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## Remodelling the System of Legal Protection in Hungary

**Abstract.** The study presents how the system of legal protection since the turn of the 1980s and 1990s, as a consequence of the changed international, political and economic circumstances, has been transformed in Hungary according to the requirements of a modern constitutional state. Giving information on the relevant historical-legal antecedents in Hungary, the then arising practical exigencies and different recently applied models in Western democracies, taken as starting points during the elaboration of the reform, the pros and cons of the latter, the study analyses the solutions introduced at the time of the change of the political-economic regime, their later developments, as well as the present-day system of legal protection in Hungary, making mentions of problems, too, which arise in some respects even nowadays. Taking all these into account, a comprehensive information is given in the study on the establishment of the Parliamentary Commissioners for Civic Rights and of the Constitutional Court in Hungary, on the prosecutor's (procurator's) offices and courts of justice, focusing on the relating constitutional principles, their organisation, competences, guarantees of independence and staff problems alike.

**Keywords:** administration of justice, Constitution, Constitutional Court, judges, judicial independence, judicial organisation, national round-table negotiations, National Council of Justice, ombudsman, Parliamentary Commissioner for Civic Rights, prosecutor's (procurator's) offices

### Introduction

Since the turn of the 1980s and 1990s, the transformation of the system of legal protection according to the requirements of the constitutional state has featured as a distinguished goal of the reform of the state establishment, primarily following the declaration made at the Party Conference of the Hungarian Socialist Labour Party (MSZMP) on the necessity of the review of the Constitution in search for an answer to the conditions of the increasingly critical economic situation that generated social discontent, to the restricted democratic rights and freedoms and to the Soviet "perestroika" more favourable to Hungarian state sovereignty. Thereby, not only research that kept the modernisation of state establishment in view for several years gathered impetus, but the preparation of drafting the new Constitution commenced in an institutional framework, as

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well, particularly as pursuant to the MT Resolution 2022/1988 (HT. 7) passed in August by the Council of Ministers.<sup>1</sup> That work encompassed all areas of constitutional regulation, in which the reform of the framework and functioning of legal protection was inevitably highlighted. In fact, simultaneously with drafting the Constitution, the establishment of a new organ of legal protection, i.e. of the Constitutional Court was anticipated under the Amendment of the Constitution of 1989 adopted on 10th January, 1989 on the grounds of the position taken by the Party Conference. Furthermore, the problem of the overall framework of legal protection was also dealt with under government documents framed during the preparation of the Constitution that drew on its interim results. Thus the option of instituting the spokesman for civic rights (ombudsman) in the framework of legal protection was first proposed in an official form in the document issued by the Ministry of Justice on 30th November, 1988 titled “Conception of the Regulation of the New Constitution of the Hungarian People’s Republic”. The draft titled “The Principles of the Regulation of the Constitution of Hungary” was prepared by the Ministry of Justice on 30th January, 1989 and the respective Resolution was adopted by Parliament on 9th March, furthermore, instead of the Draft Act on the Constitution, which was not framed for political reasons, the scope of the “qualified” transition was also delineated by the Draft Act amending the Constitution elaborated by the Ministry of Justice on 29th May, 1989 and tabled by the Government on the motion of the Political Committee of the Hungarian Socialist Labour Party (MSZMP) amongst opposition endeavours that gained ground.

The prerequisites of the actual political-economic transformation directed up to that time by the “state party” were created on 10th June, 1989, when an agreement concerning the commencement of substantial political negotiations was concluded by the MSZMP, various social organisations and movements and the Opposition Round–Table. In this process, at the National Round–Table Negotiations a trilateral consensus was reached concerning the fundamental issues put on the agenda of the discussions on the systems of political, economic and social institutions. According to the agreement concluded on 21st June, the consensus concerned also areas of the framework of legal protection,

<sup>1</sup> See, especially, the introductory essay of Géza Kilényi for *Egy alkotmány-előkészítés dokumentumai* (The Documents of Drafting the Constitution). *Kísérlet Magyarország új Alkotmányának megalkotására, 1988–1990* (Efforts at Drafting the New Constitution of Hungary, 1988–1990). Kilényi G. (ed.). Research Center for Political Sciences, Budapest, 1991. See further, Holló, A.: *Az államjogtól a jogállamig* (From State Law to a State Based on the Rule of Law). Published by the Foundation Promoting Political Culture, Budapest, 1993.

for instance, the topical formulae of the Amendment of the Constitution and issues related to the Constitutional Court.

Following from the above, the adoption of the new Constitution was temporarily removed from the agenda and the Government also withdrew the bills with the content covered in the course of the trilateral negotiations. The Parliament in its Session of 27th June did not put the discussion of the Draft Act amending the Constitution of 29th May or of the Draft Act on the Constitutional Court on its agenda. With regard to the documents on the Amendment of the Constitution and on the Constitutional Court mentioned above, the common standpoint was formulated primarily at an expert level in work committees in fierce discussions often motivated by political concerns and interests.<sup>2</sup> Standpoints which according to the closing Agreement of 18th September of the National Round-Table Negotiations held between 13th June and 18th September, 1989, were realized in draft bills as well. Under the political agreement, the Government recognised these as its own proposals and subsequently to not so much content-based as formal modifications, submitted to Parliament.<sup>3</sup> After a short debate, the supreme Hungarian representative body passed them with minor amendments in October, 1989.

The “constitutional revolution” had not been completed as pursuant to the comprehensive Amendment of the Constitution under Act XXXI of 1989. First of all, the adoption of Acts to implement the Amendment of the Constitution was still necessary, which was accomplished in 1989 and within 3–4 years following 1990 as a result of the work of democratically elected parliaments. Subsequently, however, further reformulation, readjustment and development of several constitutional institutions were even at that time imperative by reason of the inevitable improvisation, inaccuracy and non-availability of practical experience implicated in the urgency of the Amendment of the Constitution and of law-making as well as the rapidly changing social-political conditions. Despite relevant attempts and owing to the non-agreement between parliamentary parties, Hungary has failed to frame a new Constitution, whereas our constitutional framework has been completely reorganised and reinforced. According to the requirements of a constitutional state based on the rule of law, the framework of legal protection has also been transformed. In the course of the

<sup>2</sup> See, Halmai, G.: Az 1949-es alkotmány jogállamosítása (The Reformulation of the Constitution according to the Rule of Law). In: Bozóki, A.–Elbert, M. et al. (eds.): *A rendszerváltás forgatókönyve. Kerekasztal-tárgyalások 1989-ben* (The Dramaturgy of the Political Transformation. Round-Table Negotiations in 1989). Vol. 7. *Alkotmányos forradalom* (Constitutional Revolution). Essays. Új Mandátum Publisher, Budapest, 2000. 180. and following.

<sup>3</sup> See, Holló: *op. cit.*, 109.

political transformation, two new bodies of legal protection have been established, too, namely, the institution of the ombudsman and the Constitutional Court. Owing to the changes, the framework of legal protection today bears comparison in all its dimensions even at an international level. This holds true despite the fact that the reasonableness of several solutions, either sustained throughout the political transformation or newly adopted, has been challenged up to now. In the followings, we shall explore what the above exactly imply with respect to the institutions of the ombudsman, the prosecution, the judiciary and the Constitutional Court, which belong to the constitutional framework of legal protection.

