

Access to information in constitutions of countries in transition, members of the Council of Europe

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Introduction

I.

1. Free access of every individual to information is the principle of free societies, one that is guaranteed in their Constitutions and in international law. This is the subject of Article 19 of the Universal Declaration of Human Rights, which provides that: "Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers". This freedom may be restricted when it is "determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society". Any freedom guaranteed by the Universal Declaration was "proclaimed as the highest aspiration of the common people" (Preamble).

2. Art. 10 of the European Convention of Human Rights and documents developed by the Convention organs, including in particular case-law of the European Court of Human Rights make it absolutely clear that in Member States of the Council of Europe, the freedom of access of every individual to official (administrative) documents is seen as the means of oversight of administrative actions and as the condition of democracy. That freedom is among the fundamental instruments for citizen participation in public life of local communities and of the entire nation. Access to information is the means towards transparency of public life.

II.

3. Although it emerged as long ago as the 18th century, the right of access to information is traditionally associated with the United States of America. Yet the first countries to actually secure to their citizens the right to information were the Scandinavian countries: Sweden (where a constitutional law on freedom of the press was adopted by the Rikstag in 1766), followed over two centuries later by Finland (Act of 1951). It was, however, the American Freedom of Information Act of 1966 that provided a new interpretation and new legal forms of protection. In 1970, similar acts were adopted by Denmark and Norway; in 1973 – by Austria; in 1978 – by France and the Netherlands; in 1982 – by Australia, New Zealand and Canada; in 1990 – by Italy; in 1993 – by Portugal; in 1994 – by Belgium; in 1992 – by Hungary; in 1997 – by Ireland and Thailand; in 1998 – by Korea and Israel; and in 1999 – by the Czech Republic and Japan. In those countries, transparency has become a legal principle, and secrecy – an exception. Characteristically, in the new European democracies of the late nineties, terms such as "right to information" or "transparency" were absent from legal language, judicial decisions included. They appeared all of a sudden, invading an entirely barren ground. The first legal provisions and judicial decisions in the area of the right to information resemble the first private cars in the streets of Tirana in 1990. At the same time, the terms have for a long time now been well-rooted in the old democracies. During the present decade, all over the continent, the right to information – a term rather vague until quite recently – has started to be perceived as one of the foundations of autonomy of the individual. This situation was forced by:

1. Freedom of speech being fully guaranteed to everyone in established democracies. The existing barriers preventing access to information possessed by public administration were increasingly perceived as most unbearable.

2. The end of the cold war. State authorities were deprived of many of their arguments for keeping numerous data secret. It was actually the incomparably broader access to information in democratic compared to communist states that contributed, among other factors, to the well-deserved defeat of the latter. Yet also citizens of the old democracies profited by that defeat. Overcome were the last barriers preventing access to many previously reserved data. Operation of the access to information test became even more effective: today, the state is obliged to demonstrate that specific information is sensitive for security of state. The individual who demands access to information is not required in principle to quote his legal interest to be granted such access.
3. Computer revolution. Due to the millions of computers in state and private institutions, schools of all levels, and private apartments, the rapidly growing access to the Internet via which any information can be downloaded from any part of the world that is not supervised by the "thought police", those who want to be informed are incomparably stronger vis a vis public authorities. No Government, not even the Government of the People's Republic of China, is capable of raising effective barriers. Even if I cannot acquire precise information about the functioning of an institution, e.g. the police, in my town, I can easily obtain all the information I need from the WWW site of another town. Knowing what information can be found without difficulty about different (also negative) aspects of the work of my country's Police Headquarters, I can check the manner in which citizens of other states are informed. Equipped with such information, I have the weapons to pull down, together or with other persons, the walls that are raised to ban access to what should be accessible.

III.

