

2009

Publicity in the Administration  
of Justice and  
the Disclosure of Court Decisions



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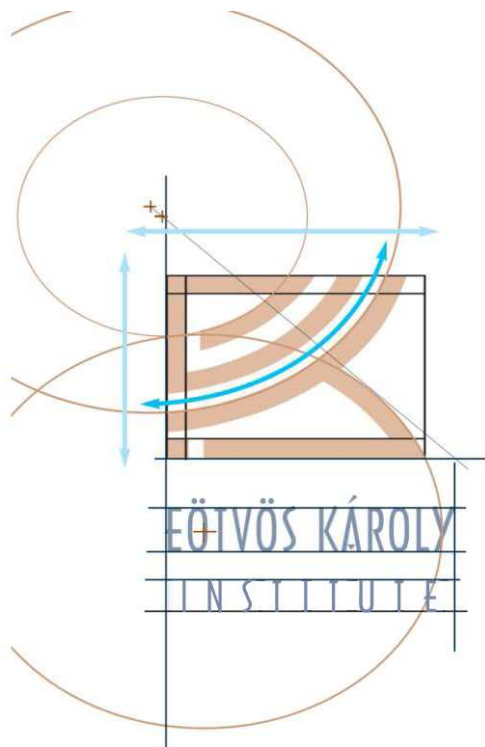
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## CONTENT

<b>Introduction – Objective and Methodology</b> .....	<b>5</b>
<b>I. The Theory Behind Disclosure in Justice</b> .....	<b>6</b>
I.1. The constitutional underpinnings of disclosure.....	6
<i>I.1.1. The function and substance of freedom of information</i> .....	6
<i>I.1.2. Disclosure in justice</i> .....	7
I.2. The functions of publicity in justice .....	8
<i>I.2.1. Social control</i> .....	8
<i>I.2.2. Impartial process</i> .....	9
<i>I.2.3. The power of law to transform society</i> .....	9
<i>I.2.4. Legal certainty</i> .....	10
<i>I.2.5. Legal uniformity</i> .....	10
<i>I.2.6. The legislative role of science</i> .....	11
I.3. Data protection as the limit of disclosure.....	11
<i>I.3.1. Momentary publicity in the courtroom</i> .....	13
<i>I.3.2. Public memory: Open access to disclosed information</i> .....	14
<i>I.3.3. Publicity as pillory</i> .....	15
<i>I.3.4. A multitude of data</i> .....	16
I.4. The scope and levels of publicity in justice .....	16
<i>I.4.1. The scope of publicity</i> .....	16
<i>I.4.2. Institutional and procedural publicity</i> .....	17
I.5. European expectations .....	18
<b>II. The Compendium of Court Decisions</b> .....	<b>19</b>
II.1. Database content .....	21
<i>II.1.1. Uploading the decisions</i> .....	21
<i>II.1.2. Associated decisions</i> .....	22
II.2. Search terms .....	22
<i>II.2.1. Decision codes</i> .....	22
<i>II.2.2. Free text search</i> .....	22
<i>II.2.3. Search by provision of law</i> .....	23
<i>II.2.4. Weighting</i> .....	23
II.3. Display of search results .....	24
<i>II.3.1. File names</i> .....	24
<i>II.3.2. Decision abstracts</i> .....	25
<i>II.3.3. The arrangement of search results</i> .....	25
II.4. Extra services.....	25
<i>II.4.1. Integrated legislative search engine</i> .....	25
<i>II.4.2. Associated decisions of international courts</i> .....	26

# Publicity in the Administration of Justice and the Disclosure of Court Decisions



<i>II.4.3. Monitoring decisions</i> .....	26
<i>II.4.4. "Remember me" function</i> .....	26
<b>II.5. Compliance with the law</b> .....	<b>27</b>
<i>II.5.1. Access to the database</i> .....	27
<i>II.5.2. Privacy notice</i> .....	27
<i>II.5.3. Anonymization</i> .....	28
<i>II.5.4. Decision code</i> .....	29
<b>III. Conclusion</b> .....	<b>29</b>



*In 2009, with the support of the Open Society Institute, the Eötvös Károly Institute conducted a research project on disclosure in the judicial system. The original Hungarian language version of the study is available for downloading from the web site of the Institute. The present synopsis in English outlines those of our findings that could be of use in a non-Hungarian context as well.*

## **INTRODUCTION – OBJECTIVE AND METHODOLOGY**

The present study forms part of a larger research project on the topic of disclosure in justice, and is limited to discussing the implementation of disclosure principles in the special area of court decisions. [Translator's note: Hereinafter, for the sake of convenience and consistency with the language of official English versions of relevant Hungarian regulations, the term decision will be used in this text (except in quotations) whenever a court decision, resolution, judgment, ruling, or verdict is meant.] In this specific regard, the project has aimed at analyzing the Compendium of Court Decisions (elsewhere translated as "Collection of Court Decisions"), created under the Act on the Electronic Freedom of Information—in other words, at examining the impact of this law ex-post. For all this special focus, however, we cannot afford to do without a description of the theoretical background to disclosure in the administration of justice. The implementation of statutory provisions—for us, the proper functioning of the Compendium of Court Decisions—cannot be subjected to analysis from either the regulatory or practical perspectives, except by making visible the theoretical foundation upon which the edifice of legislation is erected. In the present case, this means the theory of freedom of information on the one hand, and the duties and operations of the administration of justice on the other hand. Thus we will first discuss in detail the notions of freedom of information and disclosure in judicial matters, taking tally of the functions disclosure is intended to fulfill in justice. Following this overview of the theoretical underpinnings, we propose to examine the extent and depth to which the principle of disclosure has informed the public operation of the justice system.

In discussing the Act on the Electronic Freedom of Information, it was our intention to examine the usefulness of the database of the Compendium itself. We also extended the research project to include the analysis of the applied IT from the point of view of the user. In other words, we wanted to find out how user-friendly the system was, how it worked, and whether it required practical changes to be made. In this respect, the project has been essentially empirical in its methodology. In order to form a sufficiently comprehensive idea of the Compendium of Court Decisions that also lends itself to analysis, we devised a survey from that we sent to selected entities and individuals in the legal professions, including courts, the Bar Association, and several notaries. We had decided in favor of a non-representative survey, because our aim was not so much to discuss disclosure in a descriptive manner as to scrutinize the application of the law. In this way, the survey essentially consists of open questions, allowing us to map the critical points where change is needed.



## I. THE THEORY BEHIND DISCLOSURE IN JUSTICE

### I.1. The constitutional underpinnings of disclosure

#### *I.1.1. The function and substance of freedom of information*

In the rigorously consistent case history of the Constitutional Court, a set of communication rights derived from the freedom of expression serve to support the participation of the individual in social and political processes. This set of rights includes, among other things, the right to information and the freedom to access information.

Freedom of information, understood as the right to access and disseminate data of public interest, is an indispensable precondition for the triumph of freedom of expression and participation in public affairs. The acquisition and unimpeded dissemination of information on the operation of the state enables citizens to form a view of, and thus to exercise control over, the activities, lawfulness and efficiency of operation of national and municipal bodies of government.

What follows from the freedom of speech as a fundamental right is not just the inherent right of freedom of expression but also the mandate of the state to ensure the preconditions for and uninterrupted operation of democratic public opinion. Thus the freedom of expression is more than just a fundamental inherent right, because the recognition of its objective, institutional aspect amounts to guaranteeing public opinion as a vital political institution.<sup>1</sup> Freedom of information, then, is nothing but one component of these institutional safeguards in the area of communication rights.

The quintessential substance of freedom of information is the general accessibility and publicity of information held by organizations and individuals exercising public functions, except as expressly allowed by law. The accessibility of information to anyone may take two basic forms: by disclosure on a generally accessible forum (proactive freedom of information) or by making the information available upon request. Proactive freedom of information is intended to meet the need for readily available information without requesting it if it affects or is of concern to a larger group within society. This purpose is served by the institution of disclosure, which motivates the holders of public information to positive action in making the largest possible portion of information held by them available to the public.

The type of freedom of information legislation that has been enacted in Hungary<sup>2</sup> requires bodies performing public functions both to satisfy individual requests for information and to make disclosures on a regular basis. The law enables anyone to file a request for data of public interest, and requires the organization holding that data to satisfy that request promptly, but not later than within 15 days. The DP&FOIA also declares the obligation of bodies exercising national or local executive powers and other public functions to periodically disclose, electronically or by some other means, major data related to their activities.

Disclosure may be carried out electronically or by a number of conventional ways, such as by periodic publications as well as volumes, reports, and brochures delivered to public libraries. However, in this technically advanced day and age, it makes sense to take advantage of the

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<sup>1</sup> Cf. Constitutional Court Resolutions 30/1992 (V. 26.) AB and 36/1994 (VI. 24.).

