

## **Transparency and access to information in Central and Eastern Europe**

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### **Introduction**

For decades, the countries of Central and Eastern Europe were shut off from the mainstream of democratic development. Since the end of Communist or state-socialist political systems in 1989 and thereafter, the region has seen a flurry of efforts to make up for the lost years, developing new legal and institutional frameworks apace in an effort to transform whole societies rapidly into functioning democracies. Some of the most essential such efforts focus on transparency and accountability of the public sector. From a starting point of almost complete governmental opacity, the region presents in microcosm the whole array of issues that can arise in the struggle to achieve greater transparency.

The region includes the overlapping areas of Central Europe (a concept derived from pre-war German political and economic influence), East Europe (generally considered as a group of former Communist satellite countries) and South-East Europe ("the Balkans"), as well as the Baltic countries, which were part of the Soviet Union itself. This analysis will concentrate primarily on the experience of Hungary, Bulgaria, Romania, Slovakia and Ukraine, countries whose experiences demonstrate a range of experiences with regard to the speed and means by which change has been achieved.

Of course, not every issue is of equal importance in every country. It is not surprising that, given their great differences in economic situation and political stability, the newly democratic countries have reached different stages of development with regard to transparency and accountability, and thus represent a broad range of possible policy responses to the problems of creating transparency that all new democracies of the region face. In countries with a strong, centralized political authority and a presidential system, such as Belarus and Ukraine, the core issues of transparency are freedom of the press, freedom of expression and access to government-held information. In countries with a balanced political spectrum, such as Slovakia and Hungary, a tendency to over-politicise is a core problem, that is, almost every event related to transparency (or any other aspect of information rights and practice) has a political context in terms of day-to-day party politics.

But the Soviet-type monopoly of information handling had characteristic features that spanned the region, just as the demand for public access to information and the processes towards transparency in the new democracies of Central and Eastern Europe share key

characteristics. Can these processes offer general and relevant lessons to other countries? The answer is that they can – the practices and innovative solutions introduced in the CEE countries may be of use even to the highly developed western democracies and especially to other emerging democracies.

### **The common heritage**

While the Western political ideal is based on the autonomous, self-determining citizen and the transparent, accountable State, the Communist ideal was based on the self-determining party-state leadership and the transparent, accountable citizen. For decades, information handling was a party-state monopoly. In these countries the provision and the content of information were subordinated to centralized political will. Data, statistics and trends in society were hidden and/or falsified according to party interests and only a select few had access to reliable information. Society was governed partly by secret decisions and orders, so even the rules which established rights and duties were not accessible for those concerned. Collective rights were overemphasized at the expense of individual rights; informational rights were neither granted nor respected. Information was provided in a paternalistic manner; the very notion of “information” was mixed up with “propaganda”. Not surprisingly, the general public had no trust in the truthfulness and correctness of information.

Even before the fall of the Communist regimes, the countries of the region did have two rather peculiar sorts of transparency, best described as “re-imported public sphere” and secondary (alternative) public sphere. Considered equally unwelcome by the regimes, both practices were repressed to a certain degree.

For a number of decades, the broadcasts of Radio Free Europe and Radio Liberty played a crucial role in the re-import of the missing public sphere. These radio stations gathered news and commentaries relating to the Iron Curtain countries (based on the analyses of official communiqués, the reports of dissidents and tourists, secret service materials and the information provided by citizens of Communist countries) and broadcast them back to these countries in the local language. The joke about the members of the Central Committee still being in session at the time that Radio Free Europe had already reported what resolutions they had adopted reflected public perceptions of the radio station’s effectiveness and rapid reaction.

The secondary (alternative) public sphere was associated with the underground movements and the democratic opposition, which had become very well organized by the time the democratic changes came. These activities typically included the preparation, dissemination and discussion of the so-called “samizdat” publications. While severely sanctioning it, the regime in many ways tolerated the existence of this practice, regarding it as an important source of information for its own purposes, in consideration of the fact that the samizdat publications often provided a platform for prominent intellectuals to make their critical comments.

But these relatively minor sources of transparency notwithstanding, by and large the Communist legacy was a pernicious one for transparency. The traditional opposition between state and society, historically characteristic of countries of the region, can still be observed, manifested in the lack of public trust in institutions and information alike.

### **Key issues facing the region**

This heritage of almost complete opacity left all the countries in the region needing to introduce quickly a whole series of transparency-related policies and institutions to address a wide range of information issues. Perhaps the most visible of the major transparency issues in the region is the role of the press (including printed, electronic and online media). The problem is two-fold: first, how to transform the centralized, party-directed, censored media into a competitive free press, and second, how to avoid a new centralization of power and content in the hands of the commercial media. An additional issue is ensuring quality and reliability of information in the new press as a prerequisite of real transparency.

The mass privatization, or re-privatization, that has taken place in several newly democratic countries raises two transparency-related concerns. One is the transparency of the privatization process itself. The other is the privatization of public information and documents that thereby become inaccessible, despite new legislation guaranteeing access to public information.<sup>1</sup> Even the change in the form of ownership can result in limitations of access. The transformation of the national news agencies into state-owned corporations subject to Company Law provides opportunities for these corporations to make their formerly free services available only for paying users.<sup>2</sup>

The new international connections, commitments and obligations have a controversial role in the transparency landscape. On the one hand, the international community expects the new democracies to enact and implement laws guaranteeing individual rights and freedoms, including free access to public information and the protection of information privacy. On the other hand, the new alliance with NATO and the informal dependence on US support force these countries to restrict access to public information, to extend secrecy legislation and to cooperate in anti-terrorist measures, all of which implies the curtailment of newly granted informational rights.<sup>3</sup>

The ongoing waves of legislation and regulation in the region include many new provisions that have directly or indirectly affected the legal framework around transparency. But some of

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<sup>1</sup> Re: Richard's chapter

<sup>2</sup> The Hungarian DP-FOI Commissioner in a 2004 statement (352/A/2004-3) pointed out the contradiction between the constitutional right to have access to information of public interest and the provision of the Law on the national news agency which states that the national news agency MTI, within its public service activity, cannot be forced to provide free services. The Commissioner's argumentation stressed that MTI holds a quasi monopolistic position in the area of news services and that MTI is being financed, at least partly, from the state budget.

