The Notion of Security and Free Access to Information. Creation and Development of the Right of the Public to know in European and Croatian Jurisprudence

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The Notion of Security and Free Access to Information. Creation and Development of the Right of the Public to know in European and Croatian Jurisprudence

Branko Smerdel and Đorđe Gardašević

Abstract: *The contemporary notion of security, both in legal terms and international relations, reveals several important issues of crucial importance. The core of the matter centres upon a proper understanding of the balance between the competing values of the public interest on one side and individual rights on the other. The authors deal with the relevant European developments and Croatian experiences in the legal interpretation of standards guaranteeing free access to information, understood as a fundamental right, and show that an appropriate method of interpretation is indispensable for its protection.*

Key words: ***democracy, free access to information, European and Croation jurisprudence, individual security and liberty, notion of security***

Introduction: Security, secrecy and publicity

The contemporary notion of security in international and domestic relations today shows itself to be one of the major issues of concern in at least three ways. Firstly, state (or public) policy decision makers are faced with new demands in security policies arising from the reality of life in the modern world.[1]Secondly there are citizens with legitimate claims on both state-provided security measures and the transparent operation of government. Finally, the academic world, in its traditional role, stands as a kind of a "watchdog" charged with scrutinizing the actual processes of new security policies and all the accompanying relevant issues related to them. On the other hand, the list of questions that are related to the notion of security is almost endless. Thus, we can argue on a number of concepts or principles such as "good governance", "open government", separation of powers, a bill of rights, protection of human rights and fundamental freedoms, governmental efficiency, legal certainty and the rule of law etc. In order to narrow down the discussion, a strict academic analysis therefore has to be focused on a certain area of interest. This article will deal with a special issue of the

[1] Various concepts appear to be relevant here, e.g. the War on Terrorism on a global level, or actual EU integration strategies, especially relevant to the area of Central Europe. There are also opposing attitudes deriving from the concern for civil liberties. Among other sources, see e. g. *The War on our Freedoms: Civil Liberties in an Age of Terrorism*, Leone, Richard C. and Anrig, G. Jr. (eds.),; see also Darmer, K. B., Baird, R. M. and Rosenbaum, S. T. (eds.), *Civil Liberties vs. National Security in a Post 9/11 World*. For the relative "supremacy" of public interest over individual liberties in wartime situations see *Inter Arma Silent Leges*, in Darmer et al., 2004: 28–30.

relationship between security and free access to information in terms of constitutional interpretation.

In more general terms, security in this sense represents an example of the fulfilment of the public interest legitimately pursued in carrying out the state's role as the entity responsible for the protection of its citizens. On the other hand, this raises the question of legitimate restrictions of individual constitutional rights and freedoms guaranteed to the public. A constant clash between public and private interests and rights is thus highlighted in a specific context, with various legal, social and political implications. This can best be seen in the fact that a number of individual rights are touched upon when security measures are applied: e.g. the right to be protected from torture, inhuman or degrading treatment or punishment; the right to private and family life; the right to a fair trial and the right to freedom of expression[2] etc. The right to free access to information is inevitably related to all these individual rights as one of the necessary preconditions of their fulfilment and will thus serve as a way of explaining how legal interpretation can be used in creating specific and relevant legal standards.

This subject, of course, in a specific context, reflects the broader question of legal interpretation in general, and at the same time it deals with various levels of social (legal) protection of constitutionally guaranteed values. In that sense, it is important to notice that a great deal of this protection relies upon a proper application of the law within administrative and judicial branches of government. For this reason, the appropriate examination of the operation of these two branches, especially the latter, as the ultimate source of authority, deserves special attention. This is especially relevant in the context of integrative processes taking place in Central Europe in the present and future.[3] Moreover, various supranational judicial bodies are vigorously broadening their practice in international adjudication relevant to member states. This process, as it will be shown, brings very important standards of protection of human rights and fundamental freedoms. At the same time, their decisions represent valid legal sources for state authorities at the national level, the proper examination of which stands at the forefront of academic tasks.[4] On the political level, the issue is more than topical: the Central European states are already members of the Council of Europe and most of them also of the European Union. Future expansion of the EU will also bring in new states and therefore an appropriate anticipation of applicable legal and social standards is essential. Finally, most European states have already enacted freedom of information laws and some also have constitutional guarantees relating to them. However, the right

