

Towards the Dismantling of Freedom of Information in Hungary

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In this article we aim to illustrate how the Hungarian government uses the public law mandate to invoke pandemics, war in the neighbourhood or even the refugee crisis as a pretext to restrict public spaces and to block data on government operations and budgets. The example of Hungary illustrates the danger of what happens when a fundamental right that was institutionally guaranteed, namely the freedom of information (FOI) - which makes public life, public finances and public decisions transparent -, deteriorates. The erosion of freedom of information not only lead to the derogation of a fundamental right, but may also contribute to the opacification of the functioning of the state, which leads to the regression of public debates, declining control of public affairs, and ultimately leads to the eradication of the constitutional rule of law. This article covers legal developments in the area of freedom of information in the recent decade, however, the content of this paper is tailored and shortened to best fit in the structure of the special issue to be published.

Key words: *freedom of information; public data; data of public interest; transparency; ombudsman*

Introduction

By virtue of the constitutional changes in 1989, access to and dissemination of data of public interest became a fundamental right¹ in Hungary, and a special law on FOI was adopted by qualified majority in 1992,² and in 1995 Parliament elected an ombudsman to monitor the protection of personal data and the disclosure of data of public interest. The first Data Protection and Freedom of Information Ombudsman (hereinafter DP and FOI ombudsman) briefly described the constitutional status quo in 1989 as follows: “*The law gives a very good reverse definition when it declares that all data that is not personal data, or not state secrets, or not official secret, and not preparatory decision – making document is of public interest. All data held by public bodies, local authorities and other organisations with a public-service mission, such as a public service television station or the National Bank shall be considered as data of public interest. This means that anyone wishing to obtain such data does not have to prove any interest. So the law gives a great deal of freedom; and it is another matter what is actually done with it. As*

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¹ Act XX of 1949, amended by Act XXXI of 1989: § 61 (1) In the Republic of Hungary, everyone has the right to freedom of expression and speech, and to the knowledge and dissemination of data of public interest. (3) The adoption of the Act [...] on the disclosure of data of public interest requires the affirmative vote of two-thirds of the Members of Parliament present.

² Act LXIII of 1992 on the protection of personal data and the disclosure of data of public interest

I see it, on the one hand, there is not an intensive demand for information of public interest, and on the other hand, there is a long-standing reflex in the offices that it is not the citizens' business what we do in the administration.”³

The specialised ombudsman on DP and FOI has investigated complaints on fundamental rights violations; the ombudsman's statements, recommendations, together with the case law of the courts on freedom of information established a new body of law that shaped the jurisprudence for transparency in Hungary, based on best European practices and EU standards.⁴ These developments were given a new boost by the EU accession process and finally by the EU enlargement in 2004.⁵

The Hungarian Fundamental Law, which replaced in 2012 the Constitution of 1989, enshrined freedom to access data of public interest,⁶ but in the meantime the Ombudsman's institution for freedom of information was dismantled, its head was unlawfully removed before the end of his mandate and a new supervisory authority replaced the former Data Protection and Freedom of Information Ombudsman on 1 January 2012. The new authority is named National Data Protection and Freedom of Information Authority (NDPI).

A new Act on informational self determination and freedom of information (hereinafter: Information Act or Infotv.) was enacted to replace the former data protection and freedom of information act of 1992. The new data protection supervisory body (NDPI) operates as an autonomous administrative body.

As a result of these constitutional and statutory changes in Hungary, the European Commission initiated an infringement procedure against Hungary. The European Court declared the infringement of the European data protection regime by Hungary in decision C-286/12. This case was the first major step towards a slippery sloop period where Hungary gradually lost most of its core institutional protections in the area of freedom of information.⁷

³ Kerényi György: “Nem vitatom, hogy néha megnehezítem a munkájukat” (Dr. Majtényi László adatvédelmi biztos). Magyar Narancs, 1996.június 20. Majtényi, László was in this position for 6 years (1995-2001).

