Hermann-Josef Blanke
Ricardo Perlingeiro *Editors*

The Right of Access to Public Information

An International Comparative Legal Survey

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ISBN 978-3-662-55552-1 ISBN 978-3-662-55554-5 (eBook)
DOI 10.1007/978-3-662-55554-5

Library of Congress Control Number: 2017960414

Printed on acid-free paper

This Springer imprint is published by the registered company Springer-Verlag GmbH, DE part of Springer Nature.
The registered company address is: Heidelberger Platz 3, 14197 Berlin, Germany

In memoriam
Illaria Bachilo *(1926-2017)*
Former Head of the Information Law
Department of the Institute of State and Law
of the Russian Academy of Sciences

A popular Government, without popular
information, or the means of acquiring it,
is but a Prologue to a Farce or a Tragedy;
or, perhaps both.
Knowledge will forever govern ignorance:
And a people who mean to be their own
Governors
must arm themselves with the power
which knowledge gives.

J. Madison to W.T. Barry *(1822),*
Writings 9:103-109

"Publicity is justly commended as a remedy
for social and industrial diseases.
Sunlight is said to be the best of disinfectants.. ."

L. D. Brandeis,
in: *Harper's Weekly (1913),*
"What Publicity Can Do"

Sunlight may well be a great disinfectant.
But as anyone who has ever waded through
a swamp knows,
it has other effects as well.

L. Lessig
in: *New Republic (2009)*
"Against Transparency"

Foreword

The editors of this book, with work contributed by authors from widely diverse countries in Latin America, the United States of America, Europe and Asia, have done a very praiseworthy job. That the subject matter—the right of access to public information—should also be so relevant and important for the operation of the democratic system shows the concern of the editors and authors of the book for an issue so critical to the proper operation of the political system and the revitalised development of democracy.

Why has there been so much continuing interest both within the political system and within what we might call the world of ordinary citizens in the right of access to information for so many decades now? There are various reasons, but the basic one is the crisis of the political system, closely linked to the existence of a deficit of democracy. Representative democracy and the traditional model of legitimacy are exhausted. So where does the origin of this crisis lie? The reasons are complex, but it is decisively influenced by the relationship between representatives and those who are represented, as well as the classic definition of representation, which means making present what in fact is absent. This requires representatives not to become completely divorced from public affairs or from the contents of the world of the lives of ordinary citizens. If they do, representation will lose its conceptual essence. Because of this, those represented must remain actively present in the course of the representation process. This concept of representation is a long way from that put forward by Sieyès in 1789, according to which once the representatives are chosen they act with complete freedom and are not linked to those they represent (representative mandate). However, in everyday life, they are imperatively linked (binding mandate) to the political party in whose lists they are elected.

Nowadays, citizens seek the capability of influencing representatives by various means (social forums, citizens' committees, demonstrations, etc.), which implies the need for civil society to be strengthened so it can control them. The other means of public participation is through direct democracy (participatory democracy, referendums, etc.) which, for example, is included in Article 23 of the Spanish

Constitution and in Article 11 of the European Union Treaty. This means the appearance of a second legislator which, in a legitimate way, relativises Parliament's monopoly. It does not mean replacing it, but rather complementing it in certain situations.

This way of making the political system work strengthens its democratic legitimacy but it also requires well-informed citizens with ways of participating actively in public life to act effectively. To achieve this, political publicity plays a fundamental role. This is understood as the establishment of conditions for communication between the State and citizens through which they can participate in State decision making via active public opinion. Spaces for public opinion are formed through citizens taking positions in the various forums, circles, associations, and so on, where they go with the problems they come across in private life in civil society. In this space they will seek to discuss them and deal with them to exercise an influence on political power. This space is that of civil society, consisting of a network of non-State and non-economic voluntary-based associations, which, although they are private, act in a public context. Opinion-forming associations are necessary for the existence and development of political publicity. Their antagonist is the apparatus of the secret services that have controlled and continue to control the communication practice of citizens in dictatorial and totalitarian countries.

This civil society needs to articulate its relations with the State, and fundamental rights play a vital role in this articulation. Rights such as association, freedom of expression, the freedom of the media and the right of access to public information are essential for the development of public communication. In this context, the political system can only remain sensitive to public influences and be linked, through the political parties and participatory democratic systems, with the sphere of public opinion and civil society.

The fact that the right of access to public information should be recognised as a fundamental right in the Constitutions of States and should also be taken up by international organisations will give greater legitimacy to the political authorities at a time like the present when they have lost a considerable part of their legitimacy. In addition, recognition of this right will allow citizens to take part in public affairs. In fact, the right facilitates access to the information the public authorities have; information which has connotations of general interest and it is not in the private and secret sphere. Recognition of the right of access to information on one hand facilitates access to the documents in the hands of the public authorities and, on the other, encourages active publicity. In other words, the same political authorities, and particularly the Government, pass on information without citizens having to ask for it.