4. Quite obviously, in a culture of secrecy and prevalence of the presumption as to sensitivity of information for security of state, that security receives a weaker protection. Ill-informed, society cannot press the Government administration towards correction of mistakes. The state may then be strong through the number of its bayonets and truncheons, but not through openness to its citizens' creative inventiveness. Characteristically, all indigent societies are closed, and all the open ones are wealthy. The search for information is an ever-present element of the existence of man. It has always been the condition of his survival, and at the same time of domination. In ancient Egypt, few priests only understood the mechanism of eclipse of the Sun. Few people in Romania or the Soviet Union could have access not only to the Universal Declaration of Human Rights, but also to the contents of decisions of local committees of the Communist Party. Instead of making information accessible, the authorities released it to an extent that was to their advantage. Instead of information, we dealt with the propaganda of success. Transparency was associated with instability and with religious or political sin.

5. Today transparency triumphs, subject to the rules that are necessary in a democratic society.

IV.

6. Transparency is the essence of the right to information. How does the academia define this notion? What we consider a relatively full definition has recently been suggested by Teresa Górczyńska:

7. Transparency is a state of a relative absence of obstacles to being informed and able to inform others, that is to being able to seek, demand, acquire, and transmit (communicate, disseminate) information. It is [...] the possibility of gaining insight in not only one's own individual matters (if related information is in the possession of agencies and institutions) but also in common social, political, state or regional matters. Transparency means a relatively unrestricted access to all types of information, documents, activities, motives, and authors. It means absence of a ban on releasing information, although absence of obligatory access is not tantamount to impossibility of release (or access to) information. It is a rule that eliminates the barrier between the need for insight and the actual access. Yet transparency is also the means of stifling or easing the anxiety caused by inaccessibility of things. It is

therefore of immense psychological and sociological importance (Teresa Górzyńska, Prawo do informacji i zasada jawności administracyjnej [The right to information and the principle of administrative transparency]. Cracow 1999 Zakamycze: pp. 27-28).

V.

8. The report provides a comparative view of legal regulations pertaining to state secrets and freedom of access to information in countries of Central and Eastern Europe. Part One deals with constitutional provisions and the major judgements of domestic Constitutional Courts. Part Two discusses the legislation regulating the freedom of access to information in individual countries of the region. Part Three deals with state secret and secrecy of information. Part Four is devoted to the files of former communist security services. Part Five discusses the penal law regulations of responsibility for disclosure of information involving a potential threat to security of state.

Constitutional provisions

Albania

9. The Constitution of Albania was adopted on 21 October 1998. The provision of Article 22 guarantees freedom of speech and of the press, radio and television in Albania, and also prohibits preliminary censorship of the media. Additionally, under point 1 of Article 23, "the right to information is guaranteed". Point 2 provides that "everybody has the right, subject to legal provisions, to acquire information about the activity of state agencies and of holders of public functions". Everybody also has the right to follow proceedings of elected organs (point 3).

10. Article 17 of the draft Constitution of Albania contains the general principle of restricting rights and freedoms. Restrictions may only be imposed by statute, in the public interest or with the aim to protect the rights of others. The restriction should be proportional to the situation it pertains to; it may not violate the essence of rights and freedoms; and may under no circumstances be in excess of what is permitted by the European Convention of Human Rights.

11. Under Article 56, "everyone has the right to be informed for the status of the environment and its protection".

12. Mentioned here as a border issue should also be the detained person's right to be informed without delay about the reasons for detention. A provision to guarantee this right is contained in Constitutions of: Albania, Croatia, Czech Republic, Estonia, Macedonia, Poland, Romania, Slovakia, Slovenia, and Ukraine. It is absent from Constitutions of: Belarus, Bulgaria, Hungary, Latvia, Lithuania and Russia.

Croatia

13. The Croatian Constitution was adopted on 22 December 1990. It does not guarantee everybody directly access to information or freedom to seek information. It says only (article 38.2) that "freedom of expression specifically includes freedom of the press and other media of communication, freedom of speech and public expression, and free establishment of all institutions of public communication". Only journalists "have the right to freedom of reporting and access to information". Censorship is prohibited (Article 38.3).

