



TANULMÁNYKÖTET





IV. Fiatalok Európában Konferencia
Pécs, 2017. november 24-25.
Sopianae Kulturális Egyesület
Tanulmánykötet



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Pécs, 2017. november 24-25.
E-mail: feu@sopianae.com
Honlap: fiatalokeuropaban.hu
Website: fiatalokeuropaban.eu

Kiadó: Sopianae Kulturális Egyesület

Szerkesztette: Haffner Tamás

ISBN: 978-615-80444-9-3



PADA

PALLAS ATHÉNÉ
DOMUS ANIMAE
ALAPÍTVÁNY

A kiadvány a Pallas Athéné Domus Animae Alapítvány támogatásával valósult meg.



TARTALOMJEGYZÉK

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Hohmann Balázs¹⁵

AZ ÁTLÁTHATÓSÁG FOGALMÁNAK ÉRTELMEZÉSE JOGI SZEMPONTBÓL

THE INTERPRETATION OF TRANSPARENCY FROM THE LEGAL POINT OF VIEW

ABSTRACT

Today, the notion of transparency is used extensively in the creation and application of legislative and judicial strategic planning documents both here at home and abroad. The living and extremely active concept, which was present in international literature, legislative and enforcement practice for decades, has become an unspoken or expressis verbis requirement in the recent years in Hungary with respect to individual branches of law and for the entire legal system. Its spread has now reached such a level that has become commonly used not only as a rule of law policy but also in the terminology of researchers and experts in individual legal fields in the recent decades. In these circumstances, it is essential that transparency as a concept is clearly and unambiguously interpreted by its users - both in the field of legislation, law enforcement and law research - since only in this case can be ensured that the content elements associated with the concepts and principles of law can ultimately gain enforcement by legal regulation and its application. The research starts from the hypothesis that, even though the concept of transparency is used more frequently by individual authors and becomes a subject of legislation, there is no clearly defined and accepted concept of it that can be a barrier to its implementation and application. The concept, which typically involves constitutional requirements, and came to our country due to Western influence, is often used as a slogan, without the practical implications, often under immature conditions. Accordingly, the main purpose of research and presentation is to clarify and characterize the conceptual elements of transparency based on domestic and international legislative practices and the relevant literature background. In this context, the research is based on the analysis of the relevant literature and the legislative and judicial documents on the subject, attempts to use the theoretical results to delimit the most important elements of the concept of transparency and their practical aspects. The exploration and analysis of conceptual elements alone can reveal many problems that can be considered today's most important challenges in modern legal systems. Defining and characterizing the concept of transparency in the legal field can contribute to a more complete transposition of the requirements resulting from transparency and to standardizing relevant legislative, literary standpoints, which requirements may become important principles of 21st century legal systems.

1. Introduction

Transparency has become an inevitable concept today, and this is especially true when examining legal issues, particularly public law issues¹.

Originally, at least in the narrower scope of interpretation, the concept, created and used around the end of the 1700s, was originally emerged in a completely different context compared to legal sciences² when a Massachusetts Senator, later Vice President of the United States of America, in the debate on postal dissemination, formed the following sentence regarding the transparency of the government:

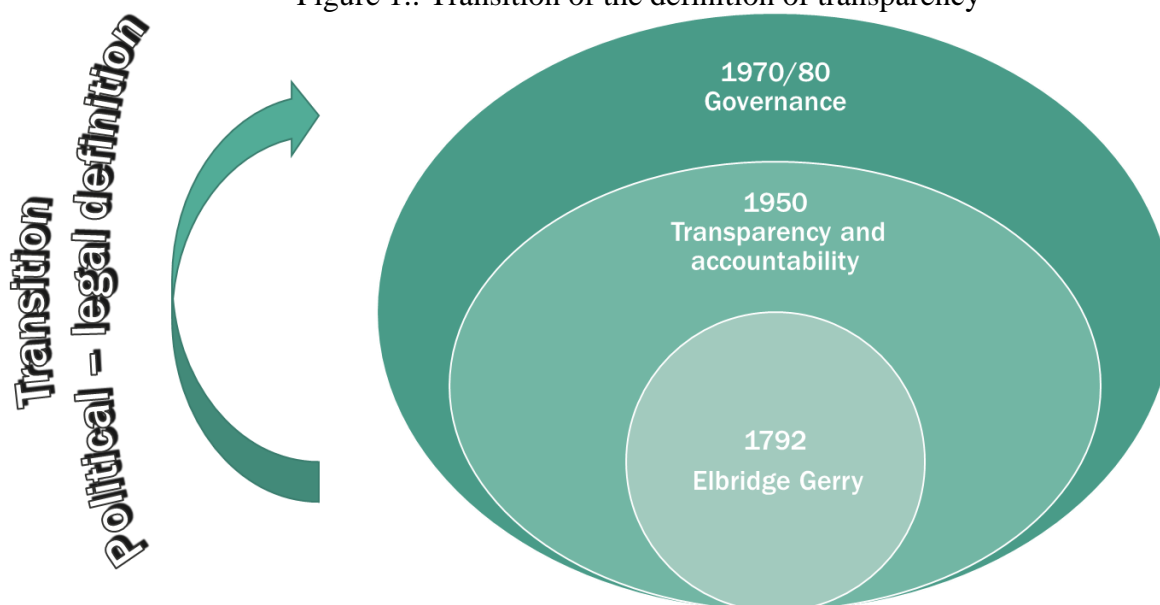
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“However firmly liberty may be established in any country, it cannot long subsist if the channels of information be stopped.”³