⁴ Bán-Forgács Nora, Az adatvédelmi ombudsman intézménye Magyarországon – a kezdet és a vég 1995–2011 [The Data Protection Ombudsman in Hungary – the beginning and the end 1995–2011]. L'Harmattan, Budapest, 2021.; Bán-Forgács Nora, A rendszerváltás és az adatvédelmi ombudsman Magyarországon. Az adatvédelmi ombudsman alapjog-értelmezése. Budapest, Magyarország : L'Harmattan Kiadó (2022); Bán-Forgács Nóra, Az Adatvédelmi Ombudsman Ars Poeticája és Morális Jogértelmezése, Közjogi Szemle 15 : 4 pp. 83-99, 17 p. (2022);

⁵ Beyond the 1992 Act, see for instance, the Act XC of 2005 on electronic freedom of information. Its purpose was to ensure that, in order to provide the public with accurate and rapid information, the range of data of public interest defined in this Act is made available electronically to anyone, without identification or request for information, on a continuous basis and free of charge. This Act is intended to comply with Directive 2003/98/EC of the European Parliament and of the Council of 17 November 2003 on the re-use of public sector information.

⁶ Art. VI (4) of Fundamental Law (published on 25 April, 2011)

⁷ Bán-Forgács, Nóra, A független ellenőrző szervek függetlenségének kritériumai és fogalmi bizonytalansága a magyar alkotmányos gyakorlatban és az európai joggyakorlatban, Európai Jog: Az Európai Jogakadémia Folyóirata, 2015 : 2 pp. 20-29, 10 p. (2015)

The new Act on informational self determination and freedom of information of 2011 (Infotv), gave the new supervisory body (NDPI) a wide range of administrative tasks, from fining to certifying the quality of data management, to guard the public access to data of public interest. This shifted the supervisory authority from an ombudsman-type human rights institution to an administrative body with supervisory and sanctioning power. The new Information Act (Infotv.) was amended several times later on.⁸ Each time more power was granted to the supervisory body and less freedom to citizens to exercise control over public data.⁹

In Hungary, as of year 2011, the Lobbying Act and its implementing administrative rules (e.g. on the registration of lobbyists) restricted lobby activities, which in particular hampered public debate on draft legislation. Finally, the new legislative procedure was invoked to remove lobbying from the law¹⁰ and even repealed the detailed law on the electronic publication of public interest data.¹¹

In a short period of extraordinary government measures during a natural disaster in 2015, not only was the Fundamental Law amended,¹² but also the ruling by government decrees infiltrated into Hungarian law and legal system. This resulted the erosion of legal guarantees in the area fundamental right protection.¹³ The tendency was criticised by the European Union.

The EU 2024 Rule of Law Report on Hungary is critical of the lack of transparency in political party financing, public procurement, lobbying, on the restrictions on the freedom of (watchdog) civil society organisations (CSOs) and those journalists, which are closely linked to access to public data. Just to mention one quote from the relevant EU report: "in certain Member States, civil society is faced with serious challenges or

⁸ Act CXII of 2011 on the Right to Informational Self-Determination and Freedom of Information was amended in 2011, 2012, 2013, 2015, 2017, 2019, 2022 and 2023, while the parts on the NDPI and its procedure regarding the free availability of data of public interest were amended in 2011, 2012, 2014, 2015, 2017, 2018, 2019, 2020, 2022 and 2023.

⁹ For example, § 75/F of the Act: § 31 (1), (4) and (6) and § 31/A-31/C of Act XL of 2022 amending Act CXII of 2011 on the right to information self-determination and freedom of information, as amended by Act XL of 2022 amending Act XL of 2022 on the right to information self-determination and freedom of information, shall apply to requests for access to data of public interest submitted on or after 31 December 2022. 77/B § of the Act: Chapter V, and Section 72 lay down the provisions necessary for the implementation of Regulation (EU) 2022/868 of the European Parliament and of the Council of 30 May 2022 on European Data Governance and amending Regulation (EU) 2018/1724 (the Data Governance Regulation).