<sup>3</sup> Re: Al's chapter

those provisions contradict others, with the result that decision-making on requests for information is left open to arbitrary consideration and often restrictive interpretation. In addition, there are not enough independent judges, prosecutors and lawyers with sufficient training and experience in information-related cases.

As the countries of the region attempt to modernize public administration, many governmental offices have established public relations and press departments. But information intended to enhance the public image of an organization does not necessarily contain objective and complete information.

Another key transparency-related issue is regulation of the newly developed business sector in the areas of fair competition and business-citizen relationships. Across the region, the level of regulation, along with the quality of business ethics, varies tremendously but in general it is lower than in established democracies and market economies. In the more developed newly democratic countries these problems have led to innovative solutions regarding the borderline between legitimate business secrets and information of public interest, especially in areas where state and business sectors have a common interface, such as privatization and concession.

### **The initial enthusiasm**

When the Communist regimes first fell, there was a surge of awareness of the transparency issue everywhere that lasted for a couple of years. In the more liberal new democracies, this surge was moderate and appeared only in certain areas, while it was comprehensive and powerful in the countries of strong central authority.<sup>4</sup> In countries where the legal guarantees of public information were still lacking, the formal and informal struggle for transparency was launched, leading to a new wave of legislation at around the turn of the millennium, although these did not always bring substantial changes. It has now become apparent that the laws passed in the early years of the new political system – riding the winds of the initial surge of interest – played a positive role; they exerted a lasting influence both on the emergence of the democratic institutions and on public opinion

In the turbulent period of the collapse of the old regimes, the archives of the secret police monitoring the regime's internal opposition and the dissidents were opened. In East Germany the population raided the local offices of the Stasi.<sup>5</sup> According to the well-known Russian dissident Boris Pustintsev<sup>6</sup>, people walking into the abandoned archives of the Party's branch offices were met with the sight of documents lying all over the floor. In a live television broadcast in Hungary, a guilt-ridden secret agent talked about the content of classified documents he himself helped to smuggle out and publish.

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<sup>4</sup> For an analysis of the Ukrainian situation, see Y. Zakharov and I. Rapp: Freedom of access to government information, in: *Freedom of Expression in Ukraine 2001*, Kharkiv Group for Human Rights Protection.

<sup>5</sup> The popularly-known abbreviated name of the secret police in former East Germany.

<sup>6</sup> At present he is head of the St. Petersburg based NGO "Citizens' Watch"

In countries where power was transferred peacefully in a negotiated and institutionalized framework, such as Hungary and Bulgaria, the entire process took place under the glare of public scrutiny. New political parties formed amidst loud propaganda, accompanied by heated public debates and the enthusiastic support of the participants. Since the development of legitimate and independent political parties had not been possible under the Communist regimes, the situation necessitated the introduction of the “imported” institutions of transparency, the “transition” laws and the rulings of the constitutional court. All this was accompanied by the disintegration of the previous regime’s institutions dealing with classified information, including the police and the secret services, in terms of both structure and staff.

As the initial euphoria faded and the countries buckled down to the task of creating and implementing workable governance structures the same institutions were re-organized, recovering not only their legality but also part of their legitimacy, propping up the new political structures and institutions. In connection with the countries that retained, or rebuilt, a strongly centralized administration, it was Pustintsev, again, who best summed up the situation by remarking that the doors of the archives had now been fitted with new locks, symbolically as well as physically.

The scenario of an initial move towards greater transparency followed by a relapse was also observed in the media, where the ownership changes were accompanied by an organizational restructuring and the consolidation of the journalists’ system of contacts and priority of sources. In Romania, for example, efforts in the early 1990s to introduce a more liberal, Anglo-Saxon type of journalistic practice soon went sour, when the media groups went into Romanian ownership, into the hands of private proprietors who reverted to the traditions of Communist propaganda. In addition to hindering the objective dissemination of information of public interest, this development also encouraged corruption amongst journalists and led to the practice of feeding distorted information to the public.<sup>7</sup> On top of all this, a certain withdrawal from politics was observed in the region among the general public, accompanied by the tabloid papers’ rising popularity and the experience that the majority of the people were more interested in obtaining practical information necessary for their personal betterment than in engaging in politics.

### **New laws, new institutions**

The legal framework of freedom of information, along with the notion and the institutional infrastructure for a transparent and accountable public sector in general, only began to emerge in the region at the end of the 1980s, parallel with the processes of the democratic political transition there. However, the policies, rights and institutional structures related to transparency were established at a different pace and with different results in the various countries. The differences mirrored the pace of the democratic changes, the process of democratization, the unique historical opportunities and constellations, the level of civilian

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<sup>7</sup> See A. Mungiu-Pippidi: Coalition for transparency – The passage of the Freedom of Information Act in Romania. A case study, 2001. [http://www.sar.org.ro/files\\_h/docs/advocacy\\_foia/7\\_case\\_study.pdf](http://www.sar.org.ro/files_h/docs/advocacy_foia/7_case_study.pdf)

involvement, and quite often the dedicated work of prominent personalities. Transparency-related reforms occurred in two waves. The first wave emerged in the early nineties, that is, among the turbulent circumstances of political and institutional changes, while the second wave evolved a decade later, in the period of consolidation of the new system.

*Hungary* was among the first to build a legal and institutional system and the accompanying practice treating transparency and free access to public information not as a separate entity but as an organic element of the new and comprehensive system of information rights. The Hungarian model, like the early models in several other countries, drew a dichotomy between state and non-state information, signaling that the prime objective of the new system was to break the state's monopoly on information. The model defines two fundamental categories of information/data: personal data and data of public interest. There is one fundamental rule for each category of data: the right of self-determination in the case of personal data and openness in the case of data of public interest.

