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Constitutional Revolution in Hungary and the data protection ombudsman: the law making role of the ombudsman in the Hungarian legal system 1995-2011.

Doctoral Thesis

Summary

Eötvös Loránd University, Faculty of Law

Doctoral School

Budapest, April, 2021

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I. Brief summary of the research task

The purpose of the research is to demonstrate the establishment and rule making role of the Hungarian Data Protection Ombudsman in the foundations of the Third Hungarian Republic after the 1989'th revolution. According to my hypothesis, the Hungarian Data Protection Ombudsman is one of the basic institutions in the rule of law architecture in Hungary. Its role can only be understood through the institution's jurisprudence and history. The dissertation points out that the Institution played a prominent role in the institutionalisation of the system of rule of law in Hungary.

The dissertation highlights that the establishment and case law of the Hungarian Data Protection Ombudsman should be understood in a broader context. On the one hand, the public law debates surrounding the establishment of the institution provide an insight into the background of the most exciting and most contested decisions of the Hungarian constitutional revolution in 1989 – I elaborate on this constitutional debate in details in the thesis. On the other hand, my research highlights that the Hungarian Data Protection Ombudsman has been uniquely active in almost all major public law issues, shaping the public law transformations in Hungary and the public law landscape from 1989 to 2011. The Ombudsman manifested himself in almost every major issue of rule of law and constitutional revolution in Hungary, from exploring the political agent's past, through the publicity of the Hungarian Opposition Roundtable debates in 1989, over the legitimate search and scrutiny of documents from the past regime, to the most emerging issues of open society.

In its jurisprudence for sixteen years, the Ombudsman ruled in favour of transparency of the government: transparency of public funds, transparency of public institutions (privatization, curbing corruption, transparency of tenders, transparency of the parliament and local governments, reduction of business secrecy, and transparency of MPs allowances).

The dissertation points out that in the struggle for the institutionalization of rule of law in Hungary, the Ombudsman took a stand for the openness of the Parliament, for the functioning of the parliamentary committees on inquiry and for structural changes in central administration: took a stand for the publicity of government minutes, also, the Ombudsman manifested himself in almost all important issues of the census, in transparency of public administration subsystems (from tax administration to consumer protection). The Ombudsman strongly stated against central government's promotional material for political advertisement and campaigns (he ruled against the promotional materials of the Country Image Centre and stated against the Prime Minister's promotional material – letter – to pensioners) and the Ombudsman scrutinized the constitutionality of the civil servants oath on public service.

The dissertation devotes a separate section to the expansion of transparency beyond the public sector, i.e. to the legislative process that extends control over public funds to quasi-market participants, over those market players disposing public money for religious, sports, or private activities. Additionally, the Data Protection Ombudsman was the only one in Hungary to halt the expansion of the national secret (security) services, in several cases forced the powerful secret services to back down (as described in the theses in details, either in the case of

protecting a criminal correspondent or in the protection of the documents in the famous Bős-Nagymaros case).

Moreover, the Ombudsman issued statements and recommendations on almost every aspect of transparency of judicial system and access to court documents, in fact, in his case law, he has played the role of missing legislation in the justice system over the years of transition from 1995 and 2011 in Hungary.

Beyond the public sector, the dissertation also focuses on the private sector related to data protection. The dissertation provides a sharp cross-section for the struggle of the Ombudsman with private sector participants in the violent expansion of market participants towards privacy rights. To illustrate the market versus ombudsman struggle, the dissertation provides a full presentation of the construction of a bank credit reporting system under high pressure of financial institutions.

In a separate section, the dissertation focuses on the Data Protection Ombudsman's relationship to the public in connection to the press, public actors and the publicity of ombudsman's own decisions. The Data Protection Ombudsman's relationship to the press has always been characterized by duality. On the one hand, the press has a decisive role in the Ombudsman's classic toolbox, as the Ombudsman's publicity tool, with a total of more than a thousand interviews, television and radio appearances, press releases and communications provided by the Ombudsman between 1995-2011 in Hungary. On the other hand, it should be emphasized that from the outset the Ombudsman's ambition was no less with his resolutions and recommendations, than to cover the full spectrum of the Hungarian press. In the reasoning of the Ombudsman, the press is one of the data controllers and the press must comply in all respects with the provisions of the Data Protection Act.¹ On the other hand, it should be noticed that Data Protection Ombudsman (Commissioner) has regularly acted as a guardian of freedom of information and therefore as a defender of freedom of the press. As we shall see in the thesis, the Data Protection Commissioner has a broad interpretation of his powers in relation to the press and public, as highlighted in a number of cases in landmark decisions such as in the case of *lottery gambling winners*, in the case of the *last Hungarian prisoner of war*, in the case of the *death of a national league footballer* or in the case on the publicity of a nationally *famous doctor-genetic at court*. At the same time, the Data Protection Commissioner was a frontrunner in the publicity of his own proceedings, considering his resolutions and recommendations as data of public interest.