[2] For example, Articles 3, 6, 8 and 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

[3] The two most relevant European integrative institutions – the European Union and Council of Europe – should be emphasized.

[4] The linking point is found e.g. in Article 140 of the Constitution of the Republic of Croatia, which prescribes that "International agreements concluded and ratified in accordance with the Constitution and made public, and which are in force, shall be part of the domestic legal order of the Republic of Croatia and shall have a legal force superior to the law."

to freedom of information itself does not depend only on the existence of an explicit norm, be it constitutional or statutory. Much of the legal protection derives also from the proper interpretation of other fundamental rights, and this article will shed some light on this process.

European jurisprudence

As was mentioned above, the discussion on a general level is to be conducted in terms of the clash of public and private interests involved, in this case of security and individual liberty. This is of course a very complex task and certainly not a recent problem. However, our job is easier than presumed, taking into account the necessary focus we have opted for in this case: security will be seen through the lens of free access to information, understood as one of the fundamental human rights. Moreover, the old debate of balancing competing public and private interests is to be revived: constant developments in constitutional adjudication present new issues all the time, and we will try to clarify them in order to make room for further anticipation of the development of legal systems.[5]

At the very beginning it should be noted that in this article a number of very important issues arising out of allowing free access to information will be left out for thematic reasons. We will therefore not address the important issues of an institutional and procedural nature, such as the definition of (state) bodies responsible for revealing official information, the definition of persons given that right in a specific legal system, the legal (administrative) procedure applied, or various institutional protection systems (e.g. regular courts, special tribunals or commissions, ombudsman etc.). Our objective is of a substantive nature and deals with interpretation of various rights underlying free access to information.

The normative protection of private rights and promotion of public interests in the contemporary notion of a state, as well as in a modern understanding of international relations, appears at several levels. Domestic legal systems provide guarantees on constitutional, statutory and by-law grounds. Internationally, this is provided through a number of relevant human rights documents and policy papers, both legally binding and non-binding.[6] Legal analysis reveals that the proper organization of various bill of rights documents must contain three important parts: the definition of specific right itself; its legitimate restrictions; and modalities of restriction. If we take the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms

[5] The notion of a constitution or convention as a "Living instrument" appears: see Reid, 1998: 38. For the concept of the "Real" or "Living Constitution" see also Smerdel, Sokol, 2006: 49. On the necessity for further examination in the USA see for instance: Leone, R. C., The Quiet Republic: The Missing Debate About Civil Liberties After 9/11, in Leone, R. C. and Anrig, G. Jr: 2003, 1–22. See also Koh, 1990: 67–100.

[6] Apart from e.g. legally binding conventions, in this area there are a number of non-binding documents of supreme value. Such "soft law" sources, however, still retain some institutional checks. A good example in the context of free access to information is the Recommendation 2 of the Committee of Ministers of the Council of Europe (2002).

as an example, these aspects can easily be seen.[7] Furthermore, the governing principle of restricting fundamental rights is the proportionality principle, both in the European Convention framework and the domestic constitutional systems, as well as in EU case law.[8] In the specific case of freedom of information legislation, however, an additional principle appears under the name of the "public interest test." Generally this includes the weighing of opposing and competing private and public rights and interests and balancing them. These two principles basically serve the same purpose.

