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Report of the Special Rapporteur on the situation of human rights defenders on his mission to Hungary: comments by the State

Note by the Secretariat

The Secretariat has the honour to transmit to the Human Rights Council the comments by the State on the report of the Report of the Special Rapporteur on the situation of human rights defenders on his mission to Hungary, which took place from 6 to 16 February 2016.

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Report of the Report of the Special Rapporteur on the situation of human rights defenders on his mission to Hungary (8-16 February 2016): comments by the State*

1. Remarks of the Government of Hungary on the Report of the Special Rapporteur on the situation of human rights defenders, Michel Forst on his mission to Hungary.

2. The Government of Hungary hereby attaches general remarks and detailed information to the Report of the Special Rapporteur on the situation of human rights defenders, Michel Forst on his mission to Hungary.

3. While we appreciate the efforts of the UN and particularly of Special Rapporteur Michel Forst, and therefore – in the air of openness and in a cooperative spirit – it was an honour to have hosted him in our country, we regret to see an unbalanced report coming out as a result.

4. First of all, it is hard to determine the nature of the Special Rapporteur's report. If it is a political document, it may only be of a subjective nature. In this case, as we assess the facts differently, we cannot agree with the report and much to our regret we have to refuse certain allegations of the Special Rapporteur. There are political forums where it is possible to discuss our different views as equal partners – nevertheless, we consider this report not to be one of them.

5. If it is a legal document, in this case we regret to see that it is not legally accurate and well-founded. The report raises questions as to the fundamental rights, but instead of their legal assessment, it draws unsubstantiated and controversial conclusions and carries out a political assessment. Although the final recommendations could actually be used for every single country on Earth and, furthermore, the report itself states that "*overall, human rights defenders have been able to safely carry out their work in Hungary*", the report still gives an unfounded – deliberately and mainly negative – impression of the situation in Hungary. The Government of Hungary has always been – also during the visit – open for discussion and with our comments below we barely try to shed light on some of the inaccurate allegations of the Special Rapporteur's report.

I. General remarks

a) about the situation of human rights in Hungary in general

6. ***"(…) the Special Rapporteur formed an overwhelming impression that the reforms generally weakened independent institutions and eroded democratic checks and balances, by bringing them increasingly under the control of the executive power or reducing their capacity to exercise effective control over the Government."***

7. ***"They led to the centralization and tightening of government's control over the judiciary, the media, religious organizations and other spheres of public life, directly or indirectly affecting human rights. The new constitution and other controversial measures adopted during this period have helped the Government "to entrench its personnel, as well as it nationalist, socially conservative policies within public institutions"."***

* Reproduced as received.

8. ***"The Special Rapporteur calls (…) for the review of the composition of the committee that nominates Constitutional judges, in order to address the perception of politicized judicial appointments."***

9. ***Recommendation: "Ensure full compliance with the international standards related to respect of human rights, democracy and rule of law (…)"***

10. As far as the general statements of the Report are concerned, several items have to be clarified especially with regards to the Fundamental Law and the legal status of independent state bodies.

11. First of all, it has to be emphasized that the Hungarian Fundamental Law fully reflects a democratic state governed by the rule of law, and is consistent with the international and European legal standards. The Fundamental Law states in its Article C) that functioning of the Hungarian State shall be based on the principle of division of powers. The detailed provisions of the Fundamental Law safeguard the relevant requirements of checks and balances, including the constitutional limits of exercising powers as well.

12. The catalogue of fundamental rights contains all fundamental rights that have become commonly granted and recognised throughout Europe. The Fundamental Law includes such principles, which were only derived indirectly from the former Constitution by the Constitutional Court. This way it also raises the case-law of the Constitutional Court to a large extent to a normative level. The fact, that the Fundamental Law stresses constitutional values more than the former Constitution, reflects the wish to ensure the durability of the Fundamental Law.

13. This statement leads to the critics of the Report with regards to the independence of democratic institutions. It has to be stressed that the constitutional institutions – including the Constitutional Court, ordinary courts, public prosecutor's offices and the State Audit Office – execute their tasks in order to ensure the rights stemming directly from the Fundamental Law or involved indirectly in the principle of rule of law. Cardinal acts safeguard the independence of these institutions. The way of appointment for these offices reflects Hungarian legal traditions: the officials are elected either by the Parliament or appointed by the President, in certain cases by the Prime Minister. High professional requirements ensure the high level execution of the tasks conferred on these institutions.

14. Taking the Constitutional Court as an example: the Constitutional Court is the principal organ for the protection of the Fundamental Law. The basic rules concerning the functioning of the Court are set in the Fundamental Law and the main regulations on the structure and procedure are determined by the cardinal CC Act. This way neither the organisation, nor the competences of the Constitutional Court can be changed without the legitimacy necessary in a democratic state. The fifteen members of the Court are elected by the Parliament with qualified majority (the vote of two-thirds of all representatives) for a term of twelve years. The President of the Court is elected by the Parliament as well. The judges elect the vice president among themselves. The mandate of the members lasts 12 years, re-election is excluded. The long term of the mandate promotes independence from the Government and the Parliament.

15. ***As these circumstances and examples show, the Fundamental Law and the cardinal laws related to it are compliant with the rules of democracy and rule of law; they ensure the efficiency of checks and balances; the democratic legitimacy and independence of democratic institutions, elected in conformity with the Fundamental Law cannot be questioned either.***

b) about the situation of human rights defenders in general

16. ***"They are exposed to serious challenges which, in some instances, appear to amount to violations of their fundamental rights and freedoms, as well as of their legitimate right to promote and defend human rights, as enshrined in the Declaration on human rights defenders."***

17. ***Recommendation: "Review all administrative and legislative provisions that restrict the rights of defenders, and ensure that domestic legislation is in line with international human rights law and standards."***

18. As the central question of the Report is, whether and how certain fundamental rights are guaranteed to human rights defenders (hereinafter: HRDs), it is inevitable to call the attention to the principle of non-discrimination being one of the most seriously protected rights in the Hungarian legal system. According to Article XV Paragraph (2) of the Fundamental Law, Hungary guarantees the fundamental rights to everyone without discrimination based on any ground such as race, colour, sex, disability, language, religion, **political or any other opinion**, ethnic or social origin, wealth, birth or any other circumstance whatsoever (emphasis added). As the primary source of law in the Hungarian legal system, the provisions of the Fundamental Law are to be applied and respected in all areas of life and branches of law.

