

ANALYSIS OF THE PERFORMANCE OF THE HUNGARIAN OMBUDSMAN
RELATED TO CHILDREN’S RIGHTS THROUGH THE LENS
OF THE UN CRC’S FOUR GUIDING PRINCIPLES

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ABSTRACT

In Hungary, soon after the democratic transition in 1989/90, the institution of the general ombudsman was established, based on the Swedish model, possessing broad oversight. Since 2012, with the Fundamental Law (new constitution) and a new ombudsman act entering into force, the defense of children’s rights has become one of the legal obligations of the general ombudsman. In this paper I examine the historical background of this “hybrid” institution² and the performance of the last three commissioners based on the child rights approach of the UN Convention on the Rights of the Child (UNCRC).

The UNCRC represents the “whole child” approach, a holistic view of a child which also informs the work of independent children’s rights institutions (ICRIs). Hence, the four guiding principles of the UNCRC³ (the right to non-discrimination; the best interests of the child; the right to life, survival and development; and the right to participation) can be seen as analyzable elements of an ICRI’s performance. There are also ‘informal’ factors that can influence the performance of an ICRI - even a stand-alone - e.g. social and political recognition of the institution, the societal and legal regard of children (are their rights widely recognized or not, etc.), the personal motivation and drive of the ombudsman, the ombudsman’s own interests and background, the financial constraints of the office, and the overall political atmosphere and various political influences around. These factors can play a vital role, but their existence can only be assumed in cases where we can see the institution’s more exact outputs based on the UNCRC guiding principles: the appearance of children in its work, attention to vulnerable groups and cases related to non-discrimination, the number of complaints submitted to the commissioner (including those by children), the appearance of best interests of children in cases. We have found differences between the last three commissioners’ performances based on the guiding principles, which are also not independent from informal factors too.

Keywords: Hungary; ombudsman; children’s rights; independent children’s rights institutions (ICRIs); UN Convention on the Rights of the Child (UNCRC); guiding principles

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² “Hybrid” refers to a general ombudsman institution with a broad scope, where the protection of children’s rights appears as a special task of the commissioner, and cases related to children’s rights are handled in a specialized department, but there is no deputy dedicated specifically to the task.

³ All rights in the UNCRC are linked to each other and must be considered as a whole. But the four “general principles” – or overarching rights – defined by the CRC Committee, are particularly necessary for the fulfilment of all other rights. Addressing these four rights can help explain the reasons behind rights violations and serve as a guide to preventing violations. <https://archive.crin.org/en/home/rights/themes/general-principles.html>

INTRODUCTION

After a short historical overview, I will examine the performance of an integrated National Institute for Human Rights (NHRI), the Hungarian ombudsman, based on four elements rooted in the guiding principles of the UNCRC: how to ensure the right to life and development, how to ensure the best interests of the child and the protection of their fundamental rights; how child participation works; and how the right to non-discrimination is realized — how marginalized, vulnerable groups of children can gain the attention of the ombudsman.

Hungary: A Historical Background

Through a constitutional amendment, the last Communist Parliament created the legal framework of the institution in 1989. During the so called “Roundtable Talks”⁴ (Bozóki, 2002) of that year, it was said that: “*If there should be an ombudsman, it should be a classical, general ombudsman*” (Sziklay, 2010, p. 123). In 1993, Act LIX on the Parliamentary Commissioner for Citizens’ Rights was adopted. Two years later, the first commissioners were elected and their joint office was established. The Commissioner for Civil Rights was responsible for fundamental rights in general, and the Commissioner for Data Protection and the Commissioner for Minority Rights acted as specialized ombudspersons. In 2008, a new - promising - post, Parliamentary Commissioner for Future Generations, was created for environmental, climate issues and sustainable development.

The commissioners were solely accountable to Parliament, and were obliged to present an annual report. They worked independently during their proceedings, and acted in accordance with the constitution. The commissioners were entitled to the same immunity as Members of Parliament. They were elected on the proposal of the President of the Republic, by two-thirds of Parliament, for a six-year, once renewable, term.

On 1 January 2012, not only did a new Fundamental Law (constitution) entered into force, but the former ombudsman act was replaced by Act CXI of 2011 on the Commissioner for Fundamental Rights (CFR Act). Article 30 of the Fundamental Law established a new unified system and opted for an integrated ombudsman’s institution rather than a series of specialized commissioners — a solution many European states had already opted for, and which increased transparency and efficiency while reducing costs. In hindsight, this move was clearly part of the government’s centralization efforts (Szigetvári, 2020, pp. 23-40).

The Commissioner for Fundamental Rights (*Alapvető Jogok Biztosának Hivatala* (AJBH) in Hungarian, CFR) has two deputies working to protect the interests of minorities and the rights of future generations, albeit with more limited powers than their predecessors, the specialized commissioners (Hajas-Szabó, 2012). Based on the constitutional provision, Act CXII of 2011 On the Right to Informational Self-determination and On the Freedom of Information, which entered

⁴ The Hungarian Round Table Talks (Hungarian: *Kerekasztal-tárgyalások*) were a series of formalized, orderly and highly legalistic discussions held in Budapest, Hungary in the summer and autumn of 1989, inspired by the Polish model, that ended in the creation of a multi-party constitutional democracy, and saw the Communist Party (formally the Hungarian Socialist Workers' Party or MSzMP) lose its 40-year grip on power.

into force on 1 January 2012, the Hungarian National Authority for Data Protection and Freedom of Information was established, replacing the Ombudsman for Data Protection.⁵

Since 2011, the CFR has been a NHRI. It has been classified as a NHRI with ‘A’ status, in accordance with the Paris Principles, but in 2021 the Sub-Committee on Accreditation of Global Alliance of National Human Rights Institutions (GANHRI SCA) recommended that the CFR be downgraded to B status, showing it is partially compliant with the Paris Principles, saying “the SCA is of the view that the CFR has not effectively engaged on and publicly addressed all human rights issues, including in relation to vulnerable groups such as ethnic minorities, LGBTI, refugees and migrants as well as constitutional court cases deemed political and institutional, media pluralism, civic space and judicial independence”. (GANHRI, 2021, pp 12-13). This recommendation shows clearly some concerning challenges in the activities of the institution in the last couple of years, however the final decision about the status has not been made yet.