As will be shown, the problem with the free access to information guarantee is that it is not always prescribed by a specific, explicit norm. However, in such cases its existence is regularly interpreted as arising out of the realm of other substantive rights or general constitutional principles. In the case of the European Convention, which does not contain a specific freedom of information norm, it may be shown in a number of cases dealing with prohibition of torture, the right to a fair trial, private and family life freedom and freedom of expression. Firstly, we will concentrate on three most important cases decided on the basis of the European Convention for Protection of Human Rights and Fundamental Freedoms.

The European Court for Human Rights in Strasbourg has dealt with free access to information in several cases. Generally, in technical terms it dealt with the issues of standing, positive and negative obligations of state parties and restrictions of the right to free access to information. Again, not all of these cases are relevant to our subject, and we will concentrate on those touching on the relationship between security and free access.

In the early case of *Leander v. Sweden* (1987), the Court dealt with the Article 8 claim (respect for private and family life) where the state pursued the protection of national security as a legitimate basis to bar the employment of the applicant from a security risk position on account of his alleged political background. On the other hand, the applicant in fact complained that he had no opportunity to challenge the correctness of the information related to him under the Swedish personnel control system. In upholding the governmental position, the Court took into account several safeguards of the Swedish system, which supported the protection of national security as a legitimate and necessary measure. It emphasized the following arguments: "a number of provisions designed to reduce the effects of the personnel checking procedure to an

[7] Good nomotechnical examples are contained e.g. in Articles 2, 5, 6, 7, 8, 9, 10, 11. Articles 14 and 15 are relevant as general standards guaranteeing equality and regulating derogation. Finally, Article 18 applies as a general clause prohibiting misuse of legitimate restrictions.

[8] For example, Article 16 of the Constitution of the Republic of Croatia prescribes: "Freedoms and rights may only be restricted by law in order to protect freedoms and rights of others, public order, public morality and health. Every restriction of the freedom or right shall be proportional to the nature of the necessity for a restriction in each individual case." On the other hand, the European Convention pursues the standard of "necessity in a democratic society". The case law of the Court of Justice of European Communities states that the principle of proportionality requires that "derogations remain within the limits of what is appropriate and necessary for achieving the aim in view" (Case 222/84: *Johnston* v *Chief Constable of the Royal Ulster Constabulary* [1986] ECR 1651, paragraph 38). See also Alexy, 2002: 66–69. For a general overview of the restrictions of fundamental rights see Sajo, 1999: 277–283.

unavoidable minimum"; the fact that "the use of the information in the secret police-register in areas outside personnel control is limited, as a matter of practice, to cases of public prosecution and cases concerning the obtaining of Swedish citizenship"; and the fact that "The supervision of the proper implementation of the system is, leaving aside the controls exercised by the Government itself, entrusted both to Parliament and to independent institutions."[9] At the normative level, it should be noticed that the Court attached special importance to a rather wide margin of appreciation in cases of national security and to the principle of efficacy of the personnel checking system.[10] The issue of national security arose once again in *McGinley and Egan v. UK* (1998), a case which involved an Article 8 claim in relation to governmental information on military atomic explosion tests, which allegedly had serious medical consequences for the applicants. The Court pointed out: "In this respect the Court observes that, given the fact that exposure to high levels of radiation is known to have hidden, but serious and long-lasting effects on health, it is not unnatural that the applicants' uncertainty as to whether or not they had been put at risk in this way caused them substantial anxiety and distress… The Court recalls that the Government has asserted that there was no pressing national security reason for retaining information relating to radiation levels on Christmas Island following the tests… In these circumstances, given the applicants' interest in obtaining access to the material in question and the apparent absence of any countervailing public interest in retaining it, the Court considers that a positive obligation under Article 8 arose. Where a Government engages in hazardous activities, such as those in issue in the present case, which might have hidden adverse consequences on the health of those involved in such activities, respect for private and family life under Article 8 requires that an effective and accessible procedure be established which enables such persons to seek all relevant and appropriate information."[11] In a secondary way, security issues were also touched upon in *Cyprus v. Turkey* (2001), a huge case which, among other things, included the examination of censorship practices in terms of alleged violations of the human rights of Greek Cypriots in northern Cyprus. The Court established that the free flow of information, being one of substantive parts of Article 10 of the European Convention, was infringed: "…the reality during the period under consideration was that a large number of school-books, no matter how innocuous their content, were unilaterally censored or rejected by the authorities. It is to be further noted that in the proceedings before the Commission the respondent Government failed to provide any justification for this form of wide-ranging censorship, which, it must be concluded, far exceeded the limits of confidence-building methods and amounted to a denial of the right to freedom of information."[12]

