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THE ELEMENTS OF CITIZEN PARTICIPATION AND THE DEFENCE OF THEIR RIGHTS IN THE ACTIVITY OF THE HUNGARIAN OMBUDSMAN

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2011 was the last year of the Ombudsman system as it was established in Hungary in 1993. The Fundamental Law and the Ombudsman Act of 2011 changed the character of the Ombudsman institution as of 1 January 2012, but the main task of the Ombudsman has remained the same: to act upon citizens' complaints to defend their rights. We are going to focus on the activities of the Hungarian ombudsman for civil rights to illustrate the changes and the continuity within this institution, which is one of the important communication channels between citizens and the State.

The challenges of the global crisis manifest themselves in the field of freedoms (freedom of assembly and freedom of expression), economic and social rights (right to work, access to welfare services or the right to housing), third generation rights (the right to a healthy and sustainable environment) as well as in the field of freedom of information and data protection. These discussions defined serious challenges concerning the situation of different social groups, especially groups in need in crisis-ridden democracies, which, unlike western democracies in 1989, can no longer be referred to as impeccable examples to follow. On the tendencies of crisis in western democracies let me quote the globally known and highly esteemed German sociologist, Claus Offe:

"Casual narratives on the crisis of democracy include economic globalisation and the absence of effective supranational regulatory regimes; the exhaustion of left-of-centre political ideas and the hegemony of market-liberal public philosophies, together with their anti-statist implications; and the impact of financial and economic crisis and the ensuing fiscal starvation of nation states which threatens to undermine

their state capacity."[1]

A healthy society, a healthy reaction of the social system to the crisis puts forward different regenerating immune systems of society and calls attention to their ability of creative renewal. Such an ability of social renewal can be described with the metaphor 'quest for a healthy society'.

1. The Ombudsman institution in Hungary

In the 21st century, the rules of constitutional order and their application must not override the principle of the rule of law. People and their property should be protected; however, people should not only survive but also be able to maintain their human dignity and to exercise the full range of available fundamental rights, and the State should also fulfil its obligation of institutional protection. It is not an easy task. Groups of persons in special need (vulnerable groups), whose individual decision-making capacity and ability to lead an autonomous life is limited, require special attention in the inquiries of the Ombudsman. Such groups are the detained, children, the elderly, persons with disabilities and homeless persons without registered domicile. The screening of 'strong' institutions should be made from the perspective of the rights of weak social groups.

The Ombudsman institution acts upon the complaints of citizens and tries to enforce human rights and the rule of law in the form of a bureaucratic way of thinking and practice in public life. The ombudsman receives complaints from the citizens, starts to conduct inquiries into the facts based upon the citizens' requests and, he may also initiate *ex officio* inquiries. This is necessary because the above mentioned vulnerable groups are generally not able to articulate their demands themselves, and the Ombudsman institution has to represent their interests which are also highly relevant.

According to the 1993 Ombudsman Act the main task of the Parliamentary Commissioner for Civil Rights was to inquire into any improprieties related to constitutional rights he/she becomes aware of and to initiate general or particular measures for their redress. The Parliamentary Commissioner for Civil Rights was solely accountable to Parliament. As for the legal status of the Ombudsman, in the course of proceedings he/she had to be independent and could take measures exclusively on the basis of the Constitution and Acts of Parliament.

The Ombudsman was elected for a six-year term by a majority of two-thirds of the votes of the Members of Parliament at the proposal of the President of the Republic. The Ombudsman could be re-elected for a second term.

It is up to the Ombudsman to choose the course of action that is deemed to be most appropriate. Key measures are:

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[1] Claus Offe: Crisis and Innovation in Liberal Democracy: Can Deliberation Be Institutionalised? *Czech Sociological Review*, 47 (2011/3) 457.

1. To make a request for remedy to the supervisory authority of the body that has infringed constitutional rights.
2. To initiate a remedy request at top management level.
3. To file an application with the Constitutional Court for the examination of the unconstitutionality of a legal act.
4. To initiate (at a public prosecutor's office) the lodging of a public prosecutor's protest.
5. To propose that the Law Commission amend or repeal an existing legislative act or that a new legislative Act be adopted.
6. To submit the case to Parliament and request a parliamentary inquiry.

