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THE SIGNIFICANCE OF FREEDOM OF INFORMATION IN THE FUNCTION OF RULE OF LAW IN HUNGARY

Freedom of information has numerous outstanding functions in the aspect of rule of law. On the one hand, the power of transparency is the most important barrier of the exercise of power without restrictions. On the other hand, it is important to highlight the functions of access and dissemination of public data in a democratic society, which is outstandingly important for the social and state functions in the interest of the creation and maintenance of trust between the state and its citizens. This report summarizes the role and significance of freedom of information covering the most important Hungarian rules.

The constitutional functions of freedom of information

One of the main achievements of the democratic change of regime was the acknowledgment of freedom of information on a constitutional level. During communism, the citizens were not allowed to control the exercise of power, the activity of the state, its organs or its representatives, nor were they allowed to have or express their opinions. However, after 1989, transparency became the general rule in the terms of decision making of the public authorities, the basic foundation of which is the right to access data of public interest and data public on grounds of public interest.

According to the Fundamental Law of Hungary, the source of public power shall be the people. The power shall be exercised by the people through elected representatives or, in exceptional cases, directly. During the assigned decision making of the public authorities, the state, the local governments and their organs act in their own scope of authority. However, the assignment of the decision making power does not mean that the right of the citizens to control the authority ceases. As the Constitutional Court stated in several of its decisions: *“One of the foundation stones of democracy is the transparent, straightforward and controllable functioning of the public authorities, state organs and executive power; it is the guarantee of a state based on the rule of law. Without the publicity test, the state becomes alienated from its citizens, its actions become unpredictable, unforeseeable, and dangerous, because the obscure functioning of the state is a real danger to the fundamental freedom rights.”*

There are internal control mechanisms that are essential and significant regarding the democratic functioning of the state. Among them there are the courts, investigating bodies, and bodies that supervise certain sectors. The form of supervision of the abovementioned organs are essential in preventing, retracing and sanctioning the abuse of power and crimes. Besides the above, the people, - as the source of power, - are also entitled to „external” control of certain proceedings. However, an external control like this can only be successful and effective if the citizens have the right to access the information needed.

Freedom of information therefore guarantees that the citizens can access all data – of public interest and public on grounds of public interest, - to judge the legality and efficiency of the actions of bodies with public service functions. Freedom of information lets the citizens peek into the decision making mechanisms, into the motivation of certain decisions and into the information underlying them. It is therefore easy to see that the right to access and disseminate data of public interest and data public on grounds of public interest is after all, one of the most important guarantees of democracy and of rule of law. As Louis Brandeis put it: *“the best cure for social and industrial dis-*

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eases is transparency. They say sunshine is the best antiseptic, and the most effective policeman is the electronic light”.¹

Freedom of information is very tightly attached to freedom of expression. It is reflected in the documents adopted by the United Nations, the European Council and the European Union. All these international instruments tend to name freedom of information as a part of freedom of expression. The two fundamental rights also have a special relation: the prevalence of the previous is most commonly a starting point of the exercise of the latter right.²

Freedom of opinion allows individuals to express themselves and to put their thoughts into shape.³ It also contributes to the development of a democratic society by guaranteeing the free unfolding of views and ideas. Finally, it guarantees that the citizens can express their opinions freely concerning the exercise of public power and public administration. Freedom of opinion „*is the precondition of the existence of an animated society having the potential to develop*” as the Constitutional Court stated in its Decision 30/1992. (V. 26.). The prevalence of this right has therefore apparent advantages on the level of the individuals as well as on the level of the society.

The role of freedom of information should also be highlighted concerning another named partial right of freedom of expression: the freedom of press. The historic roots of this relation go back to the civil revolutions era and the Europe of Enlightenment. It was then, when citizenry started to gain strength and rulers with absolute power started to decline, that the need to guarantee the access to information started to formulate.⁴ The first result of this progression was the Swedish Press Act of 1766. This Act, with its expressed goal to control the ruler's power, declared the citizens' right to consult official documents.

The freedom of press on the one hand provides the opportunity to the press to report on the events of our time and on the information of public interest important for the understanding of public power and politics. On the other hand, it formulates an expectation towards the press to inform in a balanced way to the citizens „*on the important events and controversial questions*” as the Hungarian Press Act words it. These tasks assume access to the adequate information and transfer through the appropriate channels. In the absence of freedom of information, the exercise of this right and the obligation of the press to authentically inform would be eliminated.