<sup>2</sup> Specifically, Act LXIII of 1992 on the Protection of Personal Data and the Disclosure of Data of Public Interest (hereinafter: "DP&FOIA", short for Data Protection and Freedom of Information Act).



opportunities afforded by electronic disclosure. Modern freedom of information laws around the world therefore go beyond safeguarding the right to individual data requests and stipulate a disclosure obligation for a specific set of data of public interest.

Access to information is always easiest if it has been disclosed already. In this case, the government and its agencies take a proactive role, preempting requests by disclosing information on their own as required by law, which will then be there for the taking. These data remain readily available even if nobody happens to take an interest in them. Access to information based on individual request is more complicated than that. First of all, the citizen must identify the organization capable of giving him the information sought (an attempt greatly aided by mandatory disclosures as described above). Then he must formulate the request and send it to the competent entity, which will decide to satisfy the request for information or, as the case may be, deny it.

## *1.1.2. Disclosure in justice*

Owing to the special nature of the administration of justice, there are a number of tenets in addition to the general principles of freedom of information that render disclosure in this field especially vital.

The classic theory of checks and balances builds on the perception that liberty and freedom from tyranny cannot be guaranteed unless the three branches of power operate in independence from one another. Directly following from this perception are the organizational autonomy of justice as one of the three branches of power, and the constitutional principle of the independence of each specific court decision as an act of resolving conflict. To put it differently, not only does this mean that the courts in general must remain immune to external influence, but that individual judges passing a decision must not follow instructions, answering to nothing but the law. There is no such thing as a specific supervisory power to which the judiciary would have to report. Having survived as one of the tokens of constitutional democracy, the principle of independence continues to define the operation of the justice system, but is no longer alone in doing so. It is joined by two other demands we cannot afford to ignore. These are the dictates of transparency and accountability, which the administration of justice must also heed these days, rather than contenting itself with safeguarding its independence from the other two branches.

### Transparency and accountability:

The administration of justice cannot be transparent unless both the operation of the courts in general and individual decisions in particular become accessible to the public at large.

Far from meaning the restriction of judicial independence, accountability implies that the judiciary must remain open to scrutiny and control.

Recent research in jurisprudence<sup>3</sup> has been virtually unanimous in identifying the growth of judicial powers and the expansive outcome and influence of the courts' application of the law as the main

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<sup>3</sup> Guiseppe Di Federico: Independence and Accountability of the Judiciary in Italy: The Experience of a Former Transitional Country in a Comaparative perspective, <http://siteresources.worldbank.org/INTECA/Resources/DiFedericopaper.pdf>, Wim Voermans: Judicial transparency furthering public accountability for new judiciaries. Utrecht Law Review, Volume 3, Issue 1 (June)



causes that have given rise to the requirements of transparency and accountability. In short: The more power to justice, the stronger the need to exercise control over its activities. Now, this control cannot be implemented without harm to the principle of independence unless both the organization and the decisions of the courts remain transparent—i.e., accessible for the general public. As for the principle of accountability, it can obviously triumph only if justice operates under public scrutiny, meaning that sufficient information is available to uncover errors and shortcomings in decisions and operation, and to apply the appropriate sanctions. Thus public scrutiny fulfills a twin function by being both the vehicle of, and the driving force behind, the mechanism of control.

All of this may require a sort of shift in values and a reformed mindset on the part of everyone in the administration of justice. Instead of bowing to the monopoly of judicial independence, we will need to come face to face with the dual principles of transparency and accountability, both of which inevitably presuppose the acceptance of public scrutiny as a cardinal virtue and as one of the means of transparency and accountability in justice.

## **I.2. The functions of publicity in justice**

In what follows, we take tally of the functions fulfilled by publicity in justice. Apart from providing us with a theoretical foundation, these identified functions will be helpful in examining regulatory and judicial practices. These functions essentially define the lines along which we intend to conduct this study, showing how, and to what extent, prevailing regulations and practices are reconcilable with the functional requirements of publicity.

### *I.2.1. Social control*

As regards justice as a branch of power, publicity is first and foremost intended to ensure the process of social control. The publicity of trial and the disclosure of decisions are among the oldest tenets of justice in constitutional democracies. As a consequence of enforcing the independence of justice, prior to the advancements in technology, this was practically the single principle capable of offsetting the possibility of bias and arbitrariness in court decisions and practices. Initially, publicity remained confined to the courtroom in terms of open trial and decision. The issue of public scrutiny of the judicial organization itself as a body vested with public power did not arise as a means of social control.

The broadening of social control and the transformation of the notion itself only became perceptible starting the second third of the 20<sup>th</sup> century, when the new challenges presented to the courts by social, economic, and technological change gradually amplified the role of social control and pushed its boundaries ever further. This process led to a situation where the openness of trial alone no longer sufficed. The information society began to claim additional powers of access to the workings of the judicial system. First the demand emerged to access decisions in their written form. Later, as a result of the progress of information technology, it became impossible to ignore the call for electronic disclosure as well. The process raised a number of questions for which we are still looking for the answer, for instance in relation to the television broadcasting of trials and the full-scale disclosure of court documents. We believe that our research project is particularly timely and of

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2007.; Nuno Garoupa and Tom Ginsburg: The Comparative Law and Economics of Judicial Councils, Berkley Journal of International Law, 20 February 2007 <[http://www.boalt.org/bjil/docs/BJIL27.1\\_Ginsburg.pdf](http://www.boalt.org/bjil/docs/BJIL27.1_Ginsburg.pdf)>.





great consequence precisely because of the call for the administration of justice to respond to these still ongoing changes in ways that will achieve harmony in the complex web of interconnectedness among the dictates of independence, social control, disclosure, privacy, and the protection of personal data.

## *1.2.2. Impartial process*

The publicity of judicial power also guarantees impartial, fair trial and due process. Impartiality means the lack of bias, preconception, and prejudice. This function comprises a narrower field than social control, which is aimed at providing external monitoring of judicial practice. While social control ensures impartiality in a general, objective sense and by indirect means, impartiality itself is something that is subjectively felt by the parties involved in the process. In other words, the parties to a trial have a direct interest in keeping bias and arbitrariness out of the courtroom. Although the function of social control does not differ from the principles of impartial process in its essential substance, the latter clearly involves a narrower focus on the parties themselves. For parties appearing before the court in specific cases, impartiality is best guaranteed by the institution of the open trial and the open courtroom. As a matter of course, additional guarantees are provided by the disclosure of decisions, even if a decision itself does not necessarily reflect an impartial process. Apart from the openness of trial, disclosure to researchers and coverage by the media also play a paramount role in ensuring impartiality in the courtroom.

## *1.2.3. The power of law to transform society*

Due to their very nature, law and the legal system have always featured prominently among the forces shaping society. However, the changing role of the state, particularly the emergence of the intervening state, in the wake of nascent welfare societies has considerably boosted the contribution of law to transforming society in a process that has predominantly made itself felt in various organizations and, within social policy, in the welfare system. Whereas social transformation is most commonly brought about by legislation, the application of the law claims and is given a lesser role in this process in comparison. In terms of the power of law to shape society, another distinction must be made between the function of intervening in the life of society on the macro level and the micro-level function that impacts individual citizens. From the point of view of the publicity of justice, the principles informing the increasingly proactive role of the state are quite different from those informing the legal awareness of people.

With individuals, the transformative power of law is basically concentrated on legal awareness, since law-abiding conduct inevitably relies on the knowledge of the law and on contact with bodies applying the law. The publicity of or general access to judicial decisions and practices may certainly make an instructive and formative, if indirect, contribution to raising legal awareness among the citizenry.

In criminal law, for instance, one of the objectives of punishment is to prevent other members of society from perpetrating similar offenses. This is yet another goal that increased publicity in the administration of justice is capable of implicitly serving.

On the level of organizations and social policy, the function of publicity is essentially directed at monitoring government practices, which furthers the function of social control.



## 1.2.4. Legal certainty

The imperative of legal certainty means that the law—these days inevitably understood as including the application of the law beyond mere legislation—must be foreseeable and predictable. Legal certainty, a *sine qua non* of constitutional democracy, makes it the duty of the state, and of the legislature in particular, to ensure that the entirety of the legal corpus, as well as its specific fields and specific statutes, be clear, unambiguous, and predictable in terms of their operation for those subject to them. That is to say, legal certainty not only demands that specific norms be unequivocal in their meaning, but also that each legal institution work in a predictable manner.

Looking at the evolution of jurisprudence over time, the process started with the work of making laws and regulations (hereinafter collectively: “laws”) accessible to the public at large. This process in Hungary was completed only in the recent past, with the entry into force, on January 1, 2006, of the Act on Electronic Freedom of Information, which guaranteed online access to laws. Apparently, the legal system here is often taking a long time to cope with the challenges despite the progress of technology. The same is true for the application of the law. The posting of unedited court decisions for online access free of charge had not become mandatory in Hungary until July 1, 2007. For comparison, electronic access to decisions in Estonia was first opened in 2001.