The CFR is vested with the quasi-judicial competence to hear and consider complaints against public authorities and other entities providing public services, and to initiate investigations ex officio into the situation of a non-determinable group of people, or the implementation of a particular fundamental right. In case of rights infringement, the CFR addresses a recommendation to the respective authority or its supervisory organ, which is obliged to inform him of its position on the merits of the recommendation and on the measures taken within thirty days.

There was also a parliamentary debate on Act XXXI of 1997, On the Protection of Children and Guardianship Administration (Child Protection Act, CPA), demonstrating that the level of protection of children's rights by the general Parliamentary Commissioner was insufficient. In November 2003, the Minister for Children, Youth and Sport appointed a Ministerial Representative for the Rights of the Child to draft the framework of the institution of a Ministerial Commissioner for the Rights of the Child. In early 2004, the Ministerial Representative began her preparatory work, but no concrete law was drafted. The establishment of a Ministerial Commissioner was presumably further “victimized” by the run-up to the 2006 elections, the position of the Ministerial Representative was closed and the topic has yet to return to the political agenda.

There is another actor who can be mentioned as an ‘ombudsman’ who deals with children’s rights: the Office of the Commissioner for Educational Rights. This office is a ‘mixed’ institution with a field of work similar to an ombudsman (it is also often referred to in the media as ombudsman), but much narrower in competences. Moreover this Commissioner lacks independence - mainly because his office is in the Ministry of Education - and has thus not been an ombudsman.⁶ The Minister of Education took up the post following the 40/1999. (X.8.) decree of the Ministry of Education and Science, to ensure the enforcement of the rights of pupils, students, researchers,

⁵ The Court of Justice of the European Union ruled (8 April 2014) that changes to Hungary’s data protection regime resulted in the unlawful replacement of the country’s data protection ombudsman, András Jóri, in 2012. ECLI:EU:C:2014:237. <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62012CJ0288>

⁶ At the time of the establishment, the Office of the Commissioner for Educational Rights was established as an internal organizational unit of the Ministry of Education. The office is headed by a Commissioner for Educational Rights, who is appointed by the Minister responsible for education. The Commissioner is solely responsible to the Minister. Since its inception, the office has been filled by the same person (for 22 years now), and the vast majority of his cases concern public education issues.

teachers, parents and their communities in the event that a decision or the absence thereof, infringes upon their educational rights or creates an imminent threat of infringement. There exists no formal, but informal cooperation with the CFR in cases related to schools (member of staff or even the ombudsman can call each other in cases of collisions of subjects).

In the absence of a separate ombudsman or deputy for the rights of the child, the task of protecting children's rights was, according to Section 11 (2) of the CPA, the Parliamentary Commissioner for Citizens Rights' responsibility. Since then, the CFR Act has been explicitly declared in Art 1. (2) that the CFR pays special attention to protecting the rights of children in its activities, in particular, by conducting ex officio investigations.⁷ Since 2013, this task has notably changed as the Department of Equal Opportunities and Children's Rights (DEOCR) began operating within the institution to conduct investigations on social and children's rights. In April 2021, of the twenty-one DEOCR staff members, seven were lawyers dealing with cases related to children's rights.

LEVEL OF PROTECTION OF CHILDREN'S RIGHTS BASED ON THE FOUR GUIDING PRINCIPLES OF THE UN CRC

Right To Life and Development

The CFR deals with this right rather as a core fundamental right declared in Article II of the Fundamental Law, and as an immanent part of the right to protection and care of a child, which is provided in Art XVI of the Fundamental Law.⁸ In his mandate, the CFR is expected to monitor the implementation of these rights in cases where their abuse is an issue. The CFR regularly refers to these Hungarian constitutional rights. Moreover, since 1 January 2015, the CFR has performed the tasks of the Optional Protocol to the Convention Against Torture, National Preventive Mechanism (OPCAT NPM), and regularly examines the treatment of persons deprived of their liberty in the absence of a complaint or maladministration, as well as children living in various institutions - state care homes, correctional centers, juvenile prisons, and in police detention. Nevertheless, it is worth examining the mandate and the detailed rules of the complaint procedure of the CFR. So the right to life and development is within the right to protection and care is examined first and foremost in cases labeled as children's rights cases independently the case is based on a complaint or initiated ex officio.

"Anyone" (hence, also a child, though children are not specifically named in the founding law CFR Act) - can initiate free proceedings based on the CFR Act. However, rarely does a child do

⁷ According to the law, the ombudsman can investigate an "authority" — an administrative body, local government, national self-government, public body operating on the basis of compulsory membership, the Hungarian Armed Forces, law enforcement and other bodies acting in administrative jurisdiction, investigative authority, forensic bailiff, independent bailiff or public service body (body performing or contributing to the performance of a state or local government task, public utility service provider, universal service provider, organization participating in the provision or mediation of state or European Union support, and an organization providing the mandatory service required by law.)

