European conference on courts and communication

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The relationship between publicity and the courts

Ladies and Gentlemen,

Our Authority often met with the following negative reaction or attitude of bodies performing public duties: they consider the requests for data of public interests as annoying actions out of curiosity or pure desire of control. That is why I personally highly appreciate the idea of organising a conference on this specific topic. Let me congratulate the organisers for undertaking a most progressive and constructive step in this direction!

As you may know the unique Hungarian legal solution safeguards both informational rights – namely the right to informational self-determination and freedom of information – by one single organization. Between 1995-2011 it was the the data protection ombudsman, since 1st January, 2012 - due to the constitutional reform also affecting the whole ombudsman system - it is the National Authority for Data Protection and Freedom of Information which is dedicated to perform this duty.

Our long time experience with the two informational rights might be useful in finding the way to dissolve the possible conflicts between the judicial system and publicity. I would like to emphasise that there has always been a very successful professional cooperation between the relevant organs: the National Office of the Judiciary and the Hungarian Supreme Court have contacted us many times for consultations concerning specific data protection and freedom of information issues in relation to the work of the courts.

In fact, there is a sensitive balance between the needs of publicity and privacy.

Our Athority has to – just as before the data protection ombudsman had to – face the controversial characteristic of publicity of court procedures. From the point of view of privacy it is quite absurd that the audience of a courtroom may enjoy the closest insight into the most intimate sphere of a marriage during the hearing of a divorce proceeding including the sexual life, health problems, financial matters of the husband and wife. On the other hand it makes

no sense that people get no information about decisions of historical importance or cases of nation-wide interest. It happens too often that the press gives detailed information on a crime committed just some days or weeks ago but remains absolutely silent when the criminal procedure enters into the judicial phase.

There has been a serious dispute whether the data protection ombudsman or authority has the relevant competence to deal with issues of data processing of the judiciary. A consensus has been reached so far: what is a data processing in the sense of data protection terminology could be a procedual action from the perspective of the court. The procedure of the court is being regulated by special codes of conduct and other legal norms in detail. These are thus the primary norms ruling the judicial procedures. These specific provisions are considered as lex specialis compared to the lex generalis ruling of the Data Protection Act. However, it does not mean that the court may violate the right to informational self-determination of the data subjects during its own procedure when the primary legal norm on the specific situation fails to rule the concrete procedual or material action.

Why do the courts need publicity? What is its function?

Publicity supports the effectiveness of the classical principles such as trust in the existing judicial system, faith in the Rule of Law and the control function of the society.

The European Court of Human Rights stated that publicity is one of the main requierement of the right to fair trial, no matter in which case, in which procedure, at which level. It does not only protect the parties of the procedure from ”secret ways” and „secret judgments” but also strenghtens the public confidence in the work of the courts.

The complete publicity of the court decisions is of inevitable importance in the common law systems since the precedents serve as source of law. But even in the so-called continental legal system the publicity of the court resolutions improve the quality of laws. The principle of the Rule of Law sets the requirement - as it was said by the Hungarian Constitutional Court in 1992 - that *”the whole legal system as well as the parts of it and also the concrete legal norms shall be clear, countable and apparent to the addressees.”*

(Nr. 9/1992. (I. 30.) Decision of the Constitutional Court)

A very simple truth is that citizens can only be expected to follow the rules if they have a chance to get to learn the laws. The legal norms become effective not only through a mere declaration but also through judicial practice.

The publicity of the judiciary can be interpreted as a sectoral area to freedom of information. The control of the public shall be guaranteed on multiple levels, namely:

1. The pre-trial publicity

It is definitely not enough just to open the door of the courtroom and not to remove the audience from it to fulfill the constitutional requirement of publicity of court proceedings. We should also know the exact date and place of the session with the identification of the case. Otherwise there is no real chance of attendance and what remains is only a kind of threat of a sudden appearance.

The public list of court hearings brings with itself the necessary limitation of privacy, that is to say, the right to informational self-determinaton of the data subjects. According to the Hungarian constitutional law a basic right can be limited only by parliamentary acts. Our Authority also stated in a recent opinion that a Ministerial Decree governing the court administration shall not serve as a legal basis for personal data processing.

In the name of precise reporting the Hungarian press has a habit to show the court hearing schedule with the names of the parties as a cut screen during the interview. As a consequence of this bad habit the press is expanding the “inside” administrative publicity of the court to the outside world – with the ”package” of personal data of the data subjects. A privacy friendly solution would be not to allow showing the lists including the names on television, on internet or in newspapers in order to keep the limited area of administrative publicity of the court. Other lawful solution would be to ask for the prior consent of the data subjects. Those persons or data subjects, of course, who are performing public duties have to live with the limitation of their private sphere to a certain extent if the judicial procedure is in connection with their work.

It could still be another acceptable solution if the press shows only the monograms of the parties together with the registartion number and the subject of the trial.

2. The publicity of the hearing

As far as social demands concern there has been a gradual development from the “publicity of the moment” to the level of complete and whole publicity on the internet.