The dissertation is based on three main hypotheses:

1. The constitutional change of regime in '89 and on, in Hungary was influenced by the jurisprudence of the Data Protection Ombudsman, similarly to the catalyzing role of the Hungarian Constitutional Court. Ombudsman's recommendations and resolutions to this day give a real imprint of the "rule of law process" in Hungary;

¹ Act LXIII of 1992. Not yet in effect.

2. The Hungarian Data Protection Ombudsman was uniquely active in facilitating and institutionalizing rule of law mechanism in Hungary between 1995 and 2011;

3. One of the most effective institutions for expanding transparency and modern democratic publicity in Hungary was the Data Protection Ombudsman between 1995 and 2011 in Hungary;

II. A brief description of research and methodology

The dissertation consists of three main parts. The first part is dominated by the history of the ombudsman institution, where I use empirical research to explore the reasons leading to the establishment of the ombudsman institution and the Data Protection Ombudsman. In order to present the antecedents of jurisprudence of the institution, I present the early Hungarian data protection and freedom of information literature with a holistic approach, aiming for completeness and covering all early details of the institution. My research is also designated to the role of ombudsman and the data protection ombudsman in the domestic and international legal literature. (Including but not limited to the Independence of the ombudsman, ombudsman's role in separation of powers, etc.). To explore all this, I use comparative law methods, relying on international legal sources on the one hand and extensive international literature on the other. Today, ombudsmen are part of the international human rights network, so, any international comprehension is necessary.

In my analysis, I distinguish between the UN human rights instruments, the documents of the Council of Europe and its bodies on ombudsmen, and the case law of the European Court of Human Rights. In addition, Hungary, as full member of the EU, participates in the work of all EU institutions (the European Agency for Fundamental Rights, which is prominent in our subject), and Hungary is also bound by all judgments of the Court of Justice of the European Union (CJEU). A separate chapter in the dissertation is dedicated to the case law of the ECtHR and the CJEU in relation to the problem of "independence" of data protection commissioners. The dissertation covers in detail CJEU C-288/12. decision on the dissolution of the Hungarian Data Protection Ombudsman. When analyzing CJEU judgment, the research relied on the dogmatic method in a methodological sense, and used the so called "methodological and conceptual method," mainly to clarify terminological issues in interpreting the judgment (in order to analyze the compliance with judgment that may be "impossible", to analyze the implementation of the judgement that may be "impossible", or to analyze the dogmatic difficulties in limitation of the temporal effects of the judgment). The conclusions drawn from the judgment were taken in a logical and systematic methodological approach.

In the second and third parts of the dissertation I describe the role of the data protection ombudsman in the light of crucial issues of legal developments in the constitutional system after '89 in Hungary, I also analyze the ombudsman's role in establishing the rule of law system in Hungary, including transparency of government.

In terms of methodology, the dissertation states: the starting point is that we can discuss the ombudsman's legal practice and – in a broader context, the constitutional decisions of the ombudsman – in two ways. "One is to perform a normative analysis and, through the analysis of the content of the above-mentioned abstract concepts and values, we reach a position on

the issue of justifying some form of legal reasoning and interpretation."² The other approach focuses on descriptive, empirical research and argues that the true character of a legal decision is not a function of theoretical abstraction and justification, but can be understood and described by descriptive methods. This approach puts the emphasis on empirical in – depth analyzes because abstract concepts alone do not lead to results, these concepts do not define clear answers on the validity of reasoning. This approach is close to Hart's descriptive theory (and methodological positivism), legal positivism is adequately expressed in a theory of law that is descriptive in nature.³

At this point, the dissertation aims to meet two methodological requirements parallel. On one hand, it aims to give precise description of the jurisprudence of the ombudsman. On the other hand, the dissertation aims to show how the data protection ombudsman through its jurisprudence in Hungary fulfilled its higher constitutional role by protecting personal data and other fundamental rights.

