Law and Morality in the Context of the Ombudsman

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If you look around the world, you see single-headed and multi-headed ombudsmen. It cannot take decisions that can be enforced by authority - this is the conceptual definition of the Ombudsman. Persons holding this position are given a diverse array of titles worldwide. The office was first installed in early 1700s Sweden, though similar state functions had already existed earlier. Gabriele Kucsko-Stadlmayer differentiates three main types based on the subject and rules of supervision, as well as their scopes of authority: the basic or classical model, the rule of law model, and the human rights model. In particular, it can investigate public authorities, public service bodies, public administration, such as notaries and bailiffs. Law consists of 4 layers, the layer of the text of law, the layer of legal doctrine, the layer of fundamental constitutional rights and the layer of judicial law.
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The concept of ombudsman in international comparison refers to an official who is the defender of human rights and, in some states, the guardian of the functioning of public administration, i.e. of legality and fairness. The term technically originated in Sweden in the early 1700s, and some believe that it had its roots in the Ottoman Sultan's court.[1]

If you look around the world, you see single-headed and multi-headed ombudsmen, like a dragon. Actually, the single-headedness of the ombudsman means that the office is run by a single head, there may be deputies to the ombudsman, but it is the head who gives the verdict on important matters. A multi-headed ombudsman, on the other hand, implies that some fundamental rights have separate, distinct defenders who are free to decide on matters within their own competence. The international legal comparison recognises corporate ombudsmen, where one or other ombudsman has no

1 CSERVÁK Csaba: *Az alapjogokat érvényesítő intézményrendszer*, Lícium-Art, 2018. Budapest, 48-50.

independent power to act, but can only act and decide by a corporate majority decision. Take Austria or Greece, for example. I note that in Europe, out of 49 systems, about 40 can be considered monocratic. So one-man management can make better use of the press. In a multi-headed system, separate ombudsmen are not only unnecessary, they are also seen as counterproductive.[2]

It is of cardinal importance that ombudsmen are armed with recommendations and publicity. It cannot take decisions that can be enforced by authority - this is the conceptual definition of the Ombudsman.

In the academic literature of constitutional law, the ombudsman has long constituted a widely accepted category. Persons holding this position are given a diverse array of titles worldwide. In Hungary, they are the Commissioner for Fundamental Rights, in the Ukraine the Parliament Commissioner for Human Rights. They are named High Commissioner for Human Rights in the Russian Federation and in Azerbaijan, while Spain, Czechia and Slovakia use 'Defender of the People' or 'Public Defender of Rights'. In Albania and Croatia, it is the People's Advocate, and in Macedonia, the People's Attorney. France, Belgium and Luxembourg call it Mediator. Portugal refers to the post as 'Justice Provider'.[3]

The office was first installed in early 1700s Sweden, though similar state functions had already existed earlier.[4] International organisations advocating for human rights (among others) routinely call upon their member states to create such offices. Both the Council of Europe and its handbook dealing with administrative requirements touch upon the topic, with the Council having issued an official recommendation to establish ombudsmen.[5] A 2003 Council resolution explicitly focusing on ombudsmen emphasised the importance of such independent officials in protecting human rights and the rule of law alike.[6]

Academic literature remains rather brief on the categorisation of ombudsmen. Gabriele Kucsko-Stadlmayer differentiates three main types based on the subject and rules of supervision, as well as their scopes of authority.

2 CSERVÁK 2018., 63.

3 Gabriele KUCSKO-STADLMAYER: *Európai ombudsman-intézmények*, ELTE Eötvös Kiadó, 2010 Budapest, p. 27.

4 VARGA Zs. András: *Ombudsmanok Magyarországon*, Rejtjel Kiadó 2004. p. 14.

5 VARGA 2004., pp. 30-31.

6 KUCSKO-STADLMAYER p. 29. On some specific powers of the Ombudsman, see: Arató, Balázs: A közbeszerzési jogorvoslat története; in: Jogelméleti szemle 16: 3; 2015, pp. 2-33., p. 32.