### **The Establishment of the Institution of the Ombudsman (Parliamentary Commissioner) in Hungary**

The Institution of the Parliamentary Commissioner originates in Scandinavia and looks back on a past of two centuries. According to the Swedish model, it gained ground in other Scandinavian countries primarily following the 2nd World War and in several Western European countries (e.g., in England, France, Austria, Spain) following the 1960s and 1970s. Moreover, we can assert that the introduction of the institution of the Parliamentary Commissioner was put on the agenda on other continents and has been spreading all over the world.

Basically, two factors account for the apparent prevalence of the institution of the Parliamentary Commissioner. Primarily, it is considered to be an appropriate form of the extension of parliamentary control over the executive power, but its establishment has also created an additional guarantee for the protection of citizens' rights.

The traditional forms of function of the parliament are not appropriate for the control of the legality of particular procedures of applying the law by authorities. Albeit the representatives place great emphasis on the settlement of the complaints of their constituents, even if the settlement of individual and group complaints distracts them from performing their "express" representative duties. Therefore, as a result of the delegation of power to promote to solve individual and group grievances to the Parliamentary Commissioner, not only the supervisory power of Parliament will be construed as more comprehensive, but representatives will also be exempted from the task of attending to the complaints of their constituents.

The establishment of the institution of the Parliamentary Commissioner is further justified by the consequent extension of guarantees for increased

protection of the rights and lawful interests of citizens, even if independent judicial review of the legality of administrative decisions is available in every case. Nevertheless, the instrument of judicial remedy is perforce incomplete. Generally, courts cannot secure remedy if the officials of the respective authority resort to offensive abuse, fail to make a decision within the prescribed or reasonable period, do not institute proceedings in an arbitrary manner within their discretionary powers, perchance take arbitrary measures or decisions. In case of such abuses, if the procedure is otherwise lawful, courts do barely have the power to proceed, since the authority resorts to arbitrary measures only within the scope of law. For instance, the law allows that the authority in a given group of cases made either an affirmative or a negative decision within its discretionary powers, and on these grounds it may grant the request of one party and dismiss that of the other without a recognisable reason. Similar inconsistencies may appear in the system of remedies not only in administrative, but also in judicial, prosecuting or other procedures by authorities or *quasi* authorities. In such cases, with regard to judicial independence, except for court proceedings, intervention by the Parliamentary Commissioner (in certain cases by commissioners attached to other organs, such as, e.g., the Head of State or bodies of local self-government), being independent of the organs of applying the law is deemed to be a supplement and an effective instrument of the increased protection of civil rights and lawful interests.

At the turn of the 1980s and 1990s, the establishment of the institution of the Parliamentary Commissioner was necessitated by similar reasons in Hungary, as well. The document issued on 30th November, 1988 by the Ministry of Justice with the title “Conception of the Regulation of the New Constitution of the Hungarian People’s Republic”, based on foreign examples and Hungarian research, referred to the necessity of the establishment of the institution (“spokesman for civic rights”), in case the competence of the prosecution (independent of the executive power, i.e. the administration) to exercise full legality supervision would be substantially transformed (narrowed) or abolished. Consequently, a largely similar scope of duties could be delegated to the power of the ombudsman. This conception was reaffirmed under the Resolution of Parliament adopted on 9th March 1989 on the Principles of the Regulation of the Constitution of Hungary.

The Draft Act of 29th May, 1989 amending the Constitution did not set forth the establishment of the institution of the Parliamentary Commissioner. However, the establishment of the institution was highlighted again at the National Round-Table Negotiations that commenced in June, whereas at that time it was not directly attached to the transformation of the scope of power of the prosecution. Finally, according to the agreement, the Constitution should

stipulate an authorisation for the establishment of the institution of a general ombudsman and of special parliamentary commissioners at a later date. Such independent institutions could be, e.g., the Parliamentary Commissioners for Data Protection, Environmental Protection and for Protection of Minorities, who would proceed in matters concerning national minorities.<sup>4</sup>

According to the Round-Table Agreement, the comprehensive Amendment of the Constitution of 1989 provided for the establishment of the institution of the "Parliamentary Commissioner for Civic Rights". Accordingly, the Parliamentary Commissioner for Civic Rights shall be responsible for the investigation or initiating the investigation of cases involving irregularities related to constitutional rights he has become aware of and initiating general or specific measures for their redress. Proceedings by the ombudsman may be initiated by any citizen in the cases specified by law. The Parliamentary Commissioner shall be elected by Parliament based on the proposal of the President of the Republic. The Parliament may also elect special commissioners for the protection of specific constitutional rights. The Parliamentary Commissioners shall submit an annual report on their activities to Parliament. The detailed rules concerning Parliamentary Commissioners shall be set forth under an Act of constitutional force. Later, Act XL of 1990 amended the constitutional provisions by specifying the institution of the Parliamentary Commissioner for the Rights of National and Ethnic Minorities as responsible for investigating or initiating the investigation of cases involving irregularities related to the rights of national or ethnic minorities he has become aware of and initiating general or specific measures for their redress. According to this amendment, in a remarkable way, the competence of the Parliamentary Commissioner would have been exercised by a body consisting of one representative of each national and ethnic minority, who were to be proposed on the motions of national and ethnic minority organisations by the President of the Republic and elected by Parliament. This solution was primarily promoted so that national and ethnic minority rights could be enforced, since the autonomous representation of national and ethnic minorities had not been granted in Parliament and according to the reasoning of the draft amendment, the authority of the Parliamentary Commissioner to protect minorities may even be considerably broader and more efficient than those of the MPs. Later, however, as pursuant to Act LXXIII of 1994 amending the Constitution, the

<sup>4</sup> See: Bozóki, A.–Elbert, M. et al. (eds.): *A rendszerváltás forgatókönyve. Kerekasztal-tárgyalások 1989-ben* (The Dramaturgy of the Political Transformation. Round-Table Negotiations in 1989). Vol. 6. *Documents*. Ed., introduction and notes by Kalmár, M.–Révész, B. Új Mandátum Publisher, Budapest, 2000. 618.

amendment above providing for the establishment of the *quasi* “representative” body designated to protect national and ethnic minority rights was repealed. Subsequently, the person of Commissioner to protect minorities too, shall be elected with a qualified majority vote by Parliament on the proposal of the President of the Republic as pursuant to the Amendment of 1990. Besides, since the Act with constitutional force as a special type of Acts ceased to exist in 1990, the detailed rules concerning Parliamentary Commissioners was to be specified under a qualified majority Act of Parliament. Accordingly, this was accomplished on the adoption of Act LIX of 1993 on the Parliamentary Commissioner for Civic Rights, which was supplemented by Act LXXVII of 1993 on the Rights of National and Ethnic Minorities, furthermore, by Act LXIII of 1992 on Personal Data Protection and Publicity of Data of Public Interest with respect to the still acting Commissioner for the Rights of National and Ethnic Minorities as well as Commissioner for Data Protection; the Commissioner for Data Protection having even special powers exceptionally as an authority. Following their election in 1995 for a term of 6 years, the Parliamentary Commissioners, who may be once re-elected, started their work. The considerations of the supporters of the introduction of the institution have been justified by the fact that the independent parliamentary commissioners subjected exclusively to the Constitution and other law have proceeded in their offices to common content. The favourable judgement of their operation manifests itself in the recurrent claim for the establishment of further offices of special commissioners, too, in favour of more efficient protection of constitutional rights drifting into the focus of general attention.