1.1. Main directions of the new Ombudsman system

The institution of Ombudsman itself is a like a 'ship being rebuilt on water'. With the making of the new Fundamental Law the Ombudsman system was radically remodelled in a way that I had been advocating for years as Ombudsman: one single institution for the protection of rights, with deputies responsible for the fields of the rights of national and ethnic minorities, and environment protection, respectively.

During the parliamentary debate of the Fundamental Law and the Ombudsman Act all the Ombudsmen had the opportunity to express their views. Although certain structural elements of the new regulation are in accordance with my original concept, I would not take responsibility for the entire normative content of the bases and final form of the new regulation, since the regulation, like all rules of law, is based on a multitude of political and legal compromises that might at times even impair the unity of the original concept.

The new Fundamental Law changed the structure and competences of certain institutions of our system based on the rule of law; among others it changed that of the Ombudsman, an institution of human rights protection with 15 years of history. Instead of the four Ombudsmen established upon the Swedish model, the new Fundamental Law opted for just one single Ombudsman institution. One reason could be that this system has been chosen by the great majority of European countries, as it allows a unified and interrelated interpretation of human rights, transparency, effectiveness and the concentration of resources to the most relevant issues. In countries that have more than one Ombudsman (like Sweden, Austria, Lithuania, Moldova) one of them holds, either permanently or on a rotational basis, the office of head of the institution. Hungary has been lacking such coordination until this day.

In accordance with the Fundamental Law, the single Ombudsman institution has been established, in which the Ombudsman and his or her two specialised deputies are elected for a term of six years by a two-thirds majority of the Members of Parliament. The institution has been renamed; the designation 'Parliamentary Commissioner for Citizens' Rights' has been replaced by 'Commissioner for Fundamental Rights'. More emphasis is laid on its task to turn to the Constitutional Court for *ex post* review of norms, as the possibility of *actio popularis* ceased to exist; citizens and their organisations can only turn to the Constitutional Court via the Government,

one-fourth of the Members of Parliament or the Ombudsman [paragraph (2)e) of Article 24].

Similarly to other institutions of public law and fundamental rights, the new Fundamental Law has not divested the institution of Ombudsman of its original character but has left it unchanged; the Ombudsman is still an independent institution which aims to uncover improprieties endangering the enforcement of fundamental rights and makes recommendations to the Government, public administration or Parliament for redress. At present the Ombudsman's control does not cover the activities of the courts and of the prosecution service (with the exception of the investigation organs of the Prosecution Service).

1.2. Unaltered role of protecting fundamental rights

The effective Ombudsman-type protection of rights has proved to be one of the *basic cornerstones* of guaranteeing fundamental rights since the first Ombudsman entered office in the summer of 1995. In accordance with the Fundamental Law, Parliament adopted an Act on 11 July 2011 on the unified Ombudsman system in order to create an effective, coherent and full protection of fundamental rights. Based on previous provisions of the Constitution, Article 30 of the Fundamental Law clarifies that the Commissioner for Fundamental Rights performs the task of *general fundamental rights protection*, and that anyone can initiate proceedings with the Commissioner. As in the previous period, the Commissioner's primary task is in accordance with the *classic role of Ombudsman*: he or she inquires into the improprieties relating to fundamental rights or has these improprieties inquired into, and initiates general or specific measures for redress.

In the future, the Ombudsman's activities will still, among others, focus on the *protection of the rights of individuals who are not, or not entirely capable of enforcing their rights*. In the course of their work, Parliamentary Commissioners paid special attention to *the situation of persons living with disabilities*. The Ombudsman Act gives a legal expression to this already existing role and attitude, stipulating that the Commissioner for Fundamental Rights, in the course of his or her activities, has to pay special attention to assisting, protecting and supervising the implementation of the UN Convention on the Rights of Persons with Disabilities, especially by conducting *ex officio* proceedings. The situation is much the same regarding the protection and enforcement of the rights of children, where the Ombudsman has been trying to achieve results with all legal and other tools at his disposal since 2007 by launching special projects and promoting legal awareness. Furthermore, the Ombudsman Act designates other social groups to the rights of which the Commissioner for Fundamental Rights has to pay special attention, following the *rights protection philosophy of previous Ombudsmen*.

