



**Freedom of Information – Constitutional Protection and its Legislative Regulation in
Germany, the Czech Republic and Georgia**

by Salome Jokhadze

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SUPERVISOR: Markus Böckenförde

Central European University

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Abstract

It has not been long that freedom of information gained the status of constitutionally guaranteed fundamental right. Its recognition spread across the world in nineteenth century and since then more countries are adopting regulations ensuring the proper access to government-held information. But there are still many uncertainties regarding what we mean under the right.

This thesis aims to investigate into the inclusion of freedom of information in constitutional framework by exploring theoretical categorization of different approaches to the issue as well as justification for its protection. Moreover, the thesis aims to overview the regulations concerning freedom of information both at constitutional as well as at legislative level considering three jurisdictions. Namely, the thesis will explore relevant regulatory framework in Germany, the Czech Republic and Georgia. Moreover, the thesis will also explore the standards established by respective constitutional courts as an important source for interpretation and understanding of constitutional provisions.

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INTRODUCTION

Freedom of information nowadays forms a valuable part of the catalogue of fundamental rights. But it has not been long since its recognition as such. Roughly thirty years ago there were only ten countries guaranteeing right to access government-held information.¹ In contrast, Peled and Rabin identified ninety countries on five continents that have recognized the right to access to public information as provided for 2011.² Despite such rapid recognition of the right the issue is still not fully understood at least not at the constitutional level.³ There are different set of arguments as to why freedom of information in itself is deserving of a constitutional protection apart from being of instrumental nature for ensuring protection for other constitutional interests. These justifications will be introduced within the following chapter outlining the theoretical framework of freedom of expression.

At the same time freedom of information laws play priceless role in building and sustaining democracy. They are “a crucial step toward the solution of the accountability deficit”.⁴ Freedom of information creates the ability to effectively control and supervise everyday activities of public authorities or reveal violations in the process in a timely manner. Moreover, freedom of information is usually closely connected in theory as well as in practice to freedom of opinion and expression. For instance, one of the major parts of Peled and Rabin’s political democratic justification heavily stresses on their correlation.⁵ This is also clear from the constitutional

¹ John M. Ackerman and Irma E. Sandoval-Ballesteros, “The Global Explosion of Freedom of Information Laws,” *Administrative Law Review* 58, no. 1 (2006): 85–130. 85

² Roy Peled and Yoram Rabin, “The Constitutional Right to Information,” *Columbia Human Rights Law Review* 42, no. 2 (2011 2010): 357–402. Pg. 357

³ *Ibid.*

⁴ Ackerman and Sandoval-Ballesteros, *supra* note 1 at 87

⁵ Peled and Rabin, *supra* note 2 at 361

regulations of different countries, taking for example one of the comparative jurisdictions for this thesis – the Czech Republic that guarantees both of abovementioned freedoms in one constitutional provision.⁶

Considering all the explanations for the importance of freedom of information this thesis will concentrate on its regulatory framework in three jurisdictions. In light of German, Czech and Georgian regulations it will try to underline approaches undertaken by these states. As the scope of the thesis is to inspect the constitutional and relevant legislative framework for freedom of information the obvious limitation for the thesis is that it does not touch upon the issue of how relevant state bodies apply normative regulations. Therefore, it will explore only the normative picture presented in three different sets of sources of law, namely the constitution, legislation and the case-law of respective constitutional courts. In this respect the case-law of constitutional courts is analyzed and used as a source of normative principles and standards set by the courts and not as a practical application of the constitutional provisions to specific constitutional complaints.

Another clarification I think needed for the further read is the understanding of the terms used throughout the thesis - ‘freedom of information’, ‘access to information’ or ‘right to information’. For the purposes of this thesis they refer to state-held information.

The first chapter will present existing theoretical framework for freedom of information. More precisely, it will analyze its path to the inclusion in national constitutional order generally and emphasize some of the problematic aspects in determining the scope of freedom of information

⁶ The Constitution of Czech Republic, Charter of Fundamental Rights and Basic Freedoms; Article 17

laws. Further, the thesis will try to frame some of the arguments that support the importance and increased need for protection of freedom of information in contemporary world.

The second chapter will be entirely dedicated to the issue of national regulation of freedom of information in Germany, the Czech Republic and Georgia. Regarding German legislative framework, it must be noted that the thesis is limited to presenting respective issues only concerning the federal regulations and does not overview the legislation adopted by different Landers. The chapter will introduce the constitutional arrangement, rules prescribed by respective legislative pieces and the case-law of constitutional courts in a topic-driven manner.

The third chapter aims to analyze and summarize information provided in the second chapter by underlying some of the major similarities and differences found in three targeted jurisdictions.

1. Freedom of Information and its Theoretical Framework

This chapter is concerned with the overview of theoretical approaches that has emerged and shaped freedom of information. It will try to present arguments to questions that may not be clear from the outset. Namely, first it will observe whether such right is constitutionally guaranteed, and does it have such a status worldwide? What is meant by the freedom of information and what type of information are we talking about? Lastly, the chapter will present different arguments contributed to the acknowledgement of freedom of information as a fundamental right.

1.1 Inclusion of Freedom of Information in national constitutions

Freedom of information does not have its roots in distant history. Rather, it can be considered as a relatively recent creation. The first country to constitutionally guarantee freedom of information

was Sweden in as early as 1766 by adopting His Majesty's Gracious Ordinance Relating to Freedom of Writing and of the Press.⁷ This is the original version of the current Freedom of the Press Act⁸ that is one out of the four acts that forms the constitutional order in the country.⁹ Sweden was followed by Colombia and Finland.¹⁰ More recently some countries included freedom of information explicitly in their constitutions like Switzerland during the revision of the constitution in 1999.¹¹ In others the right has been guaranteed through the legislative pieces without an explicit mentioning in the basic law of the country.¹² Another way the right to information made it to the national legal systems is the judiciary that by its interpretation of the constitution establishes the right to be part of the existing constitutional order without the formal change or an amendment to the constitution itself. One such example is the case-law of the Supreme Court of India that recognized the right of access to information.¹³

In certain countries there has not been a need for constitutional amendments as the right was part of the original draft of the constitution. Peled and Rabin analyze in this respect that these are mostly newly established democracies with an experience of totalitarian regimes that made them realize importance of having mechanisms for people's participation.¹⁴ Another reason behind such division between the approaches they consider to be the very fact that at the time the new democratic constitutions were being drafted, the notion of transparency had already been

⁷ Patricia Jonason and Anna Rosengren, *The Right of Access to Information and the Right to Privacy: A Democratic Balancing Act* (Södertörns högskola, 2017), Para. 6

⁸ Peled and Rabin, *supra* note 2 at 371

⁹ The Instrument of Government; article 3

¹⁰ Peled and Rabin, *supra* note 2 at 368-369

¹¹ *Ibid.* at 371

¹² *Ibid.* at 370

¹³ S.P. Gupta v. Union of India (1982), 69 A.I.R. 149, (global freedom of expression – Colombia University webpage); Available at: <https://globalfreedomofexpression.columbia.edu/cases/s-p-gupta-v-union-of-india/>