The social functions of freedom of information

The social function of freedom of information is mainly to maintain the citizens' trust in the actions of public authorities. The faith put in the system of democratic institutions is an indispensable element of a democratic society. This guarantees the political stability in governing.⁵ The lack of public confidence in the government „*puts democracy itself in danger; because in the short term it makes the system work dysfunctional, and in the long term it makes way for the decay of democracy.*”⁶ Rule of law without the confidence of the citizens is the essential characteristic of the authoritarian and dictatorial regimes. The government's stability can however only be seen as a value, if the democratic basic values fully prevail.

Freedom of information contributes to the maintenance of public confidence primarily through its constitutional functions presented above. On the one hand, the citizens become distrustful of authority in lack of information, which inevitably lead to the mistrust in state and local government organs. Distrusted citizens will find alternative ways to manage their businesses, which may lead to chaos in state functioning. On the other hand, trust strengthen the efficacy of the citizens' actions. „*Transparency is the most important element of representative democracy, because it motivates all the participants to seek for truth, justice and equity*”.⁷ In lack of trust there is not enough will to control the actions of the different organs, which lead to an unpredictable and unforeseeable decision making process of the public authorities.

Therefore, the constitutional and social functions of freedom of information are in close interaction with each other in the maintenance of the democratic rule of law and society. In lack of trust, this right cannot fill its outstanding role in the constitutional system. Without the latter, public confidence prevails even less in connection with the functioning of the state and local government organs.⁸ Thus it is easy to see that transparency and freedom of information are some of the most outstanding values in our modern democracy.

Request for disclosure, the object of the request, the requesting party and the fee chargeable

The transparency of the state and local government organs materialize in the publication of data relating to their operations and finances. Besides this, in the spirit of transparency, anyone has the possibility to request data of public interest and data public on grounds of public interest from these organs. The institution of such request presupposes interest from the citizens and commitment from the journalists in the local and public matters and in the democratic values.

The Hungarian terminology considers all information data of public interest - other than personal data, - controlled by the body or individual performing state or local government responsibilities, as well as other public tasks defined by legislation, concerning their activities, finances or generated in the course of performing their public tasks. For instance, it is public how much money a local government spends on road works, school maintenance or how much the mayor spends on new service cars each year.

Data of public interest shall be made available to anyone upon a request without proving a personal interest. The body with public service functions that has the data of public interest on record must comply with requests for public information at the earliest opportunity, as a general rule within not more than fifteen days.

According to the Act CXII of 2011 on the Right of Informational Self-Determination and on Freedom of Information (hereinafter referred to as: Info Act) any person or body attending to statutory State or municipal government functions or performing other public duties provided for by the relevant legislation (hereinafter referred to collec-

tively as “body with public service functions”) shall allow free access to the data of public interest and data public on grounds of public interest under its control to any person.

The purpose of the request

Generally, the request must be satisfied, the body with public service functions is not granted discretionary authority, exceptions under this main rule are very limited, and are set out in the Info Act and other laws. The requesting party does not need to prove a personal interest, therefore he/she does not need to declare the motivation and the object of the request.⁹ Accordingly, the object of the request is indifferent, the requesting party can have an interest in the data requested out of pure curiosity. Freedom of information is a fundamental right, access to the data of public interest and data public on grounds of public interest must be ensured irrespective of the reasons of access and dissemination. As the 32/1992 Decision of the Constitutional Court states „*it is not the citizen who need to prove his interest in obtaining the information, but it is the body with public service functions that need to justify the potential refusal of the request, besides certifying the legal reasons of it.*”

The requesting party: „any person”

The Fundamental Law of Hungary declares that „*everyone*” shall have the right to access and disseminate data of public interest. Corresponding with the Fundamental Law, the Hungarian Info Act uses the terms „*any person*” and „*anyone*”¹⁰, with which it often upsets the employees of the bodies with public service functions. The use of the general subject means that the Fundamental Law of Hungary does not make a distinction between the legal entities with regard to freedom of information. The requesting party can be a natural person, a legal entity, a company or organization without legal personality, a civil organization, but it can also be a group of friends, it is not required to be an organization registered by official records. The requesting party’s citizenship, country of origin, occupation, or status is also indifferent for the purposes of the request.

