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CONVERGENCE AND DIVERGENCE

The practical implementation of the principle of participation in the
national implementation of the UN Convention on the Rights of
Persons with Disabilities

theses of the doctoral dissertation

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I. Introduction

The adoption of the UN Convention on the Rights of Persons with Disabilities (hereinafter: Convention) in 2006 brought about innovations which, together with related social and human rights processes, made it appear that the document could contribute significantly to a fundamental change in the place and role of people with disabilities in society. This is, of course, a very complex issue which can be examined from many angles, but the fundamental question of the extent to which these changes are driven by disabled people themselves is a key one.

The Convention became a paradigm shift, among other things, by identifying disability not with physical or mental impairment, or lack of certain abilities, but with the inability to participate actively in society on an equal basis with others. It is therefore of particular importance to examine how this principle of participation is applied in the implementation of the Convention itself at national level. The forthcoming approaching 20th anniversary of the Convention's adoption provides a good opportunity to review the origins and evolution of the participatory approach of the Convention, how the norm that has been incorporated into the existing text can be interpreted, and what trends and dynamics can be observed in the evolution of participatory approaches and practices in the UN and in the States Parties over the last two decades.

The almost two decades since the Convention was born have been a rich experience for all of us, and the documents produced at international and national level provide a very valuable research base for examining how participation is changing in terms of the expectations and criteria set by the UN and the practice of States Parties.

In the Hungarian context, however, the study of this topic is particularly topical. On the one hand, Hungary played a role in the creation of the Convention, its rapid and widespread ratification, and even in the shaping of the UN's international practice in this field. As a result, the framework developed in Hungary is typically accompanied by a higher level of attention and expectation than that of the majority of States Parties. On the other hand, in 2023, Hungary has made very significant changes to the composition and functioning of the independent monitoring mechanism at national level. The analysis of the new concept and the assessment of the first period of the new mechanism can provide important contributions not only from a domestic perspective but also as a valuable case study for the analysis of the processes outlined above.

Based on all this, the aim of our research is not to analyse the characteristics of a specific moment in time, but rather to identify processes and trends. The aim is to support a dynamic curve of current international and national practices in the field of participation of people with disabilities, which will help the professional community to formulate realistic but ambitious proposals for future development based on this curve and on the experience of the past. The ultimate aim is to strengthen the real and meaningful participation of people with disabilities in society, which we believe will enrich and develop our societies as a whole.

II. Structure of the thesis, description of the research task

The structure of the thesis is based on the logic presented above. First, we present the paradigmatic and ideological background of the topic, clarifying the meaning of the concepts that are used recurrently, and recalling the relevant antecedents that have developed these concepts up to the present day. Next, we review and analyse the international human rights law antecedents of national implementation, control and participation, which also help to place the relevant elements of the Convention in a historical context. This will be followed by a presentation of the immediate antecedents of the Convention's creation, with the above-mentioned focus, and then a comprehensive analysis of the relevant existing text, including all the related documents that are indispensable for the interpretation or enforcement of these articles. Building on this, an analysis of the practice of individual States Parties, including Hungary in particular, and of the UN Committee on the Rights of Persons with Disabilities (hereinafter: the Committee) will be carried out, focusing on the participatory arrangements of the national independent mechanism, the perception of these arrangements and their evolution and development. Finally, based on the research findings, we summarise the experience of the period since the Convention was drafted from the perspective of the chosen topic, and make *de lege ferenda* recommendations to support the development of future practice.

In our research, we sought to answer the following questions:

1. How did participatory thinking develop before the Convention? What international human rights precedents did the Convention build on in the field of independence and participation? What did the text adopted in 2006 draw on and change?

2. How has the participatory approach manifested itself in the practice of States Parties? What tools did the Commission initially use to assess and monitor them? How did these tools serve to assess and evaluate the conformity of the Convention and related instruments with the set of requirements?
3. What trends have been observed in the last decade and a half in the use of participatory solutions and concepts in Europe and other participating States? What are the changes in the Commission's communication and expectations in this respect? How do these interact?
4. How does the development of Hungary's independent mechanism fit into these trends? How can the composition, scope and functioning of the Hungarian independent mechanism to be launched in 2023 be assessed in the light of the previous findings of the research?
5. On this basis, what trajectory for the future can be sketched in terms of both the participatory practices of States Parties and the Commission's expectations, conceptual framework, communication and other instruments?