[9] See *Leander v. Sweden*, para 64. All the cases decided by the Strasbourg Court are available at: http://cmiskp.echr.coe.int/tkp197/, accessed 1 July 2006. The Court also explained a number of procedural checks fulfilling the requirements of the limitation clause contained in para 2 of Article 8 of the European Convention.

[10] Ibid, paras 59 and 66.

[11] See McGinley and Egan v. UK, paras 99–101.

[12] See Cyprus v. Turkey, para 252.

Following the best European practice, we will now turn to the case law of the Court of Justice of the European Communities. At the current normative level, the governing document is Regulation 1049/2001 of the European Parliament and of the Council of 30 May 2001. In the Regulation, security forms the basis of the public interest and one of the legitimate bases for restricting the right of free access to documents within the Union.[13] At the case law level the landmark case is *Hautala v. Council* (T-14/98). This involved a request for a document containing criteria for arms exports defined by the European Council. The Council then refused access to documents with the explanation that it "contained highly sensitive information, disclosure of which would undermine the public interest, regarding public security."[14] In the final judgment of the Court of First Instance, the question arose whether it is permissible to withhold such a kind of information in order to maintain good international relations with third countries. In rejecting the applicant's argument, the Court first stressed the political role of the Council in assessing the possible consequences for international relations and then pointed out that the relevant document contained "exchanges of views between the Member States on respect for human rights in the country of final destination" and that "the contested report was produced for internal use and not with a view to publication, and so contains formulations and expressions which might cause tension with certain non-member countries."[15]The more recent *Kuijer v. Council* (T-211/00) judgment reaffirmed the criteria for release of documents in a case involving asylum seekers and information that could possibly involve security issues in terms of both security of persons and international relations between the Union and the third countries. Thus, the exception to a release of information is to be construed only as an exception to the general principle of transparency, the examination is to be made for each document separately and, finally, the principle of proportionality must be combined with the principle of the right to information.[16]

The Croatian Constitution and the right of the public to know

Importance of proper interpretation in constitutional matters

We hold that the right of the public to know, meaning the right of the public to gain access to information held by governmental bodies, is constitutionally guaranteed under the Croatian Constitution. Although not expressly formulated in the text, it is quite easy to deduce this fact by a proper legal interpretation of the Constitution. Consequently, we regard as erroneous a bare grammatical interpretation, based on the

[13] Article 4 of the Regulation.

[14] Hautala v. Council, para 18. All cases of the Court of Justice of the European Communities available at: http://www.curia.europa.eu/en/index.htm, accessed 10 September 2006.

[15] Ibid. para 73.

[16] Kuijer v. Council, paras 55–57. In a relevant part of the judgment, the Court emphasized: "Consequently, the Council must consider whether it is appropriate to grant partial access, confined to material which is not covered by the exceptions. In exceptional cases, derogation from the obligation to grant partial access might be permissible where the administrative burden of blanking out the parts that may not be disclosed proves to be particularly heavy, thereby exceeding the limits of what may reasonably be required."

second sentence of the Section 2 of Article 38 of the Constitution, which says: "journalists shall have the right to freedom of reporting and access to information", according to which only journalists, but not the general public, would have such a right.[17] Such an interpretation is a consequence of a formalist approach to the Constitution, limited to a grammatical interpretation of isolated sections of the particular constitutional provisions. The fact that this manner of interpretation still prevails among our politicians and even legal experts, makes an additional argument in favour of an intellectual exercise in constitutional interpretation, as presented in this article.