- the basic or classical model
- the rule of law model
- the human rights model

In the first case, „soft" powers, such as recommendations are typical when overseeing administrative organisations. The second category sports a wider array of rights, while the third focuses specifically on human rights.[7]

In the author's view, such a colourful international repertoire of powers is rather difficult to compress into three categories only. The borders between them would be hard to define and many additional types might arise.[8]

Interestingly, the traditional ombudsman used to be a counterweight against the misdeeds and inequities of the public administration only.[9] These days – at least in the Hungarian public mind – it is a guardian of fundamental and constitutional rights. The extensive study of relevant academic literature only strengthened the author's conviction that not only is there a lack of contradiction here, but these two approaches are strongly connected, since administrative acts violating fundamental rights are automatically unlawful and almost certainly an infringement on human rights.[10]

There are many nuanced theories around this topic. The subject matter for the procedures of the Commissioner for Fundamental Rights – with a general set of powers – is always a contravention (a violation of some legislation

7 KUCSKO-STADLMAYER pp. 97-101. The author also alludes to the dichotomy of „classic" and „hybrid" espoused by Linda Reif, which is even more restrictive and difficult to differentiate (see: KUCSKO-STADLMAYER i.m. p. 96). Under her system, the current Hungarian ombudsman would fall mainly under the human rights classification model. It is very interesting to note that in Israel, the ombudsman's tasks are effectively carried out by the state audit office.

8 An instrument of differentiation could be whether or not the ombudsman even possesses any powers regarding the human rights in question – and if so, are these rights dominant within the commissoner's scope of authority? The introduction of a „constitutional complaint on grounds of a human right violation" could well serve as an additional power for ombudsmen organised under the aegis of the human rights model. The Hungarian system, for one, does not strictly belong to it.

9 VARGA 2004, p. 32.

10 According to certain views, the right to a fair public administration is a fundamental right on its own. „Critiques of the office of the ombudsman have noted that commissioners have often established the violation of a 'right to legal certainty', as a contravention against a constitutional right. Citing Paragraph 1 of Article 2 in the Fundamental Law of Hungary, ombudsmen have interpreted the unlawful and erroneous rulings of the public administration as a breach of legal certainty and elevated them to the level of constitutional contraventions." And yet, they could not refer to a classical fundamental right in every case in this manner. See: SOMODY Bernadette: Hol húzódnak az ombudsman alapjog-értelmezésének határai?, *Jogtudományi közlöny*, 2004, Issue 10, p. 327.

or the danger thereof) related to fundamental rights. *Administrative errors*, that is, faulty acts or rulings of the public administration not in violation of these right *do not give grounds for an ombudsman procedure*. „Constitutional contraventions" do not equal „maladministration", especially since it isn't the commissioner's task in Hungary to monitor the effective workings of the public administration. In spite of this, there have often been references to the fundamental right of citizens to legal certainty and fair proceedings, justifying such interventions from the ombudsman into administrative matters not strictly constitutional in nature.[11] Once again, this only projects the appearance of a contradiction, since the human right to fair proceedings undoubtedly resembles the original function of the very first ombudsmen: that is, to detect and combat administrative errors.[12] The dilemma could be resolved by allowing the ombudsman to act only in cases where the contravention complained of would not only violate professional, but also legal norms and the applicant's substantive rights. If the error has no consequence towards the individual, then an appeal within the internal framework of the public administration should suffice; be it addressed to the actor's immediate superior authority, the Government Control Office, the State Audit Office or, as a last resort, a prosecutor. If the applicant's personal freedom is infringed, but in a way that cannot be traced back to the violation any single legal norm, then commissioners might still employ their „soft law" arsenal and request the amendment of current legislation in order to eliminate legal vacuums.[13]

The functions mused on above are further complicated by the fact that aside from their task to protect fundamental rights, some also consider

11 SOMODY Bernadette: A húszéves országgyűlési biztosi intézmény: ki nem használt lehetőség, Új Magyar Közigazgatás, Complex Kiadó Jogi és Üzleti Tartalomszolgáltató Kft., October-November 2009, Volume 2, Issue 10-11, p. 10.

12 See: SOMODY 2004., p. 328., on the right to a fair trial, see also: Arató, Balázs: A tisztességes eljáráshoz fűződő jog, különös tekintettel a tisztességes igazságügyi szakértői eljárásra; in: Tóth J. Zoltán (ed.): Az Abtv. 27. §-a szerinti alkotmányjogi panasz. Tanulmányok a „valódi" alkotmányjogi panasz alkotmánybírósági gyakorlatáról; Budapest, KRE-ÁJK; Patrocinium; 2023; p. 216.; pp. 9-30.