The European Court of Human Rights recognized in the case „*Társaság a Szabadságjogokért v. Hungary*, no. 37374/05, 14 April 2009.”, that legal entities, in this case a civil organization, have the right to submit a request to state authorities with no limitations. The Court reasserted this position later in several of its subsequent decisions.¹¹ Similar to the Court of Strasbourg, the Court of the European Union does not make a distinction between the requesting parties either, regarding the access to public information upon request. In the court practice there were several German businesses and an organization gathering foreign journalists based in Bruxelles that submitted requests legitimately.¹²

According to the Info Act, the body with public service functions that has the data of public interest on record is not obliged to comply with requests for public information if the requesting party does not provide his/her name, in case of a legal person its description, and contact details through which the requested dataset or any other information can be provided. However, the body with public service functions does not have the right to confirm the identity of the requesting party. It is prohibited to ask for the proof of one’s identity, namely to copy one’s personal documents, or to ask for a personal visit for the same reason.

In relation to the administrative segment of freedom of information cases, the body with public service functions must take into consideration the rules on personal data protection, because in certain cases, while fulfilling the request, it is inevitable to process the requesting party’s name, electronic or postal address, or name and bank account number, in case a fee is charged and needs to be paid.

Since personal data may be processed only for specified and explicit purposes, unless otherwise provided for by law, the processing of personal data of the requesting party, in connection with any disclosure upon request, is permitted only to the extent necessary for disclosure, for the examination of the request (if it is identical to that of submitted by the same requesting party within one year and with the same dataset), as well as for the collection of payment of charges needed for the disclosure.

The fee chargeable

Before the 2015 modification of the Info Act, the requests for public information were free of charge. Compared to this, it represented a setback for the validation of a fundamental right, but an ease for the bodies with public service functions, that it is now possible to charge a fee for the requests for public information.

In regard of the fee chargeable, it is important to note that its determination is only a possibility, not an obligation, the given body with public service functions can decide whether to live with this right or not. If the body does not assess the amount in advance, or fails to communicate the exact fee to the requesting party, it is not possible to determine it in retrospect.

Restrictions to freedom of information

Freedom of information as a fundamental right, is not of absolute nature. This means, it can be restricted, or in some cases it is even possible to exclude the disclosure of data of public interest and data public on grounds of public interest. The cases of restrictions are set out in Article 27 of the Info Act. The legal constraints shall be exercised within narrow limits and are the following:

- personal data that are not data public on grounds of public interest
- classified data
- certain data restricted by law - with the specific type of data indicated - where considered necessary to safeguard certain interests set out in law
- business secrets

- protected know-how
- data that cannot be disclosed due to limitations by European Union legislation with a view to any important economic or financial interests of the European Union, including monetary, fiscal and tax policies
- information underlying a decision.

The Hungarian National Authority for Data Protection and Freedom of Information

The Hungarian Authority is an autonomous administrative organ, independent from the government, and is responsible to supervise and promote the enforcement of the rights to the protection of personal data as well as access to public information and information of public interest. However not all EU member states follow the same division of tasks and competences. In some countries there is an independent ombudsman or data protection authority for the protection of personal data, and there is a separate authority dealing with the enforcement of freedom of information.

The Authority's role is to guarantee access to all data of public interest and data public on grounds of public interest. However, this very often does not meet with the interests of organs financed by public money or with the interests of businesses having contractual partnership with the public sector. They are not necessarily willing to share as much information with the public as the Hungarian laws require. This is not typical to Hungary, there are other countries of rule of law with similar actors, who think their interest take precedence over transparency, and ultimately an independent authority or court has to say the last word on the matter. The job of the Hungarian Authority is not easy, because it rarely brings recognition. The work for the enforcement of transparency and the confrontation with the government is nonetheless not negligible, definitely serves the case of democracy and is essential to safeguard the values of rule of law.