Czech Republic

14. The Czech constitutional law which regulates human rights, i.e. the Charter of Fundamental Rights and Basic Freedoms [hereinafter referred to as the Charter], adopted originally on 9 January 1991 as the federal law of Czechoslovakia, was confirmed as part of the constitutional order of the Czech Republic on 16 December 1992. Article 17.1 of the Charter guarantees freedom of expression and the right to information. The following paragraph 17.2 says that "Everyone has the right to express his views in speech, in writing, in the press, in pictures, or in any other form, as well as freely to seek, receive, and

disseminate ideas and information irrespective of the frontiers of the state". There is no permission for censorship (Article 17.3). Interesting is Article 17.4 which envisages limits to the freedom of expression. The legal interference with that freedom mentioned in the first place is that for reasons of protection with the rights and freedoms of others; unlike most of the other Constitutions, such reasons come before the security of the state and public security.

15. Article 17.5 of the Czech Charter offers some access to information with respect to activities of the person concerned. This right is rather weak. The person concerned may request to be supplied with such information "in an appropriate manner" and under conditions described by law. Much stronger seems to be the right to "information about the state of the environment and natural resources". Such information should be "timely and complete".

16. Additionally, the Charter protects citizens belonging to national or ethnic minorities. Such citizens have the right to disseminate and receive information in their native language (Article 25.1).

Georgia

17. Georgia adopted its constitution on 4 April 1995. Article 24.1. says that "Everyone has the right to receive freely and to disseminate information and to express and disseminate his opinion in written or any other form." Censorship is prohibited and media are free (Article 24.2). Monopolies in dissemination of information are prohibited, including institutions owned by the state (Article 24.3).

18. Additionally the Constitution guarantees all individuals "the right to complete, objective and timely information on their working and living conditions" (Article 37.5).

19. On the other hand the Constitution prohibits however "the revelation of information received in confidence" (Article 24.4 in fine). There is no doubt that the last provision is directed mostly against journalists who rely on leaks from public officials and politicians.

Estonia

20. The Constitution of Republic of Estonia, adopted on 28 June 1992, guarantees free access to information. Under its Article 44, everybody has the right freely to acquire publicly disseminated information. All state agencies, local governments, and officials representing them are obliged to provide the citizens of Estonia, upon their demand, with full information on their activities, following procedures specified by law. The exception is information whose disclosure is prohibited by law, or that designed for service use only.

21. Every Estonian citizen has "the right to become acquainted with information about themselves held by state and local government authorities and in state and local government archives, in accordance with procedures determined by law. This right may be restricted by law in order to protect the rights and liberties of other persons, and the secrecy of children's ancestry, as well as to prevent a crime, or in the interests of apprehending a criminal or to clarify the truth for a court case" (Article 44.3).

22. The above right may be limited by law with the aim to secure protection of civil rights and liberties; to keep secret data on a child's family background; to fight crime; to apprehend a criminal; and to disclose the truth in judicial proceedings.

23. The Constitution of Estonia also provides that foreign citizens and stateless persons dwelling in Estonia enjoy a right to acquire publicly disseminated information equal to that of citizens.

24. The Supreme Court of the Republic of Estonia has never examined the issue of freedom of information so far, and no judgements have been passed on this issue.

Hungary

25. The Constitution of Hungary of 1949, as amended on 31 December 1990, guarantees the right of access to data of importance from the viewpoint of public interest. Under its Article 61.1, "in Republic of Hungary, everybody shall have the right to express his own opinions, and also to acquire and disseminate information of importance from the viewpoint of public interest". Point 2 states that "Republic of Hungary recognises and protects freedom of the press". Particularly important for data protection is the provision of point 3 of that Article, which states that "for adoption of a law regulating the revealing of data of importance from the viewpoint of public interest, and of a law pertaining to freedom of the press, the majority of votes of two-thirds of members of the National Assembly present at the voting shall be required".