According to the Constitution and Act LIX of 1993, the Parliamentary Commissioner for Civic Rights shall be competent to exercise its supervisory or controlling power in all cases, if, in consequence of the proceedings of any authority or an organ performing public service or its decision made (measure taken) and/or of the omission of measures a person’s constitutional (fundamental or “human”) rights have been injured or if its direct threat obtains, provided that the person concerned has exhausted the available administrative legal remedies (except for the judicial review of an administrative decision as pursuant to a later amendment) or provided that no legal remedy has been secured. With regard to determining the scope of competence of the Commissioner, the following aspects are, however remarkable:

– Concerning its application, Article 29 of the original text of the Act specified the scope of organs that qualify as authority and are subject to the authority of the Commissioner. Later, however, the Constitutional Court stated in its Decision of 7/2001 (III. 14.) that in some aspects the definition was vague, since it was not unambiguous, which organs the supervisory power of the

Commissioner exactly encompassed. This contradicts the principle of legal security that grounds a state based on the rule of law. In view of that, several points of the definition were annulled by reason of unconstitutionality, which called for a more accurate regulation of Article 29 under Act XC of 2001, according to which an authority, that the competence of the Commissioner pertains to, is an organ performing public administration, an organ exercising its competence of public administrative character, the armed forces, the policing organs, the national security service, the investigating authority including the public prosecutor's office performing prosecution investigation, local self-governments and national or ethnic minority self-governments, a public body operating on the basis of obligatory membership, a notary public, the county court bailiff and the independent court bailiff. Nevertheless, in respect to the application of the Act, the Parliament, the President of the Republic, the Constitutional Court, the State Audit Office, the court, the Office of the Public Prosecutor, except for the prosecuting authority that accomplishes prosecution investigation, shall not qualify as authority.

– The power of supervision of the Parliamentary Commissioner for Civic Rights encompasses only the activities or omissions of authorities and organs performing public service concerning the exercise of constitutional rights. It shall not encompass the entire activity of the supervised organs, such as the case in respect of, e.g., public administration in some countries. Its supervision necessarily pertains, first of all, to the operation of public administration, so far as it interacts with a great number of citizens on a daily basis. Nevertheless, we may assert that its basic agency is the protection of fundamental rights, rather than the external supervision of the executive power or of public administration.

– The Commissioner is responsible for the elimination or the prevention of the injury of fundamental constitutional rights. As a consequence, it supervises mainly the lawfulness of the operation of different organs. In its scope of constitutional authority, however, it is entitled to intervene in any case of irregularities concerning the enforcement of constitutional rights he has cognisance of even if it does not directly infringe any legal rule. Consequently, it may examine, and according to the established practice it has done so, whether the authority within its discretionary powers had proceeded in a consistent manner and in good faith. In its procedure, the authority may not pursue any objective other than it has powers and competence for; it may proceed on an objective and impartial basis with respect to the relevant circumstances in the case concerned. It shall make a decision adequate for the peculiarities of the case within a reasonable period even if this period is shorter than the period



specified by law. Human dignity shall at all times be respected in the course of the proceedings by the authority.<sup>5</sup>

The institution of the Parliamentary Commissioner for Civic Rights is related to Parliament. Nevertheless, it is not expressly an organ of Parliament exercising supervision or control, at least not in the sense as it is in several countries (e.g., England and France), where, according to the rule, the investigation of the complaints of citizens may be initiated by their representative or senator in Parliament. In Hungary, those concerned may directly initiate proceedings by the Commissioner in cases subject to its scope of supervision, who shall examine the filed petition and proceed to investigate the case on a mandatory basis unless the irregularity mentioned in the petition, according to the judgement of the ombudsman, is of small importance. Otherwise, the Parliamentary Commissioner is entitled to proceed in order to reveal and terminate any irregularity concerning constitutional rights *ex officio* on any or without notification, too.

As in other countries, the Parliamentary Commissioner does not have, as a rule, powers to redress the revealed irregularity. According to the nature of the irregularity, he may, for instance, resort to the following “soft” measures that can by no means be considered insignificant by reason of the great publicity his activity entails: initiate that the organ incurring the irregularity terminated it, or recommend redress of the irregularity to the supervisory authority. The Parliamentary Commissioner may initiate that the competent public prosecutor lodged a prosecutor’s protest. If in the course of proceedings, the Commissioner forms a grounded suspicion of perpetration of a disciplinary or petty offence, he may, whereas if he forms that of a criminal offence, he shall initiate the corresponding process. He may initiate that the Constitutional Court instituted proceedings. So that the irregularity shall be avoided in the future, the Commissioner may recommend that the organ authorised to make law or norms amends, repeals or frames a legal rule or any normative legal instrument. Eventually, the Commissioner shall notify the Parliament of the revealed irregularity or request its investigation in his annual report, or, if the irregularity is extraordinarily massive, in the interim period.

<sup>5</sup> See, e.g., Report of the Parliamentary Commissioner for Civic Rights and its General Deputy on their activity in the period of 1<sup>st</sup> January–31<sup>st</sup> December, 1998 submitted to Parliament. In: *Hungarian Official Gazette*, II./79/1999. 18.

### **The Organisation and Functions of the Prosecution's (Procurator's) Offices**

Following the bourgeois transformation, the system of prosecution on the European continent was in general established as subordinated to the executive power (Government, Minister of Justice), and, according to the French model, it was strictly centralised and performed duties almost exclusively related to criminal procedures (accusation, public prosecution at court) so that the uniformity of prosecution could be ensured. Such prosecution was established in Hungary following 1871, as well. Lately, in view of the requirement of impartial criminal investigation, issues such as guaranteeing the independence of prosecution, loosening its attachment to the executive and constraining the directive power of the superior authority in the centralised system have all been stressed. Nevertheless, the system of prosecution is still generally a levelled, hierarchical structure attached to the executive power. Apart from duties related to the prosecution, it secondarily or exceptionally attends to civil procedural or administrative duties. The scope of duties of the prosecution does not include, in principle, the supervision of the legality of public administration. In several countries, similar duties are performed by the institution of the Parliamentary Commissioner, which is independent of the executive power.

Following 1917, in Russia or the Soviet Union the system of prosecution established, with respect to its organisation and functions, was different from the solutions adopted in Western Europe. After 1936, the strictly centralised prosecution was separated from public administration and it was organised not as a member state, but as a federal organisation dependent exclusively on the supreme federal organ of representation. This principally promoted centralisation, which was instrumental to the uniform enforcement of federal law on the whole territory of the federation. This organisational construction was also substantiated by the fact that the prosecution was constituted as not only responsible for criminal and partly civil procedures, but also for the so-called general supervision of legality, so, accordingly, it supervised both the lawful operation of state, social and economic organs and the legality of the activities of citizens. Nevertheless, the prosecution controlled principally the lawful functioning of public administration. Therefore, the consequential assurance of the effectiveness of Acts and other law required that this duty was performed not by an organ related to, but by one that was independent of public administration. This solution, which guaranteed the "external" supervision of administration, could, in principle, also provide some protection for citizens seeking legal remedy against abuses by administrative authorities, particularly in an era when any

instrument of the judicial contest of administrative decisions was virtually completely revoked.