19. Act CXXV of 2003 on Equal Treatment and Promotion of Equal Opportunities (hereinafter: the Equal Treatment Act) states in its Section 1 that all persons on the territory of Hungary must be treated with the same respect, according to the provisions of the Equal Treatment Act. Any difference of treatment based on sex, race, colour, ethnicity or belonging to an ethnicity, language, disability, health status, religious or other conviction, **political or other opinion**, family status, parenthood (pregnancy), sexual orientation, gender identity, age, social status, financial situation, the fact of having a part-time or fixed-term work contract, **belonging to an organisation whose aim is to protect certain interests or any other situation**, attribution or characteristic resulting in a less favourable treatment of these persons is to be considered direct discrimination and is prohibited by law (emphasis added).

20. The Equal Treatment Act as well as the sectorial legislation provides for efficient legal remedies in case of discrimination. The case-law of the Constitutional Court provides also extensive protection: through the new means of constitutional complaint not only against legal norms but also against judicial decisions. That is why any alleged violation of the above mentioned rights by state bodies can be challenged at independent courts and even at the Constitutional Court.

21. From this follows, that no discrimination of HRDs is possible on grounds of their opinions and activities.

II. Specific comments

a) constitutional framework and rule of law

22. ***"First, the Law often leaves it to cardinal laws "to regulate in detail the most important society setting" (constitution has over 50 references to them), resulting in significant gaps on the rule of law issues. Secondly, (…) the provisions contained in the cardinal laws are not accessible to any new parliamentary majority, unless they secure a two-thirds majority."***

23. ***"Legislative reforms in Hungary were not reinforced by procedural safeguards and were adopted with lacking public debate or meaningful consultation with stakeholders and civil society."***

24. ***Recommendation: "Ensure procedural safeguards in the legislative process that provides for a reasonable time for genuine public consultation between policy-makers, civil society and other stakeholders."***

25. Concerning the way how the provisions of the Fundamental Law are elaborated in legal acts (the adoption of cardinal acts), it has to be stressed that in Hungary it is a constitutional tradition that the constitution determines various subjects, the detailed rules of which must be laid down in a cardinal act. The special majority required for such laws does not have a practical consequence as the locking in substantive policies in these rules. Indeed, it should be understood that such majority differs from the majority required *inter alia* for constitutional amendments: "*cardinal laws require a two-thirds majority of the MPs present while a two-thirds majority of all MPs shall be applied with regard to the Constitution itself.*"[1]. In our opinion, this requirement does not amount to an obstacle to the expression of opinion of the people in their choice of their legislator but instead constitutes a proportionate safeguard as to the fundamental rights and certain institutional provisions and its primordial role in a democracy. Furthermore, passed by a two-thirds majority cardinal laws ensure a high degree of sustainability and continuity. It should also be taken into consideration that cardinal acts can be examined by the Constitutional Court in their entirety and the Constitutional Court can rule on their constitutionality, including the possibility of annulment.

26. ***That is why, cardinal laws cannot be considered as a danger to the rule of law; they rather ensure further guarantees to it: the basic rules on fundamental rights, independent state institutions etc. cannot be changed by simple parliamentary majority; a high level of political consensus is needed to regulate the most important aspects of human rights and state organisation.***

27. As far as public consultation is concerned, Act CXXXI of 2010 on public participation in the drafting of legislation contains detailed rules for the consultation with the public applicable to legislative drafts. According to this act, all draft bills, governmental decrees and ministerial decrees drafted by ministries are to be published on the Government's webpage prior to their submission to Parliament. The minister responsible for drafting a given bill is also responsible for publishing the draft and for holding a public consultation.

28. Public consultations are to be carried out within the framework of general or direct consultations. While general consultations are mandatory, direct consultations are optional. General consultation is carried out in a way that anyone (natural or legal persons, HRDs, NGOs, business companies etc.), using the e-mail address published on the webpage, may express an opinion on the draft or concept subject to public consultation. The minister responsible for drafting shall consider the opinions received and prepare a general summary of them and – in the case of rejected opinions – a standardised explanation of the reasons for rejection, which has to be published on the webpage along with the list of those offering their opinions.

29. The minister responsible for drafting the legislation may decide to form a "strategic partnership" and hold working groups or agree on other forms of consultation with the partners. Strategic partnerships may be formed with any organisation with a broad social

[1] Venice Commission, Opinion of the new Constitution of Hungary, CDL-AD(2011)016, Venice, 87th plenary session, 17-18 June 2011, §26.

reputation, for example, with NGOs, recognised churches, professional and scientific organisations, national self-governments of national minorities, organisations of interest representation, public corporations and with representatives of institutions of higher education. The minister may also involve others than the strategic partners, in a direct consultation held on a given draft law.

30. Undoubtedly, this framework does not apply to private members' bills. However, according to Article 6 of the Fundamental Law, "*[l]aws may be adopted at the initiative of the President of the Republic, the Government, any parliamentary committee, or any Member of Parliament*." Concerning the practice of private members' bills, it should be stressed that the right of MPs to propose laws is an inherent part of their legal status as representatives. According to Article 4 of the Fundamental Law Members of Parliament shall carry out their duties in the public interest and they may not be given instructions in that regard.

31. Nevertheless, the fact that laws on public consultation and certain other elements of the pre-legislative phase (that apply to the laws proposed by the Government) do not apply to private members' bills, does not result in the complete denial of responsibility for the laws proposed; political responsibility cannot be ruled out. {Decision of the Constitutional Court 165/2011. (XII. 20.) AB} Furthermore, the publicity of the legislative procedure ensures that members of the public get to know these proposals. The expression of opinion towards parliamentary committees is not excluded either. [Attention should be called to the fact that the number of private members' bills shows declining trend in the last couple of years.]