In each specific case the Constitution should be interpreted by inclusion of other methods of interpretation in addition to the basic grammatical one, and this applies to every constitution in each separate case of its application. Constitutional norms are very rarely formulated so precisely that such an intellectual undertaking would not be needed.[18] There are various classifications of such methods,[19] and therefore we would summarize them as follows: systematic interpretation; objective (teleological) interpretation; historical interpretation and comparative interpretation. The most important issue is to consider the whole of the constitutional text as a basis for interpretation, through which only the particular constitutional provisions assume their full and correct meaning (systematic interpretation). Article 3 of the Croatian Constitution points specifically to such a method of interpretation: after outlining "the supreme values of the Constitution", it defines them as grounds for interpretation of the Constitution.[20] Departing from these "supreme values", whereas "the rule of law" and "a democratic multiparty system" should be particularly emphasized, it is rather easy to conclude that "the right of the public to know" is a part and parcel of the Constitution, being implied in formulation of several constitutional provisions taken together. Let us explain our methods and arguments.

Democratic constitutional order

The Constitution stipulates a whole array of human rights and fundamental freedoms, which acquire their full meaning only by a reliance on public opinion (*opinio constitutionis)*, which is formed within an open public realm of public discourse, as

[17] Article 38 "(1) Freedom of thought and expression of thought shall be guaranteed. (2) Freedom of expression shall specifically include freedom of the press and other media of communication, freedom of speech and public expression, and free establishment of all institutions of public communication. (3) Censorship shall be forbidden. Journalists shall have the right to freedom of reporting and access to information. (4) The right to redress shall be guaranteed to anyone whose constitutionally and legally determined rights have been violated by public communication." The Constitution of the Republic of Croatia, (*Official Gazette* No. 41/2001 and 55/2001). English translation by Branko Smerdel and Dunja Marija Vićan, *Narodne novine*, Zagreb, 2001.

[18] Zierlein, 2000: 306.

[19] For instance, Perić, 1996: 130–135.

[20] Article 3 reads: "Freedom, equal rights, national equality and gender equality, love of peace, social justice, respect for human rights, inviolability of ownership, conservation of nature and the human environment, the rule of law, and a democratic multi-party system are the highest values of the constitutional order of the Republic of Croatia and the grounds for interpretation of the Constitution."

well as through institutional protection ensured in the first place by the constitutional judiciary. Accordingly, for the implementation of constitutional norms, and of the constitutional concept of a comprehensive democratic political order, the existence of an educated and well-informed public is a necessary condition (*conditio sine qua non)*. A correctly drafted constitutional text is also a necessary, but by no means sufficient condition for the creation, or better, the strengthening of a democratic political order. A democratically-oriented and enlightened political leadership, together with public opinion in a democracy, are of crucial importance for the strengthening and development of democracy. Taking this almost axiomatic position as a point of departure, we could rather easily, from the positive constitutional provisions, come to the conclusion that the right of the public to know, and not the right of the authorities to manipulate information, makes up an important component of the fundamental constitutional concept upon which rests the constitutional order of the Republic of Croatia.

By an application of the teleological method of interpretation we shall easily conclude that the first aim and purpose of the Constitution was to establish a democratic political order, founded upon majority rule and the rule of law, which guarantees full protection to all social minorities.[21] This aim has been formulated expressly in the Preamble of the Constitution *in fine:* "...the Republic of Croatia is hereby founded and shall develop as a sovereign and democratic state in which equality and human rights are guaranteed and ensured, and their [citizens] economic and cultural progress and social welfare promoted." Accordingly, the right of the public to know derives from the Article 1 of the Constitution which states that "(2) Power in the Republic of Croatia derives from the people and belongs to the people as a community of free and equal citizens. (3) The people shall exercise this power through the election of representatives and through direct decision-making." Consequently, if citizens are to rule, i.e. to make rational decisions about whom their representatives should be, or direct political decisions, they must be well-informed.