⁸ "Article XVI (1) Every child shall have the right to protection and care necessary for his or her proper physical, mental and moral development."

so. The issue of children's rights has not explicitly appeared in the too many complaints submitted to the ombudsman and the commissioners have launched mainly ex officio inquiries into this and other areas where there were conspicuously few complaints.

A chronological review of the Commissioners' practice over the last 25 years reveals (at the time of writing) that most of the complaints submitted to the Ombudsmen focused on family subsidies, on basic and specialized childcare services, as evidenced by a number of on-the-spot inquiries into children's homes and media reports on child abuse cases (AJBH Annual Reports, 2008-2020).

The Ombudsman elected in 2007 took on the self-appointed role of special or quasi-commissioner for children's rights by launching children's rights projects (AJBH Projects, 2008–2013),⁹ during which he proactively monitored the implementation of children's rights through carrying out focus investigations related to the topics of the given year and proactively communicated the findings of the reports and his annual activities. During that period he applied for membership to the European child rights network, Eurochild, and started to actively take part in the European Network of Ombudspersons for Children (ENOC).

The CFR and his deputies publish their opinions and reports via the office's website, but communicate with the media in cycles, depending on the role of the ombudsman. More recently, the Ombudsman's annual reports include statistics on his media appearances, suggesting the importance of media publicity to the office. However the communication of the CFR can be characterized by duality; since 2013 he has agreed to fewer and fewer interviews, preferring to communicate mostly through short press releases (usually on reports related to children's rights). There are also examples of the CFR communicating in a preventative way - before a study is closed or a report is issued, to ensure that decision-makers can consider the ombudsman's concerns and proposals before taking action. This is legally possible, but otherwise an unusual (and ineffective) way of acting as ombudsman. It should also be noted that traditionally most of the commissioners and as well as part of their staff actively participate in academic life through conferences, workshops and regular publishing. For the 30th anniversary of the UNCRC, the Commissioner published a remarkable volume on their most important cases related to children's rights (Láposy, 2019)

According to the statistics, the Commissioners have received around 128,000 complaints since 1995 (approximately 7–8,000 complaints per year),¹⁰ a significant proportion of which were rejected due to the limitations of their competence. In these instances, the complainant is informed. The trend seems stable: only a fraction of completed cases are labeled "child rights". However, it should be noted that there is no data on how many children (under the age of 18) are complainants, as this can only be revealed through self-declaration. There are no formal instructions on how to submit a complaint that would advise a complainant to reveal their age. Furthermore, there is no child-friendly mode for easily submitting a complaint. Additionally, those complaints that seem to

⁹ Subjects of the annual projects: awareness raising on children's rights in 2008, violence against children in 2009, family and care in 2010, children's right to health in 2011, child-friendly justice in 2012, children's right to a healthy environment in 2013.

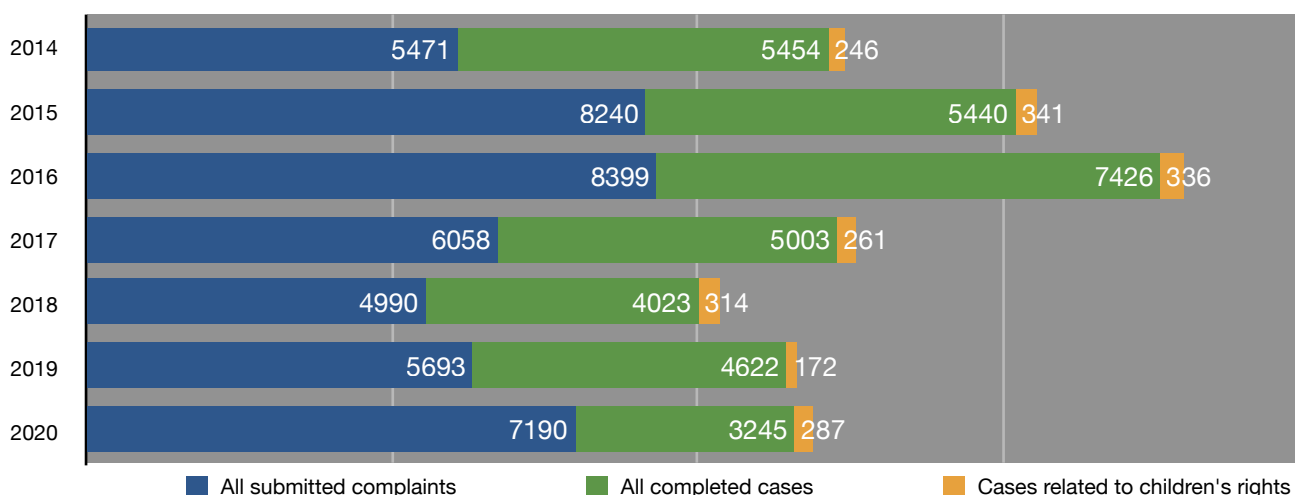
¹⁰ <http://www.ajbh.hu/ugyekhez-kapcsolodo-statisztikai-adatbazis> (last access: 26 February 2020)

have come from a child were presumably written by a parent and/or were written as a result of parental influence. Complaints coming directly from children are exceptional - the office receives approximately 10-20 such complaints and questions a year, typically related to school, and in some cases, from children raised in child protection care.