32. **This regulatory framework shows that a wide range of participation possibilities is offered for NGOs and HRDs in public-decision making and law-making processes.**

b) freedom of expression

33. ***"The broad powers of the media regulatory body combined with a high level of media concentration and an advertising market strongly dependent on governmental contracts maintained a climate conducive to self-censorship and political influence. The media laws specify new content regulations for all media platforms, outline the powers of the new media regulatory body, and set out sanctions for the breaches of the laws (…) All media outlets, including print and online services, must register (…). The Media Council can initiate a regulatory procedure of "unbalanced reporting" (…). Sanctions are reported to be disproportionately severe (…)."***

34. ***"The right of journalists not to disclose their sources is limited because of the obligation to reveal sources in "exceptional circumstances", which does not apply to independent journalists (...)."***

35. Freedom of the press is traditionally of high importance in the Hungarian constitutional system. (This long-desired liberty can be led back to Act XVIII of 1848.) As part of the communication rights, freedom of the press has been examined by the Hungarian Constitutional Court thoroughly. The Fundamental Law reflects to these traditions as it states in its Article IX Paragraph (2) that '*Hungary shall recognize and protect the freedom and diversity of the press, and shall ensure the conditions for the freedom to receive and impart information as is necessary in a democratic society*.'

36. Even from this definition follows that the Fundamental Law considers highly important to ensure plurality and prevent the creation of information monopolies with regards to the enforcement of the freedom of the press.

37. The detailed provisions of the freedom of the press are regulated in Act CIV of 2010 on Freedom of the Press and on the Basic Rules Relating to Media Content (hereinafter: Freedom of the Press Act) and in Act CLXXXV of 2010 on Media Services and on the Mass Media (hereinafter: Media Act).

38. Regarding the status of the National Media and Infocommunications Authority (hereinafter: Authority), the following has to be taken into consideration. According to Section 109 Paragraph (1) Media Act, the Authority is an autonomous regulatory agency subordinated solely to the law. Section 123 Paragraph (1) describes the Media Council as an independent body of the Authority reporting to Parliament, being the successor in title of National Radio and Television Board. The provisions of the Media Act ensure that the supervisory organs of the media services are appointed in a democratic and transparent manner as it is required in the Recommendation No. R (00) 23 of the Committee of Ministers to member states on the independence and functions of regulatory authorities for the broadcasting sector. The President of the Authority is appointed by the Head of State for a term of nine years on the recommendation of the Prime Minister. This method is in line with the definition of „democratic" way of appointment. The Explanatory Memorandum to Recommendation adds namely that the term "democratic" should be understood in its wider sense, given that the members of regulatory bodies are sometimes elected, sometimes nominated by public authorities (president, government or parliament) or by non-governmental organisations.[2] The rigorous professional selection criteria vis-à-vis potential candidates for the Presidency of the Authority safeguard that the choice is based on professional suitability. The rules of nomination ensure that the members of the Media Council are appointed after reaching a high level of political consensus. According to Section 123 Paragraph (2) of the Media Act, the Media Council and its members are subject only to law, and cannot be instructed within their official capacity. Strict rules of conflict of interest (including political activities) contribute also to the independence of these officials. [Sections 118 and 127 Media Act] **These norms ensure the high level of independence for the media supervisory organs.**[3]

39. The Report mentions the obligation of registry, which is – in line with the former regulation – included in the Media Act and the Freedom of the Press Act. In this regard it is important to emphasise, that this obligation does not mean "authorization". According to Section 5 Paragraph (1) of the Freedom of the Press Act "*[t]he conditions of registration may not inhibit the freedom of the press*". Similarly, Section 41 Paragraph (2) Media Act declares that "*[r]egistration is not a precondition for taking up the service or activity.*" This framework was elaborated after consultation with the European Commission. Furthermore, a petition for judicial review may be submitted against the ruling on the refusal of registration. **That is why, the requirement of registry for media platforms cannot be regarded as an unnecessary or disproportionate limitation of the freedom of expression.**

[2] Explanatory Memorandum to Recommendation No. R (00) 23of the Committee of Ministers to member states on the independence and functions of regulatory authorities for the broadcasting sector. https://wcd.coe.int/ViewDoc.jsp?Ref=ExpRec(2000)23&Language=lanEnglish&Ver=original&Site=COE&BackColorInternet=DBDCF2&BackColorIntranet=FDC864&BackColorLogged=FDC864

[3] Moreover, the Venice Commission stated in its previous report that "In response to international criticism, a number of amendments to the Media Act were passed in 2013. In particular, the mandate of the President of the Media Authority became non-renewable and the President of the Republic is now involved in the appointment process. Those amendments went in the right direction."
Venice Commission, Opinion on Media Legislation (Act CLXXXV on Media Services and on the Mass Media, Act CIV on the Freedom of the Press, and the Legislation on Taxation of Advertisement Revenues of Mass Media) of Hungary, CDL-AD(2015)015-e, Venice, 19-20 June 2015, §57 http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2015)015-e

40. As far as the question of balanced coverage is concerned, it has to be outlined that this principle exists in the Hungarian legal system since 1996. The media authority and the courts including the Constitutional Court have therefore also developed a solid case law, consequently the almost 20 years old practice of this legal obligation is well-known by the media content providers. It should be noted that the obligation of balanced coverage is not a Hungarian speciality. Many other European countries impose similar obligations on the media service providers, sometimes in the form of even more detailed provisions, and with more stringent sanctions. E.g. Article 319 of the Communications Act of the United Kingdom[4] contains the requirements of "due impartiality" and "due accuracy".[5] In case of the infringement of the requirement of balanced coverage administrative proceedings can be initiated against media services. Such proceedings can be initiated upon request by "the holder of the viewpoint that was not expressed" or the viewers or listeners. Section 181 Paragraph (1) of the Media Act contains *expressis verbis* that the Media Authority shall not have the right to open proceedings of its own motion in case of any infringement of the obligation of balanced information. In the event that the Media Council finds a violation of the requirement, no fine can be imposed: the media service provider shall broadcast or publish the decision of the Media Council or provide the applicant with an opportunity to present his or her viewpoint. **It can be concluded, that the requirement of balanced coverage ensures the plurality of media and does not lead to an excessive limitation of the freedom of the press.**

41. As far as the sanctions are concerned, the provisions of the Media Act fully comply with the principles of progressivity, proportionality and equal treatment. Section 185 Paragraph (2) of the Media Act contains the factors that have to be taken into account when imposing legal measures. These are: the gravity and rate of re-occurrence of the infringement, taking into account all circumstances of the case and the purpose of the sanction. That is why, where the infringement is considered insignificant and no re-occurrence is established, the least severe sanction should be imposed with regards to the aims of sanctioning. In case of repeat offenders, the possibility of aggravating sanctions is given in the relevant laws.