¹⁰ Act XLIX of 2006 on lobbying and Government Decree 176 of 2006 (August 14) have been replaced by Act CXXXI of 2010 on Lawmaking and Act CXXXII of 2010 on Reconciliation in lawmaking procedure, which will apply from 2011

¹¹ Act XC of 2005 on the Freedom of Electronic Information, which defined the electronic publication, disclosure and archiving of parliamentary, administrative, municipal and judicial documents. The rules have been incorporated into various laws, and the preservation of historical data has also been limited.

¹² The Fundamental Law has been amended 13 times, eight of which fell within and were related to the period of the Extraordinary Legislative Decree or Special Governmental Measures. Emergency measures have also been incorporated into the Acts on Asylum, Health, Defence, Disaster Response

¹³ Examples of government decrees on extraordinary measures are Government Decree 179 of 2020 (May 4), Article 2(1), Government Decree 521 of 2020 (November 25), Article 1(1), Government Decree 448 of 2023 (October 3), Article 5 and emergency derogations in the Laws 2020, 2021

systemic undue restrictions to their operations. In Hungary, there has been no progress in removing existing obstacles for CSOs, with smear campaigns and the vilification of independent CSOs remain a current practice. In Hungary, concerns remain regarding the independence and effective functioning of the Commissioner for Fundamental Rights.[...] The right to access information held by public authorities is one of the main transparency and accountability tools for civil society and citizens and it is fundamental for journalists to do their work.”¹⁴ It has been reported that freedom of information is increasingly restricted. “Further legislative changes have introduced some restrictions to freedom of information which had been subject to a recent reform. (...) In 2023 and 2024, Parliament adopted further legislative amendments, introducing new grounds for rejecting freedom of information requests. (...) According to stakeholders, these amendments make access to public information more difficult. Parliament has so far not implemented a Constitutional Court decision requiring legislative amendments to establish effective judicial protection in case of freedom of information requests related to public funds (...). While Hungary is committed to ensure that all public bodies publish specified data on the new transparency portal, stakeholders point out that proactive data publication on the new portal is not mandatory for all entities performing a public duty (...).”¹⁵

2. Malfunctions in the area of freedom of information in Hungary in the past decade

Access to public data (ie. freedom of information) is universally protected by almost all national legislations across the globe.¹⁶ Article 10 of the European Convention on Human Rights and Freedoms (1950), as part of freedom of expression, and Article 19 of the International Covenant on Civil and Political Rights (1966) also provide for freedom of access to information and freedom to communicate information within this framework. The Charter of Fundamental Rights of the EU includes freedom to receive and forward information/ideas, together with freedom of expression, within the scope of freedom of

¹⁴ Brussels, 24.7.2024 COM(2024) 800 final+ANNEX to Communication From The Commission To The European Parliament, The Council, The European Economic and Social Committee And The Committee Of The Regions. 2024 Rule of Law Report; The rule of law situation in the European Union. https://commission.europa.eu/document/download/27db4143-58b4-4b61-a021-a215940e19d0_en?filename=1_1_58120_communication_rol_en.pdf and Recommendations for Hungary p.17-18.https://commission.europa.eu/document/download/40d0f293-3047-4242-8c08-5101b8c09ff7_en?filename=4_1_58125_comm_recomm_en.pdf

¹⁵ Brussels, 24.7.2024 SWD(2024) 817 final Commission Staff Working Document

2024 Rule of Law Report - Country Chapter on the rule of law situation in Hungary. Accompanying the document Communication From The Commission To The European Parliament, The Council, The European Economic And Social Committee And the Committee of the Regions, 2024 Rule of Law Report - The rule of law situation in the European Union, p.32,https://commission.europa.eu/document/download/e90ed74c-7ae1-4bfb-8b6e-829008bd2cc6_en?filename=40_1_58071_coun_chap_hungary_en.pdf

¹⁶ Some argue that freedom of access to data of public interest is not a universal human right, but rather a fundamental right under national constitutions. See: Drinóczi, T. – Csink, L. A magánszféra, a biztonság és a nemzetbiztonság alapjogi szempontú megközelítése. In Csink, L. (ed.) A nemzetbiztonság kihívásainak hatása a magánszférára. Budapest, Pázmány Press (2017), pp.25-77

speech and expression without interference by public authorities and regardless of frontiers in Article 11. Thus, the restrictions are very general, they should fit within the protection of national security/state security, public order, public health or public morals in a democratic society, or the protection/respect of the reputation or rights of others, or territorial integrity, public safety, the prevention of disorder or crime, the prevention of the disclosure of confidential information, or the maintenance of the authority and impartiality of the judiciary, subject to the necessity-proportionality test.