¹⁴ Peled and Rabin, *supra* note 2 at 371-372

established.¹⁵ For the authors, distinction comes from the logic that unlike these cases constitutions of countries with long-standing constitutional culture were drafted in times when the right to access to information had not gained its recognition yet resulting its exclusion in respective documents.¹⁶

1.2 What do we mean under Freedom of Information

For the proper understanding of freedom of information and its importance in each legal system it is important to analyze what is meant under the right and its constitutive components. Ofak lists different types of access to information based on Beers:¹⁷ official access (refers to public officials' access to information), party access (refers to the right of affected, interested parties' access to legal procedures they are involved in), personal access (refers to access to information about one's own self) and public access (refers to the general right of everyone to have access to the government-held information).¹⁸

There is an important aspect of the meaning of "access" where Bovens identifies three perspectives – physical, financial and intellectual access.¹⁹ The first means existence of possibility for anyone to actually access the information directly, while the financial access refers to the cost of such an access that should not bar from exercising the right by large groups and lastly, information to be considered accessible it should be given in an organized and comprehensive manner.²⁰

¹⁵ *Ibid.*

¹⁶ *Ibid.* at 371

¹⁷ Ofak Lana, "Right to Access to Information," in *Max Planck Encyclopedia of Comparative Constitutional Law*, by Ofak Lana (Oxford University Press, 2016), <https://doi.org/10.1093/law:mpeccol/e68.013.68>. Para. 20

¹⁸ *Ibid.* at 20

¹⁹ M. Bovens, "Information Rights: Citizenship in the Information Society," *Journal of Political Philosophy* 10, no. 3 (September 2002): 317–41, <https://doi.org/10.1111/1467-9760.00155>. Pg. 330

²⁰ *Ibid.* at 330

Bovens refers to “public government information” to which the right entails the access.²¹ For this description he proposes that the issue concentrates on the information that is held by governmental bodies and organizations and it should be fundamental “for the social functioning of citizens”.²²

Ackerman and Sandoval-Ballesteros describe their ideal solution and coverage of the right to access to information. In their understanding it would be preferable if the right covered all the publicly financed bodies including not only different branches of the state but private sector, agencies or organizations in that category.²³ This does not mean that the proposed ideal version is implemented in practice broadly but the authors observe that the national regulations are far more restrictive than their suggested approach.²⁴ By comparative analysis of the matter they observe that in contrary, such a broad coverage is quite rare and mostly the rules do not go far beyond the governmental authorities.²⁵ One significant example they mention is the Constitution of South Africa that envisages the possibility of access to information held by “another person” conditioned by the requirement that such information is necessary “for the exercise or protection of any rights”^{26, 27} This is the issue where there is no agreement or a unified approach and as the authors note this is one of the fields where the national freedom of information legislations significantly differ.²⁸

²¹ *Ibid.* at 328

²² *Ibid.* at 328

²³ Ackerman and Sandoval-Ballesteros, *supra* note 1 at 99

²⁴ *Ibid.*

²⁵ *Ibid.*

²⁶ The Constitution of South Africa; Section 32, subsection 1(b)

²⁷ Ackerman and Sandoval-Ballesteros, *supra* note 1 at 100

²⁸ *Ibid.* at 95

The issue has become more problematic considering the notion of “structural pluralism” as Giddens put it²⁹ based on which philosophy Roberts considers the delegation of public functions to certain organizations that on their face often have very little connection to government or their privatization creates the threat to an effective control of public policy by the people.³⁰ Based on his approach due to de-concentration of policy-making authority and an increased fragmentation in governmental administration has not properly been reflected in existing freedom of information laws and while there is a liberal differentiation between public and private spheres the harm can be produced by either of the sectors.³¹ Therefore, the information rights as Bovens framed it³² including the freedom of information should be guaranteed whenever the closed manner of decision-making is capable of negatively affecting “fundamental interests of citizens”.³³

It could be regarded as a simple logic that access to as much information as possible contributes to heightened level of transparency, creates open governance and in the end upholds democracy and the rule of law in a given country. But when it comes to practices from different countries, it seems that the issue as to which bodies are obliged to provide information to the public the regulations of an issue are different and highly dependent on the approach given country and the decision-maker in power is willing to adopt. What is more or less universally accepted is that the right covers government-held information.

²⁹ Alasdair Roberts, “Structural Pluralism and the Right to Information,” *The University of Toronto Law Journal* 51, no. 3 (2001): 243, <https://doi.org/10.2307/825940>. Pg. 243

³⁰ *Ibid.* at 243-244

³¹ *Ibid.* at 244

³² Bovens, *supra* note 19 at 318

³³ Alasdair Roberts, *supra* note 29 at 244

In the end, it could be assumed that there are many issues within freedom of information where there are no universally accepted and recognized approaches, and much is depended on what national legislation decides to establish.

1.3 Why protect Freedom of Information

Peled and Rabin indicate four theoretical justifications to outline the importance of freedom of information. These arguments include the political-democratic, instrumental, propriety and oversight justifications.³⁴ Under the political-democratic justification they underline the basic importance of the access to information for the proper functioning of democracy as a precondition of people's participation in a larger political debate.³⁵ From this point the link between the freedom of information on the one hand and the freedom of expression on the other is easy to anticipate. Freedom of expression breathes from the necessary information in order to form an informed opinion and participate in public debates.³⁶ Unlike this approach the instrumental justification has little to do with the content of the right itself, rather it is concentrated on other fundamental rights and freedoms and is used for their protection.³⁷ This argument refers to the understanding that it is not the freedom of information in itself that is valuable but it is the precondition, a tool for achieving other constitutionally protected rights and because of this it has to and does enjoy constitutional protection.³⁸ More precisely, those rights that are necessary for other fundamental rights to be guaranteed should also enjoy the constitutional status.³⁹ The propriety justification refers to the government-held information as the property of citizens, taxpayers of that particular

³⁴ Peled and Rabin, *supra* note 2 at 360

³⁵ *Ibid.*

³⁶ *Ibid.* at 361

³⁷ *Ibid.* at 363-364

³⁸ *Ibid.* at 363

³⁹ *Ibid.*

country as those who order the collection of information to public servants.⁴⁰ The authors acknowledge that this argument only justifies the right to citizens or residents of the country and not to everyone.⁴¹ Lastly, the oversight justification leaves the human rights realm and constitutes an important element in constitutionally established governmental structure that ensures the proper daily conduct of public officials eliminating or at least reducing the corruption.⁴² Apart from these arguments, there is an explanation that hints to the enhanced and increased legitimacy elevated by the access to information.⁴³