42. The conditions of sanctioning are in line with the principles established by the Constitutional Court as well. The fines imposed cannot be seen as extremely high and the number of sanctioning decisions is remarkably less than in the period between 2008 and 2010. Furthermore, the possibility of suspending the exercise of the right to provide media services for a specific period of time (which was frequently used in the last years before the new regulation entered into force) was not used by the Media Council at all. **That is why it would be inaccurate to conclude that the sanctions used by the Media Council would be "disproportionally severe".**

43. The journalistic freedom is an important value in the system of the Hungarian media law. The Freedom of the Press Act explicitly contains that '*[f[reedom of the press embodies sovereignty from the State, and from any and all organizations and interest groups.*' [Section 4 Paragraph (2)][6] With regards to the protection of journalists' sources, Section 82

[4] http://www.legislation.gov.uk/ukpga/2003/21/section/319

[5] Further examples: http://mediatanacs.hu/dokumentum/2791/1321457199hungary_new_media_regulation_eng_web.pdf

[6] Section 7 of the same act contains detailed guarantees for the editorial and journalistic freedom of expression including the right to professional sovereignty and independence from the owners of the media content provider, from the sponsors of the media content provider, as well from natural and legal persons on whose behalf any commercial communication is made in any media content. According to Section 7 Paragraph (2) the sanctions prescribed in labour regulations, and those arising from other forms of employment relationship shall not apply journalists, editors etc. if they refused to

Paragraph (6) of the Hungarian Code of Criminal Procedure should be taken into consideration. This provision requires that: "*The court can order the media content provider, a person employed thereby or a person being in other legal relationship to work therewith to expose the identity of the person giving information in connection with the media content service activity only if knowing the identity of such person is indispensible in order to investigate a criminal offence punishable by three or more years of imprisonment, the evidence expected by this person's testimony cannot be substituted, and furthermore, the interest to detect the criminal offence – with regard to the special gravity of the crime – is so vital that it unequivocally exceeds the interest to keep the information confidential.*" The scope of exceptions is narrow, and the courts and competent authorities must construe these exceptions narrowly in order to ensure that the freedom of the press is respected. Therefore, it is open to the judge to order or refuse the disclosure. Moreover, there are other relevant criteria that can be found in Section 82 (6) of the Criminal Procedure Act which are in line with ECtHR's case-law and Recommendation No. R (2000)7 of the Committee of Ministers to member states on the right of journalists not to disclose their sources of information.

44. The disclosure of journalistic sources shall be deemed necessary only when "reasonable alternative measures to the disclosure do not exist" and when "the legitimate interest in the disclosure clearly outweighs the public interest in the non-disclosure"[7]. In this regard, the judiciary seems to occupy the best position to balance „the competing interests, namely the protection of sources on the one hand and the prevention and punishment of offences on the other"[8] and decide thus whether there is an overriding public interest. National courts develop the law in the light of their assessment of what measures are necessary in the interests of justice.[9] **This way an all-around protection is ensured for journalists from unjustified prosecutions in connection to their reporting in accordance with the principles of rule of law and legal certainty.**

45 As a conclusion, it should be added that concerning the rules introduced by the modifications adopted between 2011 and 2013, no further significant remarks have been made by the European Commission, the Venice Commission or the Hungarian Constitutional Court. In fact, Thorbjørn Jagland, Secretary General of the Council of Europe acknowledged on several occasions, that the Hungarian media law had been significantly improved.

c) freedom of information

46. ***"Moreover, the 2015 amendment to the Act, adopted within days of introduction and without pubic consultation, allowed government agencies that possesses public***

carry out any instruction given in violation of editorial and journalistic freedom of expression. Section 8 guarantees that journalists cannot be held responsible for any infringement committed with a view to obtaining information of common interest, where obtaining such information by other means would have been impossible for the journalist in question, or it would have entailed undue difficulties, provided that the infringement committed did not result in unreasonable or grave injury, and that the obtaining of the information was not done in violation of the Act on the Protection of Classified Information.

[7] Council of Europe, Committee of Ministers, Recommendation No. R(2000) 7 of the Committee of Ministers to member states on the right of journalists not to disclose their sources of information, adopted on 8 March 2000 during the 701th meeting of Ministers' Deputies, Principle 3 (Limits to the right of non-disclosure).

[8] ECtHR, *Roemen v. Luxemburg*, application 51772/9, 25 February 2003, §58.

[9] ECtHR, *Goodwin v. UK*, application 17488/90, 27 March 1996, §33.

interest data to charge the requesting party "labour costs associated" with completing the information request to be determined by that agency. Besides the vaguely defined labour costs, the law allows public bodies to reject requests if the demanded data supports future decision-making or if the petition is a repeat request, even if the initial request went unanswered (…). The former Data Protection Ombudsman's mandate was terminated before end of their term of office (…). Then his Office was transformed into a National Authority for Data Protection, which were seen as not meeting the requirement of complete independence. (…) "

47. ***Recommendation: "Review the legal provisions related to freedom of information and data protection in order to guarantee a free and uncontrolled access to public interest information."***

48. Act CXII of 2011 on the right to informational self-determination and on freedom of information (hereinafter: InfoAct), contains the possibility of charging a fee covering only the costs of disclosure of information, which shall be communicated to the requesting party in advance. This possibility is based on the assumption that the public duty of fulfilling data request should not lead to a disproportionate hindrance of the basic duties of state bodies, authorities etc. This problem is especially urgent if the data request refers to such documents, where collecting or making data anonymous demands much time (e.g. in case of documents dated back to several years) or expertise (e.g. several personal or classified data included).