Since the participation of persons with disabilities can be meaningfully achieved in the immediate vicinity of the events and processes that affect them, our research will always focus on the national level, including the function and functioning of the independent monitoring mechanism, with particular attention to the way and form in which persons with disabilities themselves participate.

Among the subfields and expected results of the research, the historical, comparative analysis of the participation solutions of the international legal instruments preceding the Convention and their typology can be considered a novelty of the thesis. This research should contribute to a clearer understanding of the international legal precedents on which the Convention's concept of participation was based, to a better understanding of the scale of the changes it brought about in this respect, and to a better understanding of the types of steps that could be taken in the future to further develop this arc.

Also unprecedented is the historical comparative analysis of how the approach of States Parties and the Commission to the participation of persons with disabilities in national implementation has evolved since ratification.

Finally, on the basis of publicly available literature, no systematic jurisprudential analysis of the Hungarian independent mechanism from 2023 onwards and its comparison with the relevant international legal instruments from the perspective of independence and participation has been carried out so far. On the one hand, this could provide input for the development of Hungarian practice, and on the other hand, as a well-documented case study, it is an important element in supporting the findings of the research at the international level.

As regards the methodological background of the research, it is important to note that the topic of the thesis can be considered as a borderline one, since the distinctive international legal approach is complemented by an aspect whose literature background is mainly provided by disability studies, sociology and special education, and there are also references to constitutional law and private law to a minimal extent. In order to overcome this, a kind of *interdisciplinary* approach is used to identify and bring together legal and meta-legal terminology, principles and perspectives.

The thesis is predominantly based on *desk research*, analysing international legal instruments, national legislation and publicly available related legal and literature sources.

The chronological logic of the thesis means that a *legal-historical* approach is recurrent, particularly in the exploration of the Convention's international legal antecedents.

At several points in the evaluation, it was considered relevant to compare different international instruments and national public law solutions, and *comparative* analyses were carried out.

III. Scientific results of the thesis

1. The international human rights antecedents of participation

Although the system of implementation of the Convention at national level can in many respects be regarded as a milestone, the beginning of something new, the legal-historical analysis presented in the thesis is not without precedent. The concept as we know it today is part of a trend that has been going on for decades, which has seen the concept of implementation, and

hence the nature of implementation at national level, unravel and then change. The most important stage in this process seems to have been the first to introduce obligations beyond the letter of the international treaty, the first to set expectations for the practical realisation of human rights, and thus to take implementation out of the legislative field. In my interpretation, this is when we can actually talk about implementation at national level, and when the system and function of monitoring begins to take on a new meaning, which is no longer a check on the compliance of written law with the text, but a complex examination of the systems that influence the actual implementation of rights.

As these rights in international legal instruments concern members of society as a whole or a specific group of members, this process has also led to the realisation that a meaningful assessment of the practical implementation of these rights cannot be imagined without the involvement of the people concerned. Thus began the development of the principle and practice of participation in the international legal instruments examined as a precedent. The development of participation has brought the persons concerned ever closer to becoming active players in the decisions which are the subject of the conventions concerned.

The involvement of those affected by the conventions has also brought with it an increasing focus on monitoring implementation at national level, since it is essentially at the national level that stakeholders can become active and have an impact, where decisions directly affecting them are taken. This has led to the need for national mechanisms to monitor and support the implementation practices of States Parties, in addition to monitoring at international level.

It was with this background that the Convention drafting body set out to create the first human rights convention of the millennium. From a review of the *travaux préparatoires*, it was clear that the implementation of the Convention should be supported not only by an international but also by a national implementation and monitoring system, and that persons with disabilities should play a key role in this. Moreover, it is clear that the intention of the drafters was not merely to continue the legacy of the past, but to make a significant improvement on the international legal solutions that had been in place until then in both respects.

Looking at the text in force, it is safe to say that this venture has been a success, as the Convention has become the first international legal treaty in the world to include a system of national enforcement as a mandatory element, rather than an optional element, and to do so in a complex, multi-level manner. Moreover, in general and in the context of implementation at national level, it is very broadly interpreted as a clear obligation for the active participation of

persons with disabilities in all legislative and policy processes that affect them. In this way, the Convention has not only introduced new instruments into the field of international law-making, but also a completely new paradigm in the field of human rights thinking.