Following 1945, the system of the prosecution in Eastern–European countries was transformed according to the Soviet model. As pursuant to the Constitution of 1949, a centralised, hierarchical and independent prosecution system was established in Hungary after 1953, as well, which was subordinated exclusively to the supreme organ of representation. Besides, the scope of duties of the prosecution included the tasks connected with criminal procedures (the supervision of legality of investigations, accusation and prosecution in court proceedings, the supervision of legality of the implementation of penal measures), as well as partly tasks connected with civil procedures, furthermore, the prosecution's office was specifically responsible for the general supervision of the observance of the law. No substantial change was effected later in the legal status of prosecution, although, owing to partial amendments in the meantime, the scope of the general supervision of legality was restricted. After 1972, the responsibilities of the prosecution ceased to include the supervision of the legality of economic activities, and after 1990, owing to the introduction of new methods of supervision, the supervision of local self-governments (councils). However, as pursuant to the currently effective Act V of 1972 (and its Amendments) on Prosecution, the supervision of legality exercised by the prosecution shall pertain even today to legal rules, other norms, general regulations and individual decisions applying the law of organs of state administration under the level of Government. Furthermore, it pertains to decisions of non-judicial organs settling legal disputes, to decisions of business and other organisations concerning relations of employment and those of membership in co-operatives, as well as their measures with general effect issued when enabled by law. In this scope, omission also shall be subject to supervisory procedures *ex officio* or upon notification. In case of infringement of law, redress by the public prosecutor is not admissible (except in cases of petty offences), however, he may initiate that the competent organisation terminated or prevented the infringement of the law. In case of the availability of legal conditions, e.g., the prosecutor may lodge a protest with the organisation that infringed the law or with its superior organ (organ that performs legality supervision on behalf of the state). Furthermore, the prosecutor may lodge a complaint with the director of the organisation so that the illegal practice or the infringement of the law in the form of omission was terminated, or in case the risk of future infringement of the law obtains, he may lodge an admonition in the interest of its prevention, etc.

With respect to its organisational structure and functions, the prosecution has not changed fundamentally since the “socialist” transformation, in spite

of the fact that its possibility and claim has been asserted and recurrently highlighted since the years of 1988–1989. Based on research, this, as an alternative, was formulated under the document titled “Conception of the Regulation of the New Constitution of the Hungarian People’s Republic” of 30th November, 1988 and under the Resolution of Parliament adopted on 9th March, 1989 on the Principles of the Regulation of the Constitution of Hungary. However, the conceptions concerning transformation were not recognised either by the Draft Act of 29th May, 1989 amending the Constitution or by the agreement concluded at the National Round–Table Negotiations,<sup>6</sup> and, as a consequence, were not adopted under the comprehensive Amendment of the Constitution of 1989, either. However, with reference to conceptual–professional considerations, the demand for such a transformation recurrently manifested itself in the endeavours of successive Governments after the free elections in 1990. According to the more or less prevalent models adopted in Western Europe, the motive of these endeavours was to integrate the prosecution into the organisational structure of the executive power and to subordinate it to the supervision and authority of the Minister of Justice in Hungary, as well. This could promote that the Government contributes to framing policy concerning penal law not only by the submission of bills, but by drawing on the powers of the prosecution. This is possible all the more because the extension and the establishment of other “external” safeguards for the legality of administration (quasi general introduction of administrative jurisdiction, introduction of the institution of the ombudsman) supersede the so-called general legality supervision by the prosecution that would substantiate the sustenance of the prosecution as independent of the executive power. The realisation of these endeavours, which requires an Amendment of the Constitution, has, however, so far been met by the resistance of the successive oppositions that feared the excessive strengthening of the Government, although, forceful conceptual and professional reservations have also had bearing on such a turn of events. It has been raised, e.g., that in case of the adoption of that solution, the penal proceedings preceding the judicial phase, except for some measures, would not be subject to “independent”, external control, it would be completely subordinated to the executive power which, without the introduction of adequate “counterbalances”, would threaten the assurance of the legality of criminal procedures. Therefore, following the model adopted in other countries, the institution of the investigating judge and in a relatively

<sup>6</sup> Bozóki, A.–Elbert, M. et al. (eds.): *A rendszerváltás forgatókönyve. Kerekasztaltárgyalások 1989-ben* (The Dramaturgy of the Political Transformation. Round–Table Negotiations in 1989). Vol. 6. *op. cit.*, 100. and following.

wide scope that of subsidiary private accusation should be introduced. Furthermore, the consideration has been raised that the extension or establishment of various safeguards of legality promoting the “external” supervision of administration may not fully substitute the “general” supervision of legality exercised by the prosecution that substantiates the independent system of prosecution. It cannot be replaced by the extension of administrative jurisdiction, since it is inadmissible in cases specified by law, and, we cannot disregard the option that an organ independent of the administration may initiate legality proceedings *ex officio*, since no party will take action if the decision infringes the law in his favour. The supervision exercised by the prosecution cannot be fully replaced by the powers of the Parliamentary Commissioner for Civic Rights, either, since the Commissioner may intervene exclusively by reason of the injury of constitutional rights, not by reason of the unlawful operation of state administration in general. Therefore, if the prosecution was subordinated to the Minister of Justice by terminating its power of the general supervision of legality, similarly to the solutions adopted in other countries, the Parliamentary Commissioner for Civic Rights should be authorised to perform the legality supervision of the “entire” state administration, in the scope of which he could safeguard the enforcement of constitutional rights, too.

### **The Reorganisation of Jurisdiction**

Based on previous research, the conception issued by the Ministry of Justice on 30th November, 1988 related to drafting the new Constitution of the Hungarian People’s Republic, already referred to all aspects that had great significance with respect to the development of jurisdiction in the course of political transformation. The core issues of reform endeavours thenceforth and following the adoption of the Resolution of Parliament of 9th March, 1989 on the Principles of the Regulation of the Constitution of Hungary were the following: more consistent assurance of the constitutional principle of the judicial administration of justice, reinforcement of the unity of judicial organisation, enforcement of democratic jurisdiction with respect to realities, furthermore, universal establishment of guarantees for judicial independence. These endeavours were barely asserted under the Draft Act of 29th May, 1989 amending the Constitution, however, quite obviously, they were highlighted again at the National Round-Table Negotiations in relation to the constitutional regulation of the state establishment, so far as the restriction of the powers of special courts and the extension of guarantees for judicial independence was concerned. However, the actual reform commenced only subsequently to the comprehensive

Amendment of the Constitution of 1989 and was accomplished later, via the adoption of further amendments and Acts implementing the Constitution.

The Declaration of the Rights of Man and of the Citizen of 1789 in France proclaimed that any society in which guarantees for rights and the separation of powers are not secured does not have a Constitution. The first European Constitutional Charter of 1791 (of France) that adopted the Declaration as its integral part set forth that judicial power pertains to the judges. Whereas, the requirement of the separation of powers in further French and Western European constitutional development evolved into the requirement of the division and counterbalance of powers, this hardly affected the constitutional requirement that jurisdiction should be exercised by courts. Furthermore, the principle was also set forth under the constitutions of European socialist countries, although, together with the conception of the unity of state power. They could not disregard the general requirement that jurisdiction must pertain to the power of the courts, since it is exclusively the particular organisation and procedures of courts circumscribed by guarantees, which ensures that the administration of justice shall be exercised in a lawful and impartial manner. Both the original text of the Constitution of 1949 and the effective Constitution of Hungary set forth the principle of the judicial administration of justice, too.