The use of the concept in this role was obviously the deposition of the founding and evolving American democracy, and it could be defined as a program strongly tinged with politics, but it clearly stated that the modern state could only be considered transparent if it opens up to the people legitimizing the political power at that time and ensures public access to the state through public communication and accountability⁴.

Transparency, for a long time, was much more a political proclamation and expectation than the concept of concrete legal content⁵.

1. ábra: Az átláthatóság fogalmának átalakulása
Figure 1.: Transition of the definition of transparency



Source: constructed by the author.

Transparency gained a new meaning in the mid-twentieth century with the spread of the transparency and accountability trends⁶, where in addition to the transparency of government activity (government transparency), the accountability⁷ of the people involved in this activity became the focus of the investigations. Apart from the political dimension of accountability, it has obviously attracted legal responsibility, first and foremost, the examination of public⁸ and private⁹ liability forms. Accountability within this concept was an essential prerequisite for proper, lawful and legitimate functioning of the socio-political system¹⁰. Finally, the governance doctrines¹¹ directly formed before the 21st century brought the issues to the centre of public law.

The study therefore focuses on exploring the juridical meaning of transparency by using and interpreting individual judicial documents and literary references.

1. The legal nature of the transparency

The legal nature of its concept of transparency, some of its conceptual elements are extremely difficult to grasp, because the concept includes highly subjective elements¹².

Transparency depends on its subject¹³ and object¹⁴, as it basically determines the characteristics of transparency that from whose perspective we examine the individual social conditions and what kind of social phenomenon are examined through the transparency criteria system.

Independently of this, a conceptual "core" can be distinguished which separates the concept from other concepts in terms of legal study. We can formulate this as follows, considering the above references:

Transparency is, in legal terms, a constitutional and rule of law requirement to make the object of transparency perceivable, understandable and interpretable in its process to the subject of transparency.

Obviously, in the practical implementation of transparency, the object of transparency (in this case, the state-organized society and the state organization) should be open¹⁵ to some extent to the subject of transparency, otherwise we cannot talk of transparency.

Simplifying the interpretation of the concept - the most commonly applied in the context of citizen-state organization applying the above definition - the transparency of the state organization means that some bodies of the state organization, and in particular those exercising public authority, their operations are subject to openness and accordingly, to the extent necessary, with the involvement of the public¹⁶, with the information of the citizens, it also pays attention to developing their awareness.

The creation of transparency is a legislative, law enforcement, political and related communication exercise, and we can represent the best by accounting them that when we can talk about transparency in the general and exact sense of the state's function.

From a legislative point of view, transparency - while at the same time different from other requirements and expectations, but with the same goals - requests a comprehensive regulatory requirement from the legislator, because the possibility of practicing transparency can only be expected in this case.

2. ábra: Az átláthatóság biztosításának folyamata
Figure 2.: The process of the sake of transparency



Source: constructed by the author.



It is sufficient to have a single element of a state-regulated relationship (typically within the state's own organization system or the legal relationship between the state and certain state organizations and citizens), which can be material, formal and organizational norms related to substantive, procedural regulation or other allocation, to limit or even abolish the transparency of a specific legal relationship or a specific area of state operation. The same item may be prevailing in respect of supranational, international and local legislation¹⁷ as in the case of national and Member States legislation.

