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THE CONSTITUTIONAL RIGHT TO INFORMATION IN POLAND. THEORY AND PRACTICE

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Abstract. The following article provides the outline of the right to information on activities of the persons discharging public functions and public organs in the Republic of Poland. The article considers the structure of the right established in the Constitution of 2 April 1997 and its connection with freedom to receive and impart information.

Keywords: access to information, freedom of information, freedom of expression, constitution, constitutional interpretation, access to documents, exemptions

Introduction

The article aims to describe a constitutional right to information from the theoretical and structural perspective and its unclear, evolving features in the Polish constitutional court's jurisprudence. The Polish Constitutional Tribunal perspective might be seen as an icon of changing perception of transparency at the dawn of the 21st century: from enthusiastic broad interpretation of constitutional provisions to rather lukewarm and strict reading of the Art. 61 of The Constitution of 2 April 1997 favouring limited scope of access and discretionary execution of power by the executive. The article emphasizes importance of the system of government whose task is to support the individual rights, most notably independent and impartial constitutional and supreme courts or tribunals. This task may also be difficult to achieve if there is no long standing and transparent doctrine applied to constitutional interpretation. Therefore, the impact of a doctrine (and its application by the Polish Constitutional Tribunal) on a citizen's right to information shall be examined.

1. The idea, the constitutional implementation and the practice

The proliferation of freedom of information laws in the late 1990s was result of two main claims supported by a major shift in global and European politics. Firstly, the collapse of the Iron Curtain, a triumphal march of parliamentary democracy in Middle and Eastern Europe contributed to the vision of democracy as most effective system. Since the contemporary understanding of democracy implies representative system mandated by the people and implemented for the people, transparency and accountability quickly became catch phrases associated with freedom of information laws. Secondly, the Western democracies (but also such Asian hegemons as India or Japan) decided to debunk the accusation of political establishment's alienation and create more opportunities for well-informed citizen to get involved in public affairs on both national or local level of government. The concept of universal access to information (*freedom of information* or *access to information*) is

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understood to mean entitlement having the following structure: 1) it is the right to be exercised by an individual, a legal person or another organizational unit without the need to show any legal interest in that information; 2) the right is addressed to the widely understood public authorities; it is the obligation of the public authorities or other entities acting on behalf of the state, and in special circumstances also of private entities, to provide information within specified time limits, in the manner and form prescribed by the law; 3) withholding of information is possible only in cases specified by the law, where it is highly probable that its disclosure would harm other persons (*e.g.* with regard to their privacy, health, life), state security, international relations, effective detection and combating crime, confidential information of entrepreneurs; invoking the exemption of certain values and interests cannot have a purely nominal nature; 4) the right guarantees an appeal procedure in the form of re-examination of the case by the body having control of the information or – in the form of devolution – an appeal to a higher instance; the law provides also for the possibility to make further appeals to an independent and impartial court.

In 2014 the number of Freedom of Information Laws in Europe reached 36, while the 2012 estimation of the overall number of FOIA laws in the world reached 93 (Vleugels, 2012). Estimation is the proper word because the result may vary depending on what counts as a legal, normativist source of right of access to the government's information. The origin of right to information may be traced either to proactive interpretation of freedom of speech clauses or explicit statement delivered by constitution makers (which makes the Polish Constitution the prime example of such approach). Sometimes it may be the product of both factors: an open ended issue of constitutional guarantees to acquire information and sub-constitutional, statutory expansion in a form of subjective right of access to the government's records.