The final text, which is still in force today, is a dual text. The text of the Convention as a whole opens up a very broad and active spectrum of interpretations of the functioning of the independent mechanism and the realisation of participation, which indirectly reveals the practical, dynamic and proactive nature of participation. However, in the majority of the more explicit and tangible elements of the text, it is not this, but rather the static characteristics of the mechanism, such as the legal and administrative set-up, the way it is created, designated and its legal status, that seem to be emphasised.

The scale of the change is illustrated by the fact that, while there was consensus on the principles of the Convention, there was little consensus on the concrete means of implementation. In the light of the experience of the decades that have followed the Convention's birth, and of the other findings of the study, this is a very important circumstance, which implied from the moment of its drafting that the practice developed jointly by the States Parties and the Commission would be of enormous importance in this respect.

2. The evolution of participatory practice over the last decade and a half

Trends in implementation at national level have been examined through the example of States Parties that have already produced two country reports and have had two face-to-face dialogues with the Commission. As these typically took place between 5 and 10 years, and the vast majority of the second dialogues took place in the last three years, the analysis of these dialogues has essentially revealed two waves, which shed light on the different participation solutions of States Parties and on the evolution of the Commission's practice in this respect.

The first wave of monitoring of the States Parties under review shows the characteristics of the initial period of a new international convention. In some of the States, there was no independent mechanism designated at that time, in some cases social or regulatory preparations were under way, and the documents examined may have been a reflection of the search for a place for the newly designated mechanisms.

In terms of participation, contingency and punctuality seem to be the main features of the first wave of participation by the States Parties. The initial country reports examined showed a wide variation in the description of the principles and implementation of participation, both in

terms of their mention and in terms of their depth; in this wave, there were hardly any descriptions of how participation works at the systemic level.

The research has revealed a number of trends in the Commission's initial practice. The Commission clearly thematised the issue of independent mechanisms in the first wave, and while it was not necessarily consistent in this, overall it can be said that it sought to give due weight to the independent mechanism in the first wave.

At the same time, the Commission's approach has clearly focused on the independence aspect, with a clear focus on the staffing of the mechanism, its organisational structure and its funding, typically in the context of compliance with the Paris Principles.

In addition, the dialogue between the Commission and the States Parties under review has emphasised the status of independent mechanisms as national human rights institutions. Although national human rights status alone does not guarantee full compliance with the Convention's requirements for independent mechanisms, the recurrent and prominent presence of this form of organisation may have contributed to some States Parties seeing it as a key to meeting the independent mechanism criteria.

Finally, it should be noted that the Commission's explicit expectation of participation was not very strong in the first wave. Where it did, it was more general and much less about the independent mechanism. The obvious importance of participation is indicated by the fact that the drafters of the Convention specifically emphasised this principle in the context of the national-level mechanism, but the Commission's initial practice, according to the research findings, did not follow this up, even in a reactive way.

According to the country reports examined, a twofold process was initiated by the States Parties between the two waves. Independent mechanisms have begun to emerge, their scope has been extended in some places and their funding has been somewhat stabilised, as a move towards the purpose and spirit of the Convention.

However, there is also an emergence of independent mechanisms and a separation between state, sectoral governance and policy. Based on the documents examined during the second wave period, it seems that the States Parties focused on the separation of personnel and organisation in the area of independence and on the provision of funding. Two factors may have contributed to this phenomenon: the Commission's very strong emphasis on static criteria for independence and their misinterpretation by States Parties.

This trend has implicitly implied a shift of at least part of the responsibility of the State Party for the substantive operation of the independent mechanism to the mechanism itself. This is both contrary to the original purpose of the institution of the independent mechanism and

incompatible with the nature of the Convention as a treaty under international law, since the States Parties are not the entities designated as the independent mechanism. Therefore, ensuring the existence, functioning and effectiveness of the independent mechanism remains the obligation of the State party, and the responsibility for this cannot be transferred to a party that is not a contracting party in the international legal sense.