- Majtényi László: Az információs jogok. (Information rights) In: Halmai Gábor – Tóth Gábor Attila (szerk.): Emberi jogok (Human rights). Osiris, Budapest, 2008.
- Majtényi László: Az információs szabadságok (The liberties of information) Complex Kiadó, Budapest, 2006.
- Dr. Téglásiné Dr. Kovács Júlia: Vélemény- és sajtószabadság. (Freedom of opinion and freedom of press) In: Dr. Csink Lóránt (szerk.): Alkotmányjog (Constitutional rights). Novissima, Budapest, 2014.
- Péterfalvi-Révész-Szalai-Takács-Temesi: A közigazgatás funkciói és működése (The functions of public service), Nemzeti Közszerzői Egyetem Budapest, 2013.
- Tóth Gábor Attila: Bizalom és bizalmatlanság egyensúlya az alkotmányos struktúrákban. (The balance of trust and mistrust in connection with the constitutional structures) In: Muraközy László (szerk.): A bizalmatlanság hálójában – A magyar beteg. (In the web of untrustworthiness) Corvina, Budapest, 2012.
- Révész Balázs: Magánszféra kontra biztonság – egyensúlyra törekedve. (Privacy versus Security – aiming for balance) (In: A terrorizmus Rubik-kockája, avagy a fenyegetések komplex megközelítése (konferenciakötet) (In: The Rubik cube of terrorism) Belügyminisztérium Oktatási, Képzési és Tudományszervezési Főigazgatóság, Budapest, 2013.
- Dr. Kis Norbert: Biztonság és bizalom a kormányzatban. (Safety and trust in governance) In: Dr. Kaiser Tamás (szerk.): Jó Állam jelentés (Report on the Good Government) 2016. Dialóg Campus, Budapest, 2016.
- Péter Buzás – Balázs Révész: Public information (e-learning) <http://korrupciomegelozes.kormany.hu/download/b/be/b0000/Buz%C3%A1s%20P%C3%A9ter%20>
- Péterfalvi Attila: Privacy and freedom of information in daily life Budapest. HVG-ORAC Lap- és Könyvkiadó, 2012. 180-230.
- Annual reports of the Hungarian National Authority for Data Protection and Freedom of Information (NAIH) (<http://naih.hu/naih-eves-beszamoloi.html>)
- Relevant case-law of the courts and the Constitutional Court of Hungary

¹ Louis D. Brandeis: Other People's Money and How the Bankers Use It. Frederick A. Stokes Company, New York, 1914. 92.

² Majtényi László: Az információs jogok. (Informational Rights) In: Halmai Gábor – Tóth Gábor Attila (szerk.): Emberi jogok (Human rights). Osiris, Budapest, 2008. 612-615.

³ Dr. Téglásiné Dr. Kovács Júlia: Vélemény- és sajtószabadság. (Freedom of opinion and freedom of press) In: Dr. Csink Lóránt (szerk.): Alkotmányjog (Constitutional rights). Novissima, Budapest, 2014. 45.

⁴ Majtényi László: Az információs szabadságok (The liberties of information) Complex Kiadó, Budapest, 2006 177.

⁵ Dr. Kis Norbert: Biztonság és bizalom a kormányzatban. (Safety and trust in governance) In: Dr. Kaiser Tamás (szerk.): Jó Állam jelentés (Report on the Good Government) 2016. Dialóg Campus, Budapest, 2016. 25.

⁶ Tóth Gábor Attila: Bizalom és bizalmatlanság egyensúlya az alkotmányos struktúrákban. (The balance of trust and mistrust in connection with the constitutional structures) In: Muraközy László (szerk.): A bizalmatlanság hálójában – A magyar beteg. (In the web of untrustworthiness) Corvina, Budapest, 2012. 84.

⁷ Dr. Sziklay Júlia: Az információs jogok kialakulása, fejlődése és társadalmi hatása (The birth, the development, and the evolution of information rights)

⁸ Révész Balázs: Magánszféra kontra biztonság – egyensúlyra törekedve. (Privacy versus Security – aiming for balance) (In: A terrorizmus Rubik-kockája, avagy a fenyegetések komplex megközelítése (konferenciakötet) (In: The Rubik cube of terrorism). Belügyminisztérium Oktatási, Képzési és Tudományszervezési Főigazgatóság, Budapest, 2013. 79.

⁹ Péterfalvi-Révész-Szalai-Takács-Temesi: A közigazgatás funkciói és működése (The functions of public service), Nemzeti Közszerzői Egyetem Budapest, 2013. 287-288.

¹⁰ Info Act 26. § (1) és 28. § (1)

¹¹ e.g. *Österreichische Vereinigung zur Erhaltung, Stärkung und Schaffung v. Austria*, no. 39534/07, 28 November 2013.