The spectrum of constitutional provisions starts from such exclusive examples like Sweden, where the Freedom of the Press Act from 1766 granted access to official documents and became an integral part of the constitutional system. A moderate and relatively widespread approach includes a separate provision on access to official documents accompanied by earlier and traditional clause on freedom of expression (Art. 25 Sec. 5 of the Lithuanian Constitution, Art. 17 Sec. 5 of the Czech Charter of Fundamental Rights and Basic Freedoms, Art. 26 Sec. 5 of the Constitution of Slovakia) or relocate access to documents to a separate provision (Art. 44 of the Estonian Constitution, Art. 61 of the Constitution of Poland). A formal separation between the freedom of speech and the right to information is spelled out in Art. 30 (“Freedom of Expression”) and Art. 31 (“The Right to Information”) of the Constitution of Romania of 21 November 1991. Pursuant to Art. 31(1) of the Romanian Constitution, “A person's right of access to any information of public interest cannot be restricted”. It is worth noting the imposition of a duty to provide accurate information on the part of the public authorizes (Art. 31(2) of the Romanian Constitution), which is binding as well as on “ public and private media” who are likewise required to “provide correct information to the public opinion” (Art. 31(4) of the Romanian Constitution). The solution adopted, for example in Art. 44 of the Constitution of Estonia of 28 June 1992 pertains to certain types of information (“Everyone shall have the right to freely receive information circulated for general use”) which constitutes a living example of the up-to-date nature of theories and views concerning information assets. Specific references to such “information” and to its specific functions as well as content are included only in its subsequent provisions. Pursuant to Art. 44 (2) of the Constitution of Estonia: “At the request of Estonian citizens, and to the extent and in accordance with procedures determined by law, all state and local government authorities and their officials shall be obligated to provide information on their work, with the exception of information which is forbidden by law to be divulged, and information which is intended for internal use only”. The statute implementing the constitutional right to public information was adopted by the Riigikogu on 15 November 2002 (Riigi Teataja - Official Journal of the State 2000/92/597). Moreover, Art. 44 (3) of the

Estonian Constitution states that "Estonian citizens shall have 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.

Such solutions are common in the third wave's democratic constitution however it must be noted that they did not appear in its first phase but rather in the last decade of the 20th century. Specific provisions regarding access to information were not included in the democratic constitutions established as a definitive closure of authoritarian period by the Carnation Revolution in Portugal (1976) or the fall of the Regime of Colonels in Greece (1975). Neither the Spanish Constitution (1978), through which the democratic transformation continued, nor Latin American democratization processes recognized the need for explicit provisions in this matter. Apart from freedom of expression (protected by Art. 20), Art. 105 Sec. b of the Constitution of Spain requires the law to establish the access of citizens to "administrative" files and records, except to the extent that they may concern the security and defence of the State, the investigation of crimes and the privacy of persons. The Spanish example is particularly interesting because the constitutional jurisprudence - based on a constitution's structure - rejected the connection between fundamental freedom of information with the right of access to an administrative document, claiming that the latter was not included into the fundamentals right catalogue (Art. 14-29) and therefore does not benefit from the reinforced protection of fundamental rights (Puigpelat, 2017). We are about to see that similar structural interpretation is being suggested by some Polish scholars who seem to prioritize gravity of constitutional rights in Poland depending on their nominal classification (e.g. fundamental or political, positive or negative, rights or freedoms).

At the opposite spectrum there are countries which do not have such explicitly established right in their constitutions however a right to information appears as a product of creative extra-textual interpretation which treats constitution "*as more than the sum of its written provision: as a normative structure whose provisions are, either explicitly or implicitly, based on deeper principles, and ultimately on abstract norms of political morality that are deepest source of its authority*" (Goldsworthy, 2017). Such approach might be seen in multiple jurisdictions where a right of access to information was recognized due to progressive interpretation of freedom of speech protection clauses with little literal substance pointing to governmentally held data, records, documents etc. Japanese, Indian and Israeli examples will support such observation.

The Japanese Supreme Court's jurisprudence recognized famous "right to know" or "right to be informed" (*shiru kenri*) in opinion of 26 November 1969 (also known as Hakata Train Station film case) due to progressive interpretation of the Art. 21 of the Japanese Shōwa Constitution of 1946 (Bernaczyk, Muszalska, 2014). Similar arguments may be found in India's Supreme Court's opinion of 30 December 1982 in *S. P. Gupta v. President Of India And Others* (AIR 1982 SC 149) where court upheld its previous conclusions on the freedom of speech (see Art. 19 Sec. 1(a) of the Constitution of India) as a source of right to know and the intrinsic relation between the sovereign and public officials based on transparency rather than secrecy. In the reasons for judgment in earlier India's Supreme Court opinion of 24 January 1975, *State of Uttar Pradesh v. Raj Narain and others* the court explained that "*a government of responsibility like ours, where all the agents of the public must be responsible for their conduct, there can be but few secrets. The people of this country have a right to know every public act, everything, that is done in a public way, by their public functionaries. They are entitled to know the particulars of every public transaction in all its bearing. The right to know, which is derived from the concept of freedom of speech, though not absolute, is a factor which should make one wary, when secrecy is claimed for transactions*

which can, at any rate have no repercussion on public security. To cover with veil of secrecy the common routine business, is not in the interest of the public. Such secrecy can seldom be legitimately desired" (AIR 1975 SC 865).