13 In other words, when it's „only" the applicant's freedoms under violation, but without the compulsion to take any action on the applicant's part, then the commissioner may step up. On the further differentiation of these two categories, see: POKOL Béla: *Autentikus jogelmélet* (Dialóg-Campus Kiadó, 2010. Budapest-Pécs), pp. 188-196.; For details on the requirement of norm clarity, see: Arató Balázs: *Norm clarity in the light of Hungarian case law.* Magyar Nyelvőr, 2022/5. (82–83), see also in this context: Arató Balázs - Balázs Géza: *The linguistic norm and norm of legal language*; Magyar Nyelvőr 146: 91–103.; 2022; DOI: 10.38143/Nyr.2022.5.91.; https://nyelvor.mnyknt.hu/wp-content/uploads/146507.pdf.

ombudsmen to be the general-purpose guardians of the constitution itself,[14] while others firmly deny this position.[15]

A common denominator of all offices denoted as ombudsmen is the supervision of public administration in its broadest sense. Their main instruments are recommendations, which means they only employ „soft law" that cannot be enforced. This „weakness" of theirs is offset by their authority, their deep professional knowledge and their great maneuvering space. The latter means that ombudsmen may sometimes put aside the rigid text of the law and make overtures to the world of *de lege ferenda* and ideal law. They can place a lot of things under scrutiny, but they often aren't mandated to, thus gaining even more room to assess and evaluate.

If we look at the domestic status of the office-holder, we can observe that after the regime change, there were two other fully equivalent ombudsmen in addition to the parliamentary commissioner for citizens' rights. There was also a Minority Affairs Commissioner and a Data Protection Commissioner. On 1 January 2012, the system was made single-headed because of management uncertainty. Instead of the Parliamentary Commissioner for Civil Liberties, the title was changed to Commissioner for Fundamental Rights, who has 2 deputies: the Deputy Commissioner for Fundamental Rights, who protects the rights of nationalities living in Hungary, and the Deputy Commissioner for Fundamental Rights, who protects the interests of future generations. The Data Protection Commissioner is replaced by an autonomous state administration body, the National Authority for Data Protection and Freedom of Information. The Chief Ombudsman is a Minister and the Deputy Chief Ombudsman is a State Secretary. We can now turn to what exactly the Ombudsman can do: what he can investigate, what his powers are. Well, as a general rule, it can make recommendations, it can approach the body or supervisory body under investigation, it can initiate legislation in the event of a legal vacuum, it can file a criminal complaint, it can request ex-post control of the law by the Constitutional Court. What can and cannot be investigated by the Ombudsman?

14 SOMODY Bernadette: *Ombudsmanok a magyar alkotmányos rendszerben*, In. (ed.) HARMATHY Attila: Jogi tanulmányok, ELTE-ÁJTK, 2001. Budapest, The author implies that – at least the first – general commissioner crossed the line from guardian of individual fundamental rights into that of the constitution itself.

15 VARGA 2004, p. 176. This also has to do with the author's notion that the ombudsman is no general supervisor; as a rule of thumb, the commissioner only acts upon citizen's complaints (VARGA 2004, p. 81). And yet, when it comes to the applicants, individual provisions of the constitution have, by now, practically fallen under the same regard as constitutional rights.

In particular, it can investigate public authorities, public service bodies (BKK, BKV), public administration, such as notaries and bailiffs. It may not investigate the Parliament, the President of the Republic, the Constitutional Court, the State Audit Office, courts and prosecutors' offices, except for the investigating prosecutor's office.

Our main question, the main motive of our theme, is what does the right of Ombudsman mean? Our starting point is the theory of the layer of Béla Pokol. According to this theory, law consists of 4 layers, the layer of the text of law, the layer of legal doctrine, the layer of fundamental constitutional rights and the layer of judicial law.[16] In relation to the sources of law, we can distinguish between external and internal sources of law. According to Cservák's distinctions, we can also distinguish between the layers of formal and substantive law, or external and internal layers of law. So where does the layer come from? And from what can we read what it contains? In concrete terms, obviously, the text layer of law comes from parliament, the layer of judicial law comes from the courts, the layer of legal doctrine comes from the representatives of jurisprudence from universities and academia. But here the main question in my lecture is what is the inner layer of fundamental constitutional rights, what is the origin of fundamental constitutional rights.

As a rule, since the Basic Law only briefly explains them, their concrete content is left to the Constitutional Court to interpret. In addition to the Constitutional Court, several other bodies defend and interpret this layer of fundamental rights, including of course the Ombudsman.[17] The Ombudsman's interpretation of the law and his recommendations belong to the layer of constitutional fundamental rights, which is one of the four layers of law. What is the relationship between the 2 layers, the Constitutional Court and the Ombudsman's legal material. Since the Constitutional Court has the power of annulment and the decisions of the Ombudsman are binding on the decisions of the Constitutional Court, the Constitutional Court clearly has primacy in the relationship between the 2 bodies. The importance of the Ombudsman's right has been increased by the fact that there was previously no genuine constitutional complaint. It was only possible to appeal to the Constitutional Court if the legislation applied was itself unconstitutional. The new Basic Law and the Constitutional Court Act have changed this. It is very important that, since a genuine constitutional complaint already has an impact on the Constitutional Court in terms of the application of the law, the gap in the interpretation of fundamental rights that was previously only