49. The Section 29 Paragraph (5) InfoAct lists the elements of the calculated fee: In addition to the material cost of the data carrier and postage, the InfoAct only allows labour costs to be charged if the fulfilment of a data request involves the disproportionate use of human resources necessary to carry out the basic activities of the organisation performing public functions. Accordingly, in cases where the amount of data is small, data are easily accessible and can be provided by electronic means, the InfoAct does not allow taking into account this cost element. As it is apparent from this list, only such costs can be charged which are directly related to the data request and might actually arise in relation to the fulfilment of the data request. The limitation of the amount of chargeable costs stems from Section 29 Paragraph (6) InfoAct, as well as the governmental decree issued on the basis of this provision. That is why the calculation of costs cannot be arbitrary or disproportionate. The amount of costs charged cannot be higher than the actual costs, so the provision does not lead to enrichment for state bodies. Only in exceptional cases can the fulfilment of data requests be conditional to the advance payment of related costs. In such cases the requesting party shall be notified within fifteen days from the date of receipt of his or her request if there is any alternate solution available instead of making a copy of those documents. The justification of cost-charging must be proven by the data controller.

50. Finally, it has to be mentioned that Hungarian law prescribes several public interest data to be published on the homepage of state bodies; in this case the charging of costs does not arise at all.

51. This model is in line with the Council of Europe Convention on Access to Official Documents, which contains in Article 7 that "*[a] fee may be charged to the applicant for a copy of the official document, which should be reasonable and not exceed the actual costs of reproduction and delivery of the document. Tariffs of charges shall be published*". **It can be concluded that the current model of charging costs for data requests does not lead to an unnecessary or disproportionate limitation of the freedom of information.**

52. As far as the possibility of rejecting data requests is concerned, Section 27 Paragraphs (5) and (6) Info Act contain detailed rules for the case if an information is part of, and in support of, a decision-making process. Such data shall not be made available to the public for ten years from the date it was compiled or recorded, unless public access is

authorized by the head of the body in possession of such data. It cannot be denied that there is an important public interest in upholding the legal functioning of bodies with public service functions by limitation of access to data for a certain period. However, it is important to emphasize that while the request for disclosure of information underlying a decision may be rejected within the time limit also after the decision is adopted, but only if the information is retained to support a future decision as well, or if disclosure is likely to jeopardize the legal functioning of the body with public service functions or the discharging of its duties without any undue influence (in particular the freedom to express its position during the preliminary stages of the decision-making process). Of course, not all data connected to a particular case are basis of a decision. The body with public service functions that has the data of public interest shall be able to define the future decision to which the data are connected. The burden of proof lies on the data controller.

53. **The possibility of limiting the access to such data for a reasonable time, in case such access could jeopardize the public interest, and also with regards to the procedural guarantees is in accordance with the acknowledged limitations of the right to freedom of information.**

54. Concerning the possibility of rejecting repeat requests, the InfoAct contains four important conditions, which significantly limit the use of this option by the data controller. The body with public service functions, that has the information on record, can only reject the request, if it is identical to the former request, i.e. it is submitted by the same party for the same data within a period of one year, provided that no change took place in the data concerned in the meantime. If the former data request had remained unanswered or if it has been rejected unlawfully, these can be remedied at court or in a procedure of the Data Protection Authority. That is why this possibility – limited by strict conditions – does not apply, if the data request has not been fulfilled due to a negligence of a body with public service functions. **As a consequence, the rule cannot be used to cover illegal conduct; it applies only to reduce unjustified workload on lawfully functioning public bodies.**

55. As far as the independence of the Data Protection Authority is concerned, firstly it has to be emphasised, that the Fundamental Law and the InfoAct establish the Data Protection Authority in accordance with relevant EU and international obligations. Pursuant to Article VI Paragraph (3) of the Fundamental Law of Hungary *'[t]he application of the right to the protection of personal data and to access data of public interest shall be supervised by an independent authority established by a cardinal Act.'* The Data Protection Authority is responsible for supervising and promoting the enforcement of the right to the protection of personal data and of the right to access to data of public interest. Pursuant to Section 38 Paragraph (1) of the InfoAct, the Data Protection Authority shall be an autonomous state administration organ. This legal status ensures complete independence for the Data Protection Authority as to its organisation, tasks and competences, personnel, finances and budget.

56. From an organisational point of view, the Data Protection Authority does not form part of the hierarchical organisation of public administration, it is not under the direction or supervision of the Government, nor is it established by the Government but by the InfoAct, the relevant provisions of which qualify as cardinal, i. e. provisions to be adopted by a two-thirds majority. The Data Protection Authority exercises its tasks and competences laid down in Acts free from any outside influence and according to professional criteria only. The Data Protection Authority may autonomously manage the budget appropriated for it in the Act on the central budget, and – with the narrowly defined exception of the budgetary effects of a possible natural disaster – only the Data Protection Authority or Parliament may take decisions thereon. **The independence of the Data Protection Authority has been questioned neither by the Venice Commission nor by the institutions of the European Union.**

57. Finally, it has to be added that ordinary courts as well as the Constitutional Court interpret the right to public information in a rather extensive manner. The InfoAct provides only a very limited opportunity to restrict public access to data of public interest (e.g. with regard to confidential information, protection of decision-making process). All of these restrictions are in line with applicable international norms, and are necessary and proportionate in a democratic society. The data request possibilities are complemented with a broad obligation of public institutions to publish public data on their websites. The obligations stemming from the right to public information (irrespective of being based upon a data request or on statutory obligations for proactive publication of data) are binding for state-owned companies as well. The compliance with the obligations under InfoAct is controlled by an independent Authority, whose procedures can be initiated free of charge. **As a conclusion it has to be stressed that the current system of access to public information in Hungary, ensured in the InfoAct is in line with the international standards. This has been confirmed by the Venice Commission as well.**[10]

d) freedom of assembly

58. ***"The Special Rapporteur urges the Government to ensure protection of defenders who peacefully assemble from individuals or groups of individuals, including agent-provocateurs and counter-demonstrators, who aim at disrupting or dispersing such assemblies."***