The Israeli Supreme Court's opinion of 8 May 1990 in *Meshulam Shalit v. Shimon Peres* followed the same pattern with striking similarity and an interesting focus on the nature of the bond between the elected and the electors in a parliamentary system: "*The democratic process can only function on condition that it is possible to clarify openly all problems on the agenda of the State and exchange opinions about them freely. The continuity of the relationship between the elected and the elector loses, it is true, some of its direct nature and intensivity after the elections, but election does not sever the bond between the public and its elected representatives until the next elections. (...). Freedom of public opinion and knowledge of what is happening in the channels of government are an integral part of a democratic regime, which is structured on the constant sharing of information about what is happening in public life with the public itself. Withholding of information is justifiable only in exceptional cases where security of the State or foreign relations may be impaired or when there is a risk of harming some vital public interest*" (HCJ 1601/90).

Taking into considerations these two far ends of a spectrum, the Constitution of The Republic of Poland adopted on 2 April 1997 falls into former category with unprecedented level of detail in description of right to information on activities of state institutions and its various agents. If a gravity of constitutional right were measured by the text volume, a quick comparison to other articles of Chapter II (*The Freedoms, Rights and Obligations of Person and Citizens*) would surely establish right to information among most important ones. According to Art. 61 of the Constitution of the Republic of Poland:

"*A citizen shall have the right to obtain information on the activities of organs of public authority as well as persons discharging public functions. Such right shall also include receipt of information on the activities of self-governing economic or professional organs and other persons or organizational units relating to the field in which they perform the duties of public authorities and manage communal assets or property of the State Treasury*" (section 1).

The right to obtain information 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" (section 2).

Limitations upon the rights referred to in paras. 1 and 2 above, may be imposed by statute solely to protect freedoms and rights of other persons and economic subjects, public order, security or important economic interests of the State (section 3).

The procedure for the provision of information, referred to in paras. 1 and 2 above shall be specified by statute, and regarding the Sejm and the Senate by their rules of procedure (section 4).

In terms of timing Polish constitutional (1997) and statutory (Act of 6 September 2001 on access to public information) solutions in the area of right to information were in line with the democratization trend of the late 20th century. However, social pressure to break a veil of secrecy might be traced back to the origin of Independent Self-Governing Labour Union *Solidarity* founded in 1980 in an undemocratic, communist People's Republic of Poland. In its social policy manifesto prepared for the First National Assembly of Solidarity

Delegates held in Gdańsk on 5–10 September, 26 September and 7 October 1981, Solidarity proposed a revolutionary Thesis no. 23(6):

"*A legal system shall guarantee fundamental civic freedoms, respect equality under the law of all citizens and institution of public life. It is necessary to (...) establish full transparency of public life which, among other factors, is dependent on citizens' access to documents held by administrative authorities. Limitations on the transparency of public life and access to documents shall be imposed by statute*".

A brutal suppression of Solidarity by the sudden introduction of the martial law on 13 December 1981, followed by progressing decline of the communist political system and its economy, eventually led to so called Round Table Talks and peaceful transition of power with culmination in the first partially free elections on 4 June 1989. The constitutional reforms that took place throughout the 1990s, between December 1989 and the adoption of comprehensive, codified constitution on 2 April 1997 not necessarily explored the issue of transparency. Adoption of multiple provisions concerning individual's informational self-development (Art. 51 - right to personal data protection, including a right of access to official documents and data collections concerning a data subject, Art. 54 - freedom of information gathering and dissemination, Art. 61 - right to obtain information on the activities of state and its officials, Art. 74 - right to be informed of the quality of the environment and its protection) and their entry into force on 17 October 1997 did not result in clear and coherent vision of fundamental rights. The transformation of Central and Eastern European countries allows for the hypothesis that the right to information was understood there as an attractive element which occurred in Western countries with stable democratic systems, and as such - was suitable to follow and for adoption in countries so far deprived of the culture of the democratic rule of law and respect for human rights. As in case of many legal transplants or 'borrowings' (Perju, 2012), this operation might not have been sufficiently thought-out, both axiologically (lack of reference of the right to public information to a specific concept of rights of the individual), and systemically (the problem with combining the mechanisms for disclosure of information with the principle of liability of the state and its officers for improper exercise of public authority and management of public property). Of course a legal transplant does not carry a pejorative meaning by itself. It is a practice, a lack of effective enforcement that undermines any law and not merely borrowings. This however made freedom of information/access to information laws of Middle and Eastern Europe extremely vulnerable to a rejection and decline along with other populist symptoms of discontent (Krastev, Holmes, 2018) toward not so distant adoption of the rule of law, accountability and truth as foundations of public life.