Compared to the former regulation, the competences of the Commissioner for Fundamental Rights have expanded, in exceptional cases he now additionally has the right to inquire into the activity or omission of organisations other than authorities, if their activity or omission gravely infringes the fundamental rights of a larger

group of natural persons. In such *exceptional cases* the Commissioner may initiate proceedings with the competent supervisory authority as a result of the inquiry. Consequently, the Ombudsman Act enables the Commissioner to act in order to protect the right to a healthy environment when this right is violated by any entity other than the authority or by public service providers.

The scope and nature of the classic tools and methods of inquiry and the applicable measures have not changed significantly. However, the Act has become more distinct in this aspect compared to the previous one. The detailed regulations and definitions (for instance those of authority, impropriety, and *ex officio* inquiries) are in accordance with the former practice of the Ombudsman and they help a *flexible and effective interpretation of the Ombudsman's tasks and competences*. The regulation in the Act concerning the competence of initiating the adoption or amendment of rules of law is also progressive. It ensures that the Commissioner for Fundamental Rights be able to propose to the law-maker the revision of a legal regulation if improprieties are established in individual cases, unless the impropriety only occurred due to the proceedings of the authority or public service provider. The possibility of taking parallel measures greatly helps to provide a complex solution for legal problems uncovered.

The Commissioners have always considered the rulings of the Constitutional Court on the content of fundamental rights authoritative. After the entry into force of the Fundamental Law the Commissioner for Fundamental Rights intends to continue this practice. As a consequence of the constitutional changes, the institution of *actio popularis*, which made it possible for everybody to turn to the Constitutional Court, was terminated on 1 January 2012. The Commissioner for Fundamental Rights is still entitled, next to the Government or one-fourth of the Members of Parliament, to initiate an examination of rules of law with the Constitutional Court for their compliance with the Fundamental Law or to determine whether they are in conflict with international treaties. Furthermore, according to the new Ombudsman Act and the Act on the Constitutional Court, the Ombudsman's inquiry or report are not preconditions of an application to the Constitutional Court. *Filing an application for the ex post review of norms* may not only be made as a measure: the Ombudsman may exercise this competence of his or hers upon anyone's complaint or *ex officio*, stating his reasons and requesting that the Constitutional Court examine the issue. Doing so, he or she takes on the role of a mediator, and may become a fast, flexible and active initiator of detecting and removing from the legal system Acts and rules of law which violate the Fundamental Law or international treaties on human rights.

2. Values orienting the Ombudsman's activities

2.1. Protection of children's rights

Similarly to the previous regulation, the new Ombudsman Act itself declares that in the course of his activities the Commissioner for Fundamental Rights shall pay special attention, especially by conducting proceedings *ex officio*, to the protection of

the rights of children. The Children's Rights Project launched by the Parliamentary Commissioner in 2008 for the period of his full mandate sets one priority children's right topic as a focal point of inquiries each year. In addition to his annual proactive project activity, the Ombudsman pays special attention to complaints arriving from children or concerning the infringement of children's rights, and to the monitoring of the system of child protection institutions. Areas typically inquired into include education and the specialised institutions of child protection.

2.2. Protection of the rights of the most vulnerable social groups

The new Ombudsman Act sets, as an important aim, the enhanced protection of the rights of persons belonging to the *most vulnerable social groups*. Similarly to previous years, in 2011, the Parliamentary Commissioner paid special attention to the protection of the fundamental rights of those belonging to this group, even in the absence of a specific legal obligation. On the basis of the established practice of the Ombudsman, people obviously belonging to these groups for different reasons are the following: the homeless, people living with disabilities, the elderly, the ill, especially people with psychiatric illness, detainees, and even children under the age of 18, as well as young adults over 18.

Each of the listed social groups can be regarded as vulnerable for different reasons (e.g. because of their precarious life situation, age, health or mental state); the common feature is that all of them are vulnerable in all interventions by the State or public authorities. On the other hand, it can also have serious and direct consequences in their case if the State does not fulfil some of its constitutional tasks, or if it does not or does not adequately fulfil its obligations relating to the development and maintenance of special regulations and practice in order to help those in need. Be it public authority intervention or a failure to fulfil a state task or obligation, the ability of those concerned to enforce their rights or interests is minimal.