59. ***Recommendations: "Ensure that restrictions to peaceful assembly do not impair the essence of the right, are prescribed by law, are proportionate and 'necessary in a democratic society' and still allow demonstrations to take place within 'sight and sound' of its object and target audience. Provide protection during peaceful assemblies from individuals or groups, who aim at disrupting or dispersing such assemblies."***

60. Act III of 1989 on the Freedom of Assembly (hereinafter: Freedom of Assembly Act) was elaborated in the course of the transition, before the thorough amendment of the Constitution in 1989. Since then the Act has been amended several times. The interpretation of the Act, as well as the relevant case-law have been formed by the decisions of the Constitutional Court.

61. According to the case-law of the Hungarian Constitutional Court, the freedom of assembly has a special role among communicational rights, as it contributes significantly to obtaining and sharing information and opinions with others and shaping and expressing opinions jointly. That is why it also enables the individual to take part with weight in social and political processes.

62. The significance of this right is acknowledged by the Freedom of Assembly Act as well. According to Section 2 of the Freedom of Assembly Act '*[t]he right of assembly may be exercised in the form of peaceful gatherings, rallies and demonstrations (hereinafter: "organized events"), which give participants an opportunity to express their opinion freely.*' Organised events can be held on public ground after notification; there are only two reasons for prohibiting such an event (if it is likely that the event would seriously disturb the operation of representative bodies or courts, or if traffic cannot be arranged on other

[10] „The Hungarian law on self-determination and freedom of information (Act CXII/2011, as of 1 June 2012) may be considered, as a whole, as complying with the applicable European and international standards." Opinion on Act CXII of 2011 on informational Self-determination and Freedom of Information of Hungary, adopted by the Venice Commission at its 92nd Plenary Session (Venice, 12-13 October 2012) http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2012)023-e.

routes). A prohibitive decision of the authorities may be challenged at court. The reasons for prohibition are interpreted narrowly, both by ordinary courts and the Constitutional Court. Freedom of assembly requires protection both against unjustified interference of state organs and against such an interference of others, for example counterdemonstrators or those otherwise opposing the event.

63. The Constitutional Court also stated that the authorities – should it be necessary – must secure the peaceful assembly. The order of demonstrations has to be maintained primarily by the organisers. The police may be present at demonstrations with suitable forces and disperse it in cases listed in the Freedom of Assembly Act. The circumstances which can give rise to dispersing an organised event are all directly connected to protection of the rights and freedoms of others, prevention of crimes and maintenance of public order. At exercising its rights, the Police shall act independently of the purpose or duration of the event or the number of the participants in accordance with the prohibition of discrimination.

64. The possibility of challenging the decisions, actions of the Police at ordinary courts is given. Against the decisions of the courts constitutional complaint is possible at the Constitutional Court, if the affected person considers that the judicial decision made regarding the merits of the case or other decision terminating the judicial proceedings violates his fundamental right to peaceful assembly. It has to be added that according to the Constitutional Court the protection of freedom of assembly also covers peaceful public gatherings where the nature of the event giving cause to exercising freedom of assembly event necessitates a gathering at short notice (rapid assemblies) or (spontaneously) without any preceding organisation.

65. As far as the practical aspects are concerned, the case-law of the Commissioner might be a relevant reference point. [Any individual, who thinks that his freedom of assembly has been violated by authorities or there is an imminent danger thereto, may turn to the Commissioner.] In this context, it has to be emphasized that in comparison e.g. to the period 2008 – 2010, since 2014 there have not been large quantities of complaints to the Commissioner in connection with the violation of the freedom of assembly. On the contrary, the annual report of the Commissioner about the year 2014 shows that the Commissioner conducted 1 single inquiry and no other state institution involved in the protection of human rights (Equal Treatment Authority, National Authority for Data Protection and Freedom of Information, Commissioner for Educational Rights and Independent Police Complaints Board) was addressed with complaints on this matter.[11] From the statistics of the Commissioner and the attached reports follows that in 2015 there have not been any complaints to these institutions in connection with the freedom of assembly.[12]

66. It can be concluded that the Hungarian constitutional approach to the freedom of assembly is accordance with Article 21 of the International Covenant on Civil and Political Rights as well as Article 11 of the European Convention on Human Rights and Article 12 of the Charter of Fundamental Rights of the European Union.

67. **As the regulatory framework shows, the legislation in force provides a high level protection for the freedom of assembly for organizers and participants while respecting and ensuring the legitimate interests of the public and is in line with the guarantees enlisted in the Recommendations of the Report. The efficiency of the freedom of assembly is safeguarded by the guarantees of the Freedom of Assembly Act, and the practice does not give rise to concerns either.**

[11] http://www.ajbh.hu/documents/10180/2119301/AJBH+Besz%C3%A1mol%C3%B3%202014/e4cb6abb-2b16-4f67-bcdf-e24ccb74cca2?version=1.0.

[12] http://www.ajbh.hu/documents/10180/2515707/AJBH+Besz%C3%A1mol%C3%B3%202015/4507ceb3-4c6b-4f54-b212-63d1743c8e13?version=1.0.

e) access to justice

68. ***"(…) [A]ccess to the Constitutional Court was radically limited by scrapping the previously robust system of action popularis, which allowed any human rights defender to bring the case to the Court on issues of broader public concern."***

69. ***The Special Rapporteur calls for the restoration of the Constitutional Court's jurisdiction through the repeal of the legal provisions that limit the Court's jurisdiction and for the review of the composition of the Committee that nominates Constitutional judges, in order to address the perception of politicized judicial appointments."***

70. As far as the organisation of the Constitutional Court is concerned, the number of judges has been raised to fifteen (instead the former eleven). The members of the Court are elected by the Parliament with qualified majority (the vote of two-thirds of all representatives). The President of the Court is elected by Parliament as well. According to Section 7 Paragraph (1) CC Act, members of the Constitutional Court shall be proposed by a Nominating Committee, made up of at least nine and at most fifteen members, appointed by the parliamentary fractions of the parties represented in the Parliament. The Committee shall contain at least one member from each of the parliamentary fractions. The candidates shall be heard by Parliament's standing committee dealing with constitutional matters. [This rule is basically the same as the provision of the former Act on the Constitutional Court before the entry into force of the Fundamental Law.]