Ackerman and Sandoval-Ballesteros provide different set of categories, spheres for which the protection of freedom of information is important. They distinguish political, economic and public administration.⁴⁴ Under political realm they acknowledge the relevance of transparency for informed and more involved citizens into the public debate, decision-making process, while the economic advantage underlines the increased importance of openness for the investment environment.⁴⁵ Here the authors argue that for the long-term advantage the free circulation of truthful information contributes to the stable and more desirable “investment climate”.⁴⁶ As for the public administration purposes, the access of information increases the responsiveness and accountability of public servants to the public that results in enhanced decision-making process.⁴⁷

⁴⁰ *Ibid.* at 365-366

⁴¹ *Ibid.* at 365

⁴² *Ibid.* at 365

⁴³ Patrick Birkinshaw, “Freedom of Information and Openness: Fundamental Human Rights,” *Administrative Law Review* 58, no. 1 (2006): 177–218. Pg. 195

⁴⁴ Ackerman and Sandoval-Ballesteros, *supra* note 1 at 92

⁴⁵ *Ibid.*

⁴⁶ *Ibid.*

⁴⁷ *Ibid.*

From these different sets of justifications and explanations there can be two angles spotted for the protection of freedom of information. Firstly, the right can be regarded as an individual fundamental right to access to the information collected by public authorities and there is a much wider understanding of the right as a structural element of a constitutional design. As Bovens put it current rules on open government are the question of ‘public hygiene’ but the information rights are the issue primarily of citizenship.⁴⁸ Even though the terms of open government or transparency and the rights in general differ in many ways, one can hardly imagine transparency and open government without genuine protection of freedom of information. There is a much greater importance of the access to information in a democratic society than reducing it to only being a mean for individual self-fulfillment of a citizen, a resident or even non-resident to get to know to certain information. Neatly put by the Supreme Court of India “where a society has chosen to accept democracy as its creedal faith, it is elementary that its citizens ought to know what their government is doing ... It is only if the people know how government is functioning that they can fulfil the role which democracy assigns to them and make democracy a really effective participatory democracy”.⁴⁹

1.4 Universal standards that cover Germany, Czech Republic and Georgia

As has been shown from the previous subchapters there is much to discuss and countries have much details to settle within the protection of freedom of information. It has also been mentioned on several occasions that there is no universal approach and understanding with regard to the content or the extent of the right. But the last claim cannot be considered entirely true. Even though,

⁴⁸ Bovens, *supra* note 19 at 327

⁴⁹ S.P. Gupta v. Union of India, 1981 Supp (1) SCC 87; Para. 63. Available at: <https://indiankanoon.org/doc/1294854/>

national authorities and the legislation are free to choose their path there are certain legal spaces within which legal standards are set internationally and applies to all its participants. For the purposes of this thesis, it is important to consider such universal standards set by the European Convention on Human Rights (Hereinafter “the Convention”) and the case – law of the European Court of Human Rights (hereinafter “the Court”) that is the authoritative body to interpret and apply the Convention⁵⁰. The reason for landing on this particular Convention is quite simple – all three comparator jurisdictions throughout this thesis are covered by the Convention and bound by its standards as well as by the case – law of the Court.⁵¹

The overview has to start from the text of the Convention which in its article 10 prescribes the freedom of expression by guaranteeing the right “to hold opinions and to receive and impart information and ideas”.⁵² On numerous occasions the Court has emphasized that the said provision limits the government to abstract a person “from receiving information that others wish or may be willing to impart to him”⁵³ but at the same time acknowledged that this right does not equip a person with the ability to request a “register containing information” or put an obligation to provide a person with such information.⁵⁴ Therefore, the Court had not interpreted mentioned article in the way that would give a person right to seek the government-held information for years. Even though this standard was maintained, the first real and formal acknowledgement of the right to seek the information happened in 2016 in the case against Hungary.⁵⁵ Here, the Court saw the

⁵⁰ European Convention on Human Rights; article 32

⁵¹ Information on the dates of ratification of the Convention can be found here: <https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/005/signatures>

⁵² European Convention on Human Rights; article 10; para. 1

⁵³ Case of Leander v. Sweden; ECtHR (Application no. 9248/81) 26 March 1987; para. 74

⁵⁴ *Ibid*;

⁵⁵ Case of Magyar Helsinki Bizottsag v. Hungary; ECtHR (Application no. 18030/11) 8 November 2016

necessity to facilitate the right within the Convention but considering the text of the article 10, as well as the nature of the international document that puts international obligations to the contracting states, the acknowledgement of the right from the Court was rather narrow.

More precisely, the Court found that “in circumstances where access to information is instrumental for the exercise of the applicant’s right to receive and impart information, its denial may constitute an interference with that right”.⁵⁶ Further in the judgment, the Court went on to summarize those threshold principles that underline and most importantly, trigger the protection of freedom of information.⁵⁷ In deciding whether there has been an interference in article 10 the court gives consideration to circumstances, namely – “purpose of the information requested”⁵⁸, “nature of the information sought”⁵⁹, “role of the applicant”⁶⁰ and whether the information is “ready and available”⁶¹.

For the first criteria, the Court looks at whether the information was requested for the applicant in order to enjoy freedom of expression.⁶² Moreover, even considering the purpose just mentioned is present the Court has to be convinced that the nature of the information satisfies the ‘public-interest test’.⁶³ The matter whether certain information falls under the category of public interest depends on individual circumstances of the case.⁶⁴ At the same time, it is clear from the Court’s case law that it has to raise issue of public importance and cannot be diminished to the mere interest

⁵⁶ *Ibid*; para. 155

⁵⁷ *Ibid*; para. 157

⁵⁸ *Ibid*; paras. 158-159

⁵⁹ *Ibid*; paras. 160-163

⁶⁰ *Ibid*; paras. 164-168

⁶¹ *Ibid*; paras. 169-170

⁶² *Ibid*; para. 159

⁶³ *Ibid*; para. 161

⁶⁴ *Ibid*; para. 162

in other peoples' lives.⁶⁵ Under the consideration of the role of the applicant the Court has emphasized that even though the right sought belongs to "everyone"⁶⁶ there are certain categories of professions or activities that attract increased role in free expression and hence, their special necessity to have access to state-held information, such as journalists or non-governmental organizations considering their function as social watchdogs,⁶⁷ academic researchers and authors of literature on public matters as well as bloggers and socially active persons.⁶⁸ As for the last threshold criteria, the Court explained that in deciding the matter about access to state-held information it constitutes an important consideration whether the information requested is in fact ready and available.⁶⁹

These criteria were further used by the Court in Georgian case where it found that the failure from applicants to provide the purpose of requesting the judicial documents did not correspond satisfy the requirements under article 10⁷⁰ and the fact that the applicants were able to advance their journalistic investigation even without the information sought made it clear that the access was not instrumental for freedom of expression.⁷¹ Moreover, the Court made it clear that the role of the applicant in a society is an important consideration as one of its arguments rested on a fact that one of the applicants was not a journalist or "a representative of a "public watchdog"" that also

⁶⁵ *Ibid*;

⁶⁶ European Convention on Human Rights; article 10, para. 1

⁶⁷ Case of Magyar Helsinki Bizottsag v. Hungary; *supra* note 55; para. 164

⁶⁸ *Ibid*; para. 168

⁶⁹ *Ibid*; para. 170

⁷⁰ Case of Studio Monitori and Others v. Georgia, ECtHR (Applications nos. 44920/09 and 8942/10) 30 January 2020; para. 40

⁷¹ *Ibid*; para. 41

did not satisfy the criteria under article 10 with regard to right to access the state-held information.⁷²

Having in mind this very brief overview certain aspects can be deduced. Firstly, there is a direct text of the Court that the freedom of and access to state-held information is not in itself independent right and is protected under the Convention only in relation with freedom of expression guaranteed under article 10. Furthermore, the Court does not equip every piece of information with the same value and in this context the information should fall under the public domain in order to attract the protection of the Convention as well as not everyone's right to access to state-held information has the same protection and meaning in democratic society. This narrow extent of the right under the article 10 of the Convention was recognized only in 2016 by the Court.