Comparative experience

Implying the historical and comparative method of constitutional interpretation, we find out that by the same way of constitutional interpretation, the right of the public to know has been created in the jurisprudence of developed democracies.[22] Although the issues of governmental secrecy prerogatives were raised very early in the history of developed democracies, the process was particularly intensified after adoption in 1966 of the Freedom of Information Act in The United States. At that time in Great

[21] Giovanni Sartori asserts: "To be sure (it goes without saying) constitutions are a plan or framework for *free government.* As a manner of speech we have fallen into a careless habit of calling any and all state forms constitutions. As a matter of correct understanding it should be understood, however, that for constitutionalism ....constitutions are only the state forms in which (as Rousseau said) we are free because we are governed by laws and not by other men." Sartori, 1994: 196.

[22] Cf. a similar argument for the Italian Constitution in Martines, 2003: 388–389, and the U.S. Constitution, in Holsinger, 1991: 342–343.

Britain, for instance, special attention was still paid to the legislation on governmental secrecy by consecutive amendments to the Official Secrets Act of 1911. On the grounds of the principle that whatever has not been forbidden or limited by the law remains permissible, the detailed regulation of exceptions to the free flow of information took this piece of legislation almost to the other extreme during the premiership of Mrs. Thatcher in the 1980s. The Freedom of Information Act was adopted in Britain only in the year 2001. Similar to the processes in the United States, by the adoption of the Act the process of struggle for its full implementation has been opened with an active role of civic society associations, whereas the judiciary has to provide standards and exceptions, which could have not been foreseen by those who drafted the legislation. The American statute was then amended in 1995 in order to include the necessary standards defined in jurisprudence. This is important to stress in order to point to the crucial role of the judiciary in application of legislation of this kind, which relies on the constitutional interpretation of implied guarantees and is regularly supported by a large part of but not the entire public, let alone the bureaucratic structures who are accustomed to being protected by secrecy.

The comparative and historical method of interpretation demonstrates how mature democracies began to take the issues of free access to government information seriously only in the second half of the 20th century. It is interesting here to be reminded of the classic work of the French political scientist Georges Burdeau, who explained the process of transforming the original model of "the governed democracy" into a system of "the governing democracy of the open type" during the course of the 20th century.[23] This process, which might be defined as a turn towards a serious consideration of a constitutional concept of democracy, was simultaneously opened in regard to a number of constitutional issues, such as the executive's prerogative, ethics in government, minority rights, and above all important the issue of public control of the military and security services. For instance, in Harold Wilson's book *The Governance of England*, published in 1980 and a primordial political bestseller of the time, only one and half pages out of several hundred were devoted to the security services, at a time when the anti-terrorist legislation of the country alone consisted of several hundred pages.[24] Several years before, the notorious Watergate affair dramatically exposed the abuses of power by the secret services in The United States. In order not to be misunderstood, I mention those instances from the most open democratic governments of the time in the world only in order to point that democracy is not immune to abuse. The situation in the communist world, to which Croatia belonged at the time, was so much worse that it is beyond any comparison.

[23] Burdeau, 1971: 133–180.

[24] This insight I owe to the lecture given by Tony Benn, MP at the London School of Economics in January 1980. At the time a huge row broke out after the press published findings about widespread tapping of telephones by the secret services in London, and Mrs. Thatcher claimed state security reasons in denying an answer to a question in the House of Commons.