Legal certainty cannot be implemented without guaranteeing general access to the law. The question arises: If this is true, does this mean that we cannot truly talk about legal certainty before the technical means enabling it saw the light? This is of course far from being the case, for there had been ways to uphold legal certainty before the Internet gained ground. We must nevertheless bear in mind that, what with the augmentation of judicial powers, legal certainty can no longer be guaranteed by the means of the past alone. Changes in the role of the application of the law, specifically the blurring of the boundary between legislation and case law, have given rise in Continental legal systems to the basic requirement of enabling general access to court practices as a token of legal certainty. In addition to the considerable augmentation of judicial powers, we must take into account the radical changes over the past two decades in the culture of acquiring information. Earlier methods of ensuring publicity may have sufficed to guarantee legal certainty, but the new forms of control and collecting information have certainly pushed out the boundaries of reasonably expected publicity, even as the concept of legal certainty itself has remained unchanged.

## 1.2.5. Legal uniformity

Closely interrelated with the notion of legal certainty is the criterion of legal uniformity. In order for law and the administration of justice to be predictable and foreseeable, we need uniformity of application in the field.

Legal uniformity implies that court decisions adopted in various parts of the country in cases of similar subject matter will carry identical legal substance, irrespectively of the given region and rank of venue, and without curbing the freedom of judicial interpretation. To the extent that court decisions can be accessed by anyone, legal practice will become predictable and consistent, and the legislative contribution of the courts more easily perceived.



## 1.2.6. The legislative role of science

Once we acknowledge changes in the application of the law and the role of the courts, we cannot pass in silence over the necessity of scientific and scholarly analysis. It is the task of jurisprudence to subject court decisions to scrutiny and analysis on the one hand, and to professionally critique the administration of justice in the name of social control on the other. The key prerequisites for scientific work include access to data of public interest as well as the freedom to conduct research involving information that normally falls outside the scope of data subject to disclosure. For this reason we believe that separate dedicated statutes should be adopted to provide for the rules of scientific research. Science mediates between society and the given organization. As in the case of the media, scientific study and research make available to public opinion—to the opinion of the profession and of the public at large—a set of relevant information that is capable of significantly influencing the state of confidence in the given institution, in our case the application of the law.

## 1.3. Data protection as the limit of disclosure

The call for disclosure in the administration of justice easily comes into conflict with the privacy rights of the parties to a process, and most commonly with their right to the protection of their personal data. In civil procedure, for instance, the first hearing begins with the presentation of the statement of claim, which contains a number of personal data, including the names of the parties (and of their legal counsel), their place of residence, position in the litigation (plaintiff or defendant), the right sought to be vindicated, as well as the facts and evidence marshaled in support of the claim. In this way, under prevailing procedures in Hungary, the rule of thumb is that no one will be able to enforce his rights in court unless he is willing to expose what may be a considerable portion of his privacy in the limelight of publicity. The personal data in the statement of claim—which may include facts deeply affecting privacy to the extent that these facts are invoked as evidence—become public knowledge the instant that statement is read out in court, provided it is an open trial. Similar questions are raised by the public announcement of the demonstration of evidence and the decision itself. Without a doubt, court decisions do contain personal data. Some of these have become known to the court during the process itself, but the decision itself also *generates personal data* as a new element. This is most easily seen when a criminal court rules someone guilty, creating a data which is not only personal but sensitive in nature. Conversely, the court declaring the accused innocent will likewise generate new data by virtue of the acquittal. Civil courts also generate personal data by establishing an entitlement or a liability, finding that a right or a legal relationship exists or is non-existent, or by creating, changing, or terminating a legal relationship, when these decisions are proclaimed in public. In addition to the personal data generated by the decision, decisions contain a set of personal data that make an appearance as mandatory substantive elements in procedural law. Decisions naturally contain personal data that serve to identify the case and the decision, just as they do in other documents. The personal data created by the court or authority by means of its decision is recorded in the operative part of that decision. It is important to note that the personal data here is created *by the decision*, and is merely proclaimed by the operative part thereof. The argument of decisions teems with personal data, most of them supplied by the parties, and some obtained by the court by other means. This is because the argument sets forth the facts of the case, and describes the evidence, admitted and unadmitted, in support of those facts. Additionally, the argument to a



criminal verdict also makes reference to the penitentiary record of the defendant. Under applicable EU norms of data protection, personal data pertaining to criminal record are regarded as sensitive data.

The conflict between the disclosure of decisions and the privacy of the parties to the process is not irreconcilable; it can be resolved by the technique known as anonymization.

Decisions commonly involve identification data as well as other types of data which, in conjunction with identifiers, may be correlated with specific subjects, and the use of which in the decision is unavoidable. In most cases, the reason for confidential treatment is personification. On the one hand, the confidentiality of personal data comes from their personal nature, i.e. from their ability to be correlated with a specific natural person. On the other hand, the data we are looking at also include some that have non-personal subjects with which they can be correlated, such as tax secrets in relation to business organizations. Yet another type of confidential data is not confidential because it has a subject or, if it does, because it could be correlated with that subject, but because it inherently carries information in need of protection (such as the majority of state secrets). The first two categories of data, which we may call data of personification, may be stripped of their confidential nature by removing the element of personification, without harming confidentiality itself in the process.

Rendering personified data accessible—which amounts to stripping it of its confidentiality—may be achieved in two ways: either by enabling access to the data in unchanged form, thereby curbing the rights and interests of the data subjects, or by removing the personal characteristics from the data, thereby releasing it from the burden of confidentiality.

Allowing access to data of natural persons without removing the identifiers would accomplish a restriction of their right to the protection of their personal data, as the access would be accomplished without their consent. In case of personified data of another type, access would harm the subject's right to secrecy protection or simply his appreciable interest of one sort or another in keeping the data in question confidential. Such a breach could lead to further violations of interest, potentially to the point of swaying the court's decision.

Another solution for enabling access lies in altering the data in such a way as to obviate the need for confidentiality in the first place. In the case of personified data, this can be accomplished by anonymization, that is by conclusively severing the link between the data and its subject. This releases the data from confidentiality without impinging upon the rights and interests of the data subject.

Anonymization thus consists in eliminating the connection between some material fact and its subject, accomplished by the removal of identifiers. From the point of view of the accessing entity, the abolition of this connection must be conclusive and irreversible, meaning that the data must not lend itself to re-personification. In other words, no other knowledge of facts, actual or potential, should make it possible for the entity holding the data to restore the correlation between it and its subject. Therefore, in choosing the right method of anonymization, one must be mindful of the category and type of data to be anonymized, the number of data subjects affected, and the nature of entities accessing the anonymized data. However, a law is necessarily confined to enacting general provisions—rules that can be applied to any act of access to data. As a result, it cannot prescribe the method of anonymization, only its outcome. The law may identify the target to be accomplished by means of the anonymization, while it must leave it up to the data controller (the holder of the information) to decide, in due consideration of all the parameters involved, how to achieve that goal. The data controller is responsible for handling the data confidentially, and will owe a liability to the



data subjects for rendering confidential all data that would become accessible in case of a failure to carry out their anonymization.

In respect of individuals, organizations, and institutions as parties to a judicial process, anonymization may be accomplished by deleting every identifier or by replacing them by certain codes accepted by convention, such as initials or specifying position in the trial (plaintiff or defendant). The interests of anonymity may further require the deletion or encoding of other data featured among the facts of the case, such as specific topographical names, street names, and the data of other persons and organizations not party to the proceedings. Stripping decisions of personal identifiers means that the material data can no longer be correlated with their original subjects, and can thus be freely disclosed to the public.

Regarding anonymization, mention must be made of the fact that the deletion of the identifiers does not mean that the link between the data featured in the decision and the original data subject has been once and for all prevented from being restored. While the decision itself must not contain identifiers, this clearly does not rule out the possibility that certain individuals, smaller groups, or even the public at large may be aware of information on the basis of which the correlation between the decision and its subject can be restored. For instance, a person who has attended the trial or otherwise recognizes the particular individual or organization involved in the court decision will be able to take advantage of the institution of open trial to restore that correlation, and there is nothing with that. By the same token, we cannot exclude the possibility for the data disclosed by someone in the course and capacity of his public appearance to be associated with a court decision involving his person. Thus the anonymization of a decision, while it must be complete, does not necessarily amount to irreversibly stripping the data of its personal characteristics. In this way, disclosure—in addition to the disclosure performed in the act of the announcement of the decision in the courtroom—implies further restrictions of a fundamental right. In this specific extent, this restriction is not objectionable, considering that it satisfies the twin criteria of necessity and proportionality. To wit, the purpose of the restriction could not be accomplished in any other manner, and the restriction is duly limited to the narrowest possible extent.

### *1.3.1. Momentary publicity in the courtroom*

The principle of open trial has an obvious impact on the personal data of the parties, first and foremost in the context of the claims and demonstrations made in the courtroom. This principle is no doubt one of the cornerstones of judicial process, intended to serve the fairness of trial and lack of bias in sentencing. Publicity is a means of control over judicial decisions, which no constitutional democracy can afford to relinquish.<sup>4</sup> Unbiased sentencing, which the open trial seeks to ensure, is mainly the interest of the chief parties, but also of everyone else whose acts are involved in the proceeding, and ultimately of society as a whole. This interest is pitted against the individual's interest in protecting his privacy. Since this latter interest is relegated to secondary importance by the law, the rule of thumb is the open trial in both civil and criminal proceedings.