This fundamental rights protection is a function of the data protection ombudsman which is inseparable from the its own conception of law, ars poetic, his image of justice, his moral interpretation of the law, in one word, inseparable from the normative concept of law. The thesis finds that the Data Protection Ombudsman's uniform approach to fundamental rights protection and its interpretation of law is unique in the period 1995-2010 because its case law more homogeneous than the constitutional practice of any other constitutional body in Hungary, including the often fragmented Hungarian Constitutional Court. The dissertation points out that the data protection ombudsman's conception of law is based on a) a vague interpretation of law (an activist approach to his mandate and task) b) a moral interpretation of the law (his perception of justice).

However, the dissertation does not intend to address many normative issues, such as whether it is legitimate that the Data Protection Ombudsman has strongly shaped the Hungarian public debates and the Hungarian public law regime with his case law, whether it is correct and acceptable that the Data Protection Ombudsman has often expanded beyond his competence, whether it is correct that on almost all substantive issues concerning the change of regime, the Ombudsman took a stand, referred the case and turned it into a de facto "data protection issue". And therefore the ombudsman became an indispensable player in the Hungarian public law system until 2011. These normative questions can be processed by a boarder academic research in the context of a legal legitimacy theory.

III. Brief summary of the research and results

The first part of the doctoral dissertation highlights the changes in public law leading to the establishment of the ombudsman institution, offering a legal-historical framework for the whole thesis. The second chapter in part 1 describes that the new data protection law adopted in 1992 (which is not the first Hungarian data disclosure law) had a serious dogmatic history and past, which praises the standard of Hungarian jurisprudence in the seventies and eighties.

² FICSOR Krisztina: *Formalizmus a bírói gyakorlatban*. Budapest, Gondolat Kiadó, 2015. 147.

³ HART, H. L. A.: *The Concept of Law*. (With a Postscript edited by Penelope A. BULLOCH and Joseph RAZ.) p. 145. HART: *A jog fogalma*. 275.

It is important to mention in the light of the contemporary Hungarian legal literature which advocates that data protection and freedom of information are new generation of rights and therefore their implementation was facilitated by changes in international law. My claim is that the Hungarian law on data protection and disclosure has a long history in Hungary without reference to international developments.

The dissertation proves that the spirit of the data protection ombudsman is rooted in the rule of law revolution in Hungary, it grew out of the very idea of the Hungarian Opposition Roundtable and the National Roundtable negotiations,⁴ and this high spirit was successfully carried by the institution for sixteen years. It seems symbolic that the legal institution of the Data Protection Ombudsman was abolished with the repeal of the Constitution of the Republic (originally proclaimed on 23 October 1989), on 1 January 2012. In the last chapter of Part 1, I analyze the dissolution of ombudsman and the abolishment of the data protection ombudsman institution. The main finding of the last chapter in Part I, is that in its C-288/12 decision of the Court of Justice of the European Union (CJEU) the court found that Hungary had failed to fulfil its obligations under Directive 95/46 / EC by prematurely terminating the mandate of the Personal Data Protection Ombudsman.⁵ The dissertation points out that Hungary has not yet complied with the judgment of the CJEU of April 8, 2014. No substantive steps forward have been taken to implement and enforce Article 260 TFEU, in particular to enforce Article 260 (1) and its related case law.

The dissertation claims that Hungary is stuck in a state of “impeachment” in the EU process, in breach of its obligations. An interesting finding in the light of the CJEU judgment is that in the event of an unwanted change in the public law situation in Hungary in which the ombudsman and his deputies lose their parliamentary independence and become an autonomous administrative body, similar to the Hungarian Data Protection Ombudsman, it will not be in conflict with European law. In other words, such an unpleasant constitutional change could be challenged before the Hungarian Constitutional Court – if and when the person concerned proves that there is a connection between the violation of the law and the independence of the ombudsman – other than that there is no remedy at CJEU.

In Part 1, in the intermediate chapters between the establishment and the termination of the Data Protection Ombudsman institution, the thesis seeks to find the place of the Data Protection Ombudsman in the Hungarian and international legal context. The thesis emphasizes that in the Hungarian public law system, ombudsmen are important stakeholders in the separation of power, and are also important constitutional pillars in the fundamental rights system. According to the dissertation, the ombudsman institutions worldwide can be defined on the basis of its role in the system of separation of powers, and according to its function in protection of fundamental rights. An important chapter entitled in Part 1 “The Ombudsman, the Data Protection Ombudsman and the Division of Power in Hungary” states that the ombudsman should be considered as an independent constitutional institution and not as a body of the Parliament. The correct conclusion from the independent constitutional status of the ombudsman is that it shares the independence of the Constitutional Court.