“Real time communication” - such as twitter (https://twitter.com/USSupremeCourt) and other online forums - user journalists keep asking why not to broadcast live reporting from the courtrooms in interesting cases? The OpenCourt project makes a step further: it is an

experimental project run by Boston's NPR news station that uses digital technology to make Quincy District Court more accessible to the public. Anyone with an internet connection will be able to see and hear what goes on in court.

The real problem would not particularly be with the nonstop reporting of the press[1] but rather with the leaking of information by the audience since the sanctioning of such action is not simple. Let me mention recent examples from Great Britain: two jurors have both been jailed for two months after being found guilty of contempt of court for misusing the internet during crown court trials. One of them posted a message on Facebook, the other one used Google to research the fraud case he was sitting on at Kingston crown court, and dig up extra information about victims, which he was said to have shared with fellow jurors. Both cases were brought to the high court by the attorney general on the grounds that the men's actions interfered with the administration of justice.

Although it is true that the law is not able to cope perfectly with the present digital development but it should react somehow to the new demands.

To find the right balance between freedom of information – serving the needs of the right to fair trial – and privacy protection of the data subjects is a great challenge. The relevant legal norms are not unified in one act in Hungary but we have great expectations that such a standardised regulation will be adopted in the near future.

The relevant decisions of the Hungarian Constitutional Court state that a clear distinction should be made between the publicity of the court hearing and the publicity of the press. I am confirmed that the former means a restricted publicity in time and space and any expansion should be based exclusively upon the power of a new act. The online reporting offers quick and concrete information but there is a danger of giving misinformation or infringing the privacy of the data subjects.

According to the interpretation of the Hungarian Constitutional Court the publicity of the court hearing guarantees against partial or unfair procedure primarily for the parties of the judicial trial and not for the "outside world", out of the mentioned personal scope.

The Hungarian Constitutional Court emphasises that court procedure is a tool for enforsing a right. To turn to court is not a question of choice in most cases: the person has no other way to enforce his right because either he gets involved in the case out of his will (e.g. becomes

[1] Stohl-case (http://velvet.hu/celeb/2011/03/31/stohl_andras_birosagi_targyalasa/).

plaintiff or accused person) or he sees no other legitimate way to practise his right or to protect his legal interest. In this meaning participation in a court procedure shall mean a voluntary resignation of data protection rights.

Generally speaking, publicity of the hearing shall not automatically mean the free and detailed reporting about everything that happens there without the consent of the parties involved. It is true, in particular, for the personal data of the accused person in a criminal procedure: the full name shall always be mentioned in the courtroom but it does not give authorisation to the audience to make it public outside the courtroom.

In our opinion it is the official duty of the judge to ask for the prior consent of the data subject whether he is willing to be named in a press communique of the court or in a report of a journalist. Without such consent it is not clear whether the data subject agrees or disagrees to be mentioned. However, Section 6 of the Hungarian Privacy Act[2] says that *"If there is any doubt, it is to be presumed that the data subject failed to provide his consent."*

It is worth mentioning that the press has its own responsibility on the media contents. Section 4 of Act the Press[3] says that "*Exercising the freedom of the press shall not involve or constitute the commission of a crime or abetting the commission of a crime, shall not be contrary to public morality, and shall not violate moral rights or result in personal injury under any circumstances.*"

If the future regulation gives green light to microblog reporting, the concrete cases of the exception from publicity shall also be mentioned (e.g. protection of children or victims etc.). My opinion is that limitation should not exclusively be based upon privacy interests but should also protect the integrity of the procedure and the independent decision-making of the judge.

3. Publicity of the Press

In the system of judicial communication the present legal regulation guarantees privileges for members of the press. Due to the classical principle of the independence of the judges must not report on their own single cases and decisions in order to avoid any improper influence. But the speaker of the court may give information about the official opinion of the court even on single cases.

[2] Section 6 (8)
[3] Section 4 (3) of Act CIV of 2010 on the Press

It is the privilege of the representative of the media to make audio and visual recordings during the hearing. [4] Since the appearance does not fall within the scope of public appearance the procedual rules order to get the consent of the parties (accused peson) as permission for the recording.

According to the Code of Civil Procedure[5] *"with the exception of the public prosecutor audio or visual recording is only permitted upon the clear consent of the parties and other actors of the trial, including the legal representatives, the expert, the wittness, interpretor and holder of the object of review."*

According to the provisions of the Code of Criminal Procedure[6]: making audio or visual recordings of the court hearing with the aim to inform the public is allowed only with the permission of the presiding judge. Recording of any person present at the court hearing – with the exception of the judges, the clerk of the court, the public prosecutor and the legal representative - Is only allowed with the consent of the data subject.

The ruling is clear: making audio or visual recording of the parties at a court procedure is only lawful if they have consented to. However, the procedual rules give no clear direction on the publicity of the names of the parties. Thus we shall apply the Data Protection Act and follow the relevant Constitutional Court decisions respecting the right to informational self-determination.