16 POKOL Béla: *Jogelmélet*, Századvég Kiadó, Budapest, 2005., 19-37.
17 CSERVÁK Csaba: *Az ombudsmantól az Alkotmánybíróságig - az alapvető jogok védelmének rendszere*, 2014. Debrecen: Licium - Art, 22.,75.

filled by the Ombudsman could be filled. It therefore somewhat diminishes the role of the Ombudsman. Adding that the authority and knowledge of the specific holder of the office may also contribute to this. Obviously, the word of such an authoritative official, such a professor, carries more weight.

A minor official may not be able to express such a strong opinion. Not even for the following reasons. How is the law different from any other norm? It can be enforced by the state. I pointed out at the beginning of my presentation that the Ombudsman lacks coercion, and in this sense the Ombudsman's acts are norms that are not enforceable, but by classical definition do not belong to the world of law, but almost to the world of morality. Of course, if there is voluntary compliance with the law, in whatever relationship, between a citizen and the administration, we can still say that it is impossible to know, because there is no enforcement, whether the citizen has obeyed morality or complied with the letter of the law, if he has engaged in norm-control behaviour.[18] This is particularly the case for the Ombudsman. I would like to highlight one other interesting point that we have to make in this connection. If we start from the four layers of law and say that the Ombudsman's recommendations are to some extent of a jurisprudential, legal-dogmatic nature, but that they are made by a public official and not by a representative of science, then we could say, as several professors have done in their publications, that the Ombudsman's law is legal dogmatics elevated to the status of an official state. In this connection, I would like to point out that in the practice of the Constitutional Court, there is either a violation of fundamental rights or there is not.

The practice of the Independent Police Complaints Board, which has now been merged into the Ombudsman, was a serious or slight violation of fundamental rights.[19] Most importantly, the concept of maladministration arises in relation to the Ombudsman. It is important to stress that it is the duty of the Fundamental Rights Ombudsman to investigate and take initiatives in relation to cases of abuse of fundamental rights that come to his attention. An abuse is an improper, abnormal, inconvenient situation, a violation of fundamental rights or an imminent threat of such a violation. In other words, the Ombudsman may investigate a violation of a fundamental

18 On the interesting conflict situations that arise in this context, see for example: Arató Balázs: A titok fogalma a jogban; in: Balázs, Géza; Minya, Károly; Pölcz, Ádám (ed.): A titok szemiotikája; Budapest; Magyar Szemiotikai Társaság; 2019; p. 367; pp. 29-39, and BALÁZS Géza: A titok antropológiája és szemiotikája. in: Balázs, Géza; Minya, Károly; Pölcz Ádám (ed.): A titok szemiotikája; Budapest; Magyar Szemiotikai Társaság; 2019. p. 367; pp. 15—28.

19 LUKÁCSI Dániel Csaba: Az Országgyűlés ellenőrző szervei, *KRE-DIt*, 2019/1., p. 11-14.

right that has not yet occurred. This also puts the office-holder somewhat on the borderline between law and morality. The soft legal instrument is the recommendation. The Ombudsman can act even where no specific breach of fundamental rights has occurred. In that case, the world of norms is not clearly the world of law, but some kind of borderline between law and morality. It is a curiosity that in Poland the moral values and social sensitivity of the candidate are also expected. In Slovakia, the ombudsman may be a person of integrity, which is also closely linked to morality. We might add that in our country the professional standards are high. The Ombudsman must have 10 years of explicitly outstanding experience in defending fundamental rights.

From an international perspective, I think it is adequate and somewhere in the middle. In the Swedish model, and in Portugal and Spain, which also have a strong ombudsman, there is no qualification criterion. In Romania, the Ombudsman is expected to have 18 years of adequate legal practice. There are some very interesting cases concerning the Ombudsman. The most striking is the series of infringements by the BKV. If a person does not buy a ticket for a vehicle, he is essentially entering into an implied contract to board the means of transport, but he is not fulfilling the main contractual obligation. In this respect, BKV and other transport companies tend to impose extremely severe penalties, even though this is not a matter of tort law but of civil law. It is a very strange diffusion relationship between civil and criminal law. Although the conditions for exemption under criminal law are not met, it is for this reason that it feels very exaggerated to say that the surcharge is a multiple of the ticket price. Moreover, if students can buy a season ticket and travel with it, and the inspectors find that their season ticket is not valid for some reason, or even that their student card is not valid, they will be deemed to have committed an offence. Very often, they act as authorities and restrain travellers. It is an interesting complex legal relationship with a small financial stake, yet it is an activity that causes moral damage to many people. It was precisely in this mediating role that the Ombudsman was shown to be located in the transitional sphere between law and morality. It is no coincidence that in France, Belgium and Luxembourg this function is called mediator.