We cannot fail to mention that the monopoly of courts to administer justice has never and nowhere prevailed with full consequence. For practical purposes, (e.g., expeditiousness, economising, knowledge of facts and locality, relieving courts) other organs have also attended to administering justice. Such a situation developed in Hungary, too. Nevertheless, so that the constitutional principle of the judicial administration of justice could be more consistently enforced, Economic Adjudicatory Commissions were dissolved in 1972 (their competence was taken over by ordinary courts) and, in the course of political transformation, the competence of non-judicial organs administering justice was more overtly restricted. The so-called social administration of justice (social court's adjudication) was declared unconstitutional in 1991, then, the work of Labour and Co-operative Adjudicatory Commissions was also terminated in 1992. However, even recently similar *quasi* judicial organs have also been operating, such as the Public Procurement Adjudicatory Commission to adjudge unlawful or disputed cases pertaining to public procurement. Administrative organs shall proceed in certain scopes of actions, primarily in procedures initiated by reason of petty offences. Arbitration shall be admitted in economic legal disputes and other scopes of cases recognised by law, etc. Thus despite the restriction of the competence of jurisdiction of non-judicial organs, e.g. in Hungary, we still can't posit as a fact in practice the exclusive judicial monopoly of jurisdiction. Although, we admit exceptions that are unproblematic.

matic with regard to their narrow scope and guarantees, we can assert that the Constitution does not contain even today either reference to their admission or stipulate limitations on the authorisation of non-judicial organs to administer justice, furthermore, it does not specify a main rule concerning the admissibility of the judicial review of the decisions of these organs.

The requirement of equality before the law implies the enforcement of equality before jurisdiction. This postulates that the cases of subjects of law, i.e., legal entities and natural persons shall be adjudicated by the same organs, and that provisions of law shall be rendered uniform interpretation by the organs of jurisdiction. In the judicial organisation that is safeguarded by the establishment of a unified system of courts. Consequently, in different constitutional systems all cases pertaining to courts shall be adjudicated, in principle, by courts of the same type and organisation, and all courts shall be linked on the grounds of powers of appeal–review and through the guarantees of the uniform interpretation and application of law.

Following the bourgeois transformation, the functioning of extraordinary courts, and special courts which establish privileges or manifest discrimination and are organised on the basis of social, national–ethnic or religious distinctions, have always been inadmissible on consolidated constitutional grounds. In Hungary, such courts had not obtained in the period preceding the political transformation, either, whereas, similarly to other countries, specialised courts, such as Labour Courts and Military Tribunals had operated in a narrow scope in specific proceedings. However, in favour of the reinforcement of the unity of judicial organisation, the conception issued by the Ministry of Justice on 30th November, 1988 related to drafting the Constitution took the sustenance of Military Tribunals into consideration, then the Resolution of Parliament adopted on 9th March, 1989 on the Principles of the Regulation of the Constitution promised both the dissolution of Labour Courts and narrowing the scope of competence of Military Tribunals. At the National Round–Table Negotiations, the Opposition Round–Table maintained that Military Tribunals could function exclusively for the state of defence. In the transition period, the urgent dissolution of Military Tribunals and Prosecution is inevitable with respect to guarantees.<sup>7</sup> Finally, in the course of the political transformation, Labour Courts have been operative until recently, whereas for times of peace, Military Tribunals were dissolved as pursuant to Act LVI of 1991 amending Act IV of 1972 on the Courts, and since that time military justice has been administered by the military panels operating at the appointed County Courts or the Metropolitan Court in Budapest and at the High Court in Budapest.

<sup>7</sup> *Ibid.* 99. and following.

Despite the functioning of Labour Courts established in counties and Budapest, the organisation of courts may be deemed to be unified. Judicial competence is concentrated at ordinary courts with general scope of jurisdiction. Generally, the courts that may proceed to administer justice are the Local Courts, County Courts or the Metropolitan Court of Budapest, the High Courts—three of which were established on 1st January, 2003, supplemented by two further ones on 1st July, 2004 as pursuant to Act LIX of 1997 amending the Constitution proposed under the Resolution of Parliament of 9th March, 1989 on the Principles of the Regulation of the Constitution of Hungary—and the Supreme Court. The judicial system is headed by the Supreme Court that shall assure the uniformity of administration of justice by the courts.

Since the adoption of constitutional charters, safeguarding the democracy of jurisdiction has featured as a distinct constitutional endeavour, which, in times of epochal revolutionary changes, necessitated the election of judges for definite terms, moreover, the involvement of lay assessors into jurisdiction. Whereas, in periods of political consolidation, the reasonableness of the observance of such democratic principles for themselves would usually be challenged and the meticulous enforcement and application of democratically adopted law deemed to be the major standard of democratic jurisdiction. Therefore, the system of the filling up the posts of judges must comply with the requirement of judicial independence and competence. The involvement of lay-assessors was also challenged on the grounds of its being in different cases a mere formality from the outset.

In several countries, based on the considerations above, the appointment of judges for an indefinite period has been instituted as opposed to the election of judges for a definite period, even if the election of judges is known even nowadays in a certain scope, e.g., in some member states of the U.S. and also in Switzerland. In Hungary, the system of the election of judges as pursuant to the original text of the Constitution of 1949, the exercise of which by the organs of representation was prescribed under its implementing rules, was never enforced, since the offices of judges used to be filled by way of appointment in a broad scope for a long time. As a matter of fact, the institution of the election of judges was stipulated under the Amendment of the Constitution of 1972, so that the judges were elected by the Presidential Council of the People's Republic, composed of 21 MPs, for an indefinite period. In the course of the political transformation, the comprehensive Amendment of the Constitution of 1989 dissolved the Presidential Council functioning as a collective Head of State and its role was taken over by the one-man Head of State. Thence, the system of the appointment of judges for an indefinite period after a three years' probationary period has positively prevailed. The President of the Republic is



authorised to appoint the judges. Unarguably, their appointment for an indefinite period creates better conditions for the enforcement of judicial independence. It is also beyond doubt that in case sufficient guarantees are provided, the appointment system as opposed to the contingency of election facilitates the selection of judges with adequate training. The way of selection to various major offices of the judiciary sometimes may be different, e.g., according to a more recent provision, the President of the Supreme Court is elected by Parliament for a period of 6 years.

So far as people's participation is concerned, the formerly general participation of people's assessors in adjudication on the first instance was confined to a narrower scope in Hungary as well as other countries after the 1960s. According to experience, the involvement of lay-judges incurred substantial expenses, whereas it barely promoted more meticulous adjudication. On account of their low performance, the involvement of lay-judges was mere formality, since the expectation that "practical experience" and the expertise of lay-judges could support adjudication, except for certain groups of cases, was rather chimerical. On the contrary, it was the selection of the unfit that prevailed in the system of the selection of lay-judges, i.e., not the most suitable persons were selected, but those, whose absence from the workplace caused the least disturbance. Even in such a case mustering the required number of lay-judges would be a recurrent problem by reason of disinclination to participate. These factors led to the solution that beyond labour adjudication the involvement of lay-judges was restricted to those (groups of) cases in which the participation of expert lay-judges could in fact promote reaching a more technical and considerate decision, furthermore, lay assessors could counteract the faults entailed by routine in the scope of judicial discretion, particularly in serious penal cases. Because according to sociological surveys, the attention of the professional judge in the panel is focused primarily on the act of the perpetrator, whereas that of lay-judges concentrates on the person of the perpetrator. These facts influenced the Conception issued by the Ministry of Justice 30th November, 1988 in the course of drafting the Constitution and the Resolution of Parliament on the Principles of the Regulation of the Constitution of Hungary, too, both of which proposed that the new Constitution confined the involvement of non-professional judges in jurisdiction exclusively to those cases specified by law. However, it was only later that the "reversal" of the constitutional rule pertaining to adjudication by lay-judges or "reducing" the institution in view of reality was provided for under Act LIX of 1997 amending the Constitution. As it is known, according to the former text of the Constitution, courts administered justice through panels consisting of professional judges and lay-assessors, even if Acts could provide for exceptions. According to the effective Constitution,

“Non-professional judges shall also participate in judicature in the cases and in the manner prescribed by law.” This provision theoretically also facilitated the institutionalisation of jury trials, which, however, devoid of a compelling legacy, would amount to hardly any sense in Hungary, primarily because jury trials undermine the constraints imposed by the law of evidence, furthermore, this solution, by way of making an artificial distinction between decisions on matters of fact and on legal questions would in fact transfer the responsibility to lay-judges of making autonomous decisions on questions, too, which in fact require significant legal expertise, such as the qualification of the act in penal cases.

