Strasbourg, 30 November 2009

CDL-JU(2009)059
Engl. only

EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

in co-operation with the
Constitutional Court of Turkey

FOURTH CONFERENCE

OF SECRETARIES GENERAL
OF CONSTITUTIONAL COURTS
AND
COURTS OF EQUIVALENT JURISDICTION

ANKARA, TURKEY, 1- 2 OCTOBER 2009

REPORT

"RIGHT TO ACCESS TO OFFICIAL DOCUMENTS, REQUESTING INFORMATION FROM CONSTITUTIONAL COURTS AND PROTECTION OF PERSONAL DATA"

by

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Questions arising before and after a recent judgement of the Strasbourg Court[1]

- Is a complaint pending before the Constitutional Court qualified as public information?
- Access to official documents shall be made only after the deletion of any personal data? Does this rule apply to public figures, too?
- By requesting access to a complaint pending before the Constitutional Court is it important who lodged the complaint (anybody or public figures)?
- Shall complaints for abstract constitutional review, which can be lodged by anybody or constitutional appeals lodged for the violation of rights be dealt with equally?

The European Court of Human Rights (Second Section) delivered a judgment on the 14th of April this year, holding that there has been a violation of Article 10 of the Convention: the applicant claimed that the decisions of the Hungarian courts denying it access to the details of a **complaint pending before the Constitutional Court** had amounted to a breach of the applicant's right to have access to information of public interest.

In 2004 a complaint was lodged for abstract review with the Constitutional Court, requesting the constitutional scrutiny of some amendments to the Criminal Code concerning drug-related offences.

A non-governmental organisation whose declared aim is to promote fundamental rights as well as to strengthen civil society and the rule of law in Hungary, a so called "public watchdog", and which is active in the field of drug policy requested the Constitutional Court to grant them access to the complaint pending before it.

The complaint was lodged by two individuals, and signed by a Member of Parliament ("the MP"), too. (The signature of the MP was necessary because in the complaint reference was made to international treaties, and the Constitutional Court examines rules of law or other legal means of state administration for conflicts with international treaties upon the petition of specific organs or persons, e.g. MPs.)

In July 2004 the MP gave a press interview concerning the complaint. Following this interview the applicant requested the Constitutional Court to grant them access to the complaint pending before it, making reference to the Act on the Protection of Personal Data and the Public Nature of Data of Public Interest ("the Data Act"). The Constitutional Court denied the request, explaining that a complaint pending before it could not be made available to outsiders without the approval of its author. (It would be interesting to know the answer to the question why the Constitutional Court and not the MP directly was requested.)

The applicant brought an action against the Constitutional Court. It requested the Budapest Regional Court to oblige the respondent to give it access to the complaint, in accordance with the Data Act. Meanwhile, on the 13th of December 2004 the Constitutional Court adopted a decision on the constitutionality of the impugned amendments to the Criminal Code. It **contained a summary of the complaint** in question and was **pronounced publicly**.

Notwithstanding the fact that the Constitutional Court procedure had already been terminated, the Regional Court dismissed the applicant's action. It held in essence that the complaint could not be regarded as "data" and the lack of access to it could not be disputed under the Data Act.

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[1] Second section case of Társaság A Szabadságjogokért v. Hungary (application no. 37374/05) judgment Strasbourg, 14 April 2009.

The applicant appealed disputing the Regional Court's findings. Moreover, it requested that the complaint be made available to it after the deletion of any personal information contained therein.

The Court of Appeal upheld the first-instance decision. It considered that the complaint contained some "data"; however, that data was "personal" and could not be accessed without the author's approval. Such protection of personal data could not be overridden by other lawful interests, including the accessibility of public information.

The Data Act regulated the functioning of the fundamental rights enshrined in Articles 59 (1) and 61(1) of the Constitution[2]. Its definition of public information, which had been in force until an amendment on the 1st of June 2005, had excluded personal data, whilst ensuring access to other types of data. In the instant case, the second-instance court had established that the data sought to be accessed had been personal, because it had contained the MP's personal details and opinions, which would enable conclusions to be drawn about his personality.

The mere fact that the MP had decided to lodge a constitutional complaint could not be regarded as consent to disclosure, since the Constitutional Court deliberated *in camera* and its decisions, although pronounced publicly, did not contain personal information about those having applied. Consequently, constitutional applicants did not have to take into account the possibility that their personal details would be disclosed.

We can conclude that in Hungary, due to the application of the Data Act, the Constitutional Court has chosen not to give access to the complaint without the approval of those persons who had lodged it, and only in the decision reference is made to its content. **Within the framework of the Data Act, the right of access to data of public interest was restricted by the right to the protection of personal data.**

The applicant brought the case before the European Court of Human Rights in Strasbourg claiming that the Hungarian court decisions had constituted an infringement of its right to receive information of public interest. In the applicant's view, this was in breach of Article 10 of the Convention[3]. In Strasbourg, the Government argued that the restriction of the right of access to data of public interest by the right to the protection of personal data met the requirements laid down in the Convention, in that it was prescribed by law, it was applied in order to protect the rights of others and it was necessary in a democratic society. "Should the legislature make constitutional complaints and the personal data contained therein accessible to anyone by characterising the complaints as public information, this would discourage citizens from instituting such proceedings."