The lack of data collection on age makes prioritizing children's rights on the basis of complainants difficult to achieve, and there is no direct information received on children's daily life. Furthermore, there are a number of other issues raised in the appeals to the Commissioner that can affect children's rights, even if they are not labeled as such in the administrative system of the office. This can be cases which involve children living with disabilities or cases related to social rights of a family, access of a child to healthcare, etc.

Fig 1

Data on all submitted complaints, all completed cases, and cases related to children's rights



Source. Reports on the Activities of the Commissioner for Fundamental Rights and his Deputies. Office of the Commissioner for Fundamental Rights (2014-2020).

Over the last seven years, approximately 4-5 % of all submitted cases have either directly or indirectly been related to children's rights. This means still a very small share, although the Commissioner since 2012 has a primer legal obligation to defend the rights of children.

Since 2012, the CFR has had the opportunity to initiate a review of the compliance of a law or legal provision with the Fundamental Law, to investigate its conflict with an international treaty, and the interpretation of the Fundamental Law at the Constitutional Court (CC).¹¹ During the CFR's practice, he has submitted petitions to the Constitutional Court concerning the rights of the child with various results (See CC Decision 43/2012. (XII. 20.), CC Decision 14/2014. (V.13.), CC

¹¹ According to the regulations, the ombudsman may directly initiate the norm control procedure on the basis of a citizen's complaint, even without conducting a procedure or inquiry. In addition to the direct petition, the Commissioner also has the opportunity to apply to the Constitutional Court in connection with the investigation of a specific case, in a report, as a measure.

Decision 3047/2013. (II. 28.), CC Decision 3046/2013. (II. 28.), CC Decision 3142/2013. (VII. 16.), but has not used this tool since 2014. Regarding the various outputs of the Commissioner's petitions, for example in the case 43/2012. (XII. 20.) of the Constitutional Court's decision, the Commissioner initiated the annulment of certain provisions of the Family Protection Act: he drew attention to the constitutional concern in this law about the concept of family based solely on marriage between men and women. The Constitutional Court annulled the provisions challenged by the Commissioner, stating in its reasoning that the concept of family contained in the Family Protection Act provides a narrower definition compared to the Fundamental Law.¹² In an other petition, the Commissioner called for the annulment of the provisions of the Act on the Police and Act on Public Education, which allow for police action to be taken against a pupil who has not reached the age of 14 and is absent from school without permission. In decision 3047/2013. (II. 28.) the Constitutional Court did not share the Commissioner's position on the issue, namely that this kind of police measure is disproportionate and would be classified as manifestly degrading to a child. So although the petitions submitted by the Commissioner were not successful in all cases, in its decisions the Constitutional Court made a number of important findings regarding the content, protection and (also limitation) of children's rights, thus improving the case law.

Best Interests of the Child

Hungary ratified the UNCRC in 1990, and as the UNCRC's Art 3. contains the principle of the best interests of the child, it has become part of the national legislation. Furthermore, Art 2. (1) of the CPA provides that "*local governments, guardianship authorities, courts, police, prosecutor's offices, metropolitan and county government offices acting as probation services (hereinafter: probation services), other organizations and persons shall act taking into consideration the paramount interest and rights of the child guaranteed by law.*" Hence, the Commissioner can examine these authorities to monitor their duties in relation to the best (or the Hungarian legal term, 'paramount') interests of the child.

During inquiries, the Ombudsman regularly refers to the clearly declared best interests principle.¹³ In many reports, the ombudsman draws attention to the fact that, as a result of heavy workloads and high turnover, the responsible authorities were unable to enforce the principle of the best interests of the child.¹⁴ As the Ombudsman's competence covers only soft law solutions, as a recommendation to the examined organ, the acceptance of the findings of the ombudsman depends highly on the addressee's will.

¹² It should be noted, since this decision, the Hungarian Fundamental Law has been amended which contains new provisions in Article L) namely " (1) Hungary shall protect the institution of marriage as the union of one man and one woman established by voluntary decision, and the family as the basis of the survival of the nation. Family ties shall be based on marriage or the relationship between parents and children. The mother shall be a woman, the father shall be a man."

¹³ Reports where the best interests of the child was particularly examined: AJB-5693/2014; AJB-6124/2014; AJB-4108/2014; AJB-1861/2014; AJB-5001/2014; AJB-228/2015; AJB-4710/2015; AJB-3534/2016; AJB-996/2016; AJB-729/2016; AJB-439/2017; AJB-1817/2017; AJB-4846/2017; AJB-5831/2017; AJB-811/2018; AJB-807/2018; AJB-1831/2018; AJB-3312/2018; AJB-304/2019; AJB- 606/2019.

¹⁴ Case reports AJB-3534/2016, AJB-807/2017., AJB- 1587/2018., AJB-807/2018., AJB-1441/2018., AJB- 488/2018.

In examining any complaint, another key aspect of the fundamental rights analysis is whether a decision-maker has satisfactorily served the principle of the best interests of the child, or if he/she has violated this principle by failing to do so, in addition to the child's right to care and protection, which is also a constitutional requirement based on the Art XVI of the Fundamental Law. When selecting an investigation method, this principle guides the focus of on-site inspections¹⁵, including particular child protection institutions or special institutions (e.g., special children's homes), a group of children (e.g., institutional placement of children with dual needs), or a special area (i.e., adoption, overload of guardianship authorities, removal from the family on primarily material reasons).¹⁶

Child Participation

The Ombudsman's proactive "project approach" was expected to improve children's access to the office for the 2008–2013 period. In 2008, the Commissioner set up a separate website providing information on children's rights, with an accessible version for visually impaired visitors. Since 2016, the full website has been replaced with a page of information for children on how to reach the Ombudsman. In 2011, the Commissioner created a Facebook profile to improve direct access, but the news feed is mainly for the publication of official announcements issued in connection with investigations or reports, and occasionally brief greetings on internationally observed days (like International Children's Day).