Guaranteeing judicial independence is a fundamental constitutional principle of the judicial system. Following Anglo-Saxon antecedents, its legal bases were established by the first modern constitutional charters, which instituted guarantees primarily to prevent the removal of judges from office. Later, the general rule according to which “judges are independent and subjected only to the law” has been adopted by constitutions mainly according to the model of the (German) Constitution of Weimar of 1919. Following 1936, this rule for propagandistic reasons was introduced into European socialist constitutions, among others into the Hungarian Constitution of 1949, as well. Nevertheless, this principle as a rule was not enforced until the 1960s and 1970s by reason of frequent intervention into the work of the judiciary, in spite of the fact that several legal guarantees existed for safeguarding judicial independence. Subsequently, external political influence on judicial administration of justice slackened, nevertheless, it became obvious that the democratic transformation of social-political conditions and the extension of legal guarantees for judicial independence were necessary for the elimination of legal-political encumbrances of enforcement of judicial independence. In fact, the democratic changes taking place in 1989–1990 and the transformation of the system of structural and personal legal guarantees of judicial independence established universal grounds, which facilitated that the judge endowed with human and professional dignity accomplished his/her duty in an independent, impartial and unprejudiced manner.

In democratic political systems, in which the exertion of influence upon the work of the judiciary is deemed inadmissible, the enforcement of judicial independence is safeguarded by a comprehensive system of structural and personal legal guarantees. Structural legal guarantees have been instituted so that accessibility of adjudicating judges can be precluded via the establishment of the relationship of courts with organs that supervise adjudication, guarantee the unity of law, administer courts or perform other duties. Legal guarantees related to the person of the judge facilitates that the judge, so far as his/her personal existence (career) as a judge is concerned, does not have to fear adverse

consequences, if he fails to recognise unlawful intervening attempts, that he/she shall not be exposed to unwelcome harassment, and that he/she can avert situations of incompatibility that may affect his/her work. With respect to these factors, following the political transformation in Hungary, several far-reaching changes have taken place. In the followings, we shall outline those we deem to be most important:

– The issue whether MPs in Parliament could address questions to the President of the Supreme Court concerning all matters pertaining to his scope of competence was already a subject of dispute at the National Round-Table Negotiations.<sup>8</sup> With respect to judicial independence, this option was eliminated as pursuant to the comprehensive Amendment of the Constitution in 1989.

– In view of the text of the Draft Amendment of the Constitution of 29th May, 1989, the standpoint according to which the President of the Supreme Court shall not be accountable to report on the work of the Supreme Court to Parliament was formulated at the National Round-Table Negotiations. That took effect as pursuant to the comprehensive Amendment of the Constitution in 1989.

– The document issued by the Ministry of Justice on 30th November, 1988 on the Conception of the Regulation of the New Constitution of the Hungarian People's Republic was the first one to propose in an official form that the system of the judicial administration, by way of the reinforcement of the competence of autonomous judicial bodies or setting up new ones, should be reconstituted so that its functioning (guaranteeing the material and personnel conditions of the administration of justice) could not be an instrument of intervention into issues of content in the administration of justice. The significance of judicial self-government and, for instance, the necessity of the establishment of the National Judiciary Council was emphasised also under the Resolution of Parliament of 9th March, 1989 on the Principles of the Regulation of the Constitution of Hungary. The comprehensive Amendment of the Constitution of 1989 disregarded that issue, however, the systematic establishment of the self-government of courts commenced as pursuant to the Amendments of Act IV of 1972 on the Courts in the course of the legislation of the 1990s. The competence of the Minister of Justice to supervise the general functioning of courts was terminated under Act XLII of 1989, whereas Act LXVII of 1991 legalised the operation not only of the Plenary Session of the Supreme Court, Divisions of the Supreme Court and county-metropolitan courts, but of new bodies of judicial self-governments (county-metropolitan judiciary conferences, county-metropolitan councils of judges elected by the judges out of the judges

<sup>8</sup> *Ibid.* 87. and following.

and the National Judiciary Council), too, which had a major role in formulating the decisions concerning the administration of courts. However, it was Act LIX of 1997 amending the Constitution that entailed a complete “breakthrough” concerning the administration of courts, according to which the central administration of courts shall be exercised by the National Council of Justice as the successor of the National Judiciary Council. As pursuant to Act LXVI of 1997 on the Organisation and Administration of Courts that replaced Act of IV of 1972, it’s chaired by the President of the Supreme Court and its members are: 9 judges (elected for a term of six years by the delegate conference of the judges), the Minister of Justice, the Attorney General (Prosecutor General), the Chairman of the Hungarian Bar Association, and two MPs appointed by the Budgetary and Financial as well as Constitutional and Justice Committees in Parliament. Its decisions are reached by majority vote. Simultaneously, the authorisation of the Ministry of Justice to administer courts was terminated in an unequalled manner among European states, which led to the full autonomy of courts in the scope of administration. This solution obviously promoted the prevention of potential exertion of external pressure on judicial administration of justice, even if it could accommodate several irregularities, since this way, among others, the scope of responsibility of the Government did not pertain to the keeping in operation of courts, the management of problems related to finances, infrastructure and staffing any longer. With regard to the fact also that according to the Amendment as pursuant to Act XLVI of 2002, the Government shall table to the Parliament the proposal for the annual budget of the courts framed by the National Council of Justice without modifications.