From a legal point of view, as we have explained above, we can speak of an inherently dependent situation, since the process leading to the transparency of this activity can be fundamentally transformed when the legal environment creating and shaping the enforcement activity creates this opportunity. In the case of closed, "keeping secrets" regulations, the legal application due to its function can only seek to ensure the consistent implementation of the legal provisions aimed at this closure¹⁸, and its possibilities of deviation are extremely limited.

Only a part of the cases is covered by the more closely applied law enforcement activity, and in terms of transparency, at least such a frequently occurring issue is when it comes to political and related processes. In respect of requirements, the same can be said of the above, but their level may be even higher, as contrary to the law enforcement activity, political processes and their actors are actively involved in decision-making and in law-making¹⁹.

We must not lose sight of the necessity of a well-executed, comprehensive and inclusive communication, if it is about transparency. A transparent regulatory environment and the law carried out in a transparent manner based on this can only play its role if the wider social environment is properly informed of all the most important aspects²⁰ of law enforcement and policy action, obviously in compliance with data protection and other secrecy rules, but not hiding the most important data of the activity behind the rules.

Apart from the above, the concept of transparency must be based on the legal subject matter of the transparency of the state's operation, which is typically defined as the existence and maintenance of legal security²¹, the familiarity of the functioning of the state organization²², the recognition and possible transformation of matters of public interest²³, and the transparency of judicial and official activity²⁴.

These conceptual elements and the highlighted subjects clearly illustrate the concept of transparency and the legal interpretation of the already cited authors of the literature and the relevant constitutional courts and higher courts who deal vigorously with the subject during their law enforcement and constitution interpreting work.

3. Transparency as a rule of law requirement

In the light of the above, transparency can be defined as a constitutional, rule of law requirement, which should be examined more closely because it may set a number of basic requirements for each state organization.

The content of the Constitutional Court practice described below can only be limited to a short summary of the Hungarian constitutional practice, but it is capable of perceiving how the concept of transparency is evolving during the interpretation of the Constitutional Court's interpretation of the law.



In the first years of the operation of the Hungarian Constitutional Court, the topic was examined in a direct and indirect way, which is well illustrated by the organization's early decision related to public information, which is the justification of 32/1992. (V 29) AB decision:

"Free access to public interest information enables the elected representatives, the executive power, the lawfulness and efficiency of the administration to be monitored and stimulates their democratic functioning. Due to the complexity of public affairs, citizens' control and influence on public decision-making, on matters of administration can only be effective if competent bodies reveal the necessary information."²⁵

Although the Hungarian Constitutional Court dealt with only one certainly important conceptual units of the above-mentioned transparency, it can be stated, however, that it has identified many important elements in the field of transparency. The mentioned civic control and influence, and the necessity of public participation in the political and public power processes, are all important parts in the practical creation of the transparency of the state organization.

In a later 1994 decision of the Constitutional Court, it formulates much more specifically several individual guarantees and requirements related to transparency in the context of freedom of information:

"... the open, transparent and controllable public activity, usually the functioning of state organizations and executive power before the public, is a cornerstone of democracy, a guarantee of the rule of law in the state. Without the test of publicity, citizens of the state are »alienated machines«, their operation is unpredictable, unforeseeable and expressly dangerous, because the lack of transparency of the state's operation is an increased threat to constitutional liberties."²⁶

It is clear, that the requirements of transparency in this decision are much more a guarantee of the rule of law and a requirement system.

However, in a subsequent 2013 decision of the Constitutional Court, the body has already made quite specific demands, declaring that the transparency is constitutional and, accordingly, recognized as a rule of law:

"Therefore, the basic law requirement governing the functioning of the democratic state serving its citizens, and in general terms the fulfilment of public tasks, is the transparency and public purity and the fair administration of public affairs without abuse and impartiality. Finally, the fundamental right to know and disseminate information of general interest beside and through the right of expression is intended to enforce this requirement."²⁷

4. Conclusion

The concept of transparency has changed significantly from its original roots. The concept, which is typically political, as a requirement and expectation, and the related accountability soon enriched with legal elements, with the nature of transparency, but their consistent separation rarely occurs in individual works of the literature.

The creation of a legally interpretable definition and the foundation of some conceptual elements are inevitable to ensure that transparency can be a real legal right in the very broad social environment, in which this system of requirements must prevail to speak of a truly functioning constitutional requirement of the rule of law.

The present study attempted to elaborate the legal details of the concept, considering the previously cited literature references and relevant constitutional practices. The analysis of the



conceptual elements presented in the study, with their independent and interlinked effects, can further contribute to the well-established concept of transparency and the necessary conditions for ensuring practical effectiveness.

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