

WHAT ROLES DO THE HUNGARIAN HUMAN RIGHTS NGOS HAVE IN THE PUBLIC PARTICIPATION IN GOVERNANCE?

EDIT VIGH

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Abstract in original language

Az előadásom témája a civil szektornak egy sajátos szegmensét, a jogvédelemmel foglalkozó civil kezdeményezéseket érinti. A civil jogvédő szervezeteknek az a feladatuk, hogy a jogrendszerben jelenlévő problémákra felhívják a figyelmet, beindítsák a jogrendszer korrigáló mechanizmusait, illetve közvetítsék, ismertessék az azokból levonható következtéseket.

A civil szervezetek alapszabályai és az aktivista jogászokkal készített félig strukturált interjúk alapján világosan látszik, hogy három fő tevékenységi körre tudjuk bontani a szervezetek munkáját: jogi reformtevékenység; kommunikációs és köznevelő funkció (például nyilvánossággal kapcsolatos tevékenységek, előadások, honlap); jogsegélyszolgálat és stratégiai pereskedés. Az előadásomban elsősorban a jogi reformtevékenységgel foglalkozom, különös tekintettel a jogszabályalkotásban való társadalmi részvétellel. Célom, hogy felhívjam a figyelmet a szabályozási anomáliákra, és a gyakorlati problémákra. Arra keresem a választ, hogy a hatályos szabályozás alapján lehetséges-e valós párbeszéd, diskurzus kialakulása a civilek és az állam között.

Key words in original language

jogvédő szervezetek, jogi reform tevékenység, társadalmi részvétel a jogalkotásban

Abstract

In my presentation I am concerned with the activities of Hungarian human rights NGOs and my aim is to find answer to the questions by what means, in what way can these organizations perform their mission, how they could succeed. These organizations have three main groups of activities: legal reform activities, communication and public education activities and legal advice services and strategic litigation. I will discuss these areas separately - with especial regard to the public participation in the act making process - to call attention to certain anomalies of the regulation.

In Hungary a new act has had reference to the public participation in the act writing process since January 1, 2011. I will consider to the weakest parts of this act, which can be criticized.

Key words

human rights NGOs, legal reform activities, public participation in the act making process.

INTRODUCTION

In my study I am concerned with a specific segment of the civil sector, the civil initiations handle with legal protection.

The task of the civil organizations for the defense of rights is to call attention to the problems of the legal system, to get correcting mechanisms of legal system going, or rather to transmit and expound the conclusions drawn from those.¹

The main aim of my presentation is to find answer to the questions by what means, in what way can these organizations perform their mission, how they could succeed.

ABOUT NGOS FOR DEFENSE OF RIGHTS AND CIVIL DEFENDERS OF RIGHTS

First I would like to talk about civil organizations for the defense of rights and civil defenders of rights.

We can distinguish between organizations providing nature (for example educational, health and social organizations belong here) and organizations for the protection of values and interests (for example religious, environmental protection and human rights organizations).² Civil organizations for the defense of rights can be included essentially in the second class.

The activities of civil defenders of rights can be found in those areas where „there is some kind of problem with the legal system”, whether in the area of legislation, either in justice or law enforcement areas.

Numerous expressions for lawyers who take part in this defense sector, and also their activities can be found in literature. For instance "lawyering for the good", "social justice" lawyering, "activist" lawyering, equal justice lawyering, "radical" lawyering, lawyering for social change,"critical" lawyering, "alternative" lawyering, political lawyering. These expressions can be used as synonyms. And these are only generic definitions, as distinguished from the "cause-specific" labels of civil rights, poverty, legal

¹ Csernus Eszter - Földes Ádám: Adatvédelem és információharc két fronton, in Sólyom László (et al.): Tízéves az Adatvédelmi Biztos Irodája, Budapest, 2006. 138. p.

² Lester M. Salamon - S. Wojciech Sokolowski - Regina List: A civil társadalom „világnézetben”. Civitas Egyesület, Budapest, 2003. 18. p.

aid, environmental, labor, death penalty, feminist, disability, and defense lawyering.”³

Máté Szabó has made a similar classification in relation to the post-socialist states. Civil organizations can be found in the following areas:

1. “Women’s rights
2. Minority, ethnic, sexual, disability, patients’, and drug addicts’ rights
3. Rights of those who do not have full civic status, as the rights of people asked for asylum, or rights of illegal migrants, stateless persons, refugees.
4. Protection of those who have “injured” civic status since they are held in totalitarian institutes such as prisons, the military, who are restrained or subjected to forced medication.”⁴

Of course the content of each area is highly complex. For example, the defense of patients’ right may include the patient’s informed consent for treatment, the issue of home birth and the rights of HIV patients. Furthermore, abortion and euthanasia may also be included here.