2. Constitutional and Legislative Regulation of Freedom of Information in Germany, the Czech Republic and Georgia

As it is already clear from the preceding chapter methods and legal forms to guarantee freedom of information is quite versatile and differs depending on a given jurisdiction. For that reason, this chapter will try to unfold such attitudes in chosen countries through their national legislation. Firstly, the chapter will concentrate on mere textual understanding of respective constitutional provisions provided by the author. Then it will provide information on legislative regulation of the right in respective jurisdictions and lastly, the chapter will touch upon the place of freedom of information in a given constitutional order as seen and understood by constitutional courts.

⁷² *Ibid*; para. 42

2.1 Constitutional protection of freedom of information

To start with the country of longest history of democratic governance between the three comparative jurisdictions the Basic Law of Germany does not include a provision that would independently guarantee the separate right to information. Despite this the Basic Law guarantees freedom of expression and at the same time states that “Every person shall have the right ... to inform himself without hindrance from generally accessible sources”⁷³. It is interesting that the Federal Constitutional Court of Germany connected the inclusion of the ‘right to inform oneself’ to the history of Germany up until 1945. The Court explained that after the World War II the right first made it to different state constitutions and finally found its place in the Basic Law.⁷⁴ In its part this was a result of past experiences under the National Socialists including the limitations on opinions, art and literature, information etc.⁷⁵

Before considering what does this text mean under the interpretation of the Federal Constitutional Court of Germany, it is useful to look just to the wording and afterwards compare the constitutional protection of the right to other constitutions from chosen jurisdictions.

The German provision is not quite detailed. There is a general right for every person to inform oneself. The one characteristic that could be deduced from the text is that the right belongs to everyone and is not qualified by the requirements such as citizenship or any other characteristics. What is the most important in terms of this thesis is how much does the text of the Constitution has to do with the state-held information. The wording of the provision implies that the right

⁷³ The Basic Law of Germany; article 5, para. 1

⁷⁴ "Leipzig Daily Newspaper Case"; BVerfGE 27, 71 1 BvR 46/65; para. C-II (1); unofficial English translation available at: <https://law.utexas.edu/transnational/foreign-law-translations/german/case.php?id=649>

⁷⁵ *Ibid.*

belongs to a person to be able to inform her/himself and does not necessarily oblige the state to provide the said person with the information that is requested. Moreover, the Basic Law refers to the negative obligation of the state not to interfere with the enjoyment of this right. This kind of purely textual understanding is a narrow interpretation of a general right of a person to seek and have access to the information kept by the public authorities. What is even more interesting in this context is the reference to ‘generally accessible sources’ by the Constitution. Without regard to the implications and the further understanding of the term by the Constitutional Court I think that this term could be understood as narrowing down the right to access to information down to what could be regarded as generally accessible source in the future.

It goes without saying that the abovementioned fundamental rights are not absolute in German constitutional law and the Basic Law states the grounds for their limitation that can be enshrined “in the provisions of general laws, in provisions for the protection of young persons, and in the right to personal honour”.⁷⁶

The general provision of the Constitution of the Czech Republic is similar and at the same time slightly different from that of German. The Charter of Fundamental Rights and Basic Freedoms does explicitly guarantee “right to information”⁷⁷. Similarly to German article here, freedom of information and expression is merged in the same constitutional provision. It states that “The freedom of expression and the right to information are guaranteed”.⁷⁸ It has to be noted that the right was already there when the Constitution went into effect in 1993 and existed even before as part of the Charter with the same title as above but being an addition to the then existing

⁷⁶ The Basic Law of Germany; article 5, para. 2

⁷⁷ The Constitution of Czech Republic, Charter of Fundamental Rights and Basic Freedoms; Article 17; para. 1

⁷⁸ *Ibid.*

Czechoslovak Constitution as a catalog of rights from 1991.⁷⁹ The Charter has been maintained within the independent Czech Republic as well⁸⁰ and by the reference of the Constitution⁸¹ today forms part of the constitutional order in the country.

The provision itself does not provide any definition of the content of freedom of information. What could be said based on the mere provision is that it grants the right to information to everyone not qualifying the addressees. Just like the Basic Law this general provision of the Charter does not really spell out the access to government-held information. What is different from the German example is that the Constitution goes further and apart from guaranteeing general right to information states that “State bodies and territorial self-governing bodies are obliged, in an appropriate manner, to provide information with respect to their activities. Conditions therefor and the implementation thereof shall be provided for by law”.⁸² I think that the entirety of these provisions create not only a negative obligation for the state not to interfere in the exercise of that right but explicitly confers the positive obligation to ‘state bodies and territorial self-governing bodies’ by imposing an obligation to provide information about their activities accessible ‘in an appropriate manner’. Even though there is an argument that this provision and its reach is rather restricted down to mere press-releases about the activities of a respective body⁸³ I would argue that this could be a substantial guarantee for a transparent governance or at the very least a foundation to become so through national constitutional adjudication. At least, there is the basis in

⁷⁹ Marek Antoř, “The Constitutional Right to Information in the Czech Republic: Theory and Practice,” *International Comparative Jurisprudence*, no. 1 (2019), <https://doi.org/10.13165/j.icj.2019.05.006>. Pg. 47

⁸⁰ *Ibid.*

⁸¹ The Constitution of Czech Republic; Articles 3 and 112(1)

⁸² The Constitution of Czech Republic, Charter of Fundamental Rights and Basic Freedoms; Article 17; para. 5

⁸³ Marek Antoř, *supra* note 79 at 48

the Charter to interpret the right as a general constitutional guarantee for everyone to have access to information held by the state.