There is a special situation when either **persons performing public duties or bodies with public service functions** are involved. In these cases the future regulation shall interpret the limitation of publicity in the narrow sense.

In the case of **other public figures** all circumstances of the situation shall be taken into consideration. In particular how this person became a public figure (for example in the case of an actor or an artist), what was the subject of the ongoing trial and so on. The right to informational self-determination shall be highly respected when the private sphere of the public figure is involved (for example a divorce case). The media shall ask for his consent when reporting about his private affairs.

On the other hand when the trial is in connection with his public duty (for example in fraud or corruption scandals) the right to informational self-determination of a person performing

[4] An interesting situation occured at a court hearing with the subject of refused request to access to public information. The plaintiff was repesented by an NGO, our Authority was an intervener and the judge did not give permission for the representative of the plaintiff to make audio recording beacause it did not have a press card.
[5] Section 134/A. § (3) of Act III of 1952
[6] Section 74/B. (1) of Act XIX of 1998

public duty might be limited with certain data protection guarantees. The limitation shall be necessary and proportionate for the sake of exercising justified general control of the public sphere.

In accordance with Section 26 (2) of the Data Protection Act the name and rank as well as other personal data of the person in connection with his tasks within the scope of responsibilities of the given public body – including his picture and voice, as well as his statements - might be disseminated. In relation to his other personal or sensitive data, such as place and date of birth, health status etc. the limitation of his privacy right would not be justified.

It is worth mentioning that in relation to other persons involved in the court procedure beside the person with public functions the data protection rights shall be fully respected (for example the active briber who is giving the bribery money to the politician). It means that their personal data can only be made public upon their consent.

4. Disclosure of decisions - Anonymization

Different legal systems offer various legal solutions to fulfill publicity demands. In some countries the judgments are available – sometimes for a fee - in collections. In other countries – like in Hungary – everyone may have access to them on the internet for free.

To simply copy one country's modell would be too dangerous because it is influenced by many cultural elements including the freedom of information regime and the importance of privacy protection in the given country.

In those legal systems which highly respect freedom of information the guarantee to have free access to judgments either online or in printed version should be incorporated into an act. The text of the disclosed resolutions should be indexed to guarantee easy search.

The Hungarian collection, which is also available online, copes with these challenges.

The function of the publication of judgments has little to do with the original case and its parties. The dissemination neither serves the interest of the original case nor is the aim to create a "wall of shame". Its main function is to share information on the judicial practice in general.

Court resolutions may contain information which is not meant for the public, even though this information might be part of the publicly declared resolution. That is why the text of the resolutions shall be carefully selected but special attention should be paid not to enshorten the useful information of the content. The key to the problem of this certain conflict of interests is the **anonymization** of the resolutions so that the personal information loses its direct connection with the data subject. Anonymization does not mean a pure deletion of the names and addresses but it means a careful selection of the text to prevent unlawful disclosure of personal data. The parties of the court procedure should be identified through naming their position e.g. the plaintiff, the wittness etc. According to the law there is no need to delete the name and rank of a person acting on behalf of an organ performing public duties, the name of the legal representative, the name of the NGO or foundation, the name of its representative and all the information which is made public on grounds of public interest. There is no need to delete the name of the respondent party if he loses the suit in case the law guarantees the recourse of *"actio popularis".*

If the court session was partly or completly closed and the interest based upon the closure can not be otherwise guaranteed the resolution or part of the resolution shall be deleted from the collection. Classified data should be protected as well but no other editorial revision of the resolution shall be made. (780/K/2007)

5. Re-use of public sector information in connection with the information processed by the courts

Francis Bacon said that knowledge is power. He could just as easily have identified power with the control of information. As Bacon — the lawyer, judge, and Lord Chancellor — well knew, courts were and still are the pre-eminent information systems — institutions that process information and translate it into the exercise of power; in the case of courts, by rendering judgements.

Following the thoughts of Francis Bacon the public sphere may make unbelievable economic profits through the re-use of PSI. The EU discovered almost ten years ago that generating value through the re-use of this pecific data has a sigificant potential.

Guaranteeing free research of court resolutions and making the contracts of the re-use of PSI proceeded by the courts are of major importance for experts, who are analysing the effectiveness of the legal norms and social tendencies. The good news is that Hungary has recently implemented the PSI Directive but the bad news is that the relevant ministerial decrees are still missing.

Closing remark

Court communication in a broad sense has still many open questions to be answered by a progressive future regulation. It should also deal with data protection issues, which will be of course only one but very important pillar of the regulation. Other pillars are independence of the judiciary, public control, and transparency, freedom of the press and the free management of the trial by the judge. Classical principles are sometimes in conflict with each other and finding the ”golden mean” is a hard job…

Finally, let me congratulate again for initiating this very important and interesting conference. I wish you all an exciting dialogue and thank you for the invitation. I am really happy I have the chance to attend this international event.

Thank yoo very much for your attention.

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