The provisions delineating judicial procedure establish the openness of trial as the general rule, meaning that the trial is open for attendance by anyone in addition to the main parties and others involved in the action. By way of exception, the law also permits the trial to be held in camera.

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<sup>4</sup> Gilles, Peter: A magánszféra védelme az igazságszolgáltatásban. [Protecting Privacy in Justice ] *Magyar Jog*, 1992, No. 3. p. 181.



Article 6 of the European Convention on Human Rights (ECHR) and Article 14 of the International Covenant on Civil and Political Rights (ICCPR) enshrine the right to public hearing as a fundamental right, although they, too, uphold the possibility that “The press and the public may be excluded from all or part of a trial for reasons of morals, public order (*ordre public*) or national security in a democratic society, or *when the interest of the private lives of the parties so requires*, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.” [Emphasis ours] In the case law of the European Court of Human Rights, the openness of judicial process is regarded as a vital public interest, *which the parties have no inherent right to override*.<sup>5</sup> It is up to the court to decide whether the private interests cited as a reason for excluding the public can take precedence over the interest in an open hearing. The general rule of open hearing is manifest in the civil procedure of every European country.<sup>6</sup> The interests of parties in the confidential handling of their personal data is recognized by all European codes of procedure by excluding the public from hearings if there is a threat to the “sphere of intimacy,”<sup>7</sup> “private secrets,” “privacy,” “family life,” or “private life” of a party or witness to the trial.<sup>8</sup>

Hearings where the decision is pronounced can be freely attended by the public, as these sessions are not about revealing and transferring personal data but about making a public announcement. The public announcement of the decision is just as much a means of social control over justice as is the open trial. In fact, it is an indispensable element of that control, as fair trial and due process in themselves can hardly suffice if the decision reached in that process infringes upon the law and cannot be monitored by the community. If the decision remains buried in a file, with nobody except the subjects able to access their personal data in it, the integrity of these individuals in terms of data protection will remain intact. By contrast, the personal data contained in and generated by the announcement of the decision become available or known to persons who simply have no business knowing that information.

As a rule of thumb, decisions must be announced at an open hearing, even if the public has been excluded from the trial itself. As a matter of course, the publicity of the announcement applies to the news media as well, although solutions for covering court decisions tend to vary by country. In France and Switzerland, anonymization is not mandatory, but identifying participants by name may be prohibited as an exception if justified by the identity of the individuals involved and the nature of the case. In the United Kingdom and the United States, court decisions are published with the full names of the parties. In any event, the so-called case books widely used in English-speaking jurisdictions keep the cases on file by the names of the parties.<sup>9</sup>

### *1.3.2. Public memory: Open access to disclosed information*

Disclosure in general, and electronic disclosure in particular, implies a brand of publicity that is entirely different from the single instance of publicity accomplished by the public announcement of a decision. The publicity of decisions is transposed into another dimension and virtually rendered

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<sup>5</sup> Cf. Rolf Gustafson v. Sweden judgement of 1 July 1997.

<sup>6</sup> The list includes Germany (GVG § 169), Austria (ZPO § 171), Italy (Art. 423 CP), Greece (Art. 114 CP), France (Code de Procédure Civile Art. 525 and 783), Switzerland (Art. 24 CP).

<sup>7</sup> “*l’intimité de la vie privée*” — Code de procédure civile.

<sup>8</sup> E.g. Germany’s GVB §§; 170, 171, 171b, 172 ; Italy’s Civil Procedure §423 and § 434 (2); France’s Code de procédure civile Art. 525b, Austria’s CP § 172 § (2).

<sup>9</sup> Peter Gilles *ibid.* p. 185.



timeless by the Internet and the opportunities afforded by it. Data posted on the Internet can be searched and organized, and remain available after deletion. For all intents and purposes, then, online data stay on the Internet for eternity. By contrast, verbal announcement in public, though another form of disclosure, amounts to a bare minimum of publicity. The person attending a hearing will hear everything that transpires in the courtroom, but this does not make the announcement amenable to subsequent searches and organization unless someone in the audience has been taking notes of the proceedings. In this way, the majority of decisions is lost for the public in spite of having been announced once, given that they are not archived in any form that would be accessible to inquiries.

The purpose of publishing decisions is to keep open the possibility of information for the law-seeking public, which purpose can ultimately be traced back to the imperatives of legal certainty and freedom of information. Divorced from the particulars of the case at hand, the disclosure of the decision no longer serves the interests of the parties to the action, but is aimed at disseminating information concerning judicial practice, for instance to help legal subjects to tailor their conduct to the courts' interpretation of statutory provisions, or to enable the monitoring of judicial interpretations for standards and consistency. These goals no longer presuppose familiarity with the specifics of a case. Normally, the identities of the plaintiff, defendant, and counsels are of little interest here. All of this means that, while there is good reason to prescribe publicity, including the public announcement of decisions, it would be unreasonable to enact a blanket requirement for the publication of personified decisions. This will not affect the publicity of personified decisions, considering that access to them will remain ensured positively, if subject to limitations, through the convention of public announcement in the courtroom.

Generally speaking, we can say that court decisions routinely contain information that should be of no concern for the publicity of the Internet—a searchable, organizable, and never oblivious medium—even if the information otherwise forms part of the announced decision. At the same time, the purpose of the disclosure is undeniably best served by publishing the decisions in unabridged and unedited form. In this way, the rules must carefully balance the respective arguments for full disclosure and abstracts by expressly identifying which parts or data content of a decision must be kept from the public. Given that the stated purpose of public access to court decisions does not inevitably require the disclosure of personal data—since the purpose at hand can be accomplished without it—the disclosure must steer clear of including personal data.

### *1.3.3. Publicity as pillory*

In order to familiarize oneself with how the courts interpret the law, it is not necessary to know the identity of the individual or individuals in whose case the court happened to arrive at a particular opinion. The permanent disclosure of the decision upon a person from which data remain available for retrieval at will may serve another purpose, namely that of expressing the disapproval of society at large. This disapproval, however, is already an integral part of the sentence, which turns such pillorying or public disgrace into a form of new penalty that is not recognized by the prevailing penal code. The convict would thus suffer a more severe penalty, while the cause of deterrence would be hardly served by informing prospective perpetrators of who received what sentence for what offense. It is enough to know the nature of the offense and the punishment imposed by the court. Disclosing the data of the convicts online would cause additional difficulty due to its persistence in compromising the individual's ability to fit back in with society and a normal life after having served a



sentence. For instance, a hiring employer would be able to run an Internet search on the job applicant's name and track down his criminal record. Furthermore, this scheme would fail to accommodate the institution of limitations, i.e. recognize the time frame beyond which the disadvantages that come with a criminal record no longer apply because the ex-convict is no longer liable to give an account of that criminal record. Additionally, the disclosure would have a severe impact on those close to the convict, particularly his family. Eventually, the identification of the convict in decisions would result in the disclosure of very significant personal data, such as those pertaining to personal circumstances, public access to which could not be justified by any purpose, including that of expressing social disapproval.

### *1.3.4. A multitude of data*

Another potential argument against the disclosure of decisions has to do with the unwieldy nature of any unsorted mass of data. The argument is based on the perception that large volumes of unorganized data are far less valuable than a smaller set of sorted data, because the required information is much easier to find in the smaller set.

Luckily, the advances of information technology have rendered this argument increasingly irrelevant. Ordering and locating information these days do not necessarily require screening or selection, since data recorded without any criteria of selection can be rendered searchable and, ultimately, found. This is precisely the novelty that has paved the way toward a more efficient protection of privacy—the novelty that lies in the capacity of electronically recorded information to be located, organized, and reorganized at any time at will. The temporary or permanent connections that can be set up between pieces of information make the data easier to find as well as significantly increase its value, which is a function of its meaning, or substance.

## **1.4. The scope and levels of publicity in justice**

Although in its current phase our research project focuses on the disclosure of court decisions or decisions, we nevertheless find it important to briefly review the means by which publicity communicates with judicial process. The set of issues inherent in the disclosure of decisions cannot be grasped in isolation, because access to decisions forms part of a larger system, that of publicity in the administration of justice.

Publicity in justice can be discussed based on various criteria. In terms of scope, there is a difference between the *publicity of the courtroom* and *electronic publicity*, where the distinction relies on the number of individuals with the ability to access the relevant information. Another distinction can be made between the *institutional/organizational* and the *procedural* kinds of publicity or disclosure, based on the substantive difference between data pertaining to the operation of the system of justice and data generated by judicial processes themselves. Finally, within the court procedures, we can differentiate between *open trial*, *access to court documents*, and the *disclosure of decisions*.