The Hungarian Constitution declares both fundamental rules as fundamental rights. The basic rules of implementing these rights are laid down in the combined Data Protection and Freedom of Information Act,<sup>8</sup> while the most important exceptions are contained in the sector-specific acts and the Secrecy Act,<sup>9</sup> with the sanctions listed in the Penal Code. The Penal Code addresses not only the traditional category of the disclosure of state secrets, but also the disclosure of business secrets, along with the category of illegitimate data handling, which sanctioned not only the abuse of personal data but also the keeping secret or forging of data of public interest. After the mid-1990s, sector-specific laws on handling/controlling information were passed by Parliament<sup>10</sup>, along with legal regulations specifying exceptions to the fundamental rules, including the Secrecy Act that replaced the old regulation devised by the Communist regime. Around this time, the first Parliamentary Commissioner for Data Protection and Freedom of Information was elected.<sup>11</sup>

*Ukraine* passed its law on transparency in the first wave, in 1992.<sup>12</sup> Government agencies are obliged to inform the public about their activities and resolutions, and citizens are, in principle, entitled to demand access to any official document, a demand to which agencies must respond within ten days. The fundamental right to public information was enacted in the Constitution of 1996. The Ukrainian Secrecy Act, along with the list of state secrets,<sup>13</sup> was enacted in the mid-1990s. However, no sector-specific laws have been established, nor have the rules and regulations pertaining to the handling and controlling of information been

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<sup>8</sup> Act. No. LXIII of 1992 on protection of personal data and disclosure of data of public interest.

<sup>9</sup> Act No. LXV of 1995 on state secrets and office secrets.

<sup>10</sup> For example, the Direct Marketing Act (Act CXIX of 1995 on the use of name and address data serving the purposes of research and direct marketing), the Identification Act (Act No. XX of 1996 on the identification codes and methods superseding the personal identification number), or the Medical Data Act (Act No. XLVII of 1997 on the handling and protection of medical and related data).

<sup>11</sup> László Majtényi, professor of law.

<sup>12</sup> Law on Information, 1992.

<sup>13</sup> Law on State Secrets, 1994 and "List of information that belongs to state secrets," 1995.

harmonized; only an additional decree<sup>14</sup> was issued in 1997 about the dissemination of public information. The ultimately democratic outcome of the heavily contested presidential elections in 2004/2005 may offer a significant opportunity to improve the implementation of the existing law and to introduce significant amendments.<sup>15</sup>

*Romania*, along with Slovakia and Bulgaria, represents the more recent wave in legislation.. The Romanian access law<sup>16</sup> was enacted in 2001. The Act contains all the fundamental elements of a modern FOIA, although by defining a rather broad range of exceptions it exempts many areas from the rules of free access; at the same time, it obliges government agencies to publish detailed information on their activities. Rather peculiarly, it assigns a separate chapter for dealing with the media, the “materialization” of the citizens’ access to information. Such articles usually form part of laws on media. According to this, only accredited journalists are allowed to take part in the press conferences of official bodies and the accreditation can be withdrawn at any time. A separate independent supervisor has not been elected to control the implementation of transparency, although the general ombudsman may act in information-related complaints.

The *Slovakian Parliament* has enacted a series of relevant laws in the “second wave.” First was the 1998 Act on access to information on the environment,<sup>17</sup> which gave practical experience to journalists, civil organizations and ordinary citizens in obtaining official information. (In *Bulgaria*, the law on protection of the environment (1991) played a similar role as the first law providing for individual right to information without the need to prove a legal interest.) Then came a broad law on information<sup>18</sup> in 2000. Like its Hungarian counterpart, the Slovakian Act ties the range of actors obliged to give access to information to certain public functions, thus extending the obligation to private organizations if they are involved in those public functions. Enacted in 2001, the Slovakian Secrecy Act,<sup>19</sup> like those of other recently established democracies, reflects the conditions of NATO accession.

Bulgaria’s law on access to information (APIA),<sup>20</sup> enacted in 2000, also links the obligation to give access to information to various public functions, but tops it up with the criterion of the use of public money. Since the law makes no provision for administrative appeal, and because there is no independent supervisory body, a court procedure is the only option available to rejected applicants. Among the rules of mandatory automatic provision of information, there is one that requires the ministries to maintain a website and publish information electronically. The Bulgarian legislation on the protection of information and on secrecy was promulgated two years after the enactment of APIA, which made the law more difficult to

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<sup>14</sup> “On the order of dissemination of information on public bodies and local government activity by mass media”, Statute of 23 September 1997, No. 539/97.

<sup>15</sup> See ARTICLE19 assessment of the Ukrainian Election Law and its implementation in the 2004 Presidential Election, 27 October 2004, <http://www.article19.org/docimages/1864.doc>

<sup>16</sup> Law No. 544/2001 on free access to information of public interest.

<sup>17</sup> Act No. 171/1998 Coll. On access to information on the environment.

<sup>18</sup> Act No. 211/2000 Coll. On free access to information.

<sup>19</sup> Act No. 100/1996 Coll.

<sup>20</sup> Access to Public Information Act.

implement, as the administrators easily got lost in the tangle of applicable rules and regulations. At the same time, the secrecy act enacted the four-grade classification system in line with the NATO requirements, and is in contradiction with the APIA regulations at several places.

### **Movements and driving forces**

In the first wave, it was primarily theoretical experts and reform-minded leaders of the new political regime who were behind the creation of the laws and institutions concerned with information. In the second phase, at the end of the nineties and around the turn of the millennia, it was the various civil organizations which needed political and professional support. We may say that the first phase was more „elitist”, while the second phase more „plebeian”, although the national differences were also significant.