⁴ See: BOZÓKI András: Rendszerváltás és jogállami forradalom 1989-ben. In JAKAB András – KÖRÖSÉNYI András (szerk.): *Alkotmányozás Magyarországon és máshol*. Új Mandátum Könyvkiadó, 2012.

⁵ Judgement C-288/12.

The second part of the dissertation (Part II) focuses on the jurisprudence of the Hungarian Data Protection Ombudsman between 1995 and 2010. The role of ombudsmen and, in particular, the data protection commissioner/ombudsman can be understood through procedures, therefore the focus of Part II is also in the legal practice of the ombudsman. This special focus itself is an achievement in the Hungarian legal literature, because none of the four significant monographs published on the topic of the Hungarian ombudsman contain any case law.

In sum, Part II of the dissertation focuses on the role of the data protection ombudsman in the constitutional changes after '89 and on the role of the ombudsman in the institutionalization of a system of rule of law. Regarding the change of regime, the argument is grouped around three main issues: 1. Opposition Roundtable on Negotiations; 2. the searchability of past records and files of the communist regime; and 3. the moral legal content of agents collaborating the secret police of the previous regime.

In Part II of the dissertation, the recommendation of ombudsperson on the Opposition Round Table (ORT) is a crucial case in understanding the change of the regime after '89. In ombudsman's reasoning, "ORT 's documents are among the most important documents in Hungarian history at the end of the millennium". According to the Data Protection Ombudsman, freedom of information and the right to know data of public interest, justify the publicity of the entire ORT negotiations. Hovering over positive law, based on its own concept of justice, the Data Protection Ombudsman sought to refer in his recommendation to an argument that allowed the full publicity of ORT documentation in order to make a decisive contribution to understanding the change of regime and exploring its historical past.

The second chapter of Part II focuses on the institutionalization of the democratic rule of law by the jurisprudence of the Hungarian Data Protection Ombudsman from 1995 to 2010. The most important message of chapter 2, is that the data protection ombudsman in Hungary was the second most active stakeholder in Hungary, after the Hungarian Constitutional Court, in empowering the Parliament, the Government and the Judiciary. In Part II, a separate chapter is devoted to the secret services. In 1997, the Ombudsman for the first time granted a separate chapter in his annual report on national security issues. On Data Protection Ombudsman's view, national security services deserve great attention in terms of personal data protection. In the case law of the Data Protection Ombudsman, in a special case, the documents published by the press were qualified documents. According to the Ombudsman if the documents are qualified as classified documents, but their legal classification procedurally has not taken place, then there is no breach of state secrecy according to the laws in force at that time. If the procedural rules for the classification of secrecy, which have warranty significance, have not been complied than the document is not to be considered classified.

A key statement of the dissertation is that constitutional protection of the Ombudsman goes far beyond the scope of the protection of personal data until 1995-2010, and the Data Protection Ombudsman has left behind a fundamental rights approach and institutionalised practice that is similar in scale and importance to the importance of the Hungarian Constitutional Court until 2010. The paper expands the character of the privacy (Data Protection Ombudsman) in vague interpretation and activist construction of law. In analyzing its case law the dissertation also points to contexts beyond the specific case if a legal case is

analysed. No matter if the case in question is the institutional system of the rule of law, whether it is the issue of regime change and historical justice, or a question of the public.

The dissertation highlights that the major moral dilemmas of regime change, namely: punishment of past sins, the openness of old archives, the boundaries of public and private sector, a number of other issues in the historical process of change of the regime, have all been transformed into legal issues in Hungary and appeared in legal grown. (Such legal grown can be seen for example, when protection of the rights of the persecutor and the persecuted, in the limits of human dignity, in the scope of the lustration, etc.). At the same time, almost all the great issues of Hungarian regime change eventually became a "data protection issue" as well through the Ombudsman's activist approach and jurisprudence. The phenomenon of legal transformation cannot be separated from the "legalization" of social issues. From the development by which important social issues transform and manifest in legal decisions around the world. Many call this phenomenon Juristocracy.⁶ In the decade and a half following the constitutional revolution in Hungary, all relevant public policy issues have been manifested in constitutional issues, in which the Constitutional Court and the Data Protection Ombudsman have expressed their views in landmark decisions. What follows from this change is the strengthening of the instrumentalist and further promoting functions of the law: the promotion of social change was achieved through the jurisprudence of the Ombudsman and the Constitutional Court.⁷

The research found that the case law of the Data Protection Ombudsman in Hungary can only be understood if the character of its constitutional decision is understood. By the legalization of social policy issues, in the case law of the Data Protection Ombudsman, as well as by its *sui generis* interpretation of the Constitution and the very mature and character of its constitutional decision, the Hungarian Data Protection Ombudsman became an inescapable public player between 1995 and 2010.