If an incoming complaint has clearly been sent by a child, it is made a priority in the practice - however there is no legal obligation to do so. If the complaint points to a practice of concern, it could serve as a basis for a comprehensive investigation. During the preliminary on-site inspections of child protection institutions, whether announced or unannounced, it is important for representatives of the office to meet with and speak to the affected children, to prepare interviews, or if this is not an option, to obtain information about the children's situation, especially considering the office's designation as an OPCAT NPM. Regardless of whether the investigation is deemed "traditional" or an OPCAT NPM investigation, a psychologist from the office is involved in conducting the professional interviews.

Prior to the COVID-19 pandemic, the Commissioner held regular events attended by children. These events included games and creative programs, as well as an opportunity for children to express their opinions and make suggestions on a message board to the Ombudsman. However there is no information known by the author how these messages sent to the Commissioner were built in at all in any form of the Commissioner's decision-making or planning procedures. The CFR has regularly organized annual conferences on children's rights on International Children's Day since 2008. As an informal external partner of the Commissioner, UNICEF Hungary's Ambassadors for Children's Rights took part in one of the workshops in 2015 (on bullying). They also visited the Commissioner, asked questions and made suggestions in 2019. These requests, however, were

¹⁵ Case reports AJB- 105/2020., AJB-1394/2020.

¹⁶ Case reports AJB 2026-2017, AJB-1164/2020.

sporadic. The office also adopted Child Protection Regulations Nr. 10/2020. (VIII. 28.) OCFR, providing for the participation of children.

Despite the CFR's continuous - but with changing intensity in visibility - commitment to promoting children's rights, the meaningful involvement of children has not been institutionalized since the establishment of the office. Interestingly, it was not the CFR, but the Deputy Commissioner for Nationalities who, as a supporting partner of an NGO project, contributed to the implementation of three programs for children's participation in 2017. Children ages 12 to 16 actively took part in several pilot projects based on the Council of Europe's Strategy on the Rights of the Child, which was launched to explore children's 'digital self-image' and their views on their roles in the online space. In April 2017, young people and the Deputy Commissioner's staff discussed children's rights in the digital environment, while in the summer, they addressed the effects of online prejudices and stereotypes of Roma, and in November, tackled the issue of a child-friendly digital society (Council of Europe, 2017). As part of the domestic implementation of "Children Consultations for the Development of Child-Friendly Resources in the framework of the Dosta! Campaign", a presentation was held in the office of the deputy on the results of child consultations. This program was part of the CoE's "Dosta! - Enough! Go beyond prejudice, meet the Roma!" campaign to combat prejudice and stereotypes against the Roma. Consultations with children were held in Albania, Hungary and Spain in the last quarter of 2017, allowing groups of twenty Roma and non-Roma children to prepare content proposals for the child-friendly campaign (Council of Europe, 2019).

RIGHT TO NON-DISCRIMINATION - RIGHTS OF VULNERABLE CHILDREN

In Art 2. the CFR Act states that the CFR shall pay particular attention in the performance of his activities, especially through ex officio procedures, not only to the rights of children, the interests of future generations, and the rights of nationalities living in Hungary, but to protect the rights of the most vulnerable groups in society. Hence, it is a painful shortcoming that a deputy has yet to be mandated to protect the rights of children and protect the rights of vulnerable groups.

Below I review the level of legal protection offered to vulnerable groups of children.

Children Belonging to National Minorities

In the case of violations of the rights of children belonging to a national minority (e.g., the educational segregation of Roma children), the competence is divided between the CFR and his Deputy Commissioner responsible for nationalities.

The Deputy for Nationalities monitors the enforcement of the rights of nationalities living in Hungary, and participates in the proceedings and investigations of the CFR.^{17 18} As Roma are the largest minority group, it must be highlighted that discrimination against Roma children remains a systemic and structural problem in Hungary (The Child Rights NGO Coalition, 2021).^{19 20}

If a submitted complaint has an identifiable aspect of discrimination based on nationality, DEOCR will refer these cases to the secretariat of the Deputy, and where appropriate, assist in the proceedings. Complaints can be found primarily in the field of education, where, in addition to issues in public education, there may be suspicion of malpractice or a violation of rights due to affiliation to a nationality (typically, the Roma). At the same time, it is relatively rare that these aspects are specifically mentioned in a complaint: 5-10 such cases occur per year. If during the course of an ex officio DEOCR investigation an issue related to discrimination on the basis of nationality arises, the DEOCR informs the Deputy, whom they regularly consult in educational matters before completing a case.

Regardless, the Deputy has completed only a very few reports specifically related to Roma children. This dearth of reports is surprising. In Hungary, the concentration of disadvantaged and Roma children in certain segregated schools and classes has increased over the past decades, which was also stated in a judgement of the European Court of Human Rights too (European Court of Human Rights, 2013). A joint report published by the CFR and the Deputy about segregation in education in 2014 (case report AJB-6010/2014) can be mentioned as a milestone, found that in most cases, segregation is the consequence of different direct and indirect discriminatory practices against Roma students. Later the Curia (the Supreme Court of Hungary) delivered a landmark judgement on discrimination in the case of 63 segregated children in 2020. It held the state responsible for segregating children in education, and ordered it to pay compensation to Roma

¹⁷ The Deputy's activities include: regularly informing the Commissioner, the institutions concerned and the public about his experiences with the enforcement of the rights of nationalities; drawing the attention of the Commissioner, the institutions concerned and the public to the risk of violations affecting nationalities; proposing the Commissioner initiate ex officio proceedings; assisting in the investigations of the Commissioner; may suggest that the Commissioner refer the matter to the Constitutional Court; giving an opinion on the Government's strategy on social inclusion and monitoring the implementation of its objectives concerning the nationalities living in Hungary; making a proposal for the creation and amendment of legislation concerning the rights of nationalities living in Hungary; and with its international activities, promoting the presentation of the values of the Hungarian institutional system related to the interests of the nationalities living in Hungary.