As is the case for most constitutional rights and freedoms the Czech Constitution allows restriction of the right in case it is necessary in a democratic society to protect other's rights and freedoms, state or public security, "public health or morals".⁸⁴ There is also a formal requirement that the limitation should be envisaged by law.⁸⁵

I think the Constitution of Georgia is the most straightforward regarding the protection of freedom of information. In a separately dedicated provision the Constitution envisages that "Everyone has the right to be familiarised with information about him/her, or other information, or an official document that exists in public institutions in accordance with the procedures established by law".⁸⁶ The right has been part of the constitutional catalogue of human rights since the very beginning of the independent history of the state as the original version of the Constitution adopted in 1995 right to access information was included in the Constitution.⁸⁷ Unlike Germany or the Czech Republic, the Georgian Constitution does not guarantee the right together with freedom of expression but considers it with the right to fair administrative proceeding as well as right to compensation caused by public authority.⁸⁸ Here also, right to access to information is protected for everyone without any limitation. This is an extension of coverage of the right since the latest amendments to the Constitution went into force in 2018 until when the right to information was only guaranteed for

⁸⁴ The Constitution of Czech Republic, Charter of Fundamental Rights and Basic Freedoms; Article 17; para. 4

⁸⁵ *Ibid.*

⁸⁶ The Constitution of Georgia; article 18; para. 2

⁸⁷ The Constitution of Georgia (as adopted in 1995); Article 41

⁸⁸ The Constitution of Georgia; article 18; (the title of the article: "RIGHTS TO FAIR ADMINISTRATIVE PROCEEDINGS, ACCESS TO PUBLIC INFORMATION, INFORMATIONAL SELF-DETERMINATION, AND COMPENSATION FOR DAMAGE INFLICTED BY PUBLIC AUTHORITY")

citizens.⁸⁹ The current provision also clarifies that the access is not restricted by the form of the information and covers any ‘information, or an official document’.

It could be assumed from the text that the Constitution does not consider any information held by public institutions as public as it restricts the right not to be extended to those, containing state, commercial or professional secret.⁹⁰ Apart from these limitations the Constitution separately protects personal information contained in official records and states that such information should not be accessible for anyone without the consent of a person whose information is concerned.⁹¹ In itself this protection of personal information comes with the limitation clause excluding the guarantee when provided “by law and as is necessary to ensure national security or public safety, or to protect public interests and health or the rights of others”.⁹²

All three constitution guarantee the right to information at a different level. I think that the narrowest from them is prescribed by the Basic Law where it seems more like a freedom for a person to be informed and not a positive obligation for the state to provide a person with such an information. The guarantee of right to information in the Charter of the Czech Republic seems similar in that it does not go into details as to what type of right or obligation is envisaged under the constitutional text but unlike the Germany, there is a clear indication to the positive obligation. The Charter clearly points to the state and its obligation to provide information. As for Georgia, its constitution I think is the clearest on a matter and prescribes certain details that cannot be interpreted in any other way but to ensure the proper access to information held by public

⁸⁹ The Constitution of Georgia (in force until 16 December 2018); Available at: <https://matsne.gov.ge/ka/document/view/30346?impose=translateEn&publication=34>

⁹⁰ The Constitution of Georgia; article 18; para. 2

⁹¹ *Ibid.* article 18; para. 3

⁹² *Ibid.*

authorities. What is similar in all three jurisdictions is that they envisage different types of restrictions for the right as well as guaranteeing the right to everyone.

2.2 Legislative regulation of access to information

Apart from guaranteeing the right by constitution, freedom of information may be ensured through the legislation. Moreover, as Ackerman and Sandoval-Ballesteros note the mere existence of a constitutional provision cannot in itself present the adherence and protection of the principle without the help of an intermediate legislation that puts the constitutional provision into practice.⁹³ Therefore, not envisaging the right in the constitution does not necessarily mean that the right is not protected and in contrast, its protection by the constitutional texts cannot ensure its enforcement either. These reasons make it important to observe the legislation regarding freedom of information in chosen countries.

In Germany the legislation regulating freedom of information went into force in 2006 by adopting Federal Act Governing Access to Information held by the Federal Government (Hereinafter “FOIA”).⁹⁴ The date comes quite late compared to the worldwide tendency of acknowledging the right in national legislations and due to the circumstance that the work towards adopting the respective legislative piece in Germany started as early as 1994.⁹⁵ The FOIA is the first federal normative act that regulates and grants people access to the information.

⁹³ Ackerman and Sandoval-Ballesteros, *supra* note 1 at 94

⁹⁴ Christoph Emanuel Mueller, Bettina Engewald, and Marius Herr, *Freedom of Information in Germany* in Dacian C. Dragos, Polonca Kovač, and Albert T. Marseille, eds., *The Laws of Transparency in Action: A European Perspective* (Cham: Springer International Publishing, 2019), <https://doi.org/10.1007/978-3-319-76460-3>. Pg. 205

⁹⁵ *Ibid.*

The FOIA states that “Everyone is entitled to official information from the authorities of the Federal Government”.⁹⁶ This provision lays several important principles to emphasize. Firstly, the FOIA grants the right of access to information to everyone not limited to its citizens and residents; Secondly, and with conjunction of Section 2(1) of the same document under the official information it means every and any record that serves official purposes at the same time excluding the drafts and notes; Lastly, considering the legal problems with regard to the coverage of FOI laws described in the first chapter, the FOIA expands its binding effect over any authority of federal government. The FOIA itself is a federal regulation and consequently does not provide any obligations for the authorities at a state level. It has to be noted that the FOIA does not stop at only governmental authorities and clarifies that its rules are applicable also to those other bodies or authorities that have received delegated tasks under the public law.⁹⁷ This approach includes natural and legal persons equally.⁹⁸

The FOIA clarifies its approach to the manner of retrieving the information and states that the choice of manner of receiving requested information lays to the individual requesting it that could be limited when there is a “good cause” for it, specifying that the high administrative expense can be regarded as such.⁹⁹

Czech Republic adopted its first law on freedom of information in 1999 by passing the Act No. 106/1999 Coll. On Free Access to Information that is in force from 2000 till today.¹⁰⁰ Consistent to the respective Constitutional regulation the Act provides right to access to information for

⁹⁶ Federal Act Governing Access to Information held by the Federal Government of Germany (5 September 2005); Section 1(1)

⁹⁷ *Ibid.*

⁹⁸ *Ibid.*

⁹⁹ *Ibid.* Section 1(2)

¹⁰⁰ Marek Antoř, *supra note 79* at 49

everyone including individuals as well as entities.¹⁰¹ As to the legally obliged persons who have to provide the information to the public regulations are given under Section 2 of the Act. According to the provision such persons are “state agencies, territorial self-governing units and their bodies, and public institutions”.¹⁰² Their obligation of providing the information goes as far as it relates to their powers.¹⁰³ Apart from public bodies and authorities the obligation of disseminating requested information also covers those persons upon whom the decision-making power in the area of public administration had been delegated by law.¹⁰⁴

The Czech FOI law is quite generous in determining what does the term ‘information’ entails prescribing that it includes any content no matter the medium it had been recorded or stored.¹⁰⁵ Though, there are certain exceptions, like “requests for opinions, future decisions and the creation of new information” are excluded from the definition;¹⁰⁶ also, computer programs are not considered as ‘information’ for the purposes of the Act.¹⁰⁷

The Czech FOI law establishes two legal regimes for provision of information: [1] providing information by request of any entitled person¹⁰⁸ and [2] publication of information by the legally obliged bodies.¹⁰⁹ It has to be noted that the Act prescribes in details the information that has to be

¹⁰¹ Act No. 106/1999 Coll. On Free Access to Information of the Czech Republic; Section 3(1)

¹⁰² *Ibid.* Section 2(1)

¹⁰³ *Ibid.*

¹⁰⁴ *Ibid.* Section 2(2)

¹⁰⁵ *Ibid.* Section 3(3)

¹⁰⁶ *Ibid.* Section 2(4)

¹⁰⁷ *Ibid.* Section 3(4)

¹⁰⁸ *Ibid.* Section 4a

¹⁰⁹ *Ibid.* Section 4b

disseminated by the obliged body¹¹⁰ and crates National Open Data Catalogue¹¹¹ for their recording.