In connection with the aforementioned list, some important amplifications should be made. The given political and social climate affects on which areas these organizations act, therefore, the aforementioned list should be amplified with rights belonging to the classic civic and political rights, which are consequently primarily those of the freedom of assembly and the freedom of speech.

In the course of investigating the action area, the following question arises: are there still ‘white spots’, areas where de facto active civil organizations for the defense of rights cannot be found? On the basis of conversations with civil defenders of rights, there are three areas of this kind: defense of women’s rights, age discrimination and children’s rights.

Here I would like to refer briefly to the literature concerning the civil society that are calling attention to the notion that although we are saying that the civil sector has developed in the last twenty years, its roots run back to a previous time. In the 19th century in Hungary, civil, voluntary organizations, foundations could be found which fulfilled different social demands. In the state-socialist period only corporations officially approved

³ Menkel-Meadow, Carria: The Causes of Cause Lawyering. Toward an Understanding of the Motivation and Commitment of Social Justice Lawyers, in Sarat, Austin – Scheingold, Stuart (eds): *Cause Lawyering. Political Commitment and Professional Responsibilities*. Oxford University Press, 1998. 33 p-; Pokol, Béla: A perlési politizálás dilemmái. *Jogelméleti Szemle* 2000/4.

⁴ Szabó Máté: A társadalmi mozgalmak és politikai tiltakozás. *Rejtjel Politológia Könyvek* 5. Rejtjel Kiadó, Budapest, 2001. 274. p.

by the system could operate, they were financed by public funds and they were closely attached to the party organizations. "In East-Central Europe a lot of people resisted these structures enforced on them. The passivists and the openly dissident worked within the frame of the officially approved organizations (e.g. environmental protection clubs, scouting movements, literary societies), or they established illegal underground organizations for the sake of preserving some form of the cultural, intellectual or political autonomy and integrity." The conception of the civil defense of rights, the importance of the human rights as values should be found at the so called democratic opposition, particularly at the Independent Legal Defense Service. Therefore, it can be said that the civil defense of rights in some kind of form existed in Hungary also prior to the political transformation, it had its roots, moreover, subsequently several person was also transferred to the forming, by that time legal civil sector⁵. Rights defense organizations could emerge from the catacombs and could hereby perform their work more effectively, using their publicity and their audience as a legitimizing force.⁶ The activities of civil organizations were influenced by the Regime-changing, since this change had generated/ brought forth special problems, for instance the issue of compensation, or the issue of retroactive effect.

I would like to make briefly two important clarifications. The first amplification is that in Hungary, the civil sector was roughly developed in the nineties; however a profile purifying process which was carried out has never been finished completely. The transformation of the profile may have several causes:

1. a new social problem appears, which needs the activity of the organizations
2. a competing organization appears on the scene, therefore one of them has to modify its profile
3. the protected group may be altered too. Organizations are always searching for new directions where they can obtain innovation potential.
4. the potential access of competition sources may affect the changing in the profile of the initiation.

The second remark is that if we would like to talk about that human rights watchdog NGOs have an important role in Hungary, we have to make research about lawyers how take part in this sector. The aim of this kind of researches is to find answer to the following questions. Could it be states

⁵ See: Siegel, Daniel –Yancey, Jenny: *A civil társadalom újjászületése. A nonprofit szektor Kelet-Közép-Európában és a nyugati segítségnyújtás szerepe*, RBF, New York, 1992. (Múzsák nyomda, Budapest) 19. p

⁶ Máté Szabó dealt with the professionalization of the civil organizations in several studies. See Szabó, Máté: *A katakombákból a professzionalizmus felé. Fundamentum*, 1997/2. 124-127.; Szabó, Máté: *A társadalmi mozgalmak és politikai tiltakozás*. Rejtjel Politológia Könyvek 5. Rejtjel Kiadó, Budapest, 2001.

that in the last 20 years the work of civil defense of rights has become a separate profession, within that it has become an independent legal profession which is separated from other existing professions because of its particular function and performed activity⁷. How can civil defenders of rights be placed within the structure of the legal profession⁸.

LEGAL REFORMS ACTIVITIES

Before concentrating to answer the question mentioned in the title of my presentation, I would like to make a short detour to investigate the groups of activities and tools of the organizations for the defense of rights in generally.

It is worth to highlight when we analyse the tools of an initiation it is important to know how human rights NGOs consider themselves, since their self-identity is determined by the two following roles: the role of defender and the role of improving the law. And I am of the opinion that these have an impact on their strategy, on selection of their tools.

The following areas of activities have been distinguished in the research of Máté Szabó, which was published in 1997:

1. propaganda, education, information, PR, media
2. monitoring, documentation of the infringement, initiation of legal and institutional reforms
3. legal aid services, networking, community building, and charity work
4. organizing protesting action (legal, political, media)
5. joining in international network (streaming of financial sources and information).