### *1.4.1. The scope of publicity*

The publicity of the courtroom reserves the knowledge of the proceedings for those actually present at the trial. This type of publicity is obviously influenced by familiarity with the given schedule of





hearings (i.e. what case is being heard and when before a given venue), by the personal schedules of prospective attendees themselves (who must find the time to go to the courtroom), and by the sheer size of the given courtroom. The scope of publicity is naturally the narrowest here, because the constellation of all three circumstances is necessary for someone to attend a hearing. However, it is precisely this attendance in person that ensures the deepest reach of publicity in terms of substance, for the audience can directly experience and follow each event of the trial, the documents of the case, the arguments, gestures, and tone of voice of the judge, the parties, and their counsels. It is this brand of publicity that best guarantees the impartiality of judicial process.

On the next level we find electronic publicity, where the access to information of public interest is accomplished not in person but indirectly, via the Internet. Obviously, this implies a dramatically broader scope of publicity, as anyone with basic Internet skills will be able to access information posted online, at any time and free of charge. In short, electronic disclosure means that court decisions become available to everyone, without the need to appear at the hearing or indeed to perform any further act in the interest of access.

## *1.4.2. Institutional and procedural publicity*

### *1.4.2.1. Institutional publicity*

The publicity of the institutional/organizational operation of the judicial system as a branch of power does not materially differ from the publicity of the operation of any other publicly funded organization. In the administration of justice, institutional publicity applies to data of public interest pertaining to the operation, finances, and professional/industry activities of organizations in charge of running the judicial system, including their decisions, recommendations, codes, budgets, and annual reports.

### *1.4.2.2. Publicity of process*

In terms of the judicial process, it is worthwhile to discuss the openness of trial, access to court documents, and the disclosure of decisions separately due to the differences in the theoretical underpinnings of these elements of publicity.

The institution of the *open trial* fulfills two vital functions, those of social control and of impartial process. As a cornerstone of fair judicial process, the open trial is of crucial importance but not immune to restriction. In 2005, a study of transparency in the administration of justice found that most countries adopted restrictions on open trial for five clearly distinct reasons,<sup>10</sup> including those of orderly trial (peace and order in the courtroom), public morals, public law and order, the interests of the state, and the interests of the parties themselves. A sixth criterion that could be mentioned under the interests of the parties is consideration for the individual's age.

By comparison, *access to documents* generated by the judicial process cannot be justified with reference to social scrutiny or impartial process, because—as long as the process itself is not held in camera—the documents informing the case can be inspected in the courtroom to begin with. The constitutional rights and interests related to public information cannot be construed as a full-

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<sup>10</sup> Wim Voermans: Judicial transparency furthering public accountability for new judiciaries. *Utrecht Law Review*, Volume 3, Issue 1 (June) 2007.



scale authorization to inspect files pertaining to the sentencing and legal administrative activities of the courts, as this would cause serious infringements. This is why the majority of European countries have basically restricted the right to inspect procedural documents to the parties to the process.<sup>11</sup> A further distinction can be made between access to the documents of a case still in progress and access to the documents of a case that has been closed. For the former, the rule of thumb is to reserve the permission to inspect case documents to the parties themselves. The situation is considerably more complicated with completed trials, where both the news media and scientific research become a factor.

The *disclosure of decisions* is built upon the foundation of publicity functions as previously explained. Prominent among these are the demands of social control, legal certainty, and legal uniformity.

## I.5. European expectations

The first paragraph of Article 6 of the European Convention of Human Rights provides that “Judgement shall be pronounced publicly,” but hastens to allow, in the second sentence, a set of exemptions from this general rule. According to the European Court of Human Rights, the function of this publicity is “to ensure scrutiny of the judiciary by the public with a view to safeguarding a right to a fair trial.”<sup>12</sup> In the interpretation of the Court, this publicity may be provided both orally or in written form.<sup>13</sup> Pursuant to Article 6, then, it is not mandatory to publish decisions in print. The Court found that it is sufficient that “anyone who can establish an interest may consult or obtain a copy of the full text of decisions [and that the] most important decisions, [...] are subsequently published.”<sup>14</sup> Although the Court has taken the view that it is particularly important for decisions to be published in collections or databases, the Court has also invariably found that the obligation and liability to do so do not follow from Article 6.<sup>15</sup> For reasons that will be readily apparent, the Convention provides for bare minimum requirements, and the absence of an explicit statutory liability does not mean that doing more in this regard would be somehow wrong or that other legal documents, for instance the constitutions of the signatory states, should be prevented from making the publication of decisions mandatory. Indeed, it is our perception that constitutions embracing a concept of freedom of information along the lines of Hungary’s constitution certainly make that a liability.

We find it important to note that the Court determined the absence of an express obligation to publish decisions strictly in the context of the right to a fair trial as enshrined in Article 6. All that really follows from this is the fact that the failure to publish the decision in print will not violate anyone’s right to a fair trial. That said, the Court has not yet addressed the question whether such a publication liability could arise from any other Article of the Convention, as a safeguard for another fundamental right. The Article that first comes to mind is No. 10 on the freedom of expression, from which the Court has recently deduced the liability of safeguarding freedom of information.<sup>16</sup> We believe that, by so doing, the Court’s case law has inserted the freedom of information in the catalog

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<sup>11</sup> Ibid.

<sup>12</sup> 8 December 1983, Series A., no. 71 (*Pretto and others v. Italy*), § 27.

<sup>13</sup> 8 December 1983, Series A., no. 71 (*Pretto and others v. Italy*).

<sup>14</sup> 22 February 1984, Series A., no. 74 (*Sutter v. Switzerland*), § 34.

<sup>15</sup> 25 February 1997, No. 9/1996/627/811 Z. v. Finland, particularly § 112.

<sup>16</sup> 14 April 2009, No. 37374/05 Társaság a Szabadságjogokért [Hungarian Civic Liberties Union, HCLU] v. Hungary, §§ 35-39



of rights guaranteed under the Convention.<sup>17</sup> The issue of publishing decisions remains open in light of these recent developments in sentencing.

Since various legal systems go about satisfying the demands of publicity in their own ways, it would make little if any sense for any country to emulate the solutions adopted in other legal systems. Some countries make decisions available in public collections free of charge; others may charge a fee for access. Elsewhere, for instance in the Netherlands, every decision is posted in free, publicly accessible databases.<sup>18</sup>

Indeed, the solutions are as numerous as the countries that have adopted them. However, they should never be seen in isolation but as being dependent on a variety of factors, from the way the notion of freedom of information is construed in the given jurisdiction to notions of the independence of justice to the weight accorded to the protection of privacy. Providing an overview of existing models, a recent study subjects to scrutiny the legal systems of no fewer than 16 countries in Europe, America, the Near East, and of Australia.<sup>19</sup> Another study undertook to compare solutions from across Central and South America.<sup>20</sup> Instead of regurgitating the findings of these studies, let it suffice here to present the conclusions the authors have drawn from their experiences.

Any legal system with a pretense to satisfy demands for freedom of information must provide statutory safeguards for public access to decisions on paper and online. Published decisions must be indexed and cross-referenced for convenient searches. The publication obligation applies to all court decisions, including those from different levels within the judicial system.

## II. THE COMPENDIUM OF COURT DECISIONS

The findings that follow apply to the Compendium of Court Decisions of Hungary (hereinafter: “Compendium”), which is the focus of the present research project. For the non-Hungarian reader, these findings may hold out interest in the sense that the shortcomings and flaws of the model as it

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<sup>17</sup> The argument in *HCLU v. Hungary* was subsequently corroborated by *Kenedi v. Hungary* (26 May 2009, No. 31475/05, § 43). This interpretation by the European Court of Human Rights is not without precedent: In 2006, in *Claude-Reyes et al. v. Chile*, the Inter-American Court of Human Rights arrived at a similar conclusion regarding the transformation of the freedom of information into a fundamental right proper by agency of the freedom of expression.

<sup>18</sup> Wim Voermans: Judicial transparency furthering public accountability for new judiciaries. *Utrecht Law Review*, Volume 3, Issue 1 (June) 2007.

<sup>19</sup> Report on Access to Judicial information. Manuscript, March 2009, Ropes & Gray LLP & Open Society Justice Initiative. Authors Thomas M. Susman and Margaret S. Moore provide some truly interesting information, such as the fact that in Turkey and the United Kingdom decisions are available both electronically and in print.

For Turkey, cf. Law No. 4982 On the Right to Information, available in English at

[http://www.bilgiedinmehakki.org/en/index.php?option=com\\_content&task=view&id=7&Itemid=8](http://www.bilgiedinmehakki.org/en/index.php?option=com_content&task=view&id=7&Itemid=8);

see also Serap Yazici: A Guide to the Turkish Public Law Order and Legal Research, September 2006.

[http://www.nyulawglobal.org/globalex/Turkey.htm#\\_Laws](http://www.nyulawglobal.org/globalex/Turkey.htm#_Laws);

in the U.K., the BAILII databases at <http://www.bailii.org/databases.html>

as well as Her Majesty’s Court Service: Legal/Professional, at

<http://www.hmcourts-service.gov.uk/cms/legalprofessional.htm>.