It was ascertained that constitutional decision is the centre of gravity in constitutional law. It includes *sui generis* constitutional reasoning and interpretation which character differs from any other decision – including a general court ruling. Accordingly, the common characteristics of constitutional decisions can be grasped in the case of ombudsmen, and in the case of constitutional courts, because they share a common intersection. In this approach, the difference between the constitutional court's case law and the Ombudsman's jurisprudence is only partial. The thesis provides the following definition of constitutional decision = in a constitutional dispute, i.e. a dispute in which at least one party refers to the text of the Constitution or to the provisions declared by other laws guaranteed in the Constitution (typically but not exclusively in the fundamental rights section of the Constitution) and the

⁶ See: HIRSCHL, Ran: *“Towards Juristocracy” – The Origins and Consequences of the New Constitutionalism*. Harvard University Press, 2004.

⁷ GUARNIERI, Carlo and PEDERZOLI, Patrizia: *The Power of Judges: A Comparative Study of Courts and Democracy*. Published to Oxford Scholarship Online: March 2012. See: ROSENFELD, Michel: *Judicial Politics versus Ordinary Politics*. In LANDFRIED, Christine (ed.): *Judicial Power*. Cambridge University Press, 2019. p. 36–65.

party seeks a competent legal body (typically constitutional court, ombudsman or ordinary court) to adjudicate based on legal arguments.⁸

The thesis proves its claim through hundreds of practical examples that constitutional law is designed for decoding socio-moral dilemmas and can resolve disputes as to the language and methodology of constitutional law. However, my claim is that the dispute does not lose its moral character, only transforms into a legal argument. In the argument of the dissertation, "constitutional reasoning is an inevitably moral practice (..),"⁹ and constitutional issues are moral issues.¹⁰ The research also shows that the Data Protection Ombudsman's constitutional decisions were not narrowly tailored and not bound by strict legal frames.

The thesis shows that the case law of the Hungarian Data Protection Ombudsman should be examined within the framework of rule-based formalism and rule-skeptic informalism. I prove through legal cases, that the practice of the Hungarian Data Protection Ombudsman can be described by the concept of informalism.¹¹ Therefore, the case-law of the Data Protection Ombudsman is not only a moral practice, but also by the abstraction and conceptual ambiguity of the standard on which interpretation is based, the scope of the Ombudsman's interpretation is almost unlimited. The abstraction and uncertainty of the text is inherently a "coded" feature of the legal sense. In almost all cases, the data protection law is supplemented by the provisions of the Constitution and the practice of the Constitutional Court.

Meanwhile, the dissertation does not provide any normative criticism against the rule-based decision-making process. Because the normative findings of rule-based decision-making are *in abstracto* to be supported, the research only points out that rule-based formalism is unsuitable for describing the case law of the Hungarian Data Protection Ombudsman.

The third part of the thesis examines the relationship between the public and the Hungarian Data Protection Ombudsman. It can be concluded that the concept of public in the Third Hungarian Republic are incomprehensible without examining the case law of the Data Protection Ombudsman (supervisor) from 1995 to 2010. The Ombudsman not only claimed for the shaping and transformation of the public, but I prove in the dissertation that the Ombudsman achieved most of its success as a communication rights body by broadening publicity and transparency in Hungary.

⁸ A somewhat different definition is used by SWEET, Alec Stone: *Governing with Judges: Constitutional Politics in Europe*. Oxford, 2000. p. 200–201.

⁹ See: GYÖRFI, Tamás: *Against the New Constitutionalism*. Edward Elgar Publishing, 2016. p. 183.

¹⁰ GYÖRFI: *Against the New Constitutionalism*. p. 170–172.

¹¹ Informalism (or anti-formism) believes that the logical closeness of the law is impossible, "there will always be logical gaps in it, and it even professes that the law can be found in these very gaps, in this 'logical space'. The various general clauses, regulatory frameworks and rubber conceptions create a gap in the imagined logical closeness of the law, since their content depends on interpretation (...). See: VINNAI Edina: *Nyelvhasználat a jogi eljárásban*. PhD thesis. Miskolc, 2011. 157.