2.3. Right to life and to human dignity and some of their aspects

According to Article 54 paragraph (1) of the Constitution, in the Republic of Hungary everyone has an inherent right to life and to human dignity, of which no one shall be arbitrarily deprived. The former Constitution, and also the Fundamental Law in force since 1st January 2012, enshrines the right to human dignity and the right to life as first among the inviolable and inalienable fundamental rights. According to the Constitutional Court, the right to dignity, in indivisible unity with the right to life, is an absolute human right. No one can be arbitrarily deprived of this right, because dignity is a quality inherent in human life, which is indivisible and cannot be limited, and therefore it is equal in respect of each person.

The right to life manifests itself as a subjective right and as an obligation of the State to protect institutions. The right to dignity has two functions. On the one hand it expresses the 'untouchable essence' of man, i.e. personal autonomy, the inner core

of individual self-determination which essentially differentiates human beings from legal persons.[2] In this function the right to human dignity is a basic fundamental right, namely the source of further rights (e.g. the right to self-determination, the right to privacy). The comparative side of the right to dignity, together with the right to life, ensures that from a legal point of view no difference can be made between the values of human lives. One's human dignity and life is untouchable irrespective of one's physical and mental development, or state and of the fact how much one has been able to realize from one's human potential and why.

2.4. The prohibition of discrimination and the requirement of equal treatment

Article XV paragraph (2) of the Fundamental Law of Hungary declares that "Hungary shall ensure fundamental rights to every person without any discrimination on the grounds of race, colour, gender, disability, language, religion, political or other views, national or social origin, financial, birth or other circumstances whatsoever." According to the Constitutional Court, the prohibition of discrimination does not mean that all types of distinction are prohibited, including distinction aimed at the attainment of greater social equality. The prohibition of discrimination implies that the law must treat everyone as persons of equal dignity, with the same respect and circumspection, and that the criteria for the distribution of rights and benefits must be determined by equally taking into consideration individual circumstances.

The Constitutional Court uses two tests for deciding on the constitutionality of a distinction. If unequal treatment occurs in the field of basic constitutional rights, its constitutionality may be judged on the basis of the necessity-proportionality test governing the restriction of fundamental rights. If the distinction does not concern basic constitutional rights, the Court may establish the unconstitutionality of the differing regulation if the law-makers (or those who apply the law) have made an unjustified distinction between subjects of law in similar situations and falling under the scope of the same regulation.[3] The latter, the so-called reasonableness test consists of a comparability test and a justifiability test. In the comparability test the question is whether the distinction has been made between subjects of law in a similar situation. In the reasonableness test, if the distinction has been made between persons belonging to the same group, one should examine whether the distinction is based on reasonable grounds, according to objective criteria, i.e. whether it is arbitrary or not. This test, more lenient than the necessity-proportionality test, is used by the Constitutional Court in cases of distinction on grounds of 'other status', i.e. in cases where alleged discrimination occurs on the basis of characteristics not named in the Constitution. The respect for equal treatment is a fundamental requirement,

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[2] Cf. decision 23/1990. (X. 31.) of the Constitutional Court (henceforth abbreviated: CC).

[3] Cf. decisions 9/1990. (IV. 25.), 61/1992. (XI.2 0.) and 30/1997. (IV. 29.) of the CC.

and it is of special importance for persons belonging to vulnerable groups, such as patients and children, because of their precarious situation.

2.5. Communication liberty rights

The distinguished position in the fundamental rights' catalogue of *freedom of expression*[4] declared in Article 61 paragraph (1) of the Constitution and in Article IX paragraph (1) of the Fundamental Law of Hungary is justified by its twofold role: on the one hand, free expression of opinions enables the subjective self-expression of the individual, thus the free development of his or her personality, and on the other hand it allows – almost – unlimited social communication, which is the most important precondition of a democratically functioning society. This outstanding position is further strengthened by a basic decision of the Constitutional Court[5], according to which in the fundamental rights hierarchy freedom of expression comes immediately after the right to life and human dignity, at the top of the fundamental rights catalogue. Freedom of speech in its classical sense has extended by now to numerous fields and has developed several special sub-fields; therefore it is more appropriate to speak about so-called communication rights and not just freedom of expression. All basic rights ensuring the publication of any information (message of communication) in any form come under the notion of communication rights.