Lithuania

26. The Lithuanian Constitution adopted on 25 October 1992 uses plural to describe the contents of freedom to expression (Article 25). Para. 1 provides that "Individuals shall have the right to have their own convictions and freely express them", and para. 2 that "Individuals must not be hindered from seeking, obtaining, or disseminating information or ideas". Similarly as the Czech Charter, the Lithuanian Constitution treats protection "of the health, honour and dignity, private life, or morals of a person" as more important a reason for a possible legal interference with that freedom than "protection of constitutional order" (para. 3). Freedom to expression in that country is also "incompatible with criminal actions - the instigation of national, racial, religious, or social hatred, violence, or discrimination, the dissemination of slander, or misinformation" (para. 4).

27. Article 25.5 guarantees to citizens "the right to obtain any available information that concerns them from State agencies". This rule is not self-executed. The right can be exercised "in the manner established by law", and seems to be rather weak. It does not apply to non-citizens. It is not clear whether "state agencies" include also local self-governmental agencies. It is not a self-executed constitutional rule, either.

Latvia

28. The Latvian Constitution was adopted on 15 February 1922 and seriously amended in 1998. It protects everyone's "right to freedom of expression which includes the right to freely receive, keep and disseminate information and to express their views" (Article 100). As we see the Constitution does not mention directly that everyone can seek information freely. The term "freely receive" seems to be too passive. In practice however it can be interpreted also as an active right. The same provision prohibits censorship.

29. There are state authorities that are obliged to provide to everyone "information about environmental conditions" (Article 115).

Macedonia [FYROM]

30. Macedonia adopted its Constitution on 17 November 1991. That basic law secures "Free access to information" (Article 16). The same provision says that guaranteed is "the freedom of reception and transmission of information". Guaranteed are also "The freedom of speech, public address, public information and the establishment of institutions for public information". Censorship is prohibited. This is the only constitution, which directly secures "The right to protect a source of information in the mass media".

Moldova

31. In the Constitution of Republic of Moldova, adopted on 29 July 1994, the right to information has a constitutional rank. The provision of Article 34 of the Constitution, entitled "Right of Access to Information", provides that the citizens' right to gain access to any information on activities of importance to society may not be restricted; the authorities, within their respective competencies, are obliged to provide citizens with truthful information of importance to society as well as that pertaining to individual persons. However, the citizens' free access to information may not clash with measures designed to protect citizens and

national security. The Constitution casts the media in the role of informer of the public. Under its provisions, information published by the media may not be subject to censorship.

32. So far, there have been no judgements of the Constitutional Court pertaining to freedom of information.

Poland

33. In the Polish Constitution adopted on 2 April 1997 solemn words on fundamental freedoms are plenty. Poland has the longest constitutional text in Europe. Let us concentrate on access to information. In the first chapter where foundations of the state are regulated, two relevant provisions are contained. The first of them (Article 13) restricts that freedom providing that: "Political parties and other organisations whose programs are based upon totalitarian methods and the modes of activity of nazism, fascism and communism, as well as those whose programs or activities sanction racial or national hatred, the application of violence for the purpose of obtaining power or to influence the State policy, or provide for the secrecy of their own structure or membership, shall be forbidden". The other provision guarantees freedom of the press and other means of social communication (Article 13).

34. Everyone's right of access to official documents and data collections concerning himself is guaranteed by Article 51.3, and "the right to demand the correction or deletion of untrue or incomplete information, or information acquired by means contrary to statute" by Article 52.4. The problem is that "principles and procedures for collection of and access to information shall be specified by statute" (Article 52.5). No such parliamentary act has been adopted so far, and there is no visible will on part of the Government to draft it, although one of the final provisions of the Constitution (Article 236) obliges the Government to submit to the Sejm bills necessary for implementation of the Constitution. On the other hand numerous non-governmental organisations work on an independent bill on freedom of information and try to convince a group parliamentarians to submit it.