Poland constitutes a very interesting example because a relatively weak standard of statutory provision, a lack of any institutional support and promotion among citizens (e.g. in a form of independent information commissioner or ombudsman) superseded the concept of transparent government before the actual rise of populism in the October 2015 parliamentary elections and the constitutional crisis that followed. Neither the normative conditions pre-existing constitutional crisis, nor their interpretation, worked in favour of governmental transparency. The current government's practice does not require introduction of any radical changes to shield itself from public scrutiny. Unlike their ideological predecessor in Hungary (Marietta Le, 2013), Polish executive branch just had to creatively deploy an existing case-law arising from an extremely (by Polish standards) vague statutory provision to successfully slow down or exempt the independent press from access to information, creating a political narrative in which government just follows a long-standing routine sanctioned by administrative judiciary. The judicial practice did not exhaust the constitutional potential vested in Art. 54, 61 or self-executable status of Art. 10 of the European Convention of Human Rights (see Art. 91 Sec. 1 and 2 of the Polish Constitution).

Instead of choosing the logical approach in which exclusive content of the right of information stems directly from Art. 61 of the Polish Constitution, the administrative courts gradually adversed the Kelsenian pyramid by reading the Constitution through the eyes of the legislative assuming unquestioningly that statutory language of 2001 develops or merely imitates the language of the basic law. Consequently, despite the crystal clear constitutional provision, the Polish state seemed to fail on ethical grounds (successfully avoiding the key question in social debate of why and for what purpose such right was established) and in practice (increasing judicial activism of administrative courts which have failed to recognize several inconsistencies between statutory and constitutional provisions). By 2010 a judicial activism of the Supreme Administrative Court started to grow, limiting a scope of the law on access to information. The process intertwined with a passivist stance of the parliament. The latter showed – a typical reluctance of parliamentary system of government (see Irish example by A. Roberts, 2006) – to improve a statutory provisions imposing more open information policy on executive branch whenever the government operates solely on confidence of the parliament's majority. The Polish Law on Access to Public Information of 6 September 2001 remains an inglorious example how a FOI law may fail to reach its objectives once established in parliamentary system of government. A natural relation between parliamentary majority and the executive branch creates little incentive to overcome gaps and limitation on access to public records resulting from judicial interpretation. Polish administrative courts successfully shielded executive branch from public scrutiny *e.g.* developing a case law on "intra-agency records" (or "internal documents") which - by Supreme Administrative Court conclusion - are absolutely excluded from the scope of the 2001 FOI law, although legislative history does not prove such provisions were even considered by the members of parliament (Bernaczyk, 2017). Such phenomena took place entirely within judicial branch, without any dedicated amendment from legislative branch. It sharply contrasted with the adverse opinion on separation of powers and judicial role in statutory interpretation of internal records exemption presented in similar period by U.S. Supreme Court in its 8-1 decision of 7 March 2011 in *Glen Milner v. Department of Navy*: "*If these or other exemptions do not cover records whose release would threaten the Nation's vital interests, the Government may of course seek relief from Congress*" (562 U. S. (2011)).

As a result Polish legislative or executive branch never had to propose and introduce any limitations on access since it gained an ally in judicial interpretation although the price to pay was extremely high if measured by rule of law and separation of powers standards: the administrative courts started to implement strong deference to the executive branch applying extra-textual and constitutionally dubious methods of interpretation.

Last but not least, a lack of support from the constitutional scholars and by and large sceptical approach to a concept of open government, transparency created the perfect storm. A narrow reading of the right to information clause was justified by structural argument so it is worth exploring how this argumentation began to unravel.