In Hungary in the 1980s, that is, well before the change of regime, a multi-disciplinary panel of experts began to gather and to analyze the available Western laws, studies and practical experience in the area of the individual’s information rights, both with regard to data protection and freedom of information. By the time the Communist regime fell, the concept of a new information-legal regime had already been established; moreover, the drafting of the text of the later combined data protection and freedom of information Bill had been completed. One panel member became the influential president of the newly-established Constitutional Court and reinforced the realm of information legislation with a number of milestone decisions<sup>21</sup>. The most important legal rules were created and the institution of the DP-FOI Commissioner was set up by the middle of the decade. With this historical advantage, Hungary became a model country of the new information rights and shared its experiences with other countries in the region. At the same time, this situation substituted for the development of civil movements fighting for the enforcement of these rights, which is represented by just a handful of NGOs at present.

While there was a team of lawyers also in Bulgaria which drafted a FOI Bill in 1992, their work was never continued. In this country, the most important player of free access to public information is a civil organization, the Access to Information Programme (AIP).<sup>22</sup> This organization was established in 1996 by lawyers, sociologists, economists, political scientists and journalists to launch a public debate on access to information and to keep this issue continuously on the agenda. The operation of the forces supporting the early passage of the Ukrainian Law on Information is not known to the wider public, however, it may be assumed that the Chernobyl disaster and the issue of access to environmental information have made public opinion, as well as legislation, more sensitive, similar to a number of other countries in the region. In contrast to the Bulgarian AIP, the Kharkiv Group for Human Rights Protection (KHPPG)<sup>23</sup> did not choose to specialize in this specific problem area but is fighting for the

<sup>21</sup> For instance, with his decision frequently quoted internationally, on the anti-constitutional nature of the universal personal identifier (Decision No. 15/1991 AB).

<sup>22</sup> [http://www.aip-bg.org/index\\_eng.htm](http://www.aip-bg.org/index_eng.htm)

<sup>23</sup> <http://www.khpg.org>



enforcement of a wide range of human rights, the discontinuation of governmental secrecy and the documentation and disclosure to the public of breaches of rights. Its activities in the latter area contribute indirectly to the enhancement of transparency, and, the promotion of freedom of expression has become one of their prime activities in recent years.<sup>24</sup>

The Romanian Academic Society (SAR), a group of influential intellectuals, has decided to run the campaign and to lead the movement „from above”, with professional scientific analyses, well-positioned legislative proposals and political lobbying which reflects a clear assessment of the situation. In Slovakia, a group of 11 civil society organizations that came together under the rubric Citizen’s Initiative, and eventually grew into a coalition of 122 NGOs, launched a campaign that led to the passage of an information access law and ensured that the law conformed to international norms. They used a number of tools and methods in their work: political lobbying, wide-ranging media campaigns, the publication of articles and speeches, the broadcasting of interviews with the members of Citizen’s Initiative in the media; they designed a visual logo for the campaign, sent out some fifty thousand postcards to be forwarded onto the President of the National Council demanding the passage of the law, and prepared radio and television commercials.

As noted earlier, in the ex-communist countries the institutions of democracy and transparency could not evolve organically, therefore these institutions had to be “imported”, especially in the first years of the new political system. At the same time, western democracies wanted to *export* these institutions.<sup>25</sup> Consequently, international influences played and still play a significant role in establishing institutions of transparency. This influence can be demonstrated not only in “elitist” but also in “plebeian” movements. An obvious source of this influence was the practical aid of international non-governmental organizations that extended beyond supporting the civil sector; another source was the cooperation between national NGOs that evolved at a later stage.

There existed – mainly informal – expectations of openness, from the part of democratic countries and inter-governmental organizations, however, we may go so far as to say that at the time of the disintegration of the closed political and military block of the CEE countries the possibility for foreign analysts to obtain formally secret economic and political information outweighed the need for citizens of new democracies to have access to information of public interest. The newly established formal connections, especially after September 2001, have had even more controversial effects on transparency and generally, on

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<sup>24</sup> See for example, Z. Antoniuk: Open letter on non-transparent and criminal activities of power, and V. Rechitsky: Comment of the KHPG on the political reform in Ukraine (4 November 2004), both available at <http://www.khpg.org/index.php?id=1106040116>

<sup>25</sup> A. Grigorescu qualifies these ambitions in the area of transparency as “unsuccessful norm transmission” (see: European Institutions and Unsuccessful Norm Transmission: The Case of Transparency, *International Politics* 39, no. 4, December 2002). It should be noted however that imported formal norms generally remain unfamiliar among attributes of internal law, and that the introduction of these norms is a necessary but by no means sufficient condition of implementing and socializing the rules of transparency. In addition, the interests of the West and the international organizations are rather controversial in the area of substantial exporting of these norms.

the implementation of information rights: the expectations of Western-type openness and the mandatory restrictions on access to information and documents had an influence at the same time.

### **Do people use the new laws?**

Experience around the world has shown that the laws, institutions and policies devised to guarantee transparency constitute a necessary but insufficient precondition for the implementation of the law and the practice and socialization of accessing information. This conclusion applies strongly to the case of the CEE countries, where the eagerness to achieve rapid integration with the democratic international community can easily produce shop-window legislation and unenforceable laws. This is a dangerous prospect. Laws that have no real impact can disillusion the domestic advocates of transparency and can pull the wool over the eyes of foreign bureaucrats who require that states meet certain formal criteria. The FOIA in Bosnia<sup>26</sup>, for example, is one of the finest pieces of legislation in this area, yet it exerts a minimal influence on the practical implementation of transparency.

The most important questions are as follows: How well do the administrators know their obligations to give to information? How well do the citizens know their rights to information and the means and institutions to enforce these rights? Do they use these rights, means and institutions? How good a service do the administrators provide to those applying for information?

In the countries studied, three types of organizations conduct surveys and analyses to measure and evaluate the various aspects of transparency and accountability: the official, independent guardians supervising access to information, the NGOs and the international watch-dog organizations. In view of the fact that in several countries the agency that *de facto* supervises the access to information is an NGO, and since some of the international organizations active in this area also belong to the civil sphere, the non-governmental sector plays a primary part.