Unlike both Germany and the Czech Republic in Georgia there is no special, codified law on freedom of information. In spite of this the legislative implementation of the constitutional right has been put in practice through the General Administrative Code of Georgia (hereinafter “the Code”) adopted in 1999.¹¹² The regulations had been there from the very beginning of adoption and it covers the whole territory of the country. The Code and namely respective chapter prescribes what is meant under the term public institution which for the purposes of freedom of information regulations include administrative body, also “legal person under private law with funding received from the state or local budget”.¹¹³ Moreover, under the definition of administrative body the legally bound bodies to whom freedom of information rules apply are those persons that exercise authority under public law.¹¹⁴

The Code guarantees access to “public information” to everyone.¹¹⁵ Under Georgian regulations public information is deemed open unless otherwise is stated by law or it contains professional, commercial or state secrets or personal data.¹¹⁶ There are also prescribed exceptional cases when the rules of freedom of information do not apply. These are certain enumerated occasions prescribed by the Code that includes but is not limited to for instance the criminal investigation¹¹⁷

¹¹⁰ *Ibid.*

¹¹¹ *Ibid.* Section 4c

¹¹² The General Administrative Code of Georgia; Chapter three; English translation available at: <https://matsne.gov.ge/ka/document/view/16270?impose=translateEn&publication=33>

¹¹³ *Ibid.* article 27(a)

¹¹⁴ *Ibid.* article 2, para. 1a

¹¹⁵ *Ibid.* article 37(1)

¹¹⁶ *Ibid.* article 28(1)

¹¹⁷ *Ibid.* article 3, para. 4b

or the execution of international treaties and agreements or the implementation of foreign policy.¹¹⁸

With regard to the format, the Code is also quite inclusive as it states that anyone is entitled to request public information no matter “its physical form and stored conditions”.¹¹⁹

The rules prescribed by the Code are not the only regulations in the country as well and different legal regimes are applied considering the subject matter. For instance, access to personal information contained in public information is governed by the Law of Georgia on Protection of Personal Data¹²⁰ just like legal regime for other types of secret information mentioned above is governed by the subsequent provisions of the Code.¹²¹

Apart from individual requests allowed for access to information by the Code it also defines the obligation of public institutions of a proactive publication of public information¹²² for the purpose of which there is a Public Register established.¹²³

In the end, there are obvious similar patterns in regulating freedom of information in all three jurisdictions as well as certain differences among them.

2.3 Freedom of Information in constitutional adjudication

In determining the place of fundamental rights in established constitutional order it is important to look into the case-law of respective constitutional courts. Their assessment has a huge influence on existing national legislation and normative framework. Therefore, here as well, in terms of

¹¹⁸ *Ibid.* article 3, para. 4f

¹¹⁹ *Ibid.* article 37(1)

¹²⁰ *Ibid.* article 27¹

¹²¹ *Ibid.* articles 27² – 27⁴

¹²² *Ibid.* article 28(2)

¹²³ *Ibid.* article 35

understanding the approach chosen countries took towards freedom of information, it is worth to look how do respective constitutional courts understand this right.

As the first subchapter tried to understand the text of article 5 (1), first sentence of the Basic Law it was stated that there is a right to information, but it does not entail the positive obligation for the state to produce government-held information. In this context it is important that the interpretation of article 5 (1), first sentence by the Federal Constitutional Court of Germany gives much meaning and content as to what type of basic right is guaranteed. The Court emphasized that freedom of information in existing constitutional order is protected at the same level as freedom of opinion and the press¹²⁴ and that this right first and foremost protects the freedom ‘to inform oneself’.¹²⁵ In highlighting the importance of the right itself the Court stressed heavily on its effect and value in a democratic state underlying that it enables individual as well as the community as a whole to form and express opinion.¹²⁶ Therefore, freedom of information is an important prerequisite for freedom of expression. According to the Court existence of well-informed and free public opinion is a basis for the democracy.¹²⁷ In addition, the Court acknowledged the connection of freedom of information to an individual’s personality and the basic need to inform oneself, deepen the knowledge from every possible source of information and in this way develop one’s personality.¹²⁸ Moreover, the possession of information in a contemporary world determines one’s social standing and it is this freedom that gives a person ability to be a responsible citizen and play its role in a democracy.¹²⁹

¹²⁴ BVerfGE 27, 71 1 BvR 46/65; *supra* note 74; C-II (2a)

¹²⁵ *Ibid.*

¹²⁶ *Ibid.*

¹²⁷ *Ibid.*

¹²⁸ *Ibid.*

¹²⁹ *Ibid.*

Considering these arguments, it is only logical that the Court weighted freedom of information as valuable as freedom of speech and press. Despite this, the Constitutional Court did not interpret the provision too extensively and universally in terms of freedom of information. Even though, the Court stated that the right includes not only the procurement but also the recipient of information¹³⁰ further it pointed to the wording of the constitutional provision that right of access to information only applies to the ‘generally accessible sources of information’.¹³¹ In the Court’s view such sources are those “both technically suited and intended for providing information to the general public, i.e., to a circle of persons not definable as to individuals”.¹³² In this regard the Court considered that a newspaper for this purposes was to be considered as generally accessible source.¹³³ This approach has been reiterated by the Court on several occasions¹³⁴ in addition stressing that when the legislator decides on fundamental accessibility and also opens the source for general public it falls under the fundamental protection of freedom of information.¹³⁵ Without this requirement met there is no such right in principle.¹³⁶

In terms of restriction of freedom of information the Court made an important explanation that the constitutional protection of the right is not diminished by the legislative regulations that intend to abridge their dissemination.¹³⁷ This particular statement from the Court is significant in light of paragraph 2 of article 5 of the Basic Law that prescribes the possibility of limitation of the rights prescribed by the first paragraph by “general laws”.¹³⁸ Hence, the Court excluded the interpretation

¹³⁰ *Ibid.* at C-II (2b)

¹³¹ *Ibid.* at C-II (2c)

¹³² *Ibid.*

¹³³ *Ibid.* at C-III (1)

¹³⁴ German Federal Constitutional Court’s Order of 20 June 2017, 1 BvR 1978/13; B-II (1)

¹³⁵ *Ibid.*

¹³⁶ *Ibid.*

¹³⁷ BVerfGE 27, 71 1 BvR 46/65; *supra* note 74 at C-II (2c)

¹³⁸ Basic Law of Germany; article 5(2)

of general laws mentioned in the Basic Law in a formalistic way that would result in dependence of the basic right to the will of the legislator.