2. The right to information and the structure of constitutional rights

From the beginning it was suggested that internal structure of the Chapter II divided into unmarked subchapters established the relation between individual provisions, most notably by granting an implied ontological superiority to freedoms (*wolności*) while rights (*prawa*) have been regarded as merely rights to positive state actions with much more wider margin of leeway for a legislative drafting the substance of each right. Art. 61 soon became an object of both isolated and oversimplified (from structural standpoint) interpretation. A doctrine quickly recognized the Art. 61 as constitutional "right to something" known in the analytical categorization of rights (Alexy, 2010). Such doctrinal entry point seemed to work in favour of access to information. One could

praise the law-makers of the Polish constitution who (in theory) successfully avoided a dilemma whether freedom of expression and information gathering could cover 'a right to positive acts' (e.g. access to documents). It took almost two decades to solve similar problem under Art. 10 of the European Convention on Human Rights assuming we position the opening of practical and doctrinal debate with rather sceptical conclusion in 1998 case of *Guerra and Others v. Italy* "*that freedom* [to receive information – M.B.] *cannot be construed as imposing on a state, in circumstances such as those of the present case, positive obligations to collect and disseminate information of its own motion*" (case no. 116/1996/735/932, § 53). Despite the initial restrained approach, a lengthy process of recognizing positive obligation was concluded in judgments of 10 July 2006 in *Sdružení Jihočeské Matky v. the Czech Republic* (application no. 19101/03) and of 14 April 2009 *Társaság a Szabadságjogokért v. Hungary* (application no. 37374/05). Unfortunately the doctrinal interpretation of the Polish Constitution did not perceive freedom of information as a subjective right with a complex structure (R. Alexy, 2010, p. 128), quickly departing intricacy of material connections between articles 54 and 51, 61 or 74. On the contrary, a rather simple assumption had been made, invoking 19th century Georg Jellinek's theory which claimed that individual enjoying a right may be vested with either *a status positivus, a status negativus* or *a status activus.* In Poland such argument was proposed by *Wojciech Sokolewicz* (Sokolewicz, 2005), although such approach in the early 21st century was already contested in German jurisprudence where *Jellinek's* influence was most visible. However, since the argument was made in prestigious commentary to Polish Constitution, there shall be no surprise that doctrinal band wagon effect occurred and soon the judiciary started to deploy same narrative to justify strict reading of right to information clause. Professor *Sokolewicz* went even further claiming that "*the ramification of such characteristic* ['a right to something' - M.B.] *of the right to information results in possibility of strict interpretation of the law regarding its enforcement, an interpretation with less restrictions* [more deference - M.B.] *when it comes to limitations, unlike in case of limitations imposed on civic freedoms*" (Sokolewicz, 2005, p. 5).

Robert Alexy's theory of constitutional rights helps to broaden a perspective on possible relation between articles 54 and 61 of the Polish Constitution. Alexy concluded that „*positive protection of liberty against the state arises from the combination of liberty with a right to a positive act. The idea of positive protection is hardly problematic when one is concerned with things like protection from third parties by the norms of criminal law. Problems arise in the case of entitlements such as state subsidies. There is a certain structural correspondence in that both cases concern making what is legally possible for the right-holder factually possible as well. The structural correspondence permits us, in spite of general linguistic usage, to call the combination of a liberty with an entitlement in its narrow sense ensuring the factual appropriation of liberty, a protection of liberty. The question of whether and to what extant the Basic Law contains positive protections of this nature will for the moment be left entirely open*" (Alexy, 2010, p. 149). Unlike the German Basic Law of 1949, The Polish Constitution hardly ever allows to leave an issue of protecting the freedom of information gathering as an „open" matter left entirely to a choice of the current political force controlling the legislature since the Art. 61 established a very detailed framework of such protection. Unfortunately, it is still unclear how the Polish Constitutional Tribunal sees such connection. In the judgment of 2 February 2002 (K 38/01) Tribunal stated that Art. 61 defines "*fundamental scope of right to information*" however it refrained from further remarks on the other possible constitutional sources of right to information. However it was noticeable that Tribunal also invoked a Council of Europe's recommendations on access to official documents entrenched in freedom to receive and impart information without interference which inspired the Polish Art. 54. In the reasons for judgment of 13 December 2016 (K13/16) Tribunal stated that "*freedom of information shall not be reduced to information or opinions received as favourable or perceived as indifferent*" and its function may be described as

e.g., „*a service committed to combating social pathologies"* (OTK-A 2016, pos. 101). The case concerned the meaning of Art. 54 but the function attributed by the Constitutional Tribunal to freedom of expression was strikingly similar to a traditional set of anticorruption and transparency arguments in favour of access to information laws.