Hungary's DP-FOI Commissioner keeps a record of the number of applications turned down, along with the grounds on which access was refused. The annual reporting of these data is mandatory under the law. However, the Commissioner also asks the data controllers to provide information about the number of applications they have complied with.<sup>27</sup> These data should be treated with strong reservations. The standard of discipline in reporting is unsatisfactory even among the organizations in the public sphere. Even more importantly, the methodology of defining what qualifies for data to be reported is unclear.

In Bulgaria, the AIP conducts regular surveys among the organizations (state and local self-government bodies, the mass media, and other entities financed from state budget), which are

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<sup>26</sup> Freedom of Access to Information Act for the Federation of Bosnia and Herzegovina, [http://www.ohr.int/ohr-dept/media-d/med-recon/freedom/default.asp?content\\_id=7269](http://www.ohr.int/ohr-dept/media-d/med-recon/freedom/default.asp?content_id=7269)

<sup>27</sup> In an abbreviated form, these reports are also published in English; both versions are available at [www.obh.hu](http://www.obh.hu)

obliged to release information. Its findings are then published in an annual report,<sup>28</sup> along with a brief account of the legal procedures it has filed. In 2002 the empirical study<sup>29</sup> covered approximately 300 public administration organizations and their local branches and 100 local governments. It addressed the question of the infrastructure of receiving and assessing applications on the one hand, and the mandatory publication of public information on the other. From the statistics of AIP's own legal aid service we learn that the number of rejections without giving an explanation is exceedingly high.

In Ukraine, it is not just the access to information that is clogged: its survey and supervision is equally difficult. The KHPG continuously collects and evaluates the rather small number of cases related to access – or non-access, more likely – to information. An analysis entitled *Freedom of access to governmental information*<sup>30</sup> provides a summary of KHPG's activities between 1994 and 2001. The report reveals that, after an initial trend toward opening up, the trend has been toward closing down information flows. Since the year 2000, the KHPG has kept track of the decrees, rulings and other legal documents, which are known to exist, but the content of which is kept secret. Classified as either "For service use only" or "Not for printing" or "Not for publishing," these documents seem to have increased in numbers throughout the year 2002.<sup>31</sup> Oddly enough, the steepest increase came during the preparation of the President's Decree on the additional measures for guaranteeing transparency of the activities of state agencies.<sup>32</sup>

In Romania, the team of experts delegated by the Romanian Academic Society (SAR) has compiled a long list of quantitative and qualitative analyses on access to information. Their survey<sup>33</sup> conducted in the summer of 2003 aimed to find out how much of the taxpayers' money the government organizations had been spending on publishing their own information and on promoting their image and also, how exactly they had spent it. The team concluded that the public institutions have no clear strategy on this subject and the information regarding the sums spent on publishing information is not as readily accessible as it should be.

In addition to gathering and analyzing objective data, there are other ways of monitoring the rights of access to information. The Slovakian civil initiative called Citizen's Shopping is both interesting and innovative. The basic idea is that public administrators in agencies that are obliged to provide information themselves, are asked to turn to other public institutions and ask for information and access to public documents as private citizens, concealing their true position. The experience of how they are served and treated, and the circumstance

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<sup>28</sup> *The Current Situation of the Access to Public Information in Bulgaria*, AIP 2001, 2002

<sup>29</sup> Report on Access to Public Information in Bulgaria 2002, AIP 2003; the whole survey is published in *The Year of the Rational Ignorance*, AIP, 2002.

<sup>30</sup> <http://khpg.org/index.php?id=1085223730&r=25>

<sup>31</sup> See: Kharkiv Group for Human Rights Protection: *Freedom of Expression in Ukraine* 2001, 2002, respectively.

<sup>32</sup> President's Decree No. 683 of 1 August 2002.

<sup>33</sup> Transparency for an independent media. How do public institutions spend the money for publicity? Case study based on the Freedom of Information Act.

whether their application is granted or rejected, will provide them with useful information that will come handy in discharging their duties in their own organization.

The project launched by the Open Society Justice Initiative under the title “Monitoring access to information” has a much more ambitious goal: it wishes to standardize a Freedom of Information Monitoring Methodology for evaluating access to information legislation and practice in selected countries. The pilot project covers five countries, three of which are in CEE: Macedonia, Armenia, Bulgaria, South Africa and Peru. It is hoped that the eventual results will help not only to pinpoint problems but also to reveal the roots of those problems and develop possible solutions.<sup>34</sup>

These experiments have shown that we do not have one simple indicator for measuring the practical implementation of the access to information: the combined, well-tuned and context-sensitive application of empirical and theoretical approaches, quantitative and qualitative methods is needed to draw conclusions of general validity. The comparative evaluations about the different countries should also be treated with care: even in the case of a group of countries undergoing a similar informational regime, the national differences beneath the superficial phenomena may be considerable. Another lesson of the series of studies is that one should not look on the freedom of information and all the other elements of transparency as an ideal state, which can be attained through a proper political course; it is more like a permanent process, in which the demands, the circumstances and the conditions perpetually change – especially in a region, where each country has a dynamically changing society in a state of transition.

### **Problems in implementation**

Despite the evident achievements, both the broad spectrum of surveys – analytical studies, quantitative surveys, registries, data bases, interviews, institutional inventories, case studies – and the practical, day-to-day experience reveal a whole range of problems in the implementation of new laws on transparency.

The practice of accessing information of public interest in the countries studied is colored not only by the deep-rooted social and political traditions of blocking information, but also by the traditional style of government. In the case of some countries, Hungary included, the Prussian tradition of state administration based on administrative secrecy, which had characterized the prewar period, continued to exert an influence. This was followed by four decades of Soviet-type state administration, a practice one would definitely be disinclined to describe as open and citizen-friendly. The existence of these traditions matters from the viewpoint of both the mentality and the culturally transmitted behavior-pattern of the civil servants working in the public administration of the new democracies<sup>35</sup>.