When talking about the constitutional guarantees of freedom of information in the context of constitutional adjudication of the Czech Republic Antoš notes that the dispute where the Court could have to clarify the constitutional guarantees has not appeared.¹³⁹ Even in such absence of determination from the Court in its existing decision it expanded on the matter of the importance of freedom of information. While deciding on a case concerning the access to archival records of the Former Security Services as oppose to the interest of personal data protection the Court emphasized that freedom of information establishes an independent fundamental right.¹⁴⁰ This recognition comes in line of the reasoning that freedom of information is not depended and conditioned by the subsequent dissemination of acquired information.¹⁴¹ Moreover, the Court acknowledged the importance of access to information for the constitutionally protected freedom of thought and consciousness¹⁴² at the same time acknowledging that there may be different requirements for restriction of the right to seek and receive the information in contrast to their dissemination depended on e.g. the intensity of its negative influence on privacy right.¹⁴³

What is quite interesting from this decision is the differentiated approach of the Court to different legal regimes for the access to archival record for the personal viewing and for the subsequent dissemination. The Court held that the interference in privacy is much less when a professional researcher has access to records for own personal use comparing with the publication of personal

¹³⁹ Marek Antoš, *supra note 79* at 48-49

¹⁴⁰ Constitutional Court of the Czech Republic; Judgment of 20 December 2016 (Pl.ÚS 3/14); Para. 65

¹⁴¹ *Ibid.*

¹⁴² Constitution of Czech Republic; Charter of Fundamental Rights and Basic Freedoms; Article 15(1)

¹⁴³ Judgment - Pl.ÚS 3/14, *supra note 140*; para. 65

information accessible for unlimited and unidentified circle of people.¹⁴⁴ The Court found the absence of the consent from the person affected compatible with the constitution by allowing researchers access to archival records for personal use.¹⁴⁵ The Court went on to justify its approach that under depersonalized information respective professionals would only have an access to distorted materials from the totalitarian past that “would not permit a sufficiently intensive social catharsis regarding the past, which is constantly needed”.¹⁴⁶ Therefore, the Court found it equally important for the researchers to have access to not only the content of the existing records but to the personal data included in them as well. Here, the Court found legitimate aim of studying the past or educating the citizens in that regard to be sufficient for restriction of privacy of a living individual affected by the disputed legislation.¹⁴⁷

When assessing the strict proportionality of disputed legislation, the Court deemed time and relevance of an information for the public as one of the important factors to take into consideration stressing that in terms of researching the past huge time lapse would have rendered the information less valuable.¹⁴⁸

Even though, for the Court access to historical records formed strong argument against the protection of privacy of affected individuals, that approach is not unlimited. There are different categories of personal information, among which more sensitive category of the information exist. About this type of data, the Court acknowledged the obligation of the state to establish sufficient

¹⁴⁴ *Ibid.* para. 90

¹⁴⁵ *Ibid.* para. 97

¹⁴⁶ *Ibid.* para. 98

¹⁴⁷ *Ibid.* para. 99

¹⁴⁸ *Ibid.* para. 108

legal system that would guarantee protection of such sensitive information by means of supervision by an independent body, palpable sanctions for their violations etc.¹⁴⁹

As for Georgian Constitutional Court it had to deal with the issue of balancing freedom of information on several occasions and in majority of cases the matter concerned its relation to personal data protection. Initial approach from the Court was that the constitutional regulation excluding personal information from right of access to information did shrink the scope of the latter right unless the consent of the affected person was present.¹⁵⁰ This approach was changed by overruling the previous practice in 2018.¹⁵¹ The Court emphasized that the conflict between fundamental rights is often unavoidable that does not preclude their co-existence.¹⁵² Moreover, protection of personal information by the Constitution in itself does not exclude such information from the scope of the right to access to public information especially when the Constitution in itself allows restriction of private data protection in line of established constitutional requirements.¹⁵³ Therefore, the Court took an approach by which the conflict of freedom of information and the privacy is not decided by the constitution and can be subject of a constitutional adjudication.

In terms of freedom of information itself, the Court held that the right includes access to any official information existing in public authorities.¹⁵⁴ The Court has reiterated that it is an important prerequisite for informational self-determination and one's personal development¹⁵⁵ without

¹⁴⁹ *Ibid.* para. 106

¹⁵⁰ Constitutional Court of Georgia; Judgment of 30 October 2008 (2/3/406,408); Para. II-21

¹⁵¹ Constitutional Court of Georgia; Judgment of 14 December 2018 (3/1/752)

¹⁵² *Ibid.* para. II-9

¹⁵³ *Ibid.* para. II-10

¹⁵⁴ Constitutional Court of Georgia; Judgment of 14 July 2006 (2/3/364); English translation available at: <https://www.constcourt.ge/en/judicial-acts?legal=282>

¹⁵⁵ Decision of 14 December 2018 (3/1/752), *supra note 152* para. II-2

which it is impossible to ensure freedom of opinion and the necessary discussion typical for a free society.¹⁵⁶ Moreover, its importance is much greater than merely guaranteeing the individual self-fulfillment by accessing the needed information in a democratic society as freedom of information ensures the accountability and effectiveness of public governance.¹⁵⁷ The Court linked the importance of freedom of information to the open governance as it helps the society to carry out the social supervisory function and a timely detection of violations in the process.¹⁵⁸ The Court underlined an extensive value of freedom of information in context of court judgments emphasizing that the transparency of justice is closely connected to the legitimacy of their judgments,¹⁵⁹ is particularly important for the social supervision of the justice system,¹⁶⁰ establishes the public trust in it,¹⁶¹ forms part of the right to a fair trial¹⁶² and ensures the legal certainty as courts are the institutions who have the final word on how the normative regulations are enforced and applied in practice.¹⁶³ Therefore, considering the justifications behind accessibility of court decisions the Court highlighted that no matter their content, these arguments transform them subject to increased public interest.¹⁶⁴ The Court acknowledged that court decisions may contain sensitive information about one's private life and may negatively affect it hence, held that there is a need for a case-by-case determination and assessment of conflicting interests¹⁶⁵ but in itself the default balance in favor of protection of privacy is unconstitutional.¹⁶⁶

¹⁵⁶ *Ibid.* para. II-3

¹⁵⁷ Constitutional Court of Georgia; Judgment of 27 March 2007 (1/4/757); II-5

¹⁵⁸ *Ibid.*

¹⁵⁹ Constitutional Court of Georgia; Judgment of 7 June 2019 (1/4/693,857); II-45

¹⁶⁰ *Ibid.* para. II-46

¹⁶¹ *Ibid.* para. II-47

¹⁶² *Ibid.* para. II-48

¹⁶³ *Ibid.* para. II-49

¹⁶⁴ *Ibid.* para. II-51

¹⁶⁵ *Ibid.* para. II-58

¹⁶⁶ *Ibid.* para. II-67

At the same time, the Court underlined the importance of timely access to the requested information as the delay may render the right ineffective.¹⁶⁷ Following, the Court obliged the state to establish legal system that would better guarantee the balance between the two constitutionally recognized interests and ensure the timely access to the information.¹⁶⁸

To sum up, in all three jurisdictions respective constitutional courts put much emphasis on the constitutional protection of freedom of information. At the same time, they see the right as a necessity and a prerequisite for a democratic society that is not an absolute right and can be restricted.