2.1. Transparency of public money

Although the Hungarian Fundamental Law of 2011 provides for the disclosure of data of public interest, it is incorporated in Article VI with the rights of privacy protection.

We claim that the scope of freedom of information gradually shrank in Hungary due to constitutional changes, legislative amendments and the change of the jurisprudence of the courts and quasi-courts, like ombudsmen.

An increasing number of public tasks are performed by non-state entities between 2010 and 2020 in Hungary, without ensuring transparency of their operations.¹⁷ Even though the Information Act (Infotv.) of 2011 imply that certain business data of operators managing national property are public.¹⁸ Also according to the Laws on National Property and State Property (Law CXCVI of 2011, Law CVI of 2007), private market entities who “enter into a contract with a public body for the exploitation of public property or the acquisition of any right concerning such property” must disclose the information contained in such a contract. Meanwhile, a recent study shows that transparency of those companies managing public money in private or quasi-private organisations are not transparent.¹⁹

The long lasting tension between business secrets and transparency of government data was originally sorted out in 2003 in Hungary by the so-called Glass Pockets Act²⁰ which resulted a pro transparency core legislation. However, the achievements were short-lived, as they were repealed after the political change in 2010,²¹ and the new Public Finance Act of 2011 excluded the principle of openness of public funds.²²

¹⁷ Szilágyi, E.: A nemzeti vagyonnal gazdálkodó vagy azzal rendelkező magánpiaci szereplők által kezelt adatok nyilvánossága. In: A magyar jogrendszer rezilienciája 2010-2020. Gárdos-Orosz, Fruzsina (ed.) TK-Gondolat, Budapest, 2022. pp, 223-242.

¹⁸ Thus, the statutory definition of data of public interest and public data in the public interest, Article 26: the body performing a state or local government function or other public function defined by law must enable any person to have access to the data of public interest and public data in its possession; Article 32: the obligation to inform the public about the management of state and local government assets, including contracts concluded with market operators.

¹⁹ Szilágyi, E.: A nemzeti vagyonnal gazdálkodó vagy azzal rendelkező magánpiaci szereplők által kezelt adatok nyilvánossága. In: A magyar jogrendszer rezilienciája 2010-2020. Gárdos-Orosz, Fruzsina (ed.) TK-Gondolat, Budapest, 2022. pp, 223-242.

²⁰ Act XXIV of 2003

²¹ Act XC of 2010

²² Act CXCV of 2011

With the transposition of the EU Consolidation Directive, new provisions on trade secrets were introduced into Hungarian law in 2018.²³ According to recital 11 of the Directive, the Directive does not affect “the exercise of the right to freedom of expression and information” and “the application of EU or national rules which oblige the holder of a trade secret to disclose information, including trade secrets, in the public interest”. In other words, it should be stated in the Information Act (Infotv.) that the exercise of the fundamental constitutional right of access to information and the right to disseminate information does not infringe a trade secret.²⁴ Therefore, relying on the provisions of Infotv, the text of the new Civil Code (Act V of 2013) no longer contains a transparency rule on trade secrets. But Infotv. was amended in a way that if any public authority refuses to provide information, a complaint can be lodged with its supervisory body and judicial remedies are open thereafter to data requesters.

For protection of FOI, different constitutional bodies intervened and reached judgements and recommendations in Hungary. Data Protection and Freedom of Information Ombudsman stated in 2007 that the mere fact that the public service is provided in the form of a private company, is not an excuse to circumvent the right to access to public data. (1028/K/2007-2.) Similarly, the purchase of electronic toll stickers by the Hungarian State Motorway Management Ltd. is data of public interest because “by providing information on data of public interest, the data controller is not exercising a favour, not providing a service, but supplying data in order to enforce the fundamental right laid down in Article 61 of the Constitution.” (458/K/2008-3.)