In this context, the question of the responsibility of States Parties and the competence of the independent mechanism becomes a key issue. It is clear from the interpretation of the Convention as a whole that the responsibility of a State Party is not merely to establish and then, by invoking independence, 'push aside' an independent mechanism, but to work continuously and actively to ensure that its operation and findings have an impact on the development of legislation and policy. An important prerequisite for this is not simply to wait for possible signals from the mechanism, but to initiate and catalyse the processes that can lead to this impact, while leaving the scope of the mechanism broad, ensuring the material conditions for its effective functioning, and not influencing its composition and functioning.

It is probably in response to this trend that the Commission's current evolving practice seems to be increasingly moving away from static criteria towards dynamic criteria, in particular the need to ensure effective and meaningful participation, the need to regulate the processes involved, or the need to examine issues of actual operation. As part of this, the obligation to participate is becoming a more prominent requirement for the independent mechanism, which, although the Board is not yet consistent, is a process of enormous importance.

3. Hungary as a key case study

many respects, Hungary seems to fit into the trend outlined above, as the three main phases of the history of the independent mechanism in Hungary reflect the dynamics outlined in the previous chapters in several respects.

The changes in the composition and functioning of domestic entities - above all the National Council on Disability - are in line with the two-way process we have explored earlier in relation to the emphasis on the organisational and compositional aspects of independence. In the first stage, the close link with the government side raised independence concerns, but also provided a platform for CSOs to link with policy makers. Thereafter, the linkage with government started to diminish, the concrete way in which this was achieved did not address

the independence concerns in substance, but increased the distance of CSOs from policy makers. Thus, in the second phase, the basis for criticisms of independence did not disappear, while the body's scope for participation was not strengthened, but perhaps even narrowed.

Changes with a more significant impact brought about the third phase in the history of the domestic independent mechanism, the key moment of which was the appointment of the Commissioner for Fundamental Rights. This structural change took place after the last dialogue in our country, and so we do not know the Commission's position. At the same time, as we have shown, the Commission's practice to date is that it does not explicitly see the independence of entities such as the Hungarian one as a national human rights institution with B status as explicitly guaranteed by reference to B status itself, and it is therefore likely that the current situation is not a reassuring response to criticisms of independence.

In addition to the issue of independence, an important development in the third phase is an element not previously included in the scope of the mechanism: the possibility to launch investigations and draft reports in individual cases, a novel tool resulting from the national human rights institution status of . However, the analysis presented in the thesis shows that, in addition to the classic ombudsman functions, there are still no additional elements that would allow the independent mechanism to be more complex and proactive. The establishment of the independent mechanism in the office of the Commissioner for Fundamental Rights has not yet been accompanied by the dynamic elements that would provide both a direct, institutionalised platform through which the independent mechanism could influence policy-making without compromising its independence, and the legally regulated processes through which this influence could be achieved.

IV. Further development opportunities *de lege ferenda*

1. Observations on the current text of the Convention

The results presented in the thesis suggest that two points in the 2006 Convention text may raise the idea that the current form does not fully support the development of monitoring and participation schemes that have since evolved.

The current text of the Convention allows for both single-actor and multi-actor independent mechanisms. In our view, however, the complexity of the expectations placed on

independent mechanisms, which have been expanded to a large extent since the Convention was adopted, makes it extremely difficult for a single entity, however diverse its composition, to meet them in their entirety.

By assigning responsibility to several entities independent of each other, not just the government, the mechanism as a whole can become much more resilient; complementary, corrective, synergistic effects within the mechanism can be activated. This could also have the effect of significantly increasing the diversity of the voices of persons with disabilities that are channelled into the mechanism, and radically reducing its vulnerability.

A comparison of the current text with the Commission's practice, as presented in the thesis, also leads to another conclusion. While a combined analysis of the text as a whole reveals a model of an independent mechanism based on a systemic, proactive, process-oriented influence on legislation and policy-making, the terms used in the text of Article 33 tend to emphasise the way in which the mechanism is set up and its static nature. It cannot be argued that the two interpretations contradict each other, but it can be argued that Article 33 does not explicitly require States Parties to have institutionally established and systematically regulated participatory processes.