The study points out that Belgium goes a step further by requiring decisions of the lowest rank of venue to be posted online, and that all decisions be published in each of the three official languages of the country. (pp. 38-39).

<sup>20</sup> *Disclosing Justice: A study on access to judicial information in Latin America*. Due Process of Law Foundation, June 2007.



has been implemented in Hungary offers useful lessons to be learned toward constructing databases for a similar function elsewhere.

This chapter is devoted to discussing the functional problems of the database identified through the survey as well as by our own tests, and also takes a look at the extent to which the database can be said to comply with the statutory provisions.

It is safe to observe that, the way it operates, the database fails to conform to the EFOIA—if only because the imperative, detailed under Part Four of the Act, that court decisions must be disclosed in anonymized form for inspection by anyone free of charge does not in itself guarantee that access will work in practice as intended. The empowerment to get to know court decisions and practices arises directly from the dictates of constitutional democracy. As a prerequisite for obtaining such knowledge, of course, the decisions must be readily and conveniently available for retrieval from the database for anyone seeking relevant information. The requirement for the “accurate and prompt information of the public” must be understood to imply the chance of actually finding a decision along with its relevant points of contact to other decisions. Simply put, a database that does not work well fails to satisfy the spirit of the law.

Those who completed our survey form offered recommendations that are very useful, if not binding for the National Judicial Council under prevailing regulations. Implementing these recommendations will take further development and a partial transformation of the system to make searches in the database simpler and more efficient.

The Compendium can be accessed at [birosag.hu](http://birosag.hu).

*The court decisions specified in this Act shall be accessible in a digital form to anyone without identification, free of restriction and free of charge in the Compendium of Court Decisions.*

[Act XC of 2005 on the Electronic Freedom of Information, § 16 (1)]

The survey we conducted has revealed that a significant part of users are unable to take advantage of the Compendium, because they do not understand how the database works. The problem can be traced back in part to the structure of the database, and in part to the attitudes endemic to the legal profession in Hungary.

The non-representative survey has found that, by and large, the legal profession is happy with the visual interface of the Compendium, while its functionality has come under severe criticism, with only 43% of respondents being satisfied with the rate of relevant decisions among the search results. Some of this has to do with the search functions supported by the database, a point we will return to later in this paper. Internet skills and the widely available search engines also prove critical in using the database. The Compendium would be far easier for lawyers to use if they could resort to a search method akin to those that work with databases they know and regularly use. The set of problems here includes the absence of abbreviations and acronyms conventional in the trade. These abbreviations specific to the profession are taught at the university, and lawyers would gladly use them in their searches if only the system recognized them.

It seems that professionals have a hard time coping with a system as divergent in its logic and functionality as the database of the Compendium is. Some of the problem could certainly be rectified



by simple and inexpensive modifications and upgrades, notably by incorporating an appropriate Help function. The current Help function appended to the system consists of no more than 15 sentences of advice, without saying a word about how the system operates or about the number of decisions posted, the date of posting, the status of their anonymization, or the inner logic of the system.

We chalk it up to a low level of awareness that not a single deletion request as allowed under § 18 (4) of the EFOIA has been lodged with the National Judicial Council. Pursuant to § 18 (4) of the EFOIA, “In civil procedure the party, in criminal procedure the injured party, may request the deletion of the decision made on the basis of litigation held in full or in part in private [*i.e., in camera—the translator*] from the Compendium.” However, no such request has been received since July 2007.

## II.1. Database content

The database offers no information as to the number of decisions that have been anonymized and uploaded.

*Our own test run involved an attempt to cull court decisions one way or another related to the disclosure of data of public interest. The system delivered different results depending on whether the search targeted free text, decision number, or provisions of law. The foregoing is a synopsis of our experiences.*

Given the rule that all decisions must be announced “in the name of the Republic of Hungary,” these words appear in each posted decision, with the search term “republic” returning 20054 hits. A search using the word “Hungarian” yields 20883 results, while—which is more remarkable—the query for “in the name of” nets 17209 hits. Now, it is perfectly feasible that the word “Hungarian” has more occurrences in the database than the phrase we lifted it from, but it seems less believable that the phrase “in the name of” in itself occurs fewer times than as part of the longer phrase “in the name of the Republic of Hungary.” The discrepancy between the three results clearly illustrates the unreliability of the search results.

### II.1.1. Uploading the decisions

Many people who responded to the survey questions suggested that decisions passed before July, 2007, should be uploaded as well. Although the EFOIA does not require older decisions to be posted on a mandatory basis, the interests of judicial work and access to judicial practices would urgently demand that those decisions, specifically including decisions on legal uniformity matters, be uploaded as soon as possible. However, the National Judicial Council—citing shortage of personnel and funds—is not currently planning to upload decisions that became final and enforceable prior to July 1, 2007.

We find it a cause for concern that, in the opinion of survey respondents, decisions other than individual decisions on the merits of a case do not get uploaded until well after the 30-day deadline stipulated by the EFOIA (although we do not have specific data to support this claim.)

While we endorse with the policy of keeping all but the final and enforceable decisions from disclosure, in potentially high profile cases it may well be worth considering disclosure even before



the decision becomes final and enforceable. (Suffice it to recall the mistaken verdict passed by the Metropolitan Court of Budapest in the case that had come to be known as the Mór Massacre.)

## *II.1.2. Associated decisions*

The database does not feature overturned decisions, which we believe should definitely be taken up in the database and appropriately marked as having been overturned.

## **II.2. Search terms**

Searches of the Compendium by free text and decision number both proved inadequate. The database permits searches to be filtered in terms of type of decision, court, chamber, field of law, year of the decision, identification code of the published decision, the provisions cited in the decision, and free text in the body of the decisions themselves.

### *II.2.1. Decision codes*

The code of a published decision only permits searches for codes used in the Compendium, which are unknown to the user. In various proceedings, professionals refer to court decisions by their case number. In contrast, the code used in the Compendium is generated by a totally different logic, with which users are not familiar. While the decisions published in the Compendium are marked in compliance with applicable regulations, these codes have no currency in the legal professions, making the location of decisions dysfunctional in this form.

Searches for case number in free text or among decision codes do not land a single hit, which means that the primary number used by the bar and the bench to identify cases is not recognized by the system in any form. Furthermore, even if the user happens to know the code specific to the database, the system will still not yield a valid hit for truncated code searches using the wildcard asterisk “\*.”

### *II.2.2. Free text search*

The hits delivered on a free text search include both the final and enforceable decision and its non-final version. Which of the two forms of the decision contains the phrase being searched for will not be apparent until the user opens the file and runs another search for the same phrase in the body text. For instance, searching for *any word* of the search phrase “disclosure of data of public interest” within Individual Decisions on the Merits yields too many hits, while selecting *all words* brings up 17 hits. Finally, searching for the *exact phrase* results in only two hits, of which only one non-final decision actually contains the phrase.

The system does not support any further narrowing down of search criteria, even though additional filtering options would be badly needed to refine searches that may yield hundreds of results.

For the search query *Public information and disclos\** we get too many hits, 225 hits, and 113 hits respectively for any word, all words, and exact phrase. Finding the relevant decision in among 113 results may take hours as each hit must be opened separately.



The same problem presents itself with search options related to case type. At present, the database provides a breakdown by field of law, but it remains unclear just how civil law is related to business law, and vice versa. Searching for all words of the truncated query phrase *Public information and disclos\**, which simultaneously searches for all suffix-added forms, including *disclosure, disclosed, disclosable* etc., yielded 186 results in the field of civil law, three in commercial law, eight in criminal law, zero in military law, zero in misdemeanor law, zero in labor law, 27 in public administrative law, zero in penitentiary law, and zero in enforcement law. The total is 224 results, compared to the 225 results unfiltered by field of law. The discrepancy suggests that the organization of the database and the search filtering options are inadequate.

The further breakdown of case types would be intimately linked with individual requirements stemming from lawyer specializations. Indeed, the capability of additional filtering by case type has been recommended by respondents. As a result, for instance, business law would no longer stand in a conjunctive relation with civil law as an option, but would be subsumed as a subset within civil law. The ability to refine searches in terms of the amount in dispute in a case would also greatly enhance access to relevant court decisions.

Some respondents also suggested that the user-friendliness of the database would benefit from supporting the function of excluding specified case types from the search results.

### *II.2.3. Search by provision of law*

The system enables users to search for court decisions linked to a specified provision of law. Although users seem to be confused as to whether laws should be referred to by Arabic or Roman numerals—and the Help function is of no help in this regard—the system nevertheless recognizes both formats. By contrast, the system is unable to differentiate within sections between section numbers /A, /B etc., responding to such queries with an error message. Another shortcoming of the system is that it does not support searches for paragraphs within specific sections. The inability to search for sections of the format /A, /B etc. causes a very real problem, as it simply keeps many sections of law from being retrieved by searches. For instance, a search for Section 177/A of the Criminal Code, which sets forth the statutory definition of the abuse of personal data, will yield no results, as a search for Section 177 will not include Section 177/A in the results. As for queries for paragraphs within sections, this would be clearly useful for refining searches. As we have suggested before, getting too many results could be very cumbersome, virtually rendering the database as useless as does the inability to access certain decisions. In the absence of a proper structure and search engine, the database will be unable to comply with the legal requirements.

Regarding searches based on a specific provision of law, the question arises why the system delivers 113 exact matches on truncated searches for “disclosure of data of public interest,” while bringing up only 90 decisions as results for a provision-based search for “Act LXIII of 1992 on the Protection of Personal Data and the Disclosure of Data of Public Interest,” the law that provides for access to data of public interest.

### *II.2.4. Weighting*

The search results do not make it clear how the weighting works, i.e. which decision will be featured in a given position on the list of results, and under what circumstances. The default setting



presumably arranges decisions by code number, but this is merely an assumption which cannot be proven right or wrong in view of the supplied description.

The user who fails to set a specific sequence of relevance will get 113 results for querying exact matches of the phrase *Public information and disclos* so that the user has no way of knowing on what grounds a decision is assigned to the top, middle, or bottom of the list, as the case may be.

It can be determined that the list of search results is unorganized by chronology, competence, or jurisdiction, just as the given chamber, field of law, and the year of the decision seem to play no more than an ad hoc role.

The user can alter the order of relevance, but this option is far from being obvious. This could be taken care of by upgrading the Help function. Users would also find it very useful if they could supply their own criteria of relevance, such as frequency of occurrence of the term, chronology, amount in dispute etc.

## II.3. Display of search results

### II.3.1. File names

From the point of view of functionality, the respondents would find it of great help if decisions could be downloaded not just one at a time, and with file names other than the ubiquitous “anonim.rtf.”

*RTF (Rich Text Format) is a file format that enables the exchange of formatted text documents between applications that may run on various platforms, including Macintosh. It is a file format recognized by many word processors.*

*(Source: Microsoft)*

This is because files opened during downloading may be easily mixed up, and if the user has accidentally closed an rtf file, it will take a long time to find the desired decision over again. Replacing the “anonim” nomer with a more informative file name, such as one based on the case number or the code of the published decision, would go a long way toward making the database user-friendly.

Better functionality would also be served if the decisions were available in the html format as well.

*HTML, which stands for HyperText Markup Language, is a markup language developed for web pages that has become an Internet standard with the support of the W3C (World Wide Web Consortium)*

*(Source: Wikipedia)*

While the rtf format is not the problem in and of itself, since it is recognized by every common operation system, it is nevertheless worthwhile to give some thought to the idea, as described above, of making the decisions available in other formats as well, and of specifying informative file names.





## *II.3.2. Decision abstracts*

The use of the database is hampered by the fact that each decision is filed under the same file name, so the user will be in the dark as to the content of the decision file he opens at any moment. Displaying a brief narrative abstract or a few keywords would be particularly helpful when the search yields hundreds of documents. Users either look for a specific decision or want to familiarize themselves with judicial practice regarding a specific set of questions. Of course, in the latter case there will be a greater chance that the filter terms are not specific enough to narrow down the search to a few decisions. The need for a brief abstract can be derived from the practice of processing court decisions for publication in edited form. While this would certainly involve an extra work load for the courts, having each decision abstracted in a few sentences could be very helpful in identifying the relevant decision even for purposes of editing for publication.

In terms of the relevance of result lists, the system could be made more user-friendly if a brief abstract were displayed, possibly in the html format, instead of the user having to open each file to check its contents.

## *II.3.3. The arrangement of search results*

The ease of use of the system is also impaired by the fact that clicking on a search result will not open the file in a new window, forcing the user to always return to the list of results. This inconvenience could be easily remedied by having the selected decision displayed in a new window.

## **II.4. Extra services**

In addition to enabling access to sentencing practices, the Compendium serves the causes of social control, impartial judicial process, the power of justice to shape society, and legal certainty. The feedback to the survey questions predominantly focused on the role of safeguarding legal certainty and social control in formulating recommendations aimed at improving the operation of the Compendium in integration with other databases. In what follows, then—in contrast to the foregoing—we provide an overview of recommendations that outline upgrade options to aid users rather than identifying urgent functional problems as such. Implementing these recommended upgrades is not so much an obligation per se that would arise from the spirit of applicable law as an opportunity to significantly enhance the quality of services offered by the Compendium.

### *II.4.1. Integrated legislative search engine*

One recommendation articulated the need for enabling the Compendium to simultaneously work together with the legislative search engine database. Subject to further upgrades, the Compendium is envisioned to permit concurrent searches of both decisions and statutory provisions, possibly in conjunction with the law search engine at [magyarorszag.hu](http://magyarorszag.hu), and even integrating the legal corpus of the European Union.



## II.4.2. Associated decisions of international courts

Some of the respondents also wished to see international court decisions integrated in the system. In our view, this would be paramount in the case of the European Court of Human Rights and the Luxembourg Court, the decisions of which are frequently cited in Hungarian courtrooms.

## II.4.3. Monitoring decisions

The specialization of lawyers must be taken into account when mapping the pool of users. Some may concentrate on business law, while others have an emphasis, say, on family law, each requiring familiarity with decisions and judicial interpretations in a specific field for his respective line of work. Monitoring new decisions for clients could be a value added service offered by the Compendium. Among the forms of online content provision, subscribing to RSS feeds and newsletters is a common and simple way of obtaining information.

*RSS feed is a format of web syndication which spares users from having to regularly visiting sites employing this solution to check for new content or from being notified of the same by e-mail. The program is capable of monitoring RSS-enabled sites for the user and display updated content.*

*(Source: Wikipedia)*

As many users are accustomed to receiving updates by newsletters and e-mail, they do not need to check their sources on a daily basis. Instead, the content provider takes charge of sending required information to subscribers.

## II.4.4. "Remember me" function

The web site of the Compendium places cookies on the user's computer as it is. This brief text file can be used on demand to save search criteria to facilitate subsequent searches. This option would come in handy for the National Judicial Council as a means of becoming familiar with the habits and needs of visitors to the site. It goes without saying that the cookie placement is not something that can be made mandatory, and if it is adopted, the rules of handling information on the site must be harmonized with the services being offered as well as with the provisions of the DP&FOIA.

*The "cookie" is a packet of information that the server sends to the browser, to be returned by the browser to the server along with each user query. Most browsers store cookie content in a simple text file or text files to keep the information available when the browser is turned off and restarted. If the browser returns a cookie, the server will be enabled to link the current query with earlier ones. Cookies are most commonly used to identify registered site visitors, maintain a "shopping cart," and to track users.*

*(Source: Wikipedia)*



Decision-monitoring and the “remember-me” function may supply solutions enabling professional lawyers to access groups of the latest decisions conveniently, without having to check relevant databases for content and upgrades on a daily basis.

## II.5. Compliance with the law

By and large, the Compendium can be said to satisfy the requirements stipulated by applicable law only in part. Without a doubt, its problems of search functionality await to be addressed. Although the system is up and running, access is ensured, and anonymization is satisfactory, the database fails in its functionality to enable comprehensive knowledge of judicial practice, and therefore fails to fulfill its mission as set forth by the EFOIA.

### II.5.1. Access to the database

The EFOIA provides that the Compendium “shall be accessible in a digital form to anyone without identification, free of restriction and free of charge.” The database available at the site [birosag.hu](http://birosag.hu), which publishes the Compendium, represents a solution that is adequate and acceptable both in terms of the protection of personal data and of the disclosure of data of public interest.

### II.5.2. Privacy notice

No registration is required to use the site. According to the privacy notice posted on the site, downloading certain content, including searches in the database, will cause the program to automatically place small data files (“cookies”) on the user’s computer. However, the user remains at all times able to block any activity using these data files, and the cookies will be deleted when the user exits the site. When the user enters the site, some of the parameters of his computer and its Internet Protocol (IP) will be recorded in a log file. The data thus acquired will only be used by the operator and the content provider for statistical purposes, exclusively in the interest of developing the site.

*Internet Protocol (IP) is one of the basic protocols of the Internet, which enables online nodes (computers, network devices, web cameras etc.) to communicate with each other. There are never two identical IP addresses simultaneously present on the Net at any given instant.*

*(Source: Wikipedia)*

The DP&FOIA requires all web sites to post a data protection policy stating the scope of data handled, the purpose and legal grounds of holding the data, the name and contact information of the person or entity entrusted with technical processing, how long the data will be held, and to whom the data may be transferred. The statement must also advise users of their rights in connection with the use of their data, including the available legal remedies, and of the contact information of the data controller.<sup>21</sup> Additionally, pursuant to the general rules of the DP&FOIA, the data protection policy must describe measures implemented to safeguard data security, along with the special security measures that must be developed by the operator of the telecommunication network or

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<sup>21</sup> DP&FOIA § 6 (2).



information technology device whenever that network or device involves the transfer of personal data, as well as potential technological threats to privacy, the technical solution adopted to guard against these threats, the technical means of data processing (e.g. cookies), and the date the policy was first posted.<sup>22</sup>

The statement posted on *birosag.hu* site fails to provide most of the aforementioned mandatory notices. Consequently, despite meeting the major requirements of the EFOIA, the site cannot be said to operate in conformity with the general provisions of the DP&FOIA, the law on which the EFOIA itself builds forward.

### *II.5.3. Anonymization*

According to the code adopted by the National Judicial Council, anonymization is part of editing and preparing each court decision for publication in conformity with § 18 of the EFOIA, in rtf file format. The EFOIA provides that anonymization shall not be to the prejudice of the facts of the case. The site itself offers no information whatsoever about the anonymization procedures adopted by it. The law exempts from anonymity the name and position of bodies and persons acting in the powers of national or local government and exercising any other public function, to the extent that they are involved in the proceedings by virtue of their acts performed in this public capacity. A narrow set of further exceptions may be allowed by law. For instance, the rule of mandatory anonymization does not apply to acting attorneys, the natural person party against whom the judgment has been entered if that party is the defendant, as well as legal and unincorporated entities, if the decision has been reached in a case involving the enforcement of a public-interest claim under applicable provisions of law. Data that need not be blanked out also include the name and seat of social organizations and foundations, the name of its authorized representative, and data subject to disclosure due to public interest.

Anonymization is the responsibility of the court of law that passed the decision in question. The presidents of the Supreme Court, regional courts, county courts, and the Metropolitan Court of Budapest are free to devise their internal procedures of anonymization at their own discretion.

In the course of our search tests, we encountered just a single instance of inadequate anonymization. We hasten to add that checking each decision in the database was outside the scope of this study.

As explained by the National Judicial Council, the process of anonymization is divided into two phases. In the first phase, an application launched from a general platform named BÍR-O automatically generates the rtf file, and automatically replaces with descriptors those real data in the text of the decision that are associated in the BÍR-O list with the given case, for instance replacing the actual name of the plaintiff with the phrase “plaintiff’s name.” The personal data lifted from the text by the program are later permanently anonymized by human force if deemed necessary. The person in charge of anonymizing the data is free to make several decisions at his own discretion based on the preliminary filtering performed by the program. We are in perfect agreement with the National Judicial Council’s perception that “Of course, the automated system supporting the anonymization function cannot be expected without human intervention to generate a perfectly anonymized copy

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<sup>22</sup> For more information on this topic, see Éva Simon, *Az internetes adatvédelmi nyilatkozatok tartalmi követelményei. [Substantive requirements of online privacy policy statements]* In: Iván Székely– Dániel Máté Szabó (eds.): *Szabad adatok, védett adatok. [Free data vs. protected data]* BME GTK ITM, Budapest, 2005. pp. 79-94.



that conforms to the law in every way. For this reason, we cannot do without actual human contribution to the work of finalizing anonymized copies.” This directly led us to ask a question about how the Council determined which personal data were to be regarded as being subject to disclosure due to overriding public interest. Answering this question presupposes professional expertise. Deciding whether the personal data in question is exempt from mandatory anonymization by virtue of falling into the legal category of data subject to disclosure due to public interest is always a matter of case-by-case deliberation. All that the Council offered in reply was to say that “in each specific case we make the decision on the basis of LXIII of 1992 on the Protection of Personal Data and the Disclosure to Data of Public Interest.”

In order to uncover potential problems in the area of anonymization, we inquired about any specific policies and the consistency of their provisions in regulating anonymization, in addition to the severally cited EFOIA and the Council’s own Policy No. 3/2007. The reply from the Council mentioned that anonymization followed procedures issued by the President, but we were unable to find out the number of these procedures or what they actually contained.

#### *II.5.4. Decision code*

Although the decisions are tagged in accordance with Ministry of Justice Decree 29/2007 (V. 31.) on the Marking of Decisions Published in the Compendium of Court Decisions, these codes are not actually used by practitioners of the legal professions, making the identification of decisions dysfunctional in this form. The case number that has currency among legal professionals is not recognized by the system, so it cannot be used as a query term in searching decisions in the database.

### **III. CONCLUSION**

In conducting this research, we followed a predetermined set of criteria. We felt it would be in order to provide a reasonably thorough theoretical background, for familiarity with the roles that publicity and disclosure play in the administration of justice seems indispensable for studying the impact of a legal instrument and the extent of its implementation—in other words, for understanding how electronic access to public information really works and what changes, if any, are needed to improve the conditions of that access. Once identified, the functions of publicity have served as a yardstick for surveying and describing the operation of the Compendium of Court Decisions, analyzing applicable law in its prevailing form, and highlighting points of conflict where legislative or other functional amendments would be welcome. Beyond exposing the theoretical background, we have also aimed at providing a clearly laid-out, easy-to-understand overview of concepts related to issues of publicity and disclosure in the judicial system.

Given that our specific focus has been on the implementation of online access to court decisions, we have looked at applicable provisions of law and examined the Compendium at some length, in an inquiry simultaneously descriptive, investigative, and critical in its approach. We have analyzed the operation of the Compendium as perceived by the public at large, while the survey we conducted has been instrumental in identifying problems with the system through the comments provided by legal professionals. The analysis of the database maintained by the National Judicial

## Publicity in the Administration of Justice and the Disclosure of Court Decisions



Council has permitted us to describe the ways and means of using the system, along with its strong suits and weak points of operation.

*Having completed the research project, we have come to the conclusion that the genuine implementation of freedom of information is contingent upon the willingness of everyone in the justice system to recognize publicity and disclosure as a value.*

In other words, online access to public information—“the Electronic Freedom of Information”—cannot be efficiently implemented unless it is regarded as an asset not only by well-conceived provisions of law, but also by those who apply and enforce those provisions in their daily work. No matter how meticulously and scrupulously legislators go about enacting a piece of legislation, it will only be put into service if its theoretical underpinnings are properly interpreted and interiorized. Accordingly, we are convinced that the specific, practical recommendations formulated in this study will not reach target unless professionals in the field of justice come to accept disclosure as a value rather than as a nuisance interfering with their work.

*Having subjected the Compendium of Court Decisions to scrutiny, we have found the Act on the Electronic Freedom of Information to be by and large adequate in respect of the judicial system, with the reservation that its provisions regulating the scope of application in terms of individuals and time frames are in need of revision.*

In the Republic of Hungary, legal safeguards are in place to ensure that a specific set of court decisions are made accessible online for anyone. At the same time, the law in several senses restricts the number of decisions subject to disclosure, limiting its effect to decisions passed by Regional courts of appeals and the Supreme Court, and waiving mandatory disclosure for a number of case types. Enacting the appropriate legislative framework is the first step on the road toward the full implementation of freedom of information, and the legislators in Hungary have certainly taken that step. However, we believe that the Act’s scope of effect must be amended so that it may better serve the functions of publicity, particularly in terms of social control, legal certainty, and legal uniformity.

*The analysis of survey answers has highlighted the massive deficit of familiarity with issues of disclosure in the administration of justice.*

Despite the progressive nature of Hungary’s laws regulating online access to public information, the rules binding the judiciary and applicable to the Compendium remain largely unknown, or at best vaguely familiar, to practitioners of the legal professions. Presumably, the same is true for the public at large to an even greater extent. Publicity will not be able to fulfill its role of social control if the public is unaware of what information is held where, and how to find it. Broader and more thorough information of the public seems essential in empowering citizens to exercise their law-given rights.

*Flaws in the operation of the Compendium and the failure of its database to fully conform to the principles of freedom of information make it inevitably necessary to revise the system.*

Searches for specific decisions and the survey results have both shown that the Compendium, as it is, cannot be used as required by law. Glitches in the operation of the search engine frequently prevent



even citizens holding a law degree from finding the decision or group of cases they are looking for. Our study has identified the database not only as far from being user friendly but also as coming up short of meeting statutory requirements. For all intents and purposes, several provisions of law must be regarded as non-existent in a database that is incapable of recognizing section numbers incorporating a slash, as in /A, /B etc. The functionality of search for free text and provisions by number is also in need of upgrading for better convenience of use. In order for a law to be genuinely implemented, its application must be mindful of both the letter and the spirit of the law.

Having made comparisons with the regulation and implementation of freedom of information in Estonia, we have found the scheme adopted in Hungary to be clearly superior in terms of the uniformity of the database and the capability of linking decisions from different levels.

*The protection of personal data and the anonymization of decisions as accomplished by the Compendium are by and large compatible with the criteria established by law.*

Compared to the Estonian database of sentences, the Hungarian regulation and practice of freedom of information can be said to be definitely progressive. Our test searches revealed but a single decision where anonymization had not been complete. Although we did not run a check on each and every decision, based on what evidence we have it is safe to assume that anonymization works adequately—even if we were not sufficiently informed as to the actual procedures.