The Hungarian Constitutional Court held that the nature of public duties may justify access to public data, or transparency shall be provided by the disposal and management of national assets/public funds.²⁵ The National Electricity Provider MVM Ltd managed public data according to the Constitutional Court not because electricity is *per se* a state obligation to provide, but more because any private company managing national funds shall be transparent. Similarly, the supervisory authority (NDPI) held that companies that are majority-owned by the state or local government cannot claim business secrets at all. Because companies performing state monopoly functions shall not suggest that disclosure of their business operations results in market disadvantage; given the privilege of state monopoly, they have no market competitor.²⁶ Accordingly, the same transparency principles apply to municipal-owned companies.²⁷

Finally, the Hungarian Constitutional Court annulled the legislative amendments restricting the disclosure of public data held by private companies owned by the Hungarian National Bank and foundations set up by the National Bank. The Bank’s amendments derogated from the provisions of the Information Act (Infotv.) and directly

²³ Act LIV of 2018 on the Protection of Trade Secrets transposed Directive 2016/943/EU of the European Parliament and of the Council on the protection of non-public know-how and business information (trade secrets) against unauthorised acquisition, use and disclosure (the “Consolidation Directive”), amending the Civil Code.

²⁴ Infotv Article 27 (3).

²⁵ Constitutional Court *Decision*, 25 of 2014 (July 22), NDPI case 2018/913/2/V

²⁶ NDPI Recommendation, 2016/1911/V., 2016, March 11

²⁷ NDPI Recommendation 2015/2361/9/V., NDPI/2015/321/12/V

applied provisions of the National Bank.²⁸ The supervisory authority (NDPI) ruled that the Infotv. cannot be weakened by sectoral norms in the field of freedom of information.²⁹

On a different account, Hungarian news portal “Átlátszó” was denied to receive the public procurement documents of state social services dealing with food distribution among disadvantaged people. Átlátszó initiated a FOI procedure at the court, complaining that the actual prices of the food packages distributed with EU money, constituted trade secrets. The court ruled for favour of Atlatszó news portal. Public procurement cannot be a trade secret according to the judgement. The court found that the defendant had failed to prove anything beyond its “mere reference to trade secrets”. Bidders knew the total value of competitors’ bids and, by comparison, the subsequent knowledge of unit prices did not jeopardise the efficient use of public funds.” The court judgment also ordered HUF 100 000 fine for the government. However, despite the fact that the decision has been final since the end of March 2022, the documents have not been released by the Directorate General for Social Affairs and Child Protection. The non-compliance with court decisions became a pressing issue for Hungarian legal regime.

2.2. Surveillance and control of public employees

Public employees are subject to control and surveillance as of 2020 in Hungary. Police can monitor these employees if they perform their duties properly and professionally, as required by law.³⁰ The employee does not have to be informed about the investigation. Surveillance may take place in the workplace, inside service vehicles and in public spaces.

According to data requested through a public interest request, in 2020, 1,009 people were subject to such surveillance in Hungary, the vast majority of whom were law enforcement officers. Similar results arrived in 2024 upon the request of a journalist.³¹ The Hungarian civil rights organisation TASZ, along with other complainants turned to the European Court of Human Rights.

2.3. Emergency as a pretext to halt freedom of information

Emergency powers are introduced into legal systems under extraordinary circumstances, such as war, climate catastrophe, global pandemic, like COVID-19, to control the legal system under extraordinary pressure.

²⁸ Constitutional Court Decision, 8 of 2016 (April 6)

²⁹ NDPI Recommendation 2016/1109/V.; NDPI/2016/1107/V.