I have made a similar classification like the aforementioned list, so on the basis of the fundamental rules of the organizations and the interviews with activist lawyers⁹ it can be clearly seen that three main groups of activities can be distinguished: legal reform activities, communication and public education¹⁰ (for example activities connected with public relations, i.e.

⁷ Vigh, Edit: Definition of the Civil Defense of Right as a Profession. *De iurisprudencia et iure publico*, 2011/1. 218-225. p.

⁸ Vigh, Edit: Recommendations for Emplacing Activist Lawyers in the Legal Profession. *Jogelméleti Szemle*, 2011/1.

⁹ I have visited eleven relevant – acknowledged by the profession – Hungarian organizations for defense of rights where I made semi-structured interviews with altogether 20 lawyers.

¹⁰ This part of the work of the NGOs' is connected to the public, non-profit organizations employ a wide range of strategies to educate the general public on the basic human rights and freedoms and on the critical civil liberties and environmental issues facing our state, our nation.

To achieve this goal, they have a lot of tools and strategies: organize educational and informative activities, organize professional forums, conferences, edit books and other publications (e.g. policy papers), public appearances: media, homepage etc.

publicity, lectures, home page) and legal advice services and strategic litigation¹¹.

On the basis of the statutes of NGOs, it can be stated that the work of the organizations itself is complex. It should be seen too that these three activities cannot be separated from each other because if they would like to achieve results they should handle with all of them, one in itself is not enough.

Legal reform activities include those activities, actions, which aim is to put pressure on the decision makers, who have legislative power in the affected areas (to the legislation, to the ministries e.g.). Their aims are to accept or to follow right statutory trends, which are corresponded with the views, the principles represented by the non-governmental organizations.

It can be stated, that between the parliament and the civil sector there are several kind of forms of the dialogue: public hearing and debates, motions, workshops, organizing open days, participation in the preparation of legislation and contribution to relate parliamentary debates.

In the recent years the media using habits of the NGOs have been extremely changed: they have started to use the media knowingly to achieve their aims, since "If we are well-known, we could put pressure". Let me point out that since the internet became ordinary and world-wide, NGOs prefer this kind of commutation to the printed media, because it is cheaper than that.

I would like to refer briefly to that, that human rights NGOs emphasize the importance to raise the acknowledgment of law and the sense of law. They think it is a big problem that the citizens do not know what are their rights and also do not know what they can do if they become victims of an infringement. It is an important task of the NGOs to edit brochures, publications, handouts, which can clearly explain the basic rules; and they usually go to schools to keep informative lessons etc.

¹¹ The third main activity of the human rights non-profit organizations is to maintain and operate legal aid services, which can be divided into three parts: legal counselling, farming/editing of documentary and legal representation. They aim to correct the wrong application of statutory provisions, and with this (hereby) they could contribute to improve the law.

I would like to refer to that litigation is not always the solution. "The litigation is always the ultima ratio."- said one of the lawyers. On the basis of Lynn C. Jones's research we can establish that it is a fact that activist lawyers always have another think over to take someone to the court (start legal proceedings). For them it is not important "to win a case", the aim of the movement is on the first place. At the same time it is important to know when the lawsuit is the only solution.

PUBLIC PARTICIPATION IN THE ACT MAKING PROCESS

In Hungary there is a legal channel/medium between the NGOs and the governance on the basis of the Constitution. This question is settled by two recent acts (of Parliament): the act CXXX of 2010 on the legislation and the act CXXXI of 2010 on the public participation in the act writing process.

The concerning paragraph of the legislation act:

19 § (2) The preparer of the statutory instrument, according to the act on the public participation in the act writing process, ensures that the bill becomes recognizable and commentable.

As already mentioned above, a new act has had reference to the public participation in the act making process¹² since January 1, 2011.

Let me point out that this act distinguishes between two types of public consultation:

- a) common consultation: consultation by means through the visibility which is given on the home-page
- b) direct consultation: this means a direct opinion process, between the minister (who is responsible for the specific bill) and by individuals, institutions and organizations initiated by him into this consultation.

At first hearing all this may refer to an ideal, a proper state/condition, nevertheless the circumstances are not so simple. We have to consider this as the weakest parts of this act, which can be criticized¹³.

I submit the following main problems regarding the act:

- The effect of this act is overly limited, since it regards merely the bill which has been made by the government offices. Thus it does not regard the bills, which have been made by the committees of the Parliament or the members of the Parliament, the President of the Republic¹⁴. Although many of the bills have been introduced by the government, and this rate goes for the completed bills too. But if we analyze the statistical data for the forms parliamentary term, we find 115 completed bills which have not been introduced by ministries. So

¹² Basically this act lifted over some parts of the former statutory instrument (the act of XC of 2005 on electronic freedom of information), and amplifies with several up-to-date safeguard rules such as the direct participation/consultation, the possibility to remark the problems of the enforcement of the rule.