As the principles of both publicity and secrecy play a role in the public sphere, the dichotomy between them must be resolved with the recognition of the rights of access to information and the protection of personal privacy as fundamental rights. However, in constitutional practice this does not happen, as States' Constitutions often place greater importance on the right to privacy and data protection than on

the right of access to information, rather than weighing up the two and recognising them as having the same constitutional value; in other words as fundamental rights. This places the right of access to public information in a position of inferiority, halting both the development of a consolidated civil society standing firm against political power and effective citizen participation in public affairs.

The constitutional recognition of the right of access to public information is linked to what has been called in German public law the Administrative Right of Information. This is an administrative right conditioned and developed on the base of the information and knowledge society. This information and knowledge society has engendered a communication revolution that has required a new administrative model for communication. This is modernising the public authorities and has required a dogmatic review of administrative law. The new revolution, as important as the industrial revolution was in its time, has coincided with a far-reaching social and democratic crisis of the State and a loss of legitimacy for the public authorities. The Administrative Right of Information that establishes a new form of communication between citizens and the authorities is helping to achieve the implementation of greater transparency in these relationships and, to an extent, wiping out the democratic deficit through certain forms of participatory democracy (for example, in the spheres of environmental or town planning law).

It must be hoped that this book helps to achieve some reflection on the right of access to public information at global level because the fact that authors from several continents are taking part is likely to facilitate its dissemination. This could help to some extent in the debate on the inclusion of new routes for participation in the democratic system which so badly needs a boost in the current difficult times when it is not publicity that is winning the battle with secrecy but rather the manipulation of information.

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Ricardo Garcia Macho

Council for Transparency, Access to
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Valencia, Spain
March 2018

Preface

This book is one outcome of the project "Estado de Derecho: Derecho Administrativo y Justicia Administrativa en América Latina", which was carried out at various universities throughout Germany and Latin America with sponsorship from and under the auspices of the German Academic Exchange Service (DAAD). Under the academic supervision of Professor Hermann-Josef Blanke, University of Erfurt (Germany), four Latin American universities have been cooperating in this project on "Rule of Law in Latin America": Andrés Bello Catholic University (Venezuela), Fluminense Federal University (Brazil), National Autonomous University of Mexico and the University of Buenos Aires (Argentina). For the purpose of the publication of the results of one of the subjects treated, i.e., the freedom of information legislation, the editors were able to recruit authors from all over the world. In November 2011, the Brazilian Law N° 12.527 on the Right of Access to Information had come into force. It has become a point of reference for nearly all contributions of this volume. The right of access to public information has become one of the big issues in constitutional and adminstrative law in many countries.

The editors present this volume in the run-up to the entry into force of the Council of Europe Convention on Access to Official Documents. This Convention will be the first binding international legal instrument on the regional level to recognise a general right of access to official documents held by public authorities.

The "Introduction", written by the editors, shall make it easier to understand the core elements of the right of access to public information by analysing certain aspects of transparency dealt with in the national reports. This piece shows that, in spite of all differences between the legal systems, transparency legislation has many patterns in common. While a comparative perspective will be taken, it is admittedly influenced by a German legal view.

The editors want to thank the assistants at the Chair for Public Law and Public International Law of the University of Erfurt, especially Sebastian Bunse, Franz Stockmann and Kristoffer Burck, for their efforts when controlling the formal

standards of the manuscripts and preparing the Index of this book. The editors are grateful for all the advice and support which Prof. Keith Hendersen (American University College of Law) has engaged in Chap. 4. After years of efforts the authors can present this publication thanks to a close cooperation with the publisher Springer, especially with the Executive Editor Law, Dr. Brigitte Reschke.

Erfurt, Germany — Hermann-Josef Blanke
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March 2018

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List of Abbreviations

ACHR	American Convention on Human Rights
AL	Archives Law (China)
ALL	Administrative Litigation Law (China)
APA	German Federal Administrative Procedure Act
BVerfG	German Federal Constitutional Court (Bundesverfassungsgericht)
BVerfGE	Collection of the Decisions of the German Federal Constitutional Court (Entscheidungssammlung des Bundesverfassungsgerichts)
1 BvR	First Section of the German Federal Constitutional Court
2 BvR	Second Section of the German Federal Constitutional Court
BVerwG	Bundesverwaltungsgericht (German Federal Administrative Court)
BVerwGE	Collection of the Decisions of the German Federal Administrative Court (Entscheidungssammlung des Bundesverwaltungsgerichts)
C.A.A.	Cour Administrative d'Appel (France)
CADA	Commission d'Accès aux Documents Administratifs (France), Comissão de Acesso aos Documentos Administrativos (Portugal)
CAPIO	Central Appellate Public Information Officer (India)
CCP	Chinese Communist Party
C.E.	Council of State (Conseil d'Etat)
CETA	Comprehensive Economic and Trade Agreement between Canada and the EU
CFREU	Charter of Fundamental Rights of the European Union
CGU	Comptroller General of the Union (Brazil)
Chap.	Chapter
CI	ID card number (Brazil)
CIC	Central Information Commission (India)
CIS	Citizen Information Service (Brazil)
CMCS	Confidentiality Maintenance Commitment Statement (Brazil)
CNIL	Law on the Functioning of the *Commission Nationale Informatique et Libertés*
CNPD	National Data Protection Commission (Portugal)