³⁰ Act XXXIV of 2014 on the Police, Chapter VII, as amended by Act XCII of 2017 and extended by Government Decree 293 of 2010 (December 22) and Government Decree 194 of 2022 (May 27)

³¹ Szily László: Már Strasbourg is azzal foglalkozik, hogy a magyar államigazgatásból bárkit meg lehet figyelni titkosszolgálati eszközökkel. 444.hu, 2024.október 02. providing the requested data: 1172 investigations were carried out in 2021, 949 in 2022, 988 in 2023 and 619 by the end of August 2024. While roughly 1000 secret investigation warrants are issued by the prosecution each year, only a good quarter of the cases have reached the stage of actual live testing of the target, say an attempt at corruption/law-breaking. For example, in 2022, 278 reliability investigations reached the contact stage, which is how many times undercover investigators created a live situation in which they tried to get the employee to break the law. But only 13 in total accepted the guilty offer. Of the 278 contacts, 45 involved health workers, only 2 corruption charges were filed in the end, and in 2024, 26 health workers were tried, but none of them were caught in any wrongdoing.

Emergency (or extraordinary) power of the state is used for a period of time to prevent damage in the society. Different constitutions regulate emergency powers differently. Usually a feature of extraordinary legal system is the constitutional limitation of fundamental rights, including freedom of information. "Rapid, effective, and uncontrolled lawmaking responses are not an implausible reaction to internal and external crises. However, when they appear to be only a façade that enables populist constitution-making and degrades the institutional counterbalance of executive power, constitutionalism, rule of law and democracy are endangered."³²

In Hungary emergency procedures that deviate from the standard legislative process have been in force since 11 March 2020, first justified by the outbreak of the COVID-19 crisis,³³ then continuously prolonged, last time with reference to the Russo-Ukrainian war.³⁴

The European Union raised concerns that in Hungary emergency measures should be strictly proportionate, necessary, limited in time, and in line with European and international standards.³⁵

We argue in this article that the situation of freedom of information is specific because public data on the epidemic - such as the spread of the virus, the hotspots of the outbreak of the virus, or credible information on Government measures to combat the epidemic -, are not simply data of public interest, but are in fact data that are prerequisites for public confidence in the fight against the pandemic.

Credible, verifiable information can strengthen public trust. To underscore just one dimension of our claim: without authentic information, it is hardly possible to increase confidence in vaccination, and the willingness to vaccinate is a key factor, without which it is not possible to successfully combat the pandemic. Willingness to vaccinate will increase if citizens are aware of the data on how many people have been vaccinated, what vaccine was used, and what was the effect of vaccination.

During emergency powers in Hungary the public authority shall comply with the freedom of information request within 45 days instead of the usual 15 days of statutory requirement. This may be extended once by an additional 45 days. The request for access to data of public interest may not be submitted orally. The restrictive measures shall also apply retroactively to pending FOI requests. Regarding freedom of information and emergency we further focus on three aspect of the problem. 1) First, the lack of regional

³² Fruzsina Gárdos-Orosz and Nóra Bán-Forgács, Introduction The (Non)Resilience of the Hungarian Legal System: From Populist Constitutionalism to a Permanent State of Danger. In: Fruzsina Gárdos-Orosz (Ed), *The Resilience of the Hungarian Legal System since 2010, A Failed Resilience?* Springer, 2024. 13. o.

³³ Coronavirus crisis: a 'mass human pandemic endangering the safety of life and property [...] in order to protect the health and lives of Hungarian citizens'. Government Decree 40/2020. (III. 11.).

³⁴ Government Decree 180/2022. (V. 24.). See 2023 Rule of Law Report, Country Chapter on the rule of law situation in Hungary; 2022 Rule of Law Report, Country Chapter on the rule of law situation in Hungary; 2021 Rule of Law Report, Country Chapter on the rule of law situation in Hungary; 2020 Rule of Law Report, Country Chapter on the rule of law situation in Hungary.

³⁵ Council Recommendation of 20 July 2020 on the 2020 National Reform Programme of Hungary and delivering a Council opinion on the 2020 Convergence Programme of Hungary 2020/C 282/17.

epidemiological data 2) Second, the unlawful publication of mortality data, and the 3) third problem is the separation of personal and public data in the context of the COVID-19.