3. Assessment of Existing Systems in Germany, Czech Republic and Georgia

After the basic overview of three chosen jurisdictions in terms of freedom of information this chapter aims to summarize and underline existing similarities or differences between the approaches adopted by the respective states or their constitutional courts.

First, all three countries have had similar experiences until the adoption of freedom of information. While Germany included the right in its Basic Law decades earlier than either Czech Republic or Georgia, their reasoning lay in lessons learnt under the experiences of National Socialists through restrictions in terms of opinion, press or broadcasting, etc.¹⁶⁹ On the other hand, for Georgia or Czech Republic the painful past entailed the inclusion in the Soviet Union gaining of independence from which was followed by the adoption of their respective constitutions including the right to

¹⁶⁷ *Ibid.*

¹⁶⁸ *Ibid.*

¹⁶⁹ *Supra note 74-75*

information from the beginning.¹⁷⁰ Therefore, it is safe to say that all three countries had totalitarian past experience before resorting to include freedom of information in their constitutions that fits quite well into the logic of Peled and Rabin described above.¹⁷¹ Other similarity for all three states can be found in their international commitments as they all became members of the Council of Europe after the mentioned historical transition.

In this respect, even though the understanding of the right by the German Constitutional Court heavily depends on its importance for freedom of expression it differs from the case-law of the ECtHR in that it also stressed on the meaning of informing oneself for development of her/his personality.¹⁷² One thing that significantly differentiates German Court's understanding from both other jurisdictions is the essence of 'generally accessible source' that I think narrows down the scope the fundamental right of freedom of information and more or less makes it dependent on the intent of the legislator.¹⁷³

In this regard the approach explicitly taken by Czech Republic is similar in that it includes freedom of information in the same constitutional provision as freedom of expression while Georgian logic differs. More precisely, in Georgian Constitution freedom of information is presented together with the good administration that also includes rights to a fair administrative proceeding and the compensation for the damage caused by public authorities. From chosen countries Georgia is the only state that has not adopted legislation specifically dedicated to freedom of information and its

¹⁷⁰ See *supra* notes 74, 79, 87

¹⁷¹ See *supra* notes 14-16

¹⁷² *Supra* notes 127-128

¹⁷³ *Supra* notes 130-135

basic principles are governed by the General Administrative Code while both Germany and the Czech Republic have adopted respective special regulations on the matter.

In terms of the content of the regulations in all three countries the understanding of freedom of information broadly could be regarded as similar as they guarantee the right to everyone not restricted to legal connection of an individual to the state as well as they guarantee access to information held by public authorities. Here, the difference should be noted that while both German and Czech regulation expands freedom of information to public authorities as well as to those institutions entrusted with public functions in Georgian legal solution freedom of information in addition has an obligatory effect also for those persons that receive finances from state or local budget.

When it comes to comparison and assessment of the three chosen jurisdictions there are certain similarities adopted by their constitutional courts. The obvious consistent approach is the attitude that all three apex courts understand freedom of information to be an important fundamental right that establishes prerequisite for democratic state. They share the reasoning that this right is necessary for formation and expression of one's opinion and participation in public debates.

At the same time, they all acknowledge that the right can be limited in order to balance it with other conflicting interests. In this regard, it must be noted that from analyzed decisions Georgian Constitutional Court seems to be the only one that established that the default balance by the legislation in favor of protection of personal information was unconstitutional. More precisely, if there are no additional exceptional circumstances the advantage should be granted to freedom of information when talking about the transparency of court decisions.

In this regard it is interesting that Georgia is also a participant of ECtHR but considering the abovementioned standard from the Court¹⁷⁴ weighting the intent of the request of information as one of the most relevant factors the Constitutional Court of Georgia clearly did not follow the line as it did not condition the enjoyment of freedom of information with the assessment of possible intent of a legal/natural person requesting the information. It recognizes the general right to access the information and, in this light, must be said unlike Germany that qualified freedom of information with generally accessible sources of information. Moreover, I believe that all three countries and the case-law of their respective constitutional courts present different understanding of the role of those requesting the information from the standard set by the ECtHR. The case-law of the latter grants increased importance to the issue by inquiring into whether the applicant can and intends to contribute to the public debate by the information sought while the right to information under the national legal framework leans toward more universal understanding in principle, providing the right to everyone falling under the scope of the fundamental right.

In terms of limitations, the Czech Constitutional Court examined the difference between the use of information for personal use and for the purposes of its dissemination when there are stricter requirements applicable. Here, I think that Georgian approach is also more protective of freedom of information in as much as for the Court the subsequent use of acquired information did not constitute a decisive factor.

Consequently, despite of significant similarities between the jurisdictions of targeted countries in the center of this thesis there are significant differences that make them worth considering. Having in mind the information provided in the former chapter Georgia seems to be providing the greater

¹⁷⁴ *Supra* note 70

constitutional protection in the constitutional adjudication than the assessed case law of constitutional courts of Germany or the Czech Republic allow us to notice. While there may be a perfectly logical explanation for this as for instance in case of Czechia Antos notes to be a result of lack of disputes thanks to liberal legislation¹⁷⁵ such an assessment is beyond the scope of this thesis.

CONCLUSION

The thesis has presented a brief history of development of freedom of information and its transformation into the fundamental right guaranteed in national constitutions or protected by their legislation. Moreover, it presented some of the problematic aspects in determining the meaning and the scope of freedom of information that still need to be answered along with the theoretical justifications for its protection.

Further, the second chapter provided overview of normative framework of regulating and guaranteeing freedom of information in three chosen jurisdictions. It created the basis for the further chapter to summarize the legal environment created for freedom of information in chosen countries. Consequently, this made possible to notice that in all three states freedom of information is recognized and protected both at constitutional and legislative level. Based on the theoretical explanation presented in the first chapter it has been suggested that inclusion of freedom of information in their constitutions explicitly was largely determined by the history and the period the basic documents of these countries were adopted. Despite of direct constitutional mentioning

¹⁷⁵ Marek Antoš, *supra note* 79 at 48-49

all three countries access to information to the wide circle of persons both legal and natural as well as they cover at least most part of governmental information. It is also possible to notice that the argumentation and the reasoning behind the constitutional court's decisions in all three countries show significant correlation to the existing theoretical justifications behind the freedom of information and its importance.

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