3. The Scope

Unlike the language of the right to personal data protection (Art. 51) or the freedom to express opinions, to acquire and to disseminate information (Art. 54), a bearer of the right to information was described as a 'citizen'. The members of the National Assembly Committee explained their legislative intent in 1995 while drafting the present Art. 61 with the charming simplicity using the concept of citizenship (a legal relation between an individual and a state): "*A citizen who pays taxes has right to know how the public authority operates*" (Bulletin of National Assembly's Committee, p. 58). Of course we could treat a right to information as a concept morally neutral and attribute it only to a set of arguments in favour of "transparency" (setting aside dispute over whom we shall provide it to and what utter purpose it shall serve) grounded in fiscal duty of a citizen, but in the end we will not explain anything. The concept of a tax (or other similar fiscal obligations) is based on relation between individual and the state which might be described by four attributes: nonequivalence, mandatoriness, coerciveness, generality and the exemption of refund (Antonów, 2016). There is an inconsistency in treating a right to information as an equivalent provided for taxpayer. Art. 84 of the Constitution of the Republic of Poland makes it even more confusing because the fiscal duty has been imposed on "everyone" (see Art. 84 of the Constitution of the Republic of Poland), while the right to information has been guaranteed to "a citizen" (see Art. 61 Sec. 1 of the Constitution). Legislative intent does not really provide the coherent explanation, especially, if we notice that legal entities are bound by constitutional fiscal duty followed by the Corporate Income Tax Act of 15 February 1992 (Journal of Laws 2016, item 1888). It must be also brought to our attention that on 2 December 2015 the Constitutional Tribunal issued a resolution (SK 36/14) on inadmissibility denying non-governmental, private students and alumnus association a "civic" status under Art. 61 Sec. 1 suggesting that the language of the constitution encompasses only a natural person who holds a citizenship (although Polish constitution does not require the latter to be "Polish" one, unlike e.g. the provisions on access to civil services in Art. 60 or voting rights in Art. 62). Such resolutions do not constitute universally binding and final judgments of the Constitutional Tribunal under Art. 190 Sec. 1 of the Constitution but still may affect statutory interpretation (which conveniently departs from language of the Constitution and entitles 'everyone' to the access to public information).

A textual interpretation of the Polish Constitution, doctrine or judicial practice leads to an undisputed conclusion that every branch of the government (legislative, executive and judicial as well as organs of state control and for defence of rights stipulated in Chapter IX) falls entirely within the scope of "organ of public authority" (Art. 61 Sec. 1). Nor shall we have any doubts about wide array of persons covered by the "persons discharging public functions" who - according to Tribunals reasoning in opinion delivered on 20 March 2006, K17/05 – "directly influence legal status of an individual or at least contribute into decision making process which affects other subjects". It was distinctly stated that outside that scope would fall every member of personnel who merely "provides services or performs a technical function" for a public institution. In opinion of 20 March 2006, K 17/05 Tribunal also noted a scope of information on person discharging public functions available under Art. 61 is not exactly the same as in case of Art. 54 but the language of the opinion suggested a relation between those two provisions in a manner typical for positive protection of liberty:

"*Some information concerning private sphere of public figure relevant for the interest of the public may be disclosed, even if relation between information and the function performed does not exist, however information remains important for assessment of such person's behaviour, credibility or publicly presented opinion. Art. 61 of the Constitution* [concerning "person discharging public functions" - M.B.] *covers only <> of the right to acquire information* [right to acquire information is the exact wording used in Art. 54 of the Polish Constitution - M.B.] *which remains in correlative duty of a proper public organ to disclose it. Such duty does not encompass every personal data of a person discharging public functions but only those which remain in connection with discharged function. From this point view both provisions* [Art. 54 and 61 - M.B.] *can be described as featuring a certain complementarity*". Basically, once a person becomes attributed with public function, he or she also becomes a servant of the institution so the scope of the information disclosed must be always assessed as either useful for assessment of the public institution or lacking such characteristic.