71. Those Hungarian citizens who have no criminal record and have the right to stand as a candidate in parliamentary elections shall be eligible to become a Member of the Constitutional Court, if they have a law degree, have reached 45 years of age, but have not reached 70 years of age; and are theoretical lawyers of outstanding knowledge (university professor or doctor of the Hungarian Academy of Sciences) or have at least twenty years of professional work experience in the field of law.

72. **These conditions ensure that members of the Constitutional Court are elected from among the most excellent Hungarian lawyers; a possibility of "politicized" appointments cannot be perceived.**

73. The mandate of the members lasts 12 years, re-election is excluded. In the case of the members of the Constitutional Court, the long term of the mandate promotes independence from the Government and the Parliament. From the perspective of the functioning of the state and society, the institution has important, significant tasks. For the sake of "keeping distance" from the Government and the Parliament, the president and members receive their mandates for a term extending beyond a parliamentary session.

74. Regarding the competences of the Constitutional Court, the general rules are set out in the Fundamental Law, providing the necessary guarantees for the activity of the Constitutional Court. Probably the most important change concerning the rules on the competences of the Constitutional Court is the abolition of *actio popularis* and parallelly, the alteration of the institution of constitutional complaint. Before the adoption of the Fundamental Law the core competence of the Court was the ex post review of the conformity of pieces of legislation with the Constitution, because anyone even without a legal interest was entitled to submit a petition asking the constitutional review of a legal norm. However, according to the new rules, such a proceeding can only be initiated by the Government, one-fourth of all Members of Parliament, the President of the Supreme Court (Kúria), the Prosecutor General and the Commissioner. It has to be emphasized, that according to Article 30 of the Fundamental Law and the provisions of the CFR Act anyone may turn to the Commissioner, if in his or her opinion the activity or omission of an authority infringes a fundamental right of the person submitting the petition or presents an imminent danger thereto, provided that this person has exhausted the available

administrative legal remedies, not including the judicial review of an administrative decision, or that no legal remedy is available to him or her. If as a result of his inquiries the Commissioner comes to the conclusion that the infringement of fundamental rights is in connection with the unconstitutionality of a legal norm, he or she shall require the ex-post review from the Constitutional Court.

75. Abolition of the general right to make a motion without a legal interest was demanded also by the Constitutional Court because of the extent of its caseload. At the same time constitutional judges also urged the introduction of the „real", that is, the German type of constitutional complaint. Through the "real" constitutional complaint, the Constitutional Court can also be addressed, if the judicial decision made regarding the merits of the case or other decision terminating the judicial proceedings – so not the legal regulation applied – violates the complainant's rights laid down in the Fundamental Law. [The former form of constitutional complaint remained unchanged, and the so-called direct constitutional complaint makes possible to turn to the Constitutional Court if the violation of fundamental rights can be led back to the application of a legal provision contrary to the Fundamental Law, or when such legal provision becomes effective, and so the complainant's rights were violated directly, without a judicial decision.]

76. So, the modification of the Constitutional Court's competences is a change of approach – the constitutional review focuses more intensively on subjective human rights protection – which, however, does not have a negative impact on the efficiency of the protection provided by the Constitutional Court. The Venice Commission examined the modification of the regulation on the Constitutional Court and on the whole it formed a positive opinion in relation to the changes.

77. **As a conclusion, the Fundamental Law and the cardinal laws ensure the democratic legitimacy and independence of the Constitutional Court in conformity with the principle of rule of law.**

f) national human rights institution

78. ***"The previous system of four ombudsmen was replaced by one Parliamentary Commissioner for Fundamental Rights. Despite the 2014 accreditation of an "A" status to the institution as compliant with the Paris Principles, the law amendments and the lack of enforceability of its recommendations have weakened the protection in relation to certain rights and the effectiveness of the Ombudsman's mandate. (…) Nevertheless, there are concerns that despite its mandate, the Office has been reluctant to refer complaints to the Constitutional Court for review, in cases that it deems political or institutional. (…) In order to endure the credibility and effectiveness of its work, the Government should increase allocated budget to the Office (…) The Special Rapporteur also recommends that the Ombudsman expand the scope of its activities to provide protection for human rights defenders."***

79. ***Recommendations: "Strengthen the role and independence of the Ombudsman and reinforce the financial autonomy of the Office. Consult the Ombudsman in the legislative process and ensure adequate implementation of the Ombudsman's recommendations."***

80. The Fundamental Law establishes in its Article 30 the institution of the Commissioner, who shall undertake activities aimed at protecting fundamental rights. This provision definitely means a change of approach with regards to the institution of ombudsmen. The former system was based on a model of four ombudsmen: Until 1 January 2012 four ombudsmen were active: the (general) commissioner for fundamental rights, the commissioner for the rights of the minorities, the commissioner for future generations

(dealing with issues concerning environment protection) and the commissioner for data protection and freedom of information.