– In the course of constitutional changes, the reinforcement of personal guarantees for judicial independence was of necessity also highlighted. The Conception of the Ministry of Justice issued on 30th November, 1988 emphasised, e.g., that the Constitution had to stipulate that the judges could be exempted, suspended, transferred from office or discharged with pension against their will exclusively upon the proposal of the competent judicial self-government body, on the grounds stipulated by the respective law. That was the starting point for the Resolution of Parliament adopted on 9th March, 1989 on the Principles of the Regulation of the Constitution of Hungary, too. Eventually, that was substantiated by the respective provision of the Constitution reformulated under the comprehensive Amendment of the Constitution of 1989 that stipulated “Judges may only be removed from office on the grounds and in accordance with the procedures specified by law.” Then, at the beginning of the 1990s, the Amendments of Act of 1972 on the Courts introduced a more and more meticulous reformulation of the grounds and the procedure in view of judicial independence, however, it developed into a system of guarantees

“devoid of defects” as pursuant to Act LXVI of 1997 on the Organisation and Administration of Courts and to Act LXVII of 1997 on the Legal Status and Remuneration of Judges and their further amendments. The latter enumerated the possible grounds for the exemption of judges, among others such as those on account of which the judges may be exempted from office even against their will. These reasons may be recognised without reservations, are generally circumscribed objectively and determined without the possibility of discretion (e.g. grounds for exemption may be that the judge has reached the retirement age of 70). In such cases, a proposal for the exemption of a judge shall be tabled by the National Council of Justice to the President of the Republic for taking decision after it has received the opinion of competent bodies of judicial self-government. However, it is remarkable that in case the reason for exemption is circumscribed by law with “vague” legal concepts that substantiate discretion, the proposal for exemption may be drafted on condition that prior guarantees have been exhausted. Namely, if the judge has become permanently incompetent for the fulfilment of his office, the President of the County (Metropolitan) Court, of the High Court or of the Supreme Court shall demand in writing that the judge resigned from his office. In case the judge fails to comply, in a medical case his state of health shall be examined, in case a professional ground obtains, an anticipatory evaluation of his work shall be ordained. In a case of the establishment of professional incompetence judicial review is admissible. It is only afterwards that the National Council of Justice, considering the opinion of the competent body of judicial self-government, too, may submit the proposal for the exemption of the judge from office.

### **The Establishment of the Constitutional Court**

The necessity of guaranteeing the protection of the Constitution has been on the agenda since the adoption of the first modern constitutional charters. What has been assigned special significance was to ensure the prevention or elimination of the breach of the Constitution with respect to law-making, since the application of unconstitutional legal rules may lead to massive breaches of the Constitution.

In the course of development, in several countries various organisations or mechanisms were institutionalised to ensure the exercise of a *prior* and a *posterior* norm control, so that the constitutionality of law could be guaranteed. Among the solutions adopted with respect to a *posterior* norm control, the most efficient were those, which, for instance, endeavoured to promote the review of unconstitutional legal rules, not via the framework of law-making, but via impartial, independent organs, the courts.

It is remarkable that in modern legal systems, the system of judicial concrete norm control has been established since the *Marbury v. Madison* Decision of the U.S. Federal Supreme Court in 1803, according to which all courts have the power to examine the constitutionality of the relevant statute in a particular case and if it is found unconstitutional, it shall not be applied in that case. Such cases then usually reach supreme courts via appeals, thus the final judgement concerning the applicability of the law is made either by the Supreme Court of the member state, or in cases pertaining to the federal Constitution, by the Federal Supreme Court. This court shall not make a decision on the annulment or repeal of any law with a general effect, however, a peculiarity of the American legal system is that any legal rule that is found unconstitutional with respect to a case shall become dead letter. Unless the Constitution is amended or the court modifies its standpoint, it may not be applied by courts any longer. In U.S. law, the principle of “stare decisis” is generally recognised, which means that it is mandatory for lower courts to adopt the precedent established by a higher court. Throughout the development of law on the European continent, e.g., in Hungary during the period between 1869 and 1949, there were opportunities for reviewing the constitutionality or lawfulness mainly of decrees in the process of application of the law by courts, as well. However, devoid of the direct binding force of precedents, the system of judicial concrete norm control manifest in setting aside the application of unconstitutional legal rules proved to be hardly applicable without the injury of the uniform application of the law and legal security. For the consequential assurance of the constitutionality and lawfulness of legal rules, such a solution was needed that facilitated that organs independent of any other organs, i.e. courts could make decisions on the annulment or repeal of unconstitutional legal rules abstractly with general binding force.

Disregarding the fact that in some countries ordinary courts (e.g. in a certain scope in Switzerland) or administrative courts (e.g., in France with respect to decrees) have been authorised to exercise abstract norm control, in the Post-2nd World War decades, more and more countries followed the model of the Constitution of Austria of 1920, so far as independent constitutional courts have been authorised to perform that duty, because the judicial review of legislation was considered a function of law-making, rather than of jurisdiction. Ordinary and administrative judges have competence for jurisdiction and “implementation” of law. In continental Europe assigning judges the task of lawmaking (at least “negative” lawmaking), which is an indisputably political task, would have contradicted their professional training, way of thinking and all prevalent traditions. Featuring the courts that administer justice as politically involved bodies would not have been a propitious choice with respect to public

opinion. The requirement of the division of state powers could also have affected the establishment of independent constitutional courts in the sense that constitutional judicature should not result in the concentration of powers at courts administering justice. Besides, in several countries the expectation to set up a new, higher and distinguished body also substantiated the establishment of a separate constitutional court, which in the field of the control of the government may be authorised not only to review the constitutionality of legal rules, but also to perform other tasks, such as holding high-ranking state officials responsible (so-called “state judicature”), and pronouncing judgement in case of conflicts between supreme state bodies, state units in federal states, etc.

The Hungarian constitutional system established in 1949, similarly to other socialist countries, did not institute the possibility of judicial review of Acts and other legal rules. It was particularly the competence of judicial organs to decide on the constitutionality of Acts that was deemed inadmissible. This conception was theoretically based on the principle of authorisation the supreme body of state-power and representation of the people for the exercise of all powers, i.e., if an extra-parliamentary body had the competence to decide on the constitutionality of various Acts of Parliament, this body would overreach the competence of the Parliament and violate the principle of the sovereignty of Parliament. However, there were practical reservations also concerning constitutional jurisdiction, first and foremost, that its establishment could become “an impeder of revolutionary legislation”. As a consequence, the legislative organs within the scope of their law-making power could decide on the annulment or amendment of law deemed to be unconstitutional or unlawful. Neither did the comprehensively amended Constitution of 1972 change that situation, which, for instance, specifically stipulated that Parliament and the Presidential Council are responsible for guaranteeing the observance of the Constitution. Nevertheless, the law-making bodies (or their supervisory bodies) did not exercise *de facto* norm control, apart from some exceptions concerning local council law-making, although, its urgency became more and more apparent, firstly, in view of the volume of the effective and constantly amended legal materials of 10–20 thousand pages requiring to correct at least inevitable faults of regulation techniques and secondly, of meeting demands concerning constitutionality certainly asserted after 1980. This conveyed the idea that for the professional promotion of the work of law-making bodies competent to exercise norm control, a so-called Council of Constitutional Law attached to the Parliament should be established that was not competent to terminate unconstitutionality, however, it could initiate that law-making bodies with competence reviewed a legal rule or a normative legal directive in case their unconstitutionality was established. In its own scope of competence,

it could only stay the implementation of unconstitutional provisions of a legal rule or of the directive with the exception of Acts, law-decrees and general norms of interpretation binding courts set forth by the Supreme Court. This body set up as pursuant to Act II of 1983 amending the Constitution and to its implementing Act I of 1984 consisted of 11–17 members, who were mostly MPs and other public figures [generally experts of (constitutional) law] and were elected by Parliament for one parliamentary term. In case of the establishment of unconstitutionality, it could proceed on its own initiative or on that of authorised state bodies, state officials, among them MPs, supreme national organs of social organizations, national organs representing interests of state economic organizations and organs of co-operatives. The direct initiation of the procedures by those, who had positive claims or were positively interested in the review of the constitutionality of legal rules, was not allowed. However, besides these limitations on competence and procedure, what accounted for the fact that the Council of Constitutional Law could barely perform its mission, was primarily the mistrust of the leading political and state organs, which were “offended” by reason of the control exercised over their law-making activity, which restrained the actual operation of the Council of Constitutional Law. Throughout its five-year operation with eleven board sessions, the Council put issues of constitutionality on its agenda ten times and unconstitutionality was established on merely five occasions.<sup>9</sup> Thus, by the second half of the 1980s, it became manifest that the amplified review system of the constitutionality and lawfulness of legal rules still based on the decision-making power of legislative bodies was barely working and the system of norm control was quite inoperative without providing guarantees for independent proceedings. Which explains why in the midst of highly variable political circumstances the Constitution as amended by Act I of 1989 referred to the establishment of a Constitutional Court authorised to annul unconstitutional legal rules and normative legal directives with the exception of Acts.