The question of whether a monocratic or a „multi-headed" system is preferable is most likely the greatest matter of contention in our topic. The latter model, that is, the one operating with multiple commissioners has been gradually transformed into a single-ombudsman configuration due primarily to concerns arising from perceptions of command structure confusion. Yet, these reforms were also followed by professional criticism. „The deputy system possesses an inherent contradiction: on the one hand, this

structure creates (deputy) commissioner offices with the expectation that they fulfill their mandates with the authority provided by them personally taking action, but on the other hand, they receive no independence in doing so. A deputy commissioner would be hard-pressed to apply the force of personal persuation to an argument that he or she only represents due to an agreement or an order coming from the higher echelons of the ombudsman system. In such a case, specialisation could provide a worthy alternative to the singular, general authority ombudsman, enabling us to bypass the disadvantages outlined above and also enjoy the numerous benefits of a college of independent, specialised and differentiated professionals."[20] On the other hand, as András Zs. Varga expertly points out, a system of multiple and equal commissioners also carries further hazards. „It is uncontestable that a commissioner elected to safeguard a certain constitutional right must first and foremost keep this specific right in sight. At first glance, this should not pose a problem, not even when every such right is allocated to a different individual commissioner: one constitutional right for one ombudsman, ergo, full-scale protection. *But we are falling into error if we consider fundamental rights nothing more than a set of independent legal values.* These rights are inseparable from the entities carrying them: that is, natural persons. As such, the rights natural persons are entitled to also cannot be separated from each other, for their proper interpretation requires joint scrutiny."[21] A further problem of the „multi-headed" system is that by establishing which fundamental rights are entitled to a commissioner of their own, legislators unwittingly begin to rank these rights in an order of importance. Only those they deem important enough will receive their own ombudsman, effectively sweeping the rest under the purview of the general commissioner. The most difficult dilemma tends to be when two fundamental rights collide. For instance, upon the conflict of the right to human dignity and the right to free expression, whose ombudsman would get to act, out of the two? According to András Jakab, a singular ombudsman also works better with the media, able to utilise publicity with effectiveness, whereupon multiple commissioners

20 SOMODY Bernadette: *A húszéves országgyűlési biztosi intézmény: ki nem használt lehetőség*, Új Magyar Közigazgatás, Complex Kiadó Jogi és Üzleti Tartalomszolgáltató Kft., October-November 2009, Volume 2, Issue 10-11, p. 7. Citing László Majtényi, Somody argues against the hierarchical model, considering it vulnerable to criticism and noting that any potential influence on the main commissioner's person would affect the whole office.

21 VARGA Zs. András: *A magyar ombudsmani intézményrendszer továbbfejlesztéséről*, In. (ed): CHRONOWSKI Nóra–PETRÉTEI József: Tanulmányok ÁDÁM Antal professor emeritus születésének 80. évfordulójára, Studia Iuridica Auctoritate Universitatis Pécs Publicata, Pécs, 2010., p. 433.

would not only be needless, but outright counterproductive. This is also why, out of the 49 ombudsman systems currently operating in Europe, 40 can be classified as monocratic.[22] „It comes without a doubt, however, that the true counterpart to the singular ombudsman model is the collective ombudsman body, working as a panel.[23]

The Commissioner for Fundamental Rights has made many recommendations against BKV. He recommends that passengers boarding the vehicle should be checked for tickets before entering the metro area and not afterwards. Inspectors are not allowed to touch passengers, they can only ask them to show their passes and tickets.[24] This is extremely important! I think that this was one of the positive roles played by the Ombudsman, alongside the many legendary legal cases, and here we are clearly showing that the Commissioner for Fundamental Rights in Hungary, although a high-ranking legal official, is clearly operating on the borderline between law and morality.

22 JAKAB András: *Az új Alaptörvény keletkezése és gyakorlati következményei*, HVGORAC, Budapest 2011. p. 138.
23 Such as the Austrian and Greek systems.
24 ARATÓ Balázs-CSERVÁK Csaba: Részvénytársaság - egy hatóság képében, *Jogelméleti Szemle* 2003/2.