Cons. Const.	Constitutional Council (Conseil Constitutionnel)
CPF	Cadastro de Pessoas Físicas (Natural Persons Register) (Brazil)
CPIO	Central Public Information Officer (India)
CPLA	Committee of Political and Legislative Affairs (China)
CPPSS	Center for Public Participation Studies and Supports (Peking University, China)
CRC	Regional Chambers of Audit (Chambres Régionales des Comptes)
CSJN	National Supreme Court of Justice (Corte Suprema de Justicia De La Nación—Argentina)
CSL	Civil Servant Law of the People's Republic of China
DCRA	Law on the Rights of the Citizens in their Relations with the Administrations (*Loi n° 2000-321 du 12 avril 2000 relative aux Droits des Citoyens dans leurs Relations avec les Administrations*)
DOF	Official Journal of the Mexican Federation (*Diario Oficial de la Federación*)
DÖV	Die Öffentliche Verwaltung
DPJ	Democratic Party of Japan
DVBl	Deutsches Verwaltungsblatt
ECHR	European Convention on Human Rights
ECJ	European Court of Justice
ECtHR	European Court of Human Rights
e-SIC	Electronic System source code of the Citizens Information Services (Brazil)
EU	European Union
FIA	German Federal Freedom of Information Act and the corresponding Acts of the German Länder (Informationsfreiheitsgesetz—IFG)
FOI	Freedom of Information
FOIA	U.S. Freedom of Information Act
FPA	Swedish Freedom of the Press Act
GDPR	General Data Protection Regulation (European Union)
GG	Basic Law of the Federal Republic of Germany (Grundgesetz)
I/A Court H.R.	Inter-American Court of Human Rights
IACHR	Inter-American Commission on Human Rights
IAHRS	Inter-American System for the Protection of Human Rights
IAJC	Inter-American Juridical Committee of the Organization of American States
IAP	Institute for the Monitoring of Advertising
ICCPR	International Covenant on Civil and Political Rights
ICDCI	Indexation Code of Document that contains Classified Information
ICT	Information Classification Term (Brazil)
IFG	German Federal Information Act and the corresponding Acts of the German Länder
INAI	National Institute of Transparency, Access to Information and Personal Data Protection (Mexico)

INSEE	Institut National de la Statistique et des Études Economiques
ITI	National Institute of Information Technology (Brazil)
JO	Justitieombudsman (Sweden)
LAI	Brazilian Law on Access to Information (Federal Law N° 12.527)
LFRASP	Federal Law on the Administrative Liability of Public Servants
LSSS	Chinese Law on Safeguarding State Secrets
NGO	Non-Governmental Organization
NPC	National People's Congress (China)
NPCSC	National People's Congress Standing Committee
NVwZ	Neue Zeitschrift für Verwaltungsrecht
OAS	Organization of American States
OBC	Other Backward Class (India)
OFPRA	Office Français de Protection des Réfugiés et des Apatrides
OGI	Open Government Information (China)
OIC	Internal Oversight Agencies
OSCE	Organization for Security and Co-operation in Europe
OVG	German Higher Administrative Court (Oberverwaltungsgericht)
PAISA	Swedish Public Access to Information and Secrecy Act
PAISO	Swedish Public Access to Information and Secrecy Ordinance
PCCDE	Permanent Commission for Classified Documents Evaluation (Brazil)
PIO	Public Information Officer (India)
PRADA	Persons Responsible for Access within Administrations (France)
PWC	PricewaterhouseCoopers
RAI	Right of Access to Information
RBI	Reserve Bank of India
REDLAD	Red Latinoamericana y del Caribe para la Democracia
RTI Act	Right to Information Act
SAPIO	State Appellate Public Information Officer (India)
SC/ST	Scheduled Caste/Scheduled Tribe (India)
SCC	Safety and Credentialing Core (Brazil)
SCC	Supreme Court Cases (Canada, India)
SCR	Supreme Court Records (India)
Sec.	Section (taken as meaning a distinct and numbered subdivision in legal codes, statutes etc.)
SECOM	State Secretary of the Chief Minister of Social Communication of the Presidency
Sect.	Section (taken as meaning sub-chapter)
SEK	Swedish Krona
SIC	Service of Integrated Information to the Citizens (Brazil)
SIGEN	General Auditing Office for Public Enterprises (Sindicatura General de Empresas Públicas—Argentina)
SPIO	State Public Information Officer (India)
TA	Decision of Administrative Court (Jugement du Tribunal Administratif)

TC	Decision of the Tribunal of Dispute Settlement (Arrêt du Tribunal des Conflits)
TEC	Treaty establishing the European Community
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
TTIP	Transatlantic Trade and Investment Partnership
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNCAC	UN Convention Against Corruption
UNESCO	United Nations Educational, Scientific and Cultural Organization
UPN	Unique Protocol Number (Brazil)
U.S.	United States of America
VