Hungary appoints Eastern Europe's first Data Protection Commissioner

Professor Dr. László Majtényi's first engagement abroad on being appointed Hungary's and Eastern Europe's first Data Protection Commissioner was to explain the background to his new role at the Privacy Laws & Business 8th Annual Conference.

Hungary perhaps can be considered as a model in the field of data protection in Eastern Europe. As with other countries in this area, the legal and institutional conditions of data protection are connected with the peaceful transition, from communism to the creation of a liberal democracy. The protection of privacy and the principle of free access to official documents belong to the foundation of a democratic system. The conception and demand for data protection is in an advanced phase in Hungary.

Before the transition

Until 1989, the most important data protection rule was in the Code of the Hungarian Civil Law from the 1970's. Statute law had protected the rights associated with privacy in handling personal data on computers, and with the protection of other individual rights. Unfortunately, this regulation was not on a constitutional level, and was without any details and guarantees. Until 1989, data protection had not been mentioned in the Hungarian Constitution. Data protection was demanded by independent intellectuals long before the change of political system.

The new Hungarian constitution 1989

The most important amendment, which made a shift to a liberal constitution from the party-state constitution, was enacted in 1989. It was perhaps one of the most important events in the peaceful transition in Hungary. Article 59 in the chapter of the Basic Rights, Freedoms and Duties states:

1. In the Republic of Hungary, everyone shall be entitled to a good reputation, to the inviolability of one's home, as well as to the protection of private life and personal data.
2. To pass an act on the Protection of Personal Data, a vote of two-thirds of the National Assembly representatives present shall be required.

Article 61 states: In the Republic of Hungary, everyone shall be entitled to freely express their opinion as well as have access to public data.

In terms of constitutional mechanisms, including the protection of reputation, home, private life and personal data in the same section may not be the best solution, but it is a huge step towards making data protection effective.

In reality, data protection is not a pure protective right, but in international practice it is the right of information self-determination, as expressed by Germany's Supreme Court in the 1983 census decision.

From 1989, that freedom has been based directly on the constitution and belongs to the fundamental rights and competence of the Constitutional Court. It is a remarkable feature of the development of Hungarian constitutionalism, that Hungary was the first country in our region to enact explicit constitutional rules on data protection, ensuring the protection of personal data as a basic right.

The other very important aspect of the development of data protection in Hungary is statute law. The articles quoted above from the constitution promised Hungarian society an Act on the Processing of Personal Data and on Access to Public Data. The only protector, but a very effective one, of information self-determination was the Constitutional Court. On April 9th 1991, an important decision on personal identification numbers (PIN) was taken - based on Article 59 (PL&B Dec. 1991 p.20). In essence, it limited the state's power in the field of information. This had a huge impact; it meant that not only was a legal

A Briefing in Budapest?

If there is sufficient interest in learning more about the content and practical implementation of Hungary's Data Protection Act, *Privacy Laws & Business* will organise a workshop in Budapest next year. Please contact the *Privacy Laws & Business* office if you would like to register an interest.

instrument unconstitutional, but that after 40 years of communist rule, it had symbolic connotations too: that there would never again be an omnipotent state.

The Hungarian Constitutional Court ruled that the collection and processing of personal data in the absence of a definite purpose and for arbitrary future use are unconstitutional. The ruling was that the PIN available for unlimited use was unconstitutional. This means that everybody is free to decide about the disclosure and use of his own personal data. It is clear that everybody has the right to know who uses his data and for what purpose.

Information self determination is a fundamental right. Collecting and storing data for an undefined future purpose, is unconstitutional. "From the time of publication of this decision, no one has the right to require the giving of a PIN, or to make the exercise of any right or the grant of a service dependent on the giving of such a number."

"The Data Protection and Freedom of Information Act provides for judicial enforcement. Data controllers have strict liability"

Hungary's 1992 law

In June 1992 Parliament enacted and published the Act on the Fundamental Rules Governing the Protection of Personal Data and the Implementation of the Right of Access to Data of Public Interest. The Act conforms with international standards. For the purposes of the Act:

- Personal data means any data relating to a specified natural person (data subject) and any conclusion drawn from such data with respect to him. As long as the data subject can be identified by the data, it preserves this personal characteristic. (Nothing is said about legal persons).
- Personal data shall not be processed, unless consented to by the data subject, ordered by law, or - under special provisions of law - by decree of local government.
- Sensitive personal data shall be given special protection. Sensitive data is defined as any data relating to racial origin, nationality, ethnic origin, political opinion or party affiliation, religious or other belief, health, pathological addiction, sexual life and criminal convictions. Sensitive data shall not be processed, unless: consented to in writing by the data subject, ordered by law in respect of international agreements or enforcement of basic rights guaranteed by the constitution, in the interest of national security, criminal investigation or prevention of crimes and in all other cases ordered by the Act.
- Data of public interest (public data) means any information being processed by authorities performing functions of state or local government, except for personal data and information which is subject to exceptions specified by law.
- Freedom of information may be restricted by law, in the interest of national defence, national security, criminal investigation, monetary policy, international relations or judicial procedure.

If I am more or less satisfied and a little bit proud of the general data protection law in Hungary, I have to mention that there is no special implementing regulation, for example, in the police, public health, banking, insurance or direct marketing sectors.

Transfer of personal data abroad from Hungary

Personal data transfer from Hungary needs the consent of the data subject or permission in law, provided that the same data protection principles will be obeyed by the foreign controller in respect of all data.

Enforcement

The Data Protection and Freedom of Information Act provides for judicial enforcement. Data controllers have strict liability: "The data controller shall pay compensation for any damage caused to data subjects from processing of his data or by violation of the technical requirements of data protection. The controller shall be discharged

from liability on proving that the damage was caused inevitably by reasons beyond the control of the data processor."

If his application is refused, the person requesting information may apply to the court. The authority has to prove that the refusal was reasonable and in accordance with the law.

The secret police and data protection

There is a very interesting and at the same time painful field of data protection in East-Central Europe - the secret police law and its judicial review. From Germany to Albania there are huge numbers of informers and secret agents who had betrayed colleagues, neighbours, friends, lovers, parents and children.

Who is an agent and what can a constitutional state do with him?

The unveiling of the past of secret agents has caused more drama, dissatisfaction and shame than potential profit to societies that wanted to find moral renewal through the process of exposing the activities of the secret police. In every post-communist country, the situation has been the same regardless of whether the agent list received wider or narrower publicity. The question is: what can we do with the files? Is revenge against the agent justified or not?

One kind of answer was given by the legal system of the unified Germany. The former secret service of East Germany, Stasi's, files were opened for those who wished to know who had informed on them. The result is well known: a divided society, one part accused of having been informers, and the other, the accusers. This latter group, the accusers, were not only those whose rights had been violated. Public opinion itself was distorted by the formation of moral judgements on the basis of rumour and gossip.

In former Czechoslovakia, the most sweeping secret police law was passed in 1991. The law disqualified many citizens from serving in the new state, former state-party, party-state positions, such as journalists from state owned communist media, news agencies and managers of state-owned companies. Any involvement with the former state security services, such as occupying a flat rented by the Security Service, was enough to warrant dismissal. The result of the examination of the secret police law by the Federal Constitutional Court was that it was declared constitutional. The Court said that it was adequate just to demonstrate that a person had held one of these positions in the past to disqualify them forever from serving in the new state.

Unlike the Czechoslovak Court which emphasised a sharp break with the past, the Hungarian Court, on the basis of the rule-of-law revolution, emphasised the continuity of legality, the rights of all citizens including the spies. The Court said that the laws issued before 23rd October 1989 (the date of the constitutional reform) have the same legal status as those enacted since.

The Hungarian Constitutional Court had said before, in a decision about closing local government meetings, that the right of access to information of public interest is very broad, but it is not without limits.

The 1994 Hungarian secret police law, requiring background checks on a list of influential persons, set up a system that provided for the continuing secrecy of the files. Under this law, the following categories of people would have to undergo a background check: Members of Parliament, Ministers, the President of the State, Judges of the Constitutional Court and the ordinary courts, some journalists, leaders of state universities or state-owned companies, as well as a list of government officials. If a person was determined to have had a dubious past, then the person would be given a choice; either resign from the position or the information in the files would be made public. If the person resigned from their position, then the information would be held in secret by the state.

The Constitutional Court declared that under Article 59 of the Constitution, every citizen has the right to information self-determination, however the court made an important distinction. It held that public figures have a smaller sphere of personal privacy than other individuals in a democratic state.

The Court declared that "data and records on individuals in positions of public authority and those who participate in political life - including those responsible for developing public opinion as part of their job - is considered to be information of public interest under Article 61 of the Constitution if it reveals that these persons at one

time pursued activities contrary to the principles of a constitutional state, or belonged to state organs that at one time pursued activities contrary to the same." Article 61 of Hungary's Constitution provides an explicit right of access to data of public interest.

The Court found some unconstitutional elements in the resolution. The specific list of persons to be covered by the secret police law needed to be changed because it was arbitrary and unconstitutional. In particular, the Court found that the category of journalists was too broad - including those reporting on music and entertainment programmes - and also too narrow - excluding influential journalists from the private electronic media. Extending the secret police law to officials of universities and to the top executives of state-owned companies was declared unconstitutional because these persons "neither exercise state authority nor participate in public affairs."

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This decision shows that a constitutional law on the secret police can have two goals, depending on the historical context. At the beginning of the transition, a widely defined law might have served to mark the irreversibility of the change and the cleaning of society. But more than five years after the "rule-of-law revolution," the only constitutional aim may be found in the balance between freedom of information and protection of personal data.

The office of the ombudsman

Ombudsmen are relatively new institutions of the liberal democracies. The very first ombudsman institution was set up in Sweden in 1810. From the 1970's, these institutions have been normal elements in democracies. An ombudsman requires no legal powers except powers of inquiry. In particular, they are in no sense a court of appeal and cannot alter or reverse any government or local government decisions. Their effectiveness derives entirely from his power to focus public and parliamentary attention upon citizens' grievances. Any citizen who feels he has been hurt may submit a written complaint to the ombudsman. They are impartial inquiry officials, enjoying full autonomy from their principal - the Parliament - which does not have the right to issue directives. The ombudsman's vigilance has a healthy effect on the whole administration, making it more sensitive to public opinion and the demands of fairness.

The Minister of Justice presented his Parliamentary Commissioner for Civil Rights Bill on October 1st 1990. I welcomed the proposal, although I had objections in several respects. It was passed by the National Assembly on 1st June 1993. In my judgement the Act is not worse than the corresponding laws in other countries, and Hungary's Ombudsmen may not claim that their work is unsuccessful as a result of weakness in the relevant legal framework.

According to the Constitution, the Parliamentary Commissioner (proposed by the President of the Republic and elected by the National Assembly, subject to a two-thirds majority) shall look into disorders he/she has become aware of regarding citizenship and human rights, and may initiate individual actions as a result of the investigation. On the basis of the Constitution, proceedings by the ombudsman may be initiated by anybody. Parliament may elect a separate commissioner, too, for the protection of certain basic rights.

In my opinion, the protection of constitutional rights is to be assigned to specialized ombudsmen in the following two cases:

1. If the violation of the constitutional right poses especially great danger for the liberty of the citizens and the reflexes of self-protection are not strong enough in civil society. This may have the consequence that the infringement of rights is not even realized by the citizens. I think that the office of a Data Protection Commissioner should be incorporated into the system of a legal institution for data protection.
2. The idea of appointing a parliamentary commissioner for environmental protection

is worthwhile. Environmental protection is such a critical issue and the damage to the environment has gone so far, that there is a need for a mediator. One of the major difficulties of introducing this office in Hungary is the limited extent of relevant international experience. When a specific problem arises, the right to a healthy environment is not a civil right, and therefore the environmental ombudsman will probably have a role different from the general one.

It was a constitutional and legal obligation of the Hungarian parliament to elect ombudsmen. The time limit set by Act 59 of 1993 for their election expired on 1st October 1993. The reason for lack of success lies in the severe division of the political scene in Hungary. According to the Constitution, the election of the ombudsmen shall follow a proposal by the President of the Republic, with the aim of achieving a cross-party consensus on the successful candidate. The election of the ombudsmen is successful if they are supported by two thirds of all MP's (not only those present). Following inter-party consultations, the nominees were heard by the President of the Republic in September 1993. Then - in agreement with all the parliamentary parties - he presented personal proposals for the ombudsmen.

At this point, Parliament proved impotent amidst minor constitutional storms. In the hectic climate of internal policy debates, the parliamentary parties suddenly started to waver in their resolutions concerning the nominees they had so far supported. Presumably they thought that the nomineee acceptable to some other parties might not be suitable for them. This way, under ridiculous pretexts, one of the nominees, (myself!) was not even heard by the competent parliamentary committee, thereby violating its constitutional obligation, while the other two nominees did not get the necessary votes of support.

On 30th June 1995, Parliament at last elected the Parliamentary Commissioner for Civil Rights, her deputy, the Parliamentary Data Protection Commissioner (myself) and another Parliamentary Commissioner for Ethnic Minorities. Their term of office is six years.

The Commissioners begin work together

The offices of the three independent Commissioners have been integrated into a common organisational structure for financial and practical reasons. This common organisation provides an integrated pre-selection and analysis of complaints yet ensures the conditions for independent decision-making and performing of tasks for the Commissioners. The three Commissioners' offices and the common ancillary services will altogether employ about 100 staff.

The Data Protection Commissioner monitors both data protection and freedom of information in general with an ombudsman-like role. His other tasks include maintenance of the Data Protection Register, giving an opinion on data protection and freedom of information related draft legislation as well as each category of official secrets. According to the Secrecy Act 1995, the Commissioner is also entitled to change the classification of state and official secrets. He will head an office of 15-20 people, including senior experts and a secretarial staff.

This is an edited version of Dr. László Majtényi's presentation at the *Privacy Laws & Business 8th Annual Conference*, July 10-12th 1995 at St. John's College, Cambridge.

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