¹⁸ Act CLXXIX of 2011 on the Rights of Nationalities acknowledges thirteen established national minorities in Hungary: Armenian, Bulgarian, Croatian, German, Greek, Polish, Roma, Romanian, Ruthenian, Serbian, Slovakian, Slovenian, and Ukrainian. Almost 10% of the population of Hungary affiliate themselves with a national minority. Based on the census of 2011, there are 8,504,492 Hungarian, 315,583 Roma, 185,696 Germans, 33,641 Romanians, 35,208 Slovaks, 26,774 Croats, 10,038 Serbs, and 2,820 Slovenians.

¹⁹ In the last few years, studies revealed that roughly 70–80 percent of the children in foster care (23,000 children) are Roma (the proportion was 60 percent in 2007, and 66 percent in 2010). The most recent survey showed that 80 percent of all children in foster care are Roma, while the Roma minority makes up only 7–9 percent of the Hungarian population. The disadvantageous social situation of Roma is aggravated by discrimination, especially in the field of education, health, employment, housing and access to services.

²⁰ Although it is forbidden to remove a child from his or her family due to the family's social or financial situation, the ombudsman inquiry (2017) found that every third child is taken into care due to his or her family's financial constraints. Roma are disproportionately affected by this unlawful practice as they are highly overrepresented among the poorest societal groups. <http://www.errc.org/reports-and-submissions/life-sentence-romani-children-in-state-care-in-hungary>

children who had been segregated (Roma Education Fund, 2020). With a sharp increase in political tensions (Reuters, 2020), the Deputy promised to publish an opinion, but until now has yet to do so (AJBH, 2020a), however NGOs, experts and also the Child Rights NGO Coalition issued various statements (Child Rights NGO, 2020).

Children Living With Disabilities

Art 2. (3) of the CFR Act states that the CFR shall pay special attention to assist, protect and monitor the implementation of the UN Convention on the Rights of Persons with Disabilities (UN CRPD), promulgated by the provisions of Act XCII of 2007. Interestingly, there is neither a deputy nor a separate unit to fulfill this special role (cases related to disability rights are handled by the DEOCR). It has always been the Commissioners, despite the lack of a special deputy, who pay attention to the rights of people - especially children - living with disabilities.²¹

The CFR regularly receives complaints concerning the right to accessible education and quality services for children with special educational needs (Lux, 2020, pp. 26-36). The situation of children with disabilities in child care is of special concern: particularly the situation of children with “particular”, “special” or “dual” needs²² and autism spectrum disorders, their general conditions of care (case report: AJB-1672/2017). One of the common findings of these reports is that children with disabilities in state care are not provided with appropriate care for their conditions. For instance, in some cases, the liberty of movement of children with psycho-social disabilities was often restricted to seclusion, in many cases upon admission and for a prolonged period of time - exceeding 48 hours. Concerns were also raised in regard to the risk of unnecessary use of neuroleptics, violence against some children, and their involvement in child prostitution.²³ In order to promote professional dialogue, the CFR places emphasis on following up on inquiries, and participates in working groups and expert bodies, monitors developments, and gives opinions on draft legislation. On behalf of the Ombudsman, several workshops and conferences also were organized on disability issues.

The Commissioner focused on the rights of people living with disabilities in 2009 in his annual project, with particular attention paid to children living with disabilities. During the project year, he initiated various ex office investigations and organized workshops dedicated to special topics related to disability rights. The CFR drafted reports on CRPD Articles 5, 7, 8, 12, 14, 15, 24,

²¹ There are more than 35,000 children in Hungary living with disabilities. According to statistics, the number of children with special educational needs continues to rise, yet deficiencies in the educational system have kept them segregated.

²² Institutionalisation of children can take place in different settings. The CPA provides two special types of residential services for children separated from their parents: there are special children’s homes for children with intellectual disabilities, children with long-term illnesses and children under the age of three (“*children with particular needs*”), while there are separate children’s homes for children with psychosocial disabilities (“*children with special needs*”). “Dual needs” means the mixed variants of these needs.

²³ Case Reports AJB-704/2016 on OPCAT, Visit to the Zita Special Children's Home of the Somogy County Child Protection Directorate, p 12-13, Case Report AJB-705/2016 on OPCAT Visit to the Special Children's Home of the Károlyi István Children's Center, p 17, Case Report AJB-1603/2016 on the OPCAT visit to Cseppkő Gyermekotthon).

25, 26, 27, and 28²⁴ and in the frame of the OPCAT NPM, examined CRPD Articles: 6, 7, 9, 14, 15, 19, and 24.²⁵ These reports showed the CFR's commitment to the issues related to rights of persons with disabilities, and the obligations derived from the OPCAT mechanisms "supports" the Commissioner to maintain these issues on the agenda and to give voices to these vulnerable groups of children (and their families).