In the course of drafting the new Constitution, the document issued by the Ministry of Justice on 30th November, 1988, the Resolution of Parliament adopted on 9th March, 1989 as well as the Draft Act of 29th May, 1989 amending the Constitution all took into account that a Constitutional Court will be part of the new constitutional system. In case unconstitutionality is established by the Constitutional Court, it shall have the power to suspend the enforcement of Acts until an opposing qualified majority decision is reached by Parliament, furthermore, to annul legal rules of lower rank. The question, however, whether citizens should be allowed to initiate proceedings by the

<sup>9</sup> See, Holló: *op. cit.*, 15. and following.



Constitutional Court, and if so, in which cases, has been left open. Reasonably, these were the issues concerning the Constitutional Court in the new constitutional system, on which the various standpoints most powerfully clashed at the National Round-Table Negotiations following the withdrawal of the Draft Acts amending the Constitution and on the Constitutional Court in June. The Opposition Round-Table consistently maintained that the Constitutional Court should have the power to annul unconstitutional Acts also and that any citizen could initiate proceedings for the review of legal norms with the potential introduction of filtering mechanisms.<sup>10</sup> Basically, this conception was affirmed subsequently both under the comprehensive Amendment of the Constitution of 1989 and under Act XXXII of 1989 on the Constitutional Court implementing the Constitution. As pursuant to these Acts, the Constitutional Court could start its work on 1st January, 1990.

The Constitutional Court, as pursuant to Act LXXIV of 1994 amending the Constitution, consists of 11 Judges. The Judges of the Constitutional Court, who may be once re-elected, shall be elected for a term of 9 years by Parliament with a qualified majority vote of the MPs. The members of the Constitutional Court are independent and their decisions shall be made exclusively in compliance with the Constitution and other law. In cases specified by law, they proceed at plenary sessions or in three-member boards.

The Constitutional Court exercises a *prior* and a *posterior* norm control and also proceeds in public law disputes as pursuant to the Constitution or other law. For instance:

– The Constitutional Court shall implement review of Acts adopted by Parliament prior to promulgation upon the motion of the President of the Republic; the Procedural Rules of Parliament upon the motion of Parliament; the unconstitutionality of international agreements before their conclusion upon the motion of Parliament, the President of the Republic or the Government. (Until the Amendment of 1998, it also had the power to review the constitutionality of bills on the motion of Parliament, of its standing committee, or of fifty MPs.)

– The classical powers of the Constitutional Court include a *posterior* review of the unconstitutionality of legal rules and norms for state direction other than legal rules. Uniquely among European countries, the Hungarian Constitutional Court shall be authorised to do so on the petition of anybody without being personally concerned. The circumscription of this form of petition, which anybody is entitled to resort to, by the introduction of “filtering mechanisms”

<sup>10</sup> Bozóki, A.–Elbert, M. et al. (eds.): *A rendszerváltás forgatókönyve. Kerekasztal-tárgyalások 1989-ben* (The Dramaturgy of the Political Transformation. Round-Table Negotiations in 1989). Vol. 6. *op. cit.*, 169. and following.

has been recurrently proposed, however, it is obvious that the petitions of citizens seeking redress by reason of injury via unconstitutional legal norms may not be precluded by the introduction of such mechanisms. As a matter of law, as a result of a *posterior* norm control, the Constitutional Court could fully or partly annul the unconstitutional norm (Acts included). Norm shall generally lose its validity on the day of publication of the decision on its annulment, however, the Constitutional Court may stipulate its annulment or inapplicability in a specific case on a different date, so far as that is substantiated by the interest of security of law or of the particularly important interest of the party who initiates the proceedings. The Constitutional Court shall always provide for the review of criminal procedures concluded with a final decision based on the application of an unconstitutional norm, in case the convict has not been exempted from adverse consequences, and if from the annulment of the provision applied in the proceedings resulted either in the reduction or dispensing with the penalty or the measure, or in immunity from or limitation of liability.

– The Constitutional Court shall examine *ex officio* or on the motion of state organs specified by law, officials in high public offices or any MP, whether any legal rule or norm for state direction other than a legal rule contradicts an international agreement promulgated by a Hungarian legal rule.

– The Constitutional Court shall consider constitutional complaints, which those concerned are entitled to file in by reason of the injury of their constitutionally guaranteed rights on condition that the injury of their rights was incurred by the application of an unconstitutional legal rule and that they have already exploited all available instruments of legal remedy or they are not granted other instruments of redress. In such cases, the Constitutional Court shall annul the applied unconstitutional legal rule or its provision. If it simultaneously establishes the inapplicability of the legal rule in a particular case, there is an opportunity for remedy in the particular case that substantiates constitutional complaint so that the competent judicial or administrative organ which proceeds may not apply the unconstitutional norm when considering the case of available extraordinary remedy.

– If the Constitutional Court *ex officio* or on any motion establishes that the law-making body has failed to fulfil its duty of law-making deriving from legislative authorisation and that has incurred unconstitutionality on the grounds of omission, it shall summon the body to perform its duty by determining the deadline.

– The Constitutional Court as a “court of competence” – apart from courts – shall make decisions concerning conflicts of competence arising between state organs, between local self-governments and state organs, furthermore, between local self-governments.

– The Constitutional Court, on the motion of state organs and officials in high public offices prescribed by law, shall officially interpret the provisions of the Constitution abstractly.

– The Constitutional Court may proceed in further scopes of power specified under the Constitution and other Acts, for instance, if certain conditions stipulated under the Constitution obtain, it shall make a decision concerning the impeachment of the President of the Republic.

In a summary, we may assume that during the political transformation the trustworthy legal prerequisites of protection of the Constitution and of review of unconstitutional law have been formulated in Hungary via the establishment of the Constitutional Court and the meticulous definition of its structure and competence. Moreover, the new democratic political system did not impose again actual restrictions on the fulfilment of duties of the Constitutional Court set forth under the Constitution and other law, despite the professional–political disputes concerning its work. That is also manifested by the fact that in recent years, according to the figures of 2002, the Constitutional Court, in compliance with its main duty, annulled several legal norms, among them 139 Statutes and statutory provisions deemed as unconstitutional.<sup>11</sup> These account for the fact that the development of constitutional law has reached a new phase, in Hungary, too, where the provisions of the Constitution have been transformed from “constitutional common decencies” into real, legally sanctioned rules of conduct.

<sup>11</sup> *Az Alkotmánybíróság által alkotmányértőnek minősített törvények, illetve törvényi rendelkezések (Statutes and Statutory Provisions Declared as Unconstitutional by the Constitutional Court)*. Xeroxed Manuscript, Legal Department of the Office of Parliament, 4<sup>th</sup> July, 2002. 20.