¹³ In this part of my study I had two starting-points: the act on public participation in the act making process and the opinion of the Hungarian Civil Liberties Union about this act. See it in more details: http://tasz.hu/files/tasz/imce/2011/tasz_allaspont.pdf

¹⁴ The bills which have been made by the President of the Republic are very rare. We know only about three this kind of bills.

it can be stated the 20 per cent of the rules have been made by the committees of the Parliament and the members of the Parliament¹⁵.

- The act allows exception to the consultation in several cases. And the range of the exceptions is wide, and we cannot find any guarantees. We could divide this question into two main groups.

On the one hand we can read in the act the issues which are exceptions to the consultation, these are issues which could jeopardize the defense of the Hungarian Republic. Particularly there are important interests in the areas of national defense, national security, financial, foreign affairs, natural's defense, environmental or heritage defense, respectively. The problems with this are the following. 1. The interests of national security, financial, foreign affairs as exceptions: according to the Hungarian law the completed bills are data of public interest. The act about data defense allows the restriction of the public, but only with the definition of the types of data. But this act does not contain all these. 2. The interest of natural's defense, environmental or heritage defense as exception: these arguments are not incorporated in the act of data defense. Moreover it is contradictory to article 6 of the Aarhus Convention: The public concerned shall be informed, either by public notice or individually as appropriate, early in an environmental decision-making procedure, and in an adequate, timely and effective manner.

On the other hand it is not obligatory to present the bill to public participation procedure, if the urgent passing of that bill is preferential data of public interest: the formulation of the preferential data of public interest is too wide, since it opens the door to a possible wide discretion. And all this could make the whole public consultation to paper law.

- The tenth article of the law does not contain any safeguards regarding to minimum time limit of the consultation.
- We can draw up another anxiety, because the competent minister is responsible for the adherence of the public participation procedure: this is a so called "lex imperfecta", since the law does not contain any sanction for the neglection of this obligation.
- I would like to refer back to the part of my presentation where I wrote about the types of consultations. I mentioned that one kind of consultations is the direct opinion expressing process between the

¹⁵ See more data and details on the following website:
http://www.mkogy.hu/fotitkar/tvalk/20_beny_tvjav.htm

competent minister and others, including the NGOs. An essential problem with this method is that the ministers have the right to choose the NGOs, which enter into a relation with. Accordingly we cannot find any safeguard, which can prevent the arbitrariness of this sorting.

- The last problem is in connection with the common consultation. According to the law there is no possibility to compel the minister to response separately. It is not known which suggestions have been implemented. An efficient consultation cannot arise between the NGOs and the governance.

These statements have been confirmed by the interviews with activist lawyers. In generally it can be told that most civil defenders of rights are of the opinion that the method of public participation in the governance is not suitable. *“We spend plenty of time with this, however I consider that there are no benefits.”*- said one of the activist lawyers.

Another interviewee, who has been working in this sector for more than ten years, composed the following: *“The Legislator leaves the opinions of the NGOs out of consideration, this process is only the surrogate of the democracy. So the governance has already learnt this etiquette, including that it is not allowed to keep offending the civil sector. They really know all that. But they do not know how they can integrate these views; how to establish a true process of the conflict of opinions.”*

Several of the interviewees referred to the importance of the informal connections. They consider that this connection could be more effective in several times than the formal way of the participation.

I do not agree with those opinions that civil initiations could be characterized by a certain kind of philanthropist amateurism, so civil organizations for the defense of rights do not possess a high qualified professional apparatus for the bill making process. The lawyers whom I had semi-structured interview with, are all experts at their special fields. They have a thorough knowledge not only of the national practice of law, the national literature but of the foreign literature, trends, and new methods of legal institution as well.

That is why I consider that the aforementioned act is only a symbolic rule. I have to underline again, that this act is a recent act, up to the present facts about its practice, its realization are not known. So we cannot predict the future.

Here I would like to refer briefly to some other tools of legal reform activity. According to the act about the Constitutional Court of the Republic of Hungary, NGOs are able to appeal to the Court on the basis of action of

public interest human rights. Organizations of civil defense of rights are also able to turn to the parliamentary commissioners, or human rights courts.

SUMMARY

In my study I have discussed the civil sector specialized to the defense of rights. I have distinguished three main groups of activities: legal reform activity; functions of communication and public education; legal advice service and strategic litigation. I have discussed the legal reform activities with a special regard to the public participation in the act making process. I have called attention to certain anomalies of the regulation. I do not repeat the abovementioned details I would like only to refer to the fact that there are many problems with the act of public participation. Thus there is no real public consultation, so human rights NGOs can not influence the civil control over the state effectively and successfully in this area. However it would be very important, since the whole civil sector plays a significant role in the development of an efficiently working democracy.

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