LGBTQI Children And Young People

However it is not on the mainstream agenda of any of the Commissioners, in 2015, the office organized a workshop about the situation of intersex children. The Ombudsman also had to deal with cases (case report AJB-883/2016) pertaining to the regulation on reassignment one's gender and name for individuals who are younger than the age of 18, based on submitted complaints (in two cases, complaints were submitted by 17-year-olds). Prior to 2020, transgender people had the opportunity to reassign legally their gender and name, but there was no proper comprehensive legal regulation concerning the entire procedure. For example the role of the Ministry of Human Resources in the procedure was to examine the diagnosis related to gender reassignment. However, the rules for this expert opinion had not been developed, there was no uniform practice as to who should obtain the expert opinion, in what form and with what exact content. Lack of awareness of the procedural conditions, a significant number of shortcomings due to ad hoc practices, lengthy procedures could cause unnecessary uncertainty for the parties concerned. According to the CFR's report, this situation was worrying, and the basic guarantees of a fair procedure could not prevail. Since then, the law has been amended to ban their legal recognition (Walker, 2020), and the Government adopted several anti-LGBTQI laws in 2020-2021 (Euronews, 2020, Petrequin & Cook & Spike 2021, Kovács, 2021, Euronews, 2021). The latest amendment of the Fundamental Law contains also problematic provisions regarding which NGOs, experts have expressed their serious concerns (Child Rights NGO Coalition, 2020). Pursuant to the ninth amendment, Article XVI of the Fundamental Law the following is added to Art. 1. (1): "Hungary protects the right of children to self-identity according to their gender of birth and ensures education in accordance with the values based on Hungary's constitutional identity and Christian culture." It clearly narrows the scope of the constitutional protection of the full identity of the child. The Ombudsman, however, has yet to issue a statement and he's been criticized by NGOs about his silence related to these discriminatory laws (Amnesty Hungary, 2021).

Migrant, Refugee And Asylum-Seeking Children

As part of the OPCAT NPM (and even prior to 2015), the Ombudsman visited settlement sites for children with migrant backgrounds. There were some reports carried out on the situation of

²⁴ Case reports related to children living with disabilities and Art. 7. of the CRPD: AJB-5257/2014., AJB-1380-2014., AJB-1384-2014., AJB-1782-2016, as well as reports related to Art. 24 of CRPD: AJB-150/2016., AJB-2990/2012., AJB 263-2017.

²⁵ OPCAT NPM reports related to children living with disabilities: AJB-373/2015., AJB-1603/2016., AJB 3341/2016.

unaccompanied minors (UAMs) in 2014-2015, based on on-site investigations at the children's home, where also UAMs can be settled, concerning practice of age-assessment (Haraszti, 2014, pp. 7-21). Since then, and parallel with rising political tensions related to the issue of migration, during the 2015 migration wave towards Europe, Hungary was a transit-, rather than a target-country for migrants fleeing from North Africa and the Middle East to Europe (IOM, 2015, BBC 2016). The government launched a strong anti-migration communication campaign in 2015, which was also a point of conflict with the European Commission (Goździak, 2019). The Ombudsman has fallen fully silent on these matters. Yet, international bodies, such as the Council of Europe (CoE), have raised serious concerns related to Hungarian practices that affect migrant children. During a three-day visit to Hungary, CoE child rights experts evaluated the risk of sexual abuse and exploitation faced by migrant children in transit zones between Serbia and Hungary. In their 2018 report, they concluded that the Hungarian authorities have failed to implement appropriate measures to protect minors. The CoE representatives met with the CFR (Council of Europe, 2017), who has not yet spoken publicly on this issue. Later, the Court of the European Union also harshly criticized the lack of protective measures for migrant children in transit zones in Hungary (Court of the European Union, 2020), but the CFR has yet to issue any statement or opinion.

Children Living In State Care

Traditionally, the Ombudsman has maintained a strong focus on cases concerning children living in child care (where receiving a complaint from a child is very exceptional). He dedicated the annual children's rights project to children in care in 2010. Due to latency and the limited number of submitted complaints, as well as the specifics of the institutions involved, ex officio, on-site inspections have been carried out yearly, typically as unannounced on-site inspections. The DEOCR also assists OPCAT NPM in its investigations of care institutions.²⁶ In 2020, the Ombudsman examined a state children's home where 51% of the children in state out-of-home care were removed from their families mainly or solely due to the poor living conditions and financial hardships of their parents (which is forbidden by law based on CPA). This landmark report and also some other findings of his reports related to children living in state care became reference also in international monitoring (The Child Rights NGO Coalition, 2019 and 2021).

Children in Detention

Due to the strict limits of the CFR Act,²⁷ substantive investigations into cases related to justice are rare. In 2012, the ombudsman dedicated its annual project to child-friendly justice (AJBH, 2012), based on the CoE's Guidelines on Child-friendly Justice (Council of Europe, 2010). This means that

²⁶ Recent case reports on the examination of the operation of the EMMI Kalocsa Children's Home (AJB-130/2016.), on the examination of the operation of the EMMI Children's Home in Zalaegerszeg (AJB-159/2017, AJB-299/2019), on the examination of the operation of special housing homes and member schools in Tornanádaska (AJB-309/2019), and on the operation of the Kossuth Lajos Children's Home Center (AJB-2875/2020).

²⁷ Section 18 of the CFR Act states that the Commissioner may not conduct inquiries into the activities of the courts or the prosecution service.

he carried out during the year comprehensive ex officio investigations related to juvenile justice, organized two workshops and also an international conference with speakers from the CoE, the European Commission and high level Hungarian stakeholders. These events and the reports published increased the attention towards the cases of children and young people in conflict with justice.