The Croatian historical experience

When looking at Croatian recent history we find that in the autumn of 1990, the period when the Croatian Constitution was in the process of drafting, the Constitution of the Yugoslav federation (SFRJ) was still in force. This Constitution has also guaranteed a wide array of political and personal rights and freedoms. Article 245, Section 1 of the Constitution states that "the rights of a citizen to be informed about events in the country and abroad which are of interest for his work as well as about the issues of interest to the community," and in Section 2 of the same Article state the obligation of the media "to inform the public truly and objectively" and "to publish opinions and information of governmental agencies, organizations and the citizens." One should note that it would be even easier to derive the right of the public to know than from the text of the Article 38 of the Croatian Constitution from this formulation.

However, this was only one of numerous constitutional guarantees that have been merely window dressing of a repressive political system. Censorship was formally forbidden, but the most efficient system of "self-censorship" had been imposed upon the media and individuals working in the media, because the legislation prescribed the "principle of political correctness", meaning the commitment to communist dogma and the government of the time. The best illustration for lawyers is that the secret *Official Gazette* existed, containing the classified rules and regulations, prevalently of a repressive nature, which was distributed only to the repressive agencies with a duty to implement those regulations. In legal literature one could even find grotesque "explanations" that the freedom of thought does not include the right of expression, but would have meant only a right to think in private (*cogitatitones poenam nemo patitur)*. An important focus of the drafters of the 1990 Constitution of was to eliminate such misleading stipulations from the text, and also to stress the protection of journalists, but by no means to limit the right of access to government information exclusively to them.

The aim and language of the Constitution

In the light of this it appears clearly that the formulation of Section 2 of Article 38, which says: "Censorship shall be forbidden. Journalists shall have the right to freedom of reporting and access to information," aims at strengthening the position of journalists seeking and publishing information versus any possible attempt to introduce censorship, but not to reduce the right to know exclusively to the members of the journalism profession. It seems obvious that any interpretation that only journalists have free access to information would compromise the fundamental concept of the democratic Constitution, which implies the right of the public to know. However confused some legislators may be because of their reliance only on a bare grammatical interpretation, it is simply false to say that only a journalist would have the right to access to information or that s/he would have the right to select which information the public might deserve to know. On the contrary, this guarantee has been given to

journalists in order to strengthen their position as mediators between the public and the government. The guarantee would also contradict the prohibition of any discrimination on the grounds of "a social position" of Article 14 of the Constitution.

Our interpretation is additionally supported by several provisions of the Constitution: Article 83 on public sessions of the Parliament; Article 119 on judicial hearings being held in public; and Article 3 of the Constitutional Act on the Constitutional Court,[25] which regulates the publicity of the Court sessions. From those provisions it would be erroneous to conclude that only the supreme bodies should act publicly, whilst all the other governmental bodies would remain protected by governmental secrecy. The decisions of the European Court of Human Rights are also of relevance as a positive law, since the European Convention, as all other international agreements, under Article 140 of the Constitution, since its ratification in 1997, makes part of the domestic legal order with a legal force above the legislation. The provision of the Article 68 of the Constitution, which guarantees freedom of scientific research, and contributes to this discussion because it implies free access to information.

Conclusion: the need for better balance

Complex Requirements of Legislative Regulation

Considering all the arguments presented here, it can be clearly demonstrated that the Constitution of the Republic of Croatia provides a guarantee of a free access to governmental information or the right of the public to know. However, the implementation of this fundamental concept requires proper legislation in order to balance a number of contradictory demands that, taken together, define this complex constitutional right. As with all particular human rights and fundamental freedoms, the legislation has to impose limitations on the abstractly conceived absolute right, balancing the interrelation between the public and the private interests. In the language of Article 16 of the Croatian Constitution: "Freedoms and rights may only be restricted **by law** in order to protect freedoms and rights of others, public order, public morality and health." Further, such restrictions must take care to implement the **principle of proportionality**: "Every restriction of the freedom or right shall be proportional to the nature of the necessity for a restriction in each individual case." In addition to that, the Article 50, Section 2 of the Constitution rules: "Entrepreneurial freedom and property rights may exceptionally be restricted by law for the purposes of protecting the interests and **security** of the Republic of Croatia, nature, the human environment and human health."