81. Nevertheless, during the work of the commissioner for data protection it became clear that due to the spread of information technology, the conditions caused by globalisation and the change of the social attitude, a restructuring of examination and penalisation powers was necessary. The most suitable organisational form to tackle these new challenges was an autonomous authority established instead of the institution of the commissioner for data protection. The other two 'specialized' commissioners, namely the commissioner for the rights of the minorities and the commissioner for future generations continue their work as deputies of the Commissioner in accordance with Article 30 Paragraph (3) of the Fundamental Law. This structural change means primarily a change of approach emphasising the unified protection of human rights. However, the constitutional designation of the deputies together with the provisions of the CFR Act (especially Section 3) ensure that the Deputies do not simply substitute the Commissioner but have their own competencies and responsibilities in the special fields assigned to them. **This way the new model ensures a high level protection of these special social interests, also compared to the previous system.**

82. As far as the powers of the Commissioner are concerned, it has to be emphasized that the CFR Act does not mean any decline in the level of human rights protection in comparison with the former Act LIX of 1993 on the Parliamentary Commissioner of Fundamental Rights (hereinafter: PCFR Act). On the contrary, Sections 31-38 CFR Act[13] ensure in their entirety and with regards to the single measures applicable by the Commissioner the same powers as Sections 19-26 PCFR Act. As far as the practice is concerned, it shows that the Commissioner regularly initiates proceedings at the Constitutional Court. As the possibility of *actio popularis* in case of posterior norm control procedure of the Constitutional Court is not given anymore, the role of the Commissioner has become more important in initiating such procedures, if as a result of his inquiries he comes to the conclusion that the infringement of fundamental rights is in connection with the unconstitutionality of a legal norm. According to the publicly available database of the Constitutional Court, the Commissioner has requested the Constitutional Courts proceedings 62 times since 1st January 2012.[14] The cases include complex institutional or politically relevant matters as well: e.g. social security issues, protection of vulnerable social groups, rights of children, state security control or protection of classified data.

83. **Consequently, the human rights protection ensured by the institution of the Commissioner is efficient on the normative and practical level as well.**

[13] The powers of the Commissioner include – among others – the following: If, on the basis of an inquiry conducted, the Commissioner comes to the conclusion that the impropriety in relation to a fundamental right does exist, in order to redress it he or she may – by simultaneously informing the authority subject to inquiry – address a recommendation to the supervisory organ of the authority subject to inquiry [Section 31 Paragraph (1) CFR Act]. In order to redress the uncovered impropriety related to a fundamental right, the Commissioner may initiate proceedings for the supervision of legality by the competent prosecutor through the Prosecutor General [Section 33 Paragraph (1) CFR Act]. If the impropriety noticed by the Commissioner is related to the protection of personal data, he or she shall report it to the Data Protection Authority. If he or she considers that there is a well-founded suspicion that a crime has been committed, he or she shall initiate criminal proceedings with the organ authorised to start such proceedings. If the impropriety can be lead back to the deficiencies of a legal norm, he can turn to the Constitutional Court (or in case of decrees of local self-governments to the Curia).

[14] http://www.alkotmanybirosag.hu/hatarozat-kereso (accessed: 24 January 2017)

84. Concerning the focus of investigations by the Commissioner, the most important factor is that anyone may turn to the Commissioner, if in his or her opinion the activity or omission of an authority infringes a fundamental right of the person submitting the petition or presents an imminent danger thereto, provided that this person has exhausted the available administrative legal remedies, not including the judicial review of an administrative decision, or that no legal remedy is available to him or her. The possibility of individual complaint to the Commissioner is strengthened by the facts that the proceedings of the Commissioner are free of charge and the identity of the person who has filed the petition may only be revealed by if the inquiry could not be conducted otherwise. The petitioner is informed by the Commissioner about the outcome of the inquiry and about any measure taken. Furthermore, the CFR Act prescribes in Section 1 Paragraph (2) that the Commissioner shall pay special attention, especially by conducting proceedings *ex officio*, to the protection of the rights of children, the interests of future generations, the rights of nationalities living in Hungary and the rights of the most vulnerable social groups. The Commissioner also operates a system for public interest announcements and examines the practice, how public authorities deal with these. [According to Article XXV of the Fundamental Law '*[e]veryone shall have the right to submit - either individually or jointly with others - a written request, complaint or proposal to any organ exercising executive powers.*'] **This way HRDs have the right to turn to the Commissioner without any specific limitations according to the general rules of the CFR Act; their rights are protected under all the guarantees of the CFR Act.**

85. The budgetary and financial independence of the Office of the Commissioner for Fundamental Rights is safeguarded by Section 41 Paragraph (4) of the CFR Act: "*[t]he Office shall have a separate chapter in the central budget and the powers of the head of organ directing the chapter shall be exercised by the Secretary General.*" Comparing the budget of the Office of the Commissioner for Fundamental Rights and the Data Protection Authority to the former Office of Parliamentary Commissioners (hereinafter: OPC), the following conclusions can be drawn: while the budget for the OPC was 1585 million HUF in 2010, the amount allocated in 2017 budget for the Office of the Commissioner for Fundamental Rights and the Data Protection Authority together is 2030 million HUF. This amounts to a nearly 30% increase of budget in seven years. **That is why the financial conditions of the work for the human rights institution can be considered as given in the Hungarian system.**

86. **The above described aspects of the national human rights institution show that the Hungarian legislation fully complies with the international standards, and the Government considers it as an adequate and important confirmation, that the national human rights institution received an "A" status accreditation from the Office of the International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights on 29 November 2014.**

g) Stigmatization of human rights defenders

87. The Government established the Human Rights Working Group in its decision adopted in February 2012 (Government Resolution 1039/2012 (II.22).) with the main purpose of monitoring the implementation of human rights in Hungary, **conducting consultations with civil society organisations, representative associations and other professional and constitutional bodies as well as of promoting professional communication on the implementation of human rights in Hungary.** The Working Group also monitors the implementation of the fully or partially accepted recommendations in relation to Hungary of the United Nations, Human Rights Council, Universal Periodic Review (UPR) Working Group.

88. The Working Group established the Human Rights Roundtable, which currently operates with **62 civil organisation** members and **further 46 organisations** take part in the activities of the thematic working groups based on invitation. Since 2013 the **thematic working groups have had 75** meetings. The civil organisations and the Government usually jointly establish the agenda of the meetings. In some Thematic Working Groups, only proposals of civil representatives are discussed, but there is usually co-operation in that regard. The operation of the thematic working groups is greatly affected by the composition and proposals of civil and government participants. In order to ensure the transparency of operation of the Working Group and the thematic working groups, the memos of each meeting are uploaded to emberijogok.kormany.hu website.

89. **The work of the Human Rights Working Group shows the Government's commitment to continue a permanent dialogue with NGOs.**