundamental law gives authorization for adopting the transitional provisions related to the Fundamental 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 entitled as T*ransitional Provisions related to the Coming into Force of the Fundamental 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 Fundamental Law)*. The petition secondarily aimed at the annulment of these non-transitional provisions.[19]

It is contrary to the Fundamental 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 for disposal. In this respect, the state fails to meet its obligation of objective fundamental right protection and that of ensuring access with equal opportunities and equal opportunities.[20]

In my petition related to the *government decree regulating student contracts*, I initiated the annulment of Section 110, Subsection (1), Clause 23 of Act CCIV of 2011 on Higher Education (hereinafter referred to as "HEA") and Government Decree 2/2012 (of January 20) on Student Contracts to be Concluded with the Beneficiaries of Full and Partial Hungarian State Scholarships (hereinafter referred to as "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 the Student Contracts, together with the rights, obligations and the legal consequences of a possible non-performance. The student is obliged to obtain his/her degree within an adequate

[19] case AJB-2302/2012. – http://www.ajbh.hu/allam/jelentes/201202302Ai.rtf

[20] case No. AJB-1961/2012.– http://www.ajbh.hu/allam/jelentes/201201961Ai.rtf

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 the length of his/her studies under full or partial state scholarship. Failing to do so, the former student 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 Fundamental 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 government decree, but in its Ruling 32/2012 AB (of July 4) the Court stated that both the provisions of the government decree regulating student contract and the authorization by the HEA[21] are *formally incompatible with the Fundamental Law*. Consequently, the Parliament amended the HEA by incorporating the earlier, decree-level regulations into the Act, therefore I raised objection to these new regulations of the 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 referred to as "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, 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 Fundamental Law, the rights of national minorities to form their local and national self-governments, and that 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 referred

---

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

[22] See Motion AJB-2834/2012 at http://www.ajbh.hu/allam/jelentes/201202834.rtf and http://www.ajbh.hu/allam/jelentes/201202834Ai.rtf

[23] See Motion AJB-2709/2012 – http://www.ajbh.hu/allam/jelentes/201202709Ai.rtf

to as “MA”). According to my petition the rules governing the election of the Media Council of the National Media and Infocommunications Authority (hereinafter referred to as “Media Council”) are in breach of the Fundamental 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, mock the proper functioning of the Media Council, leading subsequently to the infringement of the obligation of objective institutional defense 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 objection to the fact that the per capita campaign budget of candidates during parliamentary elections had been limited, for about 15 years, and not counting the support from the central budget, at HUF 1 million 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]

In my petition initiating the annulment of Sections 7 and 8 of *Act CCXI of 2011 on the Protection of Families* (hereinafter referred to as “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, 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 (hereinafter referred to as “CC”), a spouse and a registered partner shall inherit on the same level, while the FPA recognizes exclusively the family based on marriage.

[24] See Motion AJB-3299/2012 – http://www.ajbh.hu/allam/jelentes/201203299Ai.rtf
[25] See Motion AJB-2303/2012 – http://www.ajbh.hu/allam/jelentes/201202303Ai.rtf

In its Ruling 31/2012 AB (of April 29) the Constitutional Court suspended, as a new measure stipulated by the Fundamental Law, the entry into force of Section 8 of the FPA scheduled to July 1, 2012.[26]

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 Fundamental 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 the Parliament assumed the right to decide in 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 Fundamental 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 makes a link between two

---

[26] See Motion AJB-4159/2012 – http://www.ajbh.hu/allam/jelentes/201204159Ai.rtf

[27] See Motion AJB-2784/2012 – http://www.ajbh.hu/allam/jelentes/201202784Ai.rtf

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 these and other petitions and the hundreds of complaints we can state that the group of petitioners is rather diverse, ranging from university professors, self-governments of nationalities, members of the European Parliament through 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 and dilemmas have emerged that we have to refrain from introducing here due to size considerations.

For Conclusions – The Year is not Over Yet

The changes have promoted the institution of ombudsman in Hungary becoming more efficient and more European, and today the results at hand are stressing the soundness of 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, more efficient solutions and it may 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 Fundamental 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 judges of the Constitutional Court from nine to fifteen).

What effect will have on all this the new Parliament, consisting of fewer members but completed with the representatives of ethnic minorities, that will be elected in 2014 with the participation of significant number of Hungarian citizens living abroad? As far as the

[28] See Motion AJB-4744/2012 – http://www.ajbh.hu/allam/jelentes/201204744Ai.rtf

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 the 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 October 1 of this year 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.

Petitions to the Constitutional Court in 2012[30]

I. 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

II. Upon submission

	Date of initiation	**File**	**Subject**	**Decision of the CC**	**Reaction of the legislator**
1.	13/03/2012.	AJB-2302/2012	Transitory Provisions of the Basic Law	In process. Upon the enquiry of the CC, the ombudsman upheld the petition (27/09/2012.)	Amendment to the Basic Law
2.	22/03/2012.	AJB-1961/2012	Free legal aid concerning the submission of constitutional complaint	In process	None

[30] The table was prepared by Lóránt Csink, a colleague of the Office of the Commissioner for Fundamental Rights, an assistant professor of the Constitutional Law Department of the Faculty of Law of the Pázmány Péter Catholic University.

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	In process	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	In process, enter into force suspended	None
8.	26/06/2012.	AJB-2332/2012	Rules of taxation	In process	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	In process	None
12.	27/07/2012.	AJB-2638/2012	Transformation of the Social Service System of the Disabled	In process	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	In process	None

			at courts		
16.	04/10/2012.	AJB-4744/2012	Pensions granted before the age of retirement	In process	None

III. Petitions initiated before 2012 and upheld later on[31]

	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	In process	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-	Dustbin	Commissioner for	Refusal (the local	

[31] In the matter AJB-861/2012 the Parliamentary Commissioner for the Future Generations initiated the review of the Act on the Constitutional Court, the Commissioner for fundamental rights, however, has not upheld the petition.

		2078/2012	scavenging	Fundamental Rights	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

IV. 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)

V. 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.	24/05/2012.	AJB-4159/2012	Family protection	27/06/2012.	Suspension of the enter into force

VI. Petition upheld

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