35. Article 54 of the Constitution guarantees to everyone the "freedom to express opinions, to acquire and to disseminate information" (point 1) and prohibits censorship (point 2).

36. The right to obtain information on the activities of organs of public authority as well as persons discharging public functions is regulated directly by Article 61 of the Constitution. Such right "shall also include receipt of information on the activities of self-governing economic or professional organs and other persons or organisational units relating to the field in which they perform the duties of public authorities and manage communal assets or property of the State Treasury". That right "shall ensure access to documents and entry to sittings of collective organs of public authority formed by universal elections, with the opportunity to make sound and visual recordings" (Article 61.2). Additionally, "everyone shall have the right to be informed of the quality of the environment and its protection" (article 74.3). Although there are parliamentary acts which impose limitations upon this right, there is no statute regulating the procedure for the provision of information, although such a statute is required (Article 61.4).

37. Also mentioned should be specific rights of a detained person. Article 41.3 provides that every such person "shall be informed, immediately and in a manner comprehensible to him, of the reasons for such detention".

38. Any limitation upon the exercise of those freedoms "may be imposed only by statute, and only when necessary in a democratic state for the protection of its security or public order, or to protect the natural environment, health or public morals, or the freedoms and rights of other persons. Such limitations shall not violate the essence of freedoms and rights" (Article 31.3). It should be mentioned here that this provision uses the term "democratic state" and not "democratic society" that is used in the European Convention of Human Rights.

39. To recapitulate, it can be said that the Polish Constitution guarantees the following in the field of access to information: (1) access to official documents and data collections concerning every person; (2) the right to disseminate information (3) the right to obtain

information on the activities of organs of public authority as well as persons discharging public functions; (4) the right to be informed about the quality of the environment and its protection; (4) the right to be informed immediately and comprehensibly about the reasons for the person's detention.

40. The institution to safeguard freedom of speech, the right to information, and the public interest related to radio broadcasting and television is the National Council of Radio Broadcasting and Television (Article 231.1 of the Constitution). In practice, this is a joke and not a rule. The Council is extremely politicised and its members only safeguard the interests of their political sponsors. Another safeguard of freedoms and rights, and a genuine one this time, is the Commissioner for Citizens' Rights (Article 208).

Romania

41. The Constitution of Romania, adopted on 8 December 1991, guarantees protection of human rights and fundamental freedoms, the freedom of speech included. Its Article 30.1 provides that "freedom of expression of thoughts, opinions, and beliefs, as well as creativity expressed in words, writing, image or sound, or in any other manner of public communication, shall not be subject to limitation".

42. In further provisions, Article 30 the Constitution prohibits censorship, confirms freedom of the press, and prohibits suspension of publication. The sources of media financing shall not be secret.

43. The Constitution also provides for the possibility of restricting the freedom of speech. Under Article 30.6, freedom of expression may be restricted for reasons of protection of personal dignity, honour, privacy, and self-image. The provision of Article 30.7 provides that "any defamation of the state and nation, war-mongering, incitement of war, national, racial, class or religious hate, territorial separatism or public acts of violence, as well as any indecent and immoral behaviour shall be prohibited by law". This provision further introduces the framework of civil liability for pronouncements violating the personal interests of others.

44. Article 31.1 of the Constitution guarantees to individuals "the right of access to information of importance from the viewpoint of public interest"; the right may not be restricted. Point 2 of that same Article imposes on public authorities the duty to provide, within their respective competencies, truthful information on both public and personal matters. However, the right to information may not jeopardise the well-being of children and the young and the security of state.

45. Under Article 31.4, public and private media are obliged to provide the public with truthful information. Public radio and television are autonomous. Access to them is guaranteed for all important social or political groups. The organisation of those media as well as their parliamentary oversight is to be regulated by a separate organic law.