1) The lack of regional epidemiological data

Essential epidemiological data were partly not communicated by the Hungarian Government to citizens and data were partly delayed. This caused extreme difficulties in the first wave of the pandemic, in the spring of 2020. Also, the Hungarian Government did not communicate (at all) regional epidemiological data in the first phase of the outbreak. Mr. Gergely Gulyás, Minister of the Prime Minister's Office, stated that regional epidemiological data are not disclosed because "the Operation Task Force's position is clear: we must not create panic in any municipality."

Meanwhile, the independent Hungarian news agency, 444.hu carried an analysis in an editorial that all European countries publish regional data on coronavirus patients, except for Hungary. In a press statement, the politically appointed president of the Hungarian National Data Protection Authority (NDPI) was quick to defend the government's policy of non-disclosure. Mr. President of NDPI stated that the reason for the concealment of the territorial data is that these data can also be "decision-making preparatory" data that are immune from disclosure based on Paragraph 5 of Article 27 of the Hungarian Information Act (Infotv).

In September 2021, Mr. István Ujhelyi, member of the European Parliament (part of the Hungarian opposition) requested data of public interest on how many of the coronavirus patients who were finally hospitalized or died had been previously vaccinated, what vaccine they had received and how many times they had been vaccinated. No reply from the government was received.³⁶

The other typical set of cases in the first wave of the virus are data requests related to hospital bed evacuations. Hungarian Ministry of Human Resources (EMMI) did not make public its order on the emptying of hospital beds for future COVID-19 patients.³⁷ However, the success of the evacuation was largely contested in Hungarian society, since those who forcefully left the hospital, eventually died without hospital care system. The Hungarian Helsinki Committee, a civil rights organisation, submitted a public interest data request to the Ministry on 20 April 2020,³⁸ asking for the information, however the requested data was not made public.

2) The unlawful publication of mortality data

On 25 March 2020, the Hungarian news portal "Index" published an article entitled. "Steven Dick, British Deputy Ambassador in Budapest, is one of the victims of the crown

³⁶ https://nepszava.hu/3132813_miert-titkolja-a-covid-betegek-oltasi-adatait-a-kormany. Also: <https://infostart.hu/belfold/2021/09/30/ujhelyi-istvan-pert-indit-a-covid-betegek-oltottsagiadatai-miatt>

³⁷ <http://www.ekint.org/az-allam-atlathatosaga-informacioszabadsag/2020-05-12/uvegemberkent-elni-a-nagy-testver-oroszagaban-avagy-a-lemeszarolt-informacios-szabadsagok>

³⁸ https://kimittud.atlatszo.hu/request/korhazi_agykapacitas_felszabadit

virus outbreak in Hungary. He is the tenth person to die in Hungary from the coronavirus. The man, aged just 37. The British embassy confirmed the news to Index”³⁹

The government started publishing the statistics on infections and deaths in March and has been updating them ever since at <https://koronavirus.gov.hu/elhunytak>. In addition to the number of people who have died, their age, sex and underlying disease are also listed. In our For example, the tenth victim on the list was a 37-year-old man with an underlying alcoholism problem. The data were attributed to the British deputy ambassador, and as a result of the statistical disclosure, it became common knowledge that the deputy ambassador was suffering in alcoholism. This resulted difficulties in the Hungarian diplomacy because sensitive data about a foreign diplomat were being published without their consent.

On 31 March 2020, the Hungarian Civil Liberties Union (TASZ) contested the Hungarian government’s practice on publishing names and underlying illnesses of coronavirus patients infringing their right to privacy. Despite objections, the Hungarian government continued to publish the mortality data in the same way.

