PROMOTING THE RIGHT OF ACCESS TO PUBLIC INFORMATION

Policy Report

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I

Introduction[1]

With the profound changes that after many years introduced democracy to our country, many issues – from economic reform to cooperation with international institutions, including the International War Crimes Tribunal in Den Haag – have been the preoccupation of many of us since last October.

One of the immediate needs is to regain confidence in institutions of justice and law that the previous regime skillfully used as an effective instrument of legal repression (e.g. the notorious *Public Information Law* that *via facti* introduced censorship; the *University Law* stripped the academic community of its autonomy, etc.). It is within this context that the issue of *accountability through transparency* in promoting access to public information has now come to public attention, not only as a fundamental human right, but also as an efficient means in the struggle against political repression and corruption.

In this *Policy Report*, we shall focus on various aspects of the issues that form the subject matter of the basic human right pertinent to *the freedom of access to public information*, on the one hand, and *privacy protection of personal data*, on the other. Following a general introduction and historical background, an overview of the existing legislation in The Federal Republic of Yugoslavia (FRY) and Serbia, as well as an assessment of the existing policy implementation will be presented. In this context, comparative reference will be made to policies, institutions and solutions that can be of principal and practical significance in recommending substantial policy and legislative reforms related to the issue.

1 *Policy Report* prepared by Prof. Stevan Lilić, University of Belgrade.

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The concept of the *Legal State* and the principle of the *Rule of Law* are paramount moral and legal values that are incorporated in the very foundation of the Western, and particularly European civilization.[2] In respect to human rights, their significance is essential for implementing the notion of *legality* of government decisions, as without the framework of the legal state and the rule of law, no modern political and legal system can be imagined.

Originating in the mid-19th century, this concept rests on a normativistic legal model of regulating social relations. According to this model, general legal norms (materialized in statutes and other general legal acts, e.g. laws and regulations) prescribe the rules of social behavior. General legal norms are subsequently decomposed into concrete legal provisions contained in individual legal acts (e.g. administrative decisions, judicial ruling, etc.) that directly effect the behavior of individuals and legal entities. The main feature of the normativistic model is that the *legitimacy* of legal action (including the legitimacy of legislative, judicial and administrative action), *derives* from the legality of the legal acts. In other words, a legal decision (i.e. legal act) is legitimate by virtue of its legality. This model in its initial form, however, cannot be implemented today without peril to the idea of fundamental human freedoms and rights and the concept of political pluralism and democracy (one needs only to have in mind racist or any other totalitarian regime that rests on "law and order"). As a consequence, the values of this concept today can only be seen as a *precondition* of democratic political and legal systems.[3]

2 Lord Lloyd of Hampstead, M.D.A. Freedman, *Lloyd's Introduction to Jurisprudence*, Stevens Carswell, London/Toronto, 1985.

3 Alexander Blankenagel, Denis Galligan, Stevan Lilić, Sanford Levison, Andras Sajo, *Law, Public Administration and Social Change*, CEU Summer University, Budapest, 1997 (course material).

As opposed to this formal concept of legality, modern concepts of legal legitimacy base their fundamental principles on the idea of the rule *of law* and *human rights*. The legality of government and administrative action, therefore, does not *ipso facto* include the legitimacy of these actions. In order to achieve legitimacy, government bodies, courts, administrative and public agencies must also achieve *in concreto* legitimacy of each action they undertake or decision they render through various instruments and mechanisms of parliamentary, judicial and administrative control (e.g. parliamentary debate, hearings, judicial review, ombudsperson interventions, etc.). Consequently, modern concepts of legal legitimacy, based on the idea of the rule of law and human rights derives from the premise that government action is legitimate not by the virtue of the status of the subject or legality of the procedure, but by the virtue *of substantial values incorporated in these actions and decisions*.

Modern concepts of the legal system rest on model of government as a complex and dynamic system of human interaction. In this model the government is projected as a complex and dynamic system of structures and procedures within itself, as well as an "open system" that communicates with other systems (e.g. the political and economic system) active in the social environment surrounding it. As a system of human interaction that derives from the fact that individuals in society achieve their interests either through mutual cooperation, or through mutual conflict, the main social function of the legal system, actively integrated into various patterns and forms of human behavior, is to regulate social processes. As the realization of individual or group interests can either be achieved by domination or by compromise, the social regulation function of a legal system plays an essential role in *neutralizing contingency* effects of illegitimate social behavior or conflict.[4]

4 Niklas Luhmann, *Soziale Systeme, Grundriss einer allgemeinen Theorie*, Suhrkamp, Frankfurt am Main, 1984.

Thus, the state today is not conceived as an *instrument of power*, but rather as an organization that is politically and technically dedicated to *development and welfare* of society and *quality of life* in general (bono publico), to rendering *public services* to its citizens and to *protecting human rights*. One of the most significant means of achieving these goals is by being "transparent", i.e. (politically and technically) capable of providing access to public information to its citizens and by protecting their privacy.

II
Legislation

Democratic and accountable governments have a duty to render public services to its citizens. Two essential aspects of this duty are: a) to provide citizens with the possibility to access public information and b) to protect their right to privacy.

The state of affairs regarding access to public information and privacy protection in a particular country is usually best reflected by existing legislation that regulates these issues. While some countries have enacted freedom of information and privacy protection legislation, others have done it only partially or still lack the essential legal instruments. For example, in the United States there are many laws regulating both access to public information (i.e. The Freedom of Information Act) and privacy protection, while in other countries (e.g. Yugoslavia and Serbia) there is practically no legislation on the right to access public information (while legislation on privacy protection exists).

a) Access to Public Information

Comparative overview

As a referential model on the issue of accessing public information, the *Freedom of Information Act* (FOIA) adopted in the US in 1966 (and amended in 1974 and 1996) is usually used.