46. Article 31.5 provides as follows: "Public radio and television services shall be autonomous. They must guarantee for any important social and political group the exercise of the right to be on the air. The organisation of these services and the Parliamentary control over their activity shall be regulated by an organic law".

Russia

47. Article 29.4 of the Constitution of the Russian Federation, adopted on 12 December 1993, secures to every person the right freely to seek, acquire, transmit, produce and disseminate information by any lawful method. It means that, at least sometimes, a person who seeks information should prove that her method is legal.

48. Under Article 42, everyone has the right to reliable information about the condition of the natural environment. No doubt that that right is treated seriously by authorities in the light of numerous criminal investigations. Those cases were instituted against those journalists and environmentalists who wanted to inform the public about nuclear wastes.

Slovakia

49. The Slovak Constitution was adopted on 1 September 1992. It is rooted in the Czechoslovak Charter of 1991. Article 26 guarantees the “freedom of speech and the right to information” (para. 1): thus everyone has “the right to express his views in word, writing, print, picture, or other means as well as the right to freely seek out, receive, and spread ideas and information without regard for state borders. The issuing of press is not subject to licensing procedures”. However, similarly to Article 10 of the European Convention, enterprises “in the fields of radio and television may be pegged to the awarding of an authorisation from the state”. It is parliamentary acts that specify the conditions of that authorisation. There is no permission for censorship (Article 26.3). As the Czechoslovak Charter, the Slovak Constitution mentions protection of the rights and freedoms of others as the first legal reason for interference with freedom of expression. The security of state and public security is mentioned in the second place (Article 26.4).

50. Very much similar are also the phrases of the Slovak and Czech provisions on right to seek and disseminate information from all public authorities (state and local self-administration bodies). In Slovakia, access to such information may only be banned with the aim “to protect the rights and liberties of others, state security, public order, or public health and morality” (Article 26.5). Also formulated in the same manner is the public authorities’ “obligation to provide information on their activities in an appropriate manner and in the official state language” (para. 6), and everyone’s right to “timely and complete information about the state of the environment and the causes and consequences of its condition” (Article 45).

Slovenia

51. In Slovenia, the issues of freedom of access to information are regulated in Article 39 of the Constitution adopted on 23 December 1991.

52. Thus Article 39 guarantees “the freedom of thought, expression and assembly, as well as freedom of the press and of other forms of public communication”. Everybody has the right to gather, acquire and disseminate information and opinions. Subject to reservations stipulated by law, everybody has the right of access to public information if he can demonstrate his statutory legal interest in obtaining that information.

Ukraine

53. Article 29 of the Constitution of Ukraine, adopted on 26 June 1996, guarantees “the right to freedom of thought and speech and freedom to express one's views and beliefs”. Every citizen has the right to “freely gather, store, use and disseminate information in oral, written or any other form”. The above rights may be restricted by law, under that same constitutional provision, on account of a most broadly designed variety of factors such as: protection of national security, territorial integrity, and public order; prevention of conflicts or crime; protection of public health; protection of the good name or rights of others; prevention of disclosure of classified information; or support to the authority and integrity of courts. Thus the scale of possible restrictions is rather broad; in each and every case, however, a statutory regulation is required.

54. As in most countries in the region, everybody’s right “to an environment which is safe for life and health, and to the recovery of damages inflicted through violation of this right” is guaranteed. Parliamentary acts should also grant to everyone “the right of free access to information about the environment, the quality of food and consumer products, as well as the right to disseminate such information” (Article 45). There is no doubt that the Chernobyl disaster was cause of those provisions, but there is also no doubt that the provisions are a mere propaganda, considering the drop in life expectancy of Ukrainians, and in the size of the population from 52 to 50 million.

55. So far, the Constitutional Court of Ukraine has not examined cases pertaining to freedom of access to information.