The applicant submitted that to receive and impart information is a precondition of freedom of expression, since one could not form or hold a well-founded opinion without knowing the relevant and accurate facts. Since it is actively engaged in Hungarian drug policy, it claimed to play a press-like role in this connection, and the function of the press includes the creation of forums for public debate. The denial of access to the complaint in question had made it

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[2] The Constitution of the Republic of Hungary
- Article 59 "(1) …[E]veryone has the right to a good reputation, the privacy of his home and the protection of secrecy in private affairs and personal data."
- Article 61 "(1) ...[E]veryone has the right to express freely his/her opinion and, furthermore, to access and distribute information of public interest."

[3] "1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. ...
2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, ... for the protection of the reputation or rights of others, [or] for preventing the disclosure of information received in confidence, ..."

impossible for the applicant to accomplish its mission and enter into the public debate at the preparatory stage.

The ECHR has consistently recognised that the public has a right to receive information of general interest. In the ECHR's view, the submission of an application for an *a posteriori* abstract review of a legislation, especially by a Member of Parliament, undoubtedly constituted a matter of public interest. Consequently, the ECHR founded that the applicant was involved in the legitimate gathering of information on a matter of public importance. It observed that the authorities interfered in the preparatory stage of this process by creating an administrative obstacle. In view of the interest protected by Article 10, the law cannot allow arbitrary restrictions which may become a form of indirect censorship should the authorities create obstacles to the gathering of information. "**The Constitutional Court's monopoly of information thus amounted to a form of censorship."**

The Court noted that "the right to freedom to receive information basically prohibits a Government from restricting a person from receiving information that others wish or may be willing to impart to him". It considered that the present case essentially **constituted an interference – by virtue of the censorial power of an information monopoly – with the exercise of the functions of a social watchdog, like the press, rather than a denial of a general right of access to official documents**.

Given that the applicant's intention was to impart to the public the information gathered from the constitutional complaint in question, and thereby to contribute to the public debate concerning legislation on drug-related offences, its right to impart information was clearly impaired.

The State's obligations in matters of freedom of the press include the elimination of barriers to the exercise of press functions where, in issues of public interest, such barriers exist solely because of an information monopoly held by the authorities. The Court notes at this juncture that the information sought by the applicant in the present case was ready and available, and did not require the collection of any data by the Government. Therefore, the ECHR considered that **the State had an obligation not to impede the flow of information** sought by the applicant.

The Court considered that obstacles created in order to hinder access to information of public interest may discourage those working in the media or related fields from pursuing such matters. As a result, they may no longer be able to play their vital role as "public watchdogs" and their ability to provide accurate and reliable information may be adversely affected.

The foregoing considerations lead the Court to conclude that the interference with the applicant's freedom of expression in the present case cannot be regarded as having been necessary in a democratic society. It follows that there has been a violation of Article 10 of the Convention.

Moreover, the applicant disputed the existence of a legitimate aim. **The Constitutional Court's real aim had been to prevent a public debate on the question.** For the applicant, the secrecy of such complaints was alarming, since **it prevented the public from assessing the Constitutional Court's practice**. However, even assuming the existence of a legitimate aim, the restriction had not been necessary in a democratic society. Wide access to public information is in line with the recent development of human rights' protection.

The ECHR founded it quite implausible that any reference to the private life of the MP, hence to a protected private sphere, could be discerned from his constitutional complaint. It was true that he had informed the press that he had lodged the complaint, and therefore his opinion on this public matter could, in principle, be identified with his person. However, the ECHR considered that "it would be fatal for freedom of expression in the sphere of politics if public figures could

censor the press and public debate in the name of their personality rights, alleging that their opinions on public matters are related to their person and therefore constitute private data which cannot be disclosed without consent".

Conclusions to be drawn from this case study to the everyday practice of a Constitutional Court

The Hungarian Constitutional Court developed the following system for providing access to complaints before the adoption of a decision: on its website it regularly publishes which provisions of a legislation were requested to be annulled and with which articles of the Constitution they are thought to be in inconformity. This applies to constitutional reviews, but not for "individual" complaints, namely for constitutional appeals lodged for the violation of rights. The Secretary General asks the persons who lodged the complaint whether they give their consent to make their name and address public in the decision. If a person initiating the procedure of the Constitutional Court can be regarded as public figure, e.g. person holding public functions, their complaints are automatically published in the website of the Constitutional Court. The "public watchdogs" are aware and from time to time they request the Constitutional Court to send them documents, but not to update its homepage…