The system of communication rights also includes a separately designated type of freedom of expression, *freedom of the press*, previously enshrined in Article 61 paragraph (2) of the Constitution and at present laid down in Article XI paragraph (2) of the Fundamental Law, on the one hand it enables the expression of the individual's opinion through the media, and on the other hand it plays a fundamental role in obtaining information, which is the condition of forming a free opinion. In addition, public press is a guarantee that state and government activities are made public, thus it may have a significant role in securing the control of society over executive power. In modern constitutional democracies assemblies on public domain primarily serve the joint presentation and common representation of already established opinions and standpoints. The relation between freedom of expression and freedom of assembly particularly means the common, public expression of opinion. The significance of freedom of assembly as a communication right is all the more important because it ensures the participation in the shaping of political will for everyone, practically without direct limitation of access.[6]

According to the Constitutional Court, freedom of expression is not only a fundamental subjective right but also the recognition of the objective, institutional side of this right; at the same time it is a guarantee of public opinion as a fundamental

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4 The right to freedom of expression is enshrined in Article IX paragraph (1) of the Fundamental Law.

5 Cf. decision 30/1992. (V. 26.) of the CC.

6 See decision 75/2008. (V. 29.) of the CC.

political institution. Although this privileged role of freedom of expression does not imply that this freedom cannot be limited at all, it does entail that freedom of expression has to yield to only a few rights; therefore Acts limiting freedom of expression must be construed narrowly. The weight of the limiting Act against freedom of expression is greater if it serves the enforcement and protection of another subjective fundamental right directly. It is smaller if it protects such rights only indirectly, through an intermediary 'institution', and it is least significant if its objective is only some abstract value (e.g. public tranquillity).

2.6. Principle of the rule of law

It is laid down in the Fundamental Law that the Commissioner for Fundamental Rights shall inquire into improprieties related to constitutional rights that come to his or her knowledge, or inquire into improprieties and initiate general or specific measures to remedy them. In order to perform this task, the new Ombudsman Act ensures *wide-ranging powers for supervision and obtaining information*. The Act contains provisions on the authority concerned by the inquiry and on the possibility and manner of obtaining information and data from its supervisory organ or from other organs. If the Commissioner requests data, information or explanation, *the addressed organ has to comply with his request within the time limit* set by the Commissioner, not shorter than fifteen days.

The new Ombudsman Act clearly defines the possible proceedings ensured for the Commissioner to perform his tasks. The enforcement in practice of the procedural rules enables the Commissioner to perform his constitutional task: if the requested organ does not give a response to his request, it obstructs the Commissioner in the performance of his tasks; it therefore infringes the predictable and lawful operation of the Ombudsman institution. In certain cases the Commissioner has established that failure to respond to the requests, delays in responding or responses which do not address the merits of the case constitute an infringement of the powers of inquiry of the Commissioner, restrain him in the performance of his constitutional tasks, and consequently give rise to an impropriety related to the principle of the rule of law and the requirement of legal certainty.

3. Communication of the citizens with the Commissioner's Office in 2011

In 2011 citizens submitted 5191 complaints to the Commissioner of general competence. Thus the steady increase in the number of people applying to the Ombudsman we had experienced since 2007 did not continue in 2011.

Table 1: Complaints by year (1995–2011)

Number of submitted cases and complaints by year																		
	1995	1996	1997	1998	1999	2000	2001	2002	2003	2004	2005	2006	2007	2008	**2009**	**2010**	**2011**	**Total**
Comp-laints	3420	8526	8358	7846	6496	7437	6416	4917	6299	6769	6405	5249	5084	5723	6784	8051	5191	**108971**

Nearly half of the complainants still forwarded their submissions by mail, and the proportion of those who sent them by email also remained constant. There was a slight increase in the proportion of those who came to the Office of the Parliamentary Commissioner personally to make their complaints.