3) Relying on data protection against freedom of information to retrieve information

The case of Mr. János Áder, President of the Republic well represents the conflict between data protection and freedom of information during COVID-19 in Hungary. In this case the complainant requested the Office of the President of the Republic to release a copy of his vaccination certificate as a public data, claiming that the President of the Republic had previously announced that he had received the Sinopharm Chinese vaccine against the virus. Mr. President’s statement was made in a press conference where he personally made the information public. The NDPI in its position (NDPI- 3356-2/2021), stated that the public data in Article 26(2) of Act CXII of 2011 in the Information Act (Infotv.) explicitly refers to “personal data related to the performance of public duties.” Therefore, such personal data to reveal shall be directly related to the constitutional duties of the Head of State. Vaccination data is not related to the public duties of the President of the Republic, unless Mr. János Áder, the President of the Republic, ‘voluntarily and freely decides otherwise’, his vaccination certificate ‘may be lawfully refused in the context of a request for data in the public interest.’⁴⁰

Conclusions

In this article we aimed to provide a detailed analysis of the challenges of freedom of information in Hungary in the light of recent legal and political developments. We focused on the legislative changes, the practice of the courts and alternative conflict

³⁹ https://index.hu/belfold/2020/03/25/a_brit_nagykovethelyettes_a_koronavirus_egyik_aldozata_magyarorszagon

⁴⁰ NDPI-3356-2/2021

resolutions in the past decade or so. We focused on different aspects of the malfunctions of the protection of freedom of information in Hungary, including the challenges in managing public funds and business secrets, the challenges of mass surveillance and the difficulties of freedom of information during emergency powers.

The malfunctions of freedom of information protection are varied, in particular the reduction by law of the availability of data of public interest in an accessible form, with mandatory, continuous and updated elements (e.g. integrating into a single government portal the portals of former agencies and ministries, which contain much less information); making it more difficult to request data of public interest (e.g. by increasing the level of fees, or the time to provide information).

It has also become a good practice to widen the scope of exceptions to public access (e.g. by extending the scope of trade secrets, data used to prepare decisions, classified data); to make it more difficult for Hungarian NGOs to operate as watchdogs;⁴¹ or to constantly transform the legal entities that manage data (e.g. outsourcing of public services, change of ownership, privatisation or nationalisation). The misuse of legislative/governmental instruments has resulted in other restrictions on the exercise of fundamental rights (e.g. formalisation of the proportionality test, lack of enforcement of court judgments) and the perpetuation of special legal measures introduced during the emergency period, restricting freedom of information in a way that has no link to the emergency.

Today, the fundamental right of free access to data of public interest in Hungary is circumvented by state authorities. Hungary does not seem to fully comply with the Convention adopted by the Council of Europe on Access to Official Documents in 2009, although it has entered into force in 2020.⁴²

“This Convention is the first binding international legal instrument to recognise a general right of access to official documents held by public authorities. Transparency of public authorities is a key feature of good governance and an indicator of whether or not a society is genuinely democratic and pluralist. The right of access to official documents is also essential to the self-development of people and to the exercise of fundamental human rights. It also strengthens public authorities’ legitimacy in the eyes of the public, and its confidence in them. [...] The Convention sets forth the minimum standards to be applied in the processing of requests for access to official documents (forms of and charges for access to official documents), review procedure and

⁴¹ van der Ploeg, Tymen J.-van Veen, Wino J. M.-Versteegh, Cornelia R. M. (eds.): *Civil Society in Europe -Minimum Norms and Optimum Conditions of its Regulation*. Cambridge University Press, Cambridge, 2017. Moreover see CJEU judgment of 18 June 2020 in Case C-78/18 Commission v Hungary (ECLI:EU:C:2020:476)

⁴² Council of Europe Convention on Access to Official Documents (CETS No. 205) Declaration handed over by the Minister for Justice and Law Enforcement of Hungary to the Deputy Secretary General of the Council of Europe at the time of signature of the instrument, on 18 June 2009 and confirmed in the instrument of ratification deposited on 5 January 2010. – The Convention is incorporated in the promulgating part of Act CXXXI of 2009, which entered into force only in 2020

complementary measures and it has the flexibility required to allow national laws to build on this foundation and provide even greater access to official documents.”⁴³

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⁴³ Explanatory Report to the Council of Europe Convention on Access to Official Documents. Tromsø, 18.VI.2009 <https://rm.coe.int/16800d3836>