Against this background, it seems worth considering amending the text of the Convention on the independent mechanism, one element of which could be the creation of a multi-entity framework for the independent mechanism. As a related new element, the obligation to regulate the processes that affect the participatory functioning of the independent mechanism could be transformed into a legal obligation, building on the insights that have been clearly evident in the Commission's practice and on the practice of States Parties at national level.

2. Possible developments in the jurisprudence of States Parties

In view of the extreme heterogeneity of the legal, administrative, political and social organisation of the States Parties, it is of course difficult - almost impossible - to make uniform proposals regarding their jurisprudence, and we shall therefore focus on specific aspects in this respect.

The high level of legal backing for the staffing, organisational structure and financing of the independent mechanism will certainly strengthen its stability and independence, and maintaining or reinforcing these will remain a priority.

At the same time, these regulations must also include obligations on the State Party itself to describe the processes by which its governmental actors actively engage disabled people's organisations in a proactive manner - not just to enable them to do so.

3. Suggestions on the Commission's monitoring practice

Based on the practice identified through the dialogues examined, the combination of two aspects appears to be of paramount importance for the development of the jurisprudence of States Parties. These two aspects are consistency and the strengthening of the country-specific nature of the Commission's findings and recommendations resulting from the dialogues. It may seem that these two aspects may sometimes even be in conflict with each other, but we are convinced that a precise interpretation of consistency will necessarily avoid this.

Given that the participatory practice of implementation mechanisms is a key element of national implementation in both practical and paradigmatic terms, it should always be explicitly reflected in the dialogues with States Parties.

In addition, in order to catalyse the practice of States Parties, it would be beneficial to strengthen the country-specific nature of the recommendations. While noting that the Commission has constraints in this respect, a more tailored Commission response to the specificities of States Parties could have a meaningful impact.

The trend clearly demonstrated by the Commission to strengthen the participatory practice of independent mechanisms is very positive and its continuation and reinforcement is to be supported. The main feature of this trend is the emphasis on what the report calls dynamic criteria, among which the findings and proposals for regulating and institutionalising the processes are also prominent.

The provision of further methodological support by the Commission could have a significant impact on their concrete implementation in practice. The content of General Comment No 7, some of whose key elements are clearly reflected in the final conclusions of recent years, could serve as a basis for this. Building on this, the evaluation of some specific organisational models and the identification of further practical aspects could have a catalytic effect on the future development of practice at national level.

V. Publications on the subject of the thesis

1. Juhász Péter: Discussions on some aspects of shaping disability policy
In: Hernádi, Ilona (szerk.) PODIUM project Path of Deinstitutionalization Urgent Moves from a participatory aspect : an edited collection of studies on deinstitutionalisation in Serbia and Hungary
Budapest, Magyarország : ELTE Bárczi Gusztáv Gyógypedagógiai Kar (2018) 41 p. pp. 33-38. , 6 p.
2. Juhász Péter: A fogyatékoságügyi szakpolitikai modellek egyes dimenziói
In: Farkasné, Gönczi Rita; Gereben, Ferencné; Lénárt, Zoltán (szerk.) Rehabilitáció – életkorok, intézmények, szükségletek és lehetőségek a szolgáltatások hazai rendszerében : Tanulmánykötet a 47. Országos Szakmai Konferenciáról 2019. június 26-28.
Budapest, Magyarország : Magyar Gyógypedagógusok Egyesülete (MAGYE), ELTE Bárczi Gusztáv Gyógypedagógiai Kar (2019) 330 p. pp. 19-24. , 6 p.
3. Juhász Péter: Ember kontra személy – a fogyatékos személyek morális, társadalmi és jogi státuszának néhány aspektusa
In: Miskolczi, Bodnár Péter (szerk.) XVII. Jogász Doktoranduszok Országos Szakmai Találkozója
Budapest, Magyarország : Károli Gáspár Református Egyetem, Állam- és Jogtudományi Kar (2020) 323 p. pp. 95-102. , 8 p.
4. Juhász Péter: A fogyatékoságügyi ENSZ-Egyezmény 33. cikkének értelmezése a Bécsi Egyezmény tükrében
In: Erdős Csaba (szerk.) Doktori Műhelytanulmányok 2020
Győr, Magyarország: Széchenyi István Egyetem Állam- és Jogtudományi Doktori Iskola (2020), 99-112.