"A document" in Art. 61 Sec. 2 has not been specified (e.g. private, official, public, working, internal), which makes it a fact of empirical nature, any material data carrier containing data preserved in any shape or form readable by human senses or programmed machine. A meaning of a document shall not depend on a political decision of a legislature. In other words, any legal dispute shall not be based on the issue whether a particular data carrier held by government constitutes a document. The key issue shall be focused rather on to what statutory exemptions may apply to a requested document. No matter how logical and constitutional it may sound, such approach is not being taken in practice. The following example may serve as a comment: in 2013 a general case-law exemption of intra-agency (internal) documents falling outside the scope of the statutory provisions became a very controversial issue when the Constitution Tribunal invoked in its opinion of 13 November 2013, P 25/12 - as *obiter dictum* - a judicial practice applying such construct. It was only one sentence focused on a statue rather than the Constitution, a brief remark stating that Tribunal "recognizes such practice" without a further consideration of the fact that neither "internal document" nor "intra agency record" exist in the Polish Law on Access to Public Information and there is strong historical evidence that deputies did not intend to adopt such exemption. The administrative judiciary quickly overstepped its powers claiming that Tribunal's opinion shall be considered as major victory, since a judge-made exemption had been allegedly approved by the constitutional courts itself. Unfortunately, still little consideration has been given to the fact that the Tribunal's observation was not crucial for the facts and the law of the case and did not constitute any related constitutional issue.

Apart from access to document, section 2 also refers to entry to sittings of collective organs of public authority formed by universal elections, with the opportunity to make sound and visual recordings. In case of bicameral parliament (*Sejm* and *Senat* or National Assembly acting pursuant to Art. 114 of the Constitution) such right shall be executed according to the procedural rules established in the internal rules of proceedings (see Art. 61 Sec. 4) however this question is not entirely left to parliamentary autonomy. An internal regulation of a chamber shall be focused only on procedure and may not modify a substance of the right. This provision is also crucial in case of constitutive organs of self-government units which do not enjoy a similar law making privilege but fall entirely under the scope of the Law on Access to Public Information.

A dedicated limitation clause in Art. 61 Sec. 3 provides a standard set of interest that may be recognized and protected upon a statue. A limitation clause shall be construed in conjunction witch general proportionality principle established under Art. 31 Sec. 3. Art. 61 Sec. 3 reduced the array of interest which may be invoked as a reason for specific exemption but it does not provide proportionality mechanism nor does it prohibit a breach of the essence of the right. Polish constitutional jurisprudence did not produce any particular case law on specific

legislative technique of limiting the right to information, however so far every motion meant to strike down a statutory limitations bearing resemblance to British "exclusions" or "absolute exemptions" (Birkinshaw, Varney 2011) met with Tribunal's approval. In two separate opinions of The Constitutional Tribunal of 9 April 9 2015, K 14/13 and of 7 June 2016, K 8/15, the Constitutional Tribunal struck down statues operating with an exemption deprived of any balancing mechanism and following the same linguistic structure (e.g. "information on matters X do not constitute a public information accessible under Law on Access to Public Information").

Conclusions

The introduction of a citizen's right to information in 1997 was extremely challenging in the Republic of Poland which had never enjoyed any form of freedom of information law or actively state-supported civic society and therefore still hardly bears any tradition in holding the branches of the government accountable. In the country of prolonged distrust to various oppressive form of state, a constitutional right to information had been considered as a desired instrument to shape a new democratic society carried by the optimism of the late 20th century. Ironically, these sociological factors could have also affected the progressing narrow interpretation of relatively detailed Art. 61 of the Polish Constitution. Unlike in Spanish constitutional jurisprudence, Polish approach to relation between the freedom of expression clause (Art. 54) and right to information (Art. 61) still remains an open-ended issue but the aforementioned Tribunal's jurisprudence eventually led to a significant downgrade of the latter. Today it still treats the right to information mostly as an isolated subjective right with much of its scope left to statutory regulation and administrative court's activist interpretation. This is hardly acceptable on logical grounds since the level of detail in the supreme constitutional provisions leaves little leeway for legislative branch. A parliamentary system in Poland does not create any incentive for objectively justified, broad reading of constitutional right to information leaving major political players satisfied with relatively weak and ineffective provisions of a statute. A time will tell, whether a Polish society will recognize the need for anticorruption and transparency laws eventually abandoning the progressing neutralization of goals and values underpinning Art. 61 of the Constitution.

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