To make the problem of proper legislative regulation more complex, demands arise from Article 35, which guarantees the right to privacy, ensuring "a respect for and legal protection of personal and family life, dignity, reputation and honour." Article 37,

[25] Published in the *Official Gazette* No. 49 of 2002.

which guarantees the safety and secrecy of personal data, has to be taken into account as well.[26] And finally, even the restrictions to free communications for the reasons of state security and conduct of criminal proceedings are permitted as an exception by Section 2 of Article 36.[27]

The crucial importance of the judiciary

The complex requirements of legislative regulation cannot be fulfilled without a full awareness of the existence and importance of the right of the public to know among those who apply the relevant legislation in deciding cases of dispute, in the first place the judiciary. Numerous issues will be raised, such as a legal protection of functionaries and officials, whereas the courts in developed democracies have already defined the restrictions of legal protection due to the position of power that such individuals enjoy. Above all, the problem of balancing the demands of security with the right of the public to know will once again raise this question, and the problem of balancing the public and private interests in each single case of dispute. This is why the role of the judiciary and especially of the constitutional court judges will be of a crucial importance for establishment, maintenance and development of standards in this area in the era of emphasized demands for security.

The Catalyst Role of Initial Freedom of Information Legislation

As in the case of the adoption of the Freedom of Information Act in the United States, the Croatian Act on Free Access to Information of 15 October 2003, as a number of other pieces of legislation, has prevalently a role of a catalyst of certain imminent political processes, and should be evaluated in accordance with that. This was clearly demonstrated during the action of the Helsinki Watch organization during 2004, when hundreds of claims for information were sent to various public authorities with the intention of spreading awareness of the existence and authority of the new Act. The results of that action show that despite the radical formal innovations introduced by the Act, the traditional approach, according to which every public authority has a right to determine what information should be covered by governmental secrecy, still prevails among administrators and officials. Helsinki Watch, in its report of 28 September 2004 concludes that "there is a lack of political will to implement the Act", as well as "an insufficient information at all levels about the existence of the Law and the obligations arising from it, within the system of public administration and among journalists and

[26] Article 37: "Everyone shall be guaranteed the safety and secrecy of personal data. Without the consent of the person concerned, personal data may be collected, processed and used only under conditions specified by law. Protection of data and supervision of the work of information systems in the State shall be regulated by law. The use of personal data contrary to the purpose of their collection shall be prohibited."

[27] Article 36: "Freedom and secrecy of correspondence and all other forms of communication shall be guaranteed and inviolable. Restrictions necessary for the protection of State security and the conduct of criminal proceedings may only be prescribed by law."

citizens themselves." These results confirmed the insights we already had about the widespread disregard of the demands of the provision of Article 46 of the Constitution, according to which "everyone shall have the right to submit petitions and complaints, to make proposals to government and other public bodies, and to **receive answers** thereto." Government bodies have very rarely obeyed the obligation to respond to senders of petitions and proposals in such cases.

In the described situation the draft Act on Classified Information was presented to the public in the spring of 2006. The concern with secrecy and security of information in this draft was of such a scale that the Act, if adopted would as a *lex posterior* practically invalidate the main concept and provisions of the earlier Act on Free Access to Information. We do not say that this was the real intention of the legislators. It only demonstrates how the demands of security influence lawmakers, as well as their foreign advisors in the rapidly changing security situation. But those two approaches to the right of the public to know cannot be harmonized. In our opinion, the freedom of access to information, as a relatively new democratic right should be strengthened and maintained despite the diminished security situation in the world. Therefore, we support a thorough revision of the Act on Free Access to Information, which would go beyond its catalyst role and should carefully balance the contradictory demands of security and the preservation and promotion of the achieved level of development and protection of democratic human rights.

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