From 2020, an independent unit was set up to handle complaints concerning police procedures, especially in cases involving juveniles. The DEOCR is involved in such cases. In this regard, the tasks of the OPCAT NPM include unannounced inspections of places of detention, such as detention centers for juveniles and correctional institutions regularly classified as child protection institutions, specifically to monitor the conditions of placement. In 2020, the CFR visited 72 places of detention (AJBH, 2020b), however there wasn't any publicity generated by the office of the commissioner to amplify the findings of these visits, so it is a question how efficient could these visits be without any external visibility.

CONCLUSIONS

The performance of a public institution such as the CFR is clearly affected by public and political attitudes towards children and children's rights. Still, impacts of CFR's influence are shaped by the resilience of the institution. For example, the annual reports of the Commissioner, who was labeled as "hyperactive" or "awakening", were not discussed by the Parliament between 2009 and 2015, as part of the political game: a (political) response given to the Commissioner's statements critical of the governing party at the time. Moreover his mandate was not renewed (however, none of the Commissioners has been re-elected). It should also be mentioned that there is no open call or application procedure for candidates; they are nominated to the Parliament by the President,²⁸ which can be seen as an element to be challenged in the future in order to improve the institution's independence and effectiveness.

After examining particularly the last three Hungarian CFRs' performances through the lens of the UNCRC guiding principles, it appears that the CFR performed quite well in the field of the right to life and development - as part of the right to protection and care - and in the field of the best interests of the child, considering the number of reports of ex officio investigations, mostly which the CFR is obliged to carry out in his OPCAT NPM role.

The number of complaints related to children's rights remained stable (quite low), and the number of complaints submitted by children are almost non-existent. This dilemma may be remedied by establishing an easily accessible, child-friendly complaint submission process (e.g., website), which would improve the visibility of the complaint mechanisms and the solutions of practicing the rights of remedy.

²⁸ In Hungary, the current governing right-wing party, FIDESZ, has held a two-thirds majority since 2010, so all public positions (including the commissioners), are proposed by the FIDESZ-nominated president, János Áder, and elected by the overwhelming majority. The current ombudsman, Dr. Ákos Kozma, has served not only in various ministerial positions during the first FIDESZ government, but also previously acted as legal cabinet chief of PM Viktor Orbán. Before his appointment, 35 NGOs and previous ombudsmen requested that President Áder nominate a candidate only after a public open call, without any result.

The CFR's level of proactivity in general and in initiating petitions to the Constitutional Court and conducting ex officio investigations in particular has clearly dropped since 2013. Yet, public attention paid to and visibility of the Commissioner is closely interlinked with the activities he performs, and about which he actively informs the public.

Additionally, according to CFR resources, to a different extent and intensity, the Commissioner played a role in the direct dissemination of children's rights. Yet, without sustainability or the meaningful participation of children, this cannot really be seen as a success from the perspective of young people, as their voices are not showed up due to the lack of the complaints submitted by themselves and because there is no platform for them shaping the agenda and influencing the decision-making process of the Commissioner.

Concerning vulnerable groups, the level of proactivity and visibility of protection in the field — where the state traditionally has clear obligations to provide care and services, such as children living with disability and children in state care, has not decreased. But when dealing with a politically contentious issue, including migrant children and families, LGBTQI young people and families, or even Roma children, the CFR tends to act more cautiously, and in some cases seems to be censoring itself completely, in contradiction to the requirements of its constitutional role. This 'reserved' or even fully 'silent' attitude especially since 2013 (and even more since 2019) is not only a point to be criticized from a human rights defender perspective, but it is clearly a cause of the proposal of GANHRI experts to downgrade the CFR as an NHRI with 'B' status in 2021.

While the Deputy for Nationalities has, on occasion, tried to implement some child participation activities by contributing to such NGO events, systemically, such efforts were not institutionalized by either the CFR nor by the Deputy for National Minorities. Child participation remained sporadic and mostly initiated by other external partners.

I firmly believe that the legislator has missed an important opportunity as neither a separate specialized ombudsman nor a deputy for children's rights has been established thus far in decades. In the current system, the focus and the visibility of children's issues can be easily overshadowed. Moreover the staff is heavily overburdened and needs adequate human, technical and financial resources to implement and monitor the application of the UNCRC, which was also noted by the CRC Committee in its latest concluding observations (CRC Committee, 2020). The pressures of the current political environment amplify, if not encourage, the reserved attitude of the Commissioner and makes his voice quite silent at all.

In my opinion, the CFR, whether as a separate or an integrated office should be more than just an office. The CFR guided by the UNCRC should be a real, visible mouthpiece fulfilling its mandate by tirelessly amplifying the voices of children and resisting external, political pressures. The Commissioner must not allow the surrounding legislative and political elite to distract from the problems, needs and demands of today's children. The CFR should do all within its powers to actively contribute to the future formation of society. This goal can be better reached via a distinctive, independent institution, or at the very least, in the form of a specialized deputy, in order to be loud, visible and intense. Even the hardest work can remain in the shadow of an office desk, if the Commissioner, as a "face" of the institution does not show up with the results of his findings

regularly in the media and does not use all his soft law tools and practices beyond the minimum legal obligations. As the GANHRI SCA also noted in its latest report, it is critically important to ensure the formalization of a clear, transparent and participatory selection and appointment process of the Commissioner, which the independence of, and public confidence in can be ensured.

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