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<sup>34</sup> Discussed in detail in Laura Neuman’s and Richard Calland’s paper on “the implementation challenge” in this volume

<sup>35</sup> **Re: “implementation chapter”**

On the face of it, for example, Ukraine seems to follow a similar legislative course in this area as Hungary; however, the law has barely been implemented. Ukraine's public servants are not at all familiar with the rules regulating the access to information and are even less willing to apply them. There is no independent supervisor of the implementation of the rights of information, and the culture in public administration acknowledging the citizens' right to information as a fundamental (although not always implemented) element does not exist. Similarly, the liberal critics of the Romanian law maintain that the implementation of the Act is not satisfactory and the secondary values of transparency in general are not realized sufficiently in Romania, specifying the peculiar features of public administration and social culture as the main causes.

According to its annual assessment for the year 2002, the Slovakian civil organization, Citizen and Democracy Association<sup>36</sup> claims that thanks to the law, fundamental public information has become public, although the authorities often withhold information relating to the business sector, including information regarding privatization. As a result of the campaign, a relatively large percentage of the population has heard of the Act, but the official bodies' inclination to give access to data varies (according to the report, this inclination is considerably improved when the applicant is accompanied by a lawyer), and this could hinder its broader application.

Even now, more than a decade after the change of regime, questions of access to the documents of the KGB, Stasi and other former secret services, pose a problem. Most of the countries concerned have passed legislation concerning the status of these documents. However, the main problem is posed not by the nature of the legal solution used but by its poor enforceability. The successor organizations of the Communist secret service, Securitate, in Romania do not transfer the documents in their possession, while in Poland the special organization set up to handle such documents did not have a head for a long time. In Hungary, despite the operation of an independent institution, there is still a great deal of uncertainty concerning the contents, authenticity and completeness of the documents, which gives rise to potential political blackmail. Experiences show that there is no satisfactory solution to these problems, other than the passage of time, perhaps. The younger generations are no longer interested in this problem, however, the issue is still on the agenda in public life.

Another current problem is the price of public information – both its official and black market price. The black market price (that is, the price of information obtained through bribery) is not common knowledge; Romanian analyses estimate<sup>37</sup> that it costs 50 to 200 US dollars to obtain a piece of information. This is, however, not only a Romanian phenomenon; a number of Western sources reported the possibility of the issuance and even theft of government documents for money, primarily in the successor states of the Soviet Union.

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<sup>36</sup> <http://www.foiadvocates.net/members/cda.htm>

<sup>37</sup> See A. Mungiu-Pippidi: Coalition for transparency...

## Addressing the problems

Who has a mandate and efficient means to address these problems? In a public administration tradition and in a social and cultural milieu such as is present throughout Central and Eastern Europe, where the requirement of transparency is a new element in the history of data management, the institutions charged with supervising the implementation of the law have a prominent role to play. Of all the countries in the region, only Hungary, Slovenia, Estonia and Latvia have a specially appointed body for supervising implementation. In all the countries that have designated the institution of general Ombudsman (People's Advocate, Public Mediator), such as Romania or Bulgaria, the person in charge investigates the complaints related to the rights of access to information and the rules of controlling information to a limited degree. In Albania it is the express duty of the Ombudsman to supervise the implementation of the – otherwise almost completely ignored – law.

Interestingly, in several of the new democracies the same official supervises both the protection of personal data and the freedom of information (in Hungary the Parliamentary Commissioner for Data Protection and Freedom of Information, in Estonia the Data Protection Inspectorate, and in Latvia the Data Inspectorate). Besides the obvious economic considerations that may warrant such an arrangement, the joint interpretation of the two rights can have some other significant advantages, too: for example, it can ensure consistent positions on the borderlines between the two informational rights.

The Hungarian Parliament elected its first Commissioner in the summer of 1995. His office has accomplished pioneering work and the Commissioner himself has considerably enhanced his professional reputation. In general, his powers were 'weak', such as those associated with an Ombudsman: he possessed broad investigative powers but could only make formally non-binding recommendations. Nevertheless, his recommendations have been accepted in a very high per cent of the cases: in the majority of the cases the data controllers follow his recommendations even if they disagree with his arguments.<sup>38</sup>

In Bulgaria, the Public Mediator does little more in supervising transparency than respond to individual complaints that arise when government agencies refuse to disclose information of public interest. Broad supervision of access to information is instead carried out by an NGO, the AIP. In addition to legal counseling, writing up draft proposals and lobbying, it also fulfils functions traditionally associated with supervising, such as the informal investigation of individual cases, the filing of court procedures, the conduction of comprehensive surveys and analyses, and the collection and registry of cases associated with access to information. In the last few years, in particular, since the passage of the access legislation, it has also undertaken to engage in educational activities for both civil servants and citizens, and the number and importance of lawsuits instituted by or with the participation of AIP are becoming

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<sup>38</sup> See the Annual Reports of the Parliamentary Commissioner for Data Protection and Freedom of Information, <http://abiweb.obh.hu/dpc/index.htm>

increasingly significant, not to mention their professional support given to similar organizations in other countries.

However, the Bulgarian success story also raises questions: how far the activities of a NGO could extend, to what extent it may take over state functions and whether state administration and society will ever reach a stage of development where they will be able to carry on the initiatives of AIP independently so that AIP could remain a true civil critic and actor of the system.