Table 2: The way of Communication with Citizens (2011)

Cases		
Manner in which cases originated	**Number of cases**	**%**
Registration of oral complaint	695	14,3
Written submission	2316	47,5
Started *ex officio*	67	1,4
E-mail	1796	36,8
Total	**4874**	100,0

Similarly to the year before the reporting year, the case-load of our staff was so heavy that even by making special efforts the submissions received could not be processed completely, so we started the year 2011 with a significant backlog of pending cases. We could reduce that backlog by processing 16% more complaints than received in the reporting year of 2011, when we processed 6037 complaints altogether.

Most of the complaints concerned healthcare, pension insurance and labour issues, next in number were tax and financial issues and insurance matters. Many people turned to the Ombudsman in relation to criminal law and law-enforcement, and the next group was complaints related to public service provider issues. A large number of social complaints could be observed this year as well.

Table 3: Subject of Complainants 2011

Complaints	
Distribution of complaints by subject-matter	**Number of cases according to subject-matter**
Health and pension insurance, labour matters	533
Tax matters, matters relating to financial institutes and insurance matters	491
Criminal and law-enforcement matters	453
Public services	430
Guardianship matters, child protection and equal opportunities matters	325
Social administration and provisions	319
Other	282
Civil law matters, matters related to tenders and applications and expertise matters	280
Law enforcement and prosecution matters	272
Administrative, minor offence and electoral matters	262
Education, culture, art, science, the press, the media	243
Building and housing matters	221
Property rights related matters	215
Public bodies, public notaries, lawyers, bailiffs	214
Healthcare	188
Economic and consumer protection matters	167
Matters related to traffic, water and communications	166
Environment and nature protection, agriculture	67
Citizenship, alien police, consular and refugee matters	63
Total	5191

We managed to refer 28.3 % of the received complaints to other channels. This percentage also includes complaints where the clients were orally informed during their personal hearing in the complaints office about the possibilities of the Ombudsman to proceed and other possibilities for enforcing their rights.

We transferred 3.6% of the complaints to the competent organs, and together with these we informed 52.3 % of the complainants about other possibilities of the assertion of their rights, where necessary with an understandable explanation of the legal norms regulating the challenged measures, because we had no possibility of inquiry. Only in 13% of the received complaints did we have a legal possibility to conduct inquiries in merit.

In 786 cases we conducted inquiries involving large-scale data gathering and official requests, out of which we closed 381 cases without a report due to the case falling out of our scope. Among these were cases where we were later informed by

the relevant authority that judicial proceedings have been started in the case. In 405 cases we closed the inquiry with a report; we uncovered constitutional improprieties in 160 cases, and we made 292 recommendations for remedying them.

More than half of our recommendations were immediately accepted by the addressees and only 12% of the organs concerned thought that the recommendations were unjustified. In 37% of our cases we started a professional dialogue with the addressees of our initiatives in order to settle the given problem, but the addressee's final position was not yet known at the closing of the report.

The great majority of our recommendations were made in 96 cases where we requested the organs concerned to remedy the improprieties within their own competence. The next largest number of recommendations, 70 in all, were made in cases where we asked the supervisory organs to take necessary measures. Beyond the recommendations made in individual cases, we initiated 97 cases in which measures affected rules of law with law-makers of different-levels; among these were 59 cases where our proposals were aimed at the amendment of Acts of Parliament. In 2011 we turned to the Constitutional Court twice, and once we proposed the initiation of disciplinary proceedings. In the 26 issues where the individual complaints could not be remedied, in addition to establishing the impropriety, we drew the attention of the organs concerned to the proper application of the law in the future.

Table 4: Recommendations of the Ombudsman 2011

Recommendations	**Number**
Initiating remedy of the impropriety with the organ concerned	96
Recommendation to the supervisory organ	70
Recommendation for the adoption or amendment of an Act	59
Recommendation for the adoption or amendment of a Government decree	13
Recommendation for the adoption or amendment of a ministerial decree	14
Recommendation for the adoption or amendment of a local government decree	7
Recommendation for the adoption or amendment of public law instruments for the regulation of organisations	4
Call for proper legal interpretation in the future	26
Petition to the Constitutional Court	2
Initiating criminal, minor offence or disciplinary action	1
Total	292