¹² European Commission versus Technische Glaswerke Ilmenau GmbH, C-139/07.P., ECLI:EU:C:2010:376; Európai Bizottság kontra The Bavarian Lager Co. Ltd., C-28/08.P., ECLI:EU:C:2010:378; Kingdom of Sweden versus Association de la presse internationale ASBL (API) and European Commission, Association de la presse internationale ASBL (API) versus European Commission and European Commission versus Association de la presse internationale ASBL (API), C 514/07. P., C 528/07. P. és C 532/07. P. sz. consolidated cases, ECLI:EU:C:2010:541.

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SOME ASPECTS OF PROTECTION OF COPYRIGHTS ON THE INTERNET

In the modern age, the Internet is an invaluable means of getting information and extending connections across the globe. Development of the information networks has gradually converted the world to a single space of information and communication. The global network develops at a rapid pace. Currently, the number of Internet users across the globe is nearly 2 billion, and thousands of new users connect to the network every day [11, p. 2]. The Internet enables us to get information in a rapid, easy and cheaper way and analyze and transmit it. The Internet is the cheapest means of communication for getting, copying and disseminating information and is accessible to everyone across the globe. As F. Harry, the Director General of the General Assembly of WIPO said, the Internet has currently turned into a global sphere and provides unique conditions for the developing countries to take part in the digital market [5].

A number of scientific, literary and art works, films, phonograms, photos and computer applications have been accessible a digital form via the Internet. Major infringements of the Internet network are related to copyrights. It is observed that, such problems related to copyright infringement as changing, copying, selling, disseminating and duplicating the new works emerging in relation to protection of copyrights increase rapidly related to the development of the Internet and the ICT. Among the most noticeable problems are the rapid development of the information communication technologies and, in this regard, the protection of copyrights in the networks and the Internet. Thus, the Internet has emerged as a technology which assumes as much importance as J. Gutenberg's book printing machine for copyrights besides, a new type of public relations—the Internet relations and online communication emerged. The society faced the problem at the time when information was circulated in a digital form and the available regulations failed to suffice for regulation of newly established public relations [12, p. 25]. On the other hand, the pace of development of normative legal regulation concerning the protection of copyrights on the Internet lags behind the speed of the Internet (18, p. 53). Another important point worth noting is that the specifications of the Internet have not been taken into account in most of the laws directed to protection of copyrights.

Different works, technological applications, audio-video works, different texts and such other forms of intellectual property disseminating via the ICT can also be mentioned, some of which are the objects of the copyright. The Internet services and platforms within the Web-2.0 framework, such as Wikipedia, Facebook, MySpace and the platforms, such as YouTube, Flickr blogs (Twitter), Peering networks P2P, file sharing networks (Bit Torrent), which are used for user content expand connections for information exchange, that is to say facilitate the violation of copyrights. The statistic data estimates that, 59 % of mobile graphics of users per day across the globe is concerned with videos. Approximately 151 million people watch video in "Google" and more than 5 billion photos are shared on "Facebook" social network every day. The videonews uploaded in YouTube is around 2,5 mln/h [17, p. 3].

Moreover, the Internet acts as the nuclear of information that provides connection among the information networks belonging to different organizations in the modern world [11, p. 2]. Therefore, the protection of objects which are the output of scientific activity on the Internet, within the intellectual property rights are of special importance and we believe that, this problem should be considered in the context of the Internet regulation.

To clarify the solutions of the foregoing problem, we will focus our research on answers of a few questions: What are the problems regarding the copyrights on the Internet? For what reasons, the existing copyrights remain unprotected in the Internet space?

As it seems, ICT develops both technically and in scope. As a result of development of the digital technologies and expansion of the Internet network, the intellectual property objects have exposed to changes. In this regard, the problems caused by the copyright infringements on the Internet are, first and foremost, related to the properties of the global network (globalization, exterritoriality, accessibility for everyone, interactivity, anonymity and so forth) (16. p. 22) It should be noted that, copyrights are violated when the works published on the Internet are changed, duplicated, sold, disseminated, copied, exorbitantly shortened or edited in most cases and such problem proliferates in relation to development of the Internet and ICT. According to John Perry Barlow, one of the founders of "Electronic Frontier Foundation", electronic information is like wine and the copyrights regime is like to protect the glass.