The Ukrainian KHPG discharges similar functions (collecting and analyzing cases, issuing newsletters and other publications in a critical voice, filing court procedures, etc.), under much worse conditions but with the same commitment. The KHPG is fighting for the observation of a broad range of human rights; its work associated with transparency is closely related to the freedom of press and the freedom of expression. The legal experts and other professionals cooperating with the KHPG have produced numerous research papers on the qualitative study and critical assessment of the elements of transparency. Their activities even include the preparation of a draft containing the missing elements of the existing legal framework. V. Rechitsky has drawn up a document entitled *A model draft of the Ukrainian law "On public oversight of the state activities"*, which covers, among other things, the institution of public debates, the supervisory role of the Parliament, the limiting of the administration's information monopoly and – as a legal novelty – the investigative powers of human rights organizations. The same author has prepared the draft of the *International Convention on Protection of Intellectual Freedom*, a major initiative that may seem idealistic to the Western readers perhaps, yet it is a thoroughly understandable response to the abuses in Ukraine.<sup>39</sup> KHPG, along with other human rights organizations such as the Ukrainian Helsinki Committee, has been closely monitoring the almost revolutionary circumstances of the 2004 presidential elections and publicizing its reports about violations of legal and ethical norms on elections and access to information.<sup>40</sup>

Perhaps the most important lesson is that where there is an efficient official supervisor, the civil sphere fighting for transparency is weak, while in countries that have either weak supervision or no supervision at all, civil society organizations take over the missing function. Hungary and Bulgaria exemplify the two models. In Hungary, the high esteem the Commissioner enjoys fills NGOs with complacency, even if they criticize his activities sometimes, while in Bulgaria the AIP is forced to take over several government functions that are absent – which in turn gives comfort to the government. The ideal combination would be to have an efficiently functioning independent supervisor and strong civil control at the same time, since their respective roles, legitimization, styles and practice are different and complementary.

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<sup>39</sup> Rechitsky, Vsevolod: *International Convention on Protection of Intellectual Freedom: A Draft*. Kharkiv, Ukraine 2002. See also <http://khpg.org/index.php?id=1085224381&r=25>

<sup>40</sup> See for example: *Constitutional and legal analysis of the political situation in Ukraine (On 25 November 2004)*, <http://www.khpg.org/index.php?id=1106041111>

In addition to the independent supervisory institutions and the civil society organizations, there are other important institutions and factors that affect the transparency landscape.

International cooperation has significant and well-established channels of influence. One is official exchanges of experiences, primarily by means of international forums and mutual visits of the independent supervisory agencies. What is missing, however, is an exchange of experiences among those obliged to supply information, something that could be initiated by the independent controllers or the NGOs monitoring the observance of access rights.

Another characteristic form is professional and financial assistance rendered by international NGOs. ARTICLE19, a British-based civil organization fighting for freedom of expression and the free flow of information in partnership with local organizations in more than thirty countries, plays a particularly active role in the CEE region.<sup>41</sup> It takes part in the preparations for and debates of draft legislation, in bringing the players of the access area together, inviting foreign experts and compiling reports. Furthermore, as happened during the legislative debates of the Bulgarian APIA, it even promotes the passage and execution of legal rules corresponding to the international norms by lobbying, convincing local politicians<sup>42</sup> and publishing its positions. The Open Society Institute (OSI) is also active in this area through its various programmes and co-institutions.<sup>43</sup> For OSI, the issues of access to information play a significant role primarily in the identification of anti-corruption policies, the transparency of the funding of elections and parties,<sup>44</sup> the EU Accession Monitoring Program (EUMAP<sup>45</sup>), the monitoring project of the Justice Initiative already mentioned above and the research conducted as part of the International Policy Fellowship.

A further typical form of international cooperation takes shape in the visits of individual experts. Experts and activists from countries where sufficient useful information has been gathered in the area of access to information pay visits to other countries in the region, have their legal rules and reports translated, deliver lectures and consult not only with the representatives of the civil sector but also with members of parliament and civil servants. In the last few years, Hungary has been particularly active in sharing its experiences, and most recently, second-wave countries have seen increasingly cooperation.

A positive development of the past few years is that the friendships and work-related relationships which have evolved over the years, and the ever more frequent practice of professional assistance, have overcome what had been reluctance among local Central and Eastern European civil organizations to establish closer links with other local or regional civil organizations because they had seen them as rivals, given that they maintain themselves from

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<sup>41</sup> See <http://www.article19.org>

<sup>42</sup> In September 1999 five international experts addressed a letter to the National Assembly stating their common position on the necessary amendments of the Bill, and were given audience by the Chairman of the Human Rights Committee of the National Assembly.

<sup>43</sup> [http://www.soros.org/initiatives/regions/central-eastern\\_europe](http://www.soros.org/initiatives/regions/central-eastern_europe)

<sup>44</sup> See, for example: *Monitoring Election Campaign Finance. A Handbook for NGOs*. Open Society Institute, 2005.

<sup>45</sup> [www.eumap.org](http://www.eumap.org)



the same Western professional and financial support. One sign of cooperation is the coming into being of the Freedom of Information Advocates Network and website,<sup>46</sup> which aims to help NGOs with campaigning, advocacy, and fundraising, through exchange of information, ideas, strategies and by providing a forum for collaboration, and to facilitate the forming of coalitions of NGOs to address FOI issues at a regional or global level.

The most important institutional platform of the democratic changes was the media, which came complete with its traditional infrastructure. The organized campaigns launched by the civilian organizations, which produced a broad social consensus, generally enjoyed the support of the media. However, the role of the media in fighting for transparency has not always been positive.

While KHPG gives regular accounts of assaults sustained by journalists – threats issued to, the beating up, disappearance of, and bribes offered to journalists, the censorship exercised by the authorities, criminal proceedings instituted against newspapers, radio stations and television channels, police searches in editorial offices and other atrocities – the whole of the Ukrainian press was not KHPG's partner in its campaigns. As critically stated in KHPG's newsletter,<sup>47</sup> journalism in the Ukraine is not yet mature enough for the consistent application of freedom of speech, while self-censorship and the concealment of politically compromising cases are on the rise. The public protests and the scandals around the presidential elections in late 2004 have polarized not only the political forces but the media as well.

According to the evaluation of A. Mungiu-Pippidi, head of SAR<sup>48</sup>, the media in Romania did not support the campaign for freedom of information because the media have become complicit in a whole range of largely dishonest information-related activities. There is a thriving black market in information, with blackmail with information and blackmailing for information. These practices have become so widespread that any legal and institutional regimes that would create a clear situation in the area of access to information would threaten lucrative opportunities for journalists of this kind.

In contrast, the campaign in Slovakia relied on cooperation with the press, and this cooperation is also the basis of the civil monitoring of implementation. Through their good contacts, journalists easily locate information sources. However, the response time of public administration is disappointingly slow for them and they may therefore lose their initial interest. In addition, their behaviour may provoke suspicion in civil servants who do not have a very high opinion of journalism as a profession. The Citizen and Democracy Foundation (CDF) used journalists in conducting surveys that led to the discovery that either the Slovakian journalists were unfamiliar with the law on access to information or if they were familiar with it, they hardly at all used it in their work. This is in accord with the Hungarian

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<sup>46</sup> The FOI Advocates Network was established in 2002, on 28 September (known as the International "Right to Know" Day); [www.foiadvocates.net](http://www.foiadvocates.net)

<sup>47</sup> Ukrainian mass media are not prepared for the freedom of speech, *Prava Ludyny* No. 7, July 2000. See also Y. Zakharov's analyses in *Freedom of Expression in Ukraine 2001*.

<sup>48</sup> In "Coalition for transparency" – see Footnote 7

experience: although the Hungarian journalists know the DP-FOIA well (or at least they have heard its name), and although they often threaten to use it, in practice they very rarely rely on it to obtain information in their daily work.

In short, throughout the region media support for passage and implementation of access to information laws is spotty at best. One reason for this apparent disinterest is rooted in the fact that the formal procedure is far too slow for the purposes of a daily paper and, therefore, it can only be of use to investigative journalists. The other reason has to do with the fact that in the journalistic society the value of information *available to all* is much smaller than the value of information obtained either from exclusive sources or through personal contacts or even by illegal means.

### **Lessons learned**

The developments of transparency and access to public information have brought about a number of lessons to learn for the new democracies of Central and Eastern Europe, not only within the individual countries but also between the countries. Some of these lessons may prove or have proved to be useful for the new democracies of other regions around the world, as well as for the traditional, well-functioning democratic countries.

The most important conclusion for the new democracies is that the both the supply of and the demand for transparency and accountability can be difficult to maintain once the euphoria of the change of regime has faded. It is thus desirable to move quickly in constructing the system of access to information and to make the best of the opportunities arising from the restructuring of the legal system and state administration.

In drafting their legislation, most countries profited greatly from international models. There are exemplary model cases and arguments that are generally applicable and may be used in all countries with modern access legislation in spite of the differences in their internal laws. Yet it was not possible to simply incorporate certain legal provisions into the existing legal system by copying and pasting.

The enactment of access to information laws is a major accomplishment but is not sufficient in itself. The best method for ensuring appropriate accessibility of public information is the institution of an independent Information Commissioner. That role may also be assumed by a respected and professionally prepared civil society organization, but this does not exempt the state from the obligation of setting up an official institution. It is best if the commissioner is elected or appointed, with adequate resources at his disposal, simultaneously with the coming into force of the legislation. At the same time, the commissioner should encourage the adoption of the necessary secondary norms and specific practical measures. It may seem simpler to leave the interpretation of the law to the judiciary. This, however, requires the development of a cadre of highly qualified lawyers with expertise in the area, a more

demanding feat than the creation of the institution of the independent commissioner, at least initially.

The new democracies are encumbered with heavy political struggles and efforts should therefore be made to depoliticize the notion and practice of transparency as far as possible. Both the notion and practice should be popularized throughout the wider society. If people see access to public information as some kind of abstract law that is worth nothing in practice, a shop-window measure of the government in power or a tool in political struggles, its socialization does not stand a chance. In a place where information means nothing more than sensation, scandal and a possibility to discredit your opponent, a distorted picture will evolve of transparency in society. In such an environment, the fight for access to information is limited to activists and politicians who have vested interests in its application.

What the new democracies all have in common is an interconnection between the demand for freedom on the one hand and the demand for transparency, the chance to discover their past, on the other. Both approaches to achieving greater transparency in the CEE countries – reforms introduced from above and civil society activism – can play a role in the creation of public access to information. Over-politicization is a common peril: public information issue may become an area of political infighting; another common feature is the central role of the media. Then there is the danger that the initial openness will gradually evaporate: with the consolidation of the new institutional system, as the traditions of administrative secrecy revive. In these countries the continuous monitoring of public access to information and the establishment of independent supervisory bodies is crucially important. But most important of all is that the demand for openness and the idea of putting the institutions of transparency to good use be broadly embraced in an environment where the traditions of such mentality had been lacking.

For the layman, the simple question whether life has improved in consequence of greater transparency during the period of democratic transition remains unanswered. In all likelihood, greater transparency has complicated the lives of people holding high office, people who attempted to exploit the situation after the democratic transition and who tried to preserve and convert their earlier influence. Similarly, the new developments hardly made life easier for business monopolies trying to exploit the legal gaps and deficiencies of the newly emerging market economy, nor did they help the black-marketers of the information scene and, therefore, a narrow segment of the press. By contrast, the media as a whole – despite certain objectionable symptoms in its daily practice and the apparent disinterest of the majority of the journalists – has found it considerably easier to access public information already because of the mere existence of access laws and the growing willingness of government bodies to disclose information of public interest. The maneuvering space of the political opposition broadened, it could better obtain and publicize information and documents relating to the activities of the ruling government, which was one of the essential preconditions of the emergence of a more balanced political arena. In addition, making the life of the weaker side, the individual, the citizen, easier, transparency has also encouraged a better division of

informational power. In the more developed new CEE democracies, the demand for, and the concepts of, access to public information have grown roots in public opinion to a considerable degree. It is to be hoped that in the long run this process will lead to embedding of the practices of information rights.

The phenomena described above can be felt to a different extent in the various countries, just as the transparency situation has reached different stages of development there. But throughout the region, freer access to public information has apparently been instrumental in fostering democratic development, encouraging the discovery of the past, working towards both the emergence of an informed public and the limitation of bureaucratic power, and the fight against corruption. In other words, it has been an efficient, if not omnipotent, medicine to cure the symptoms of the all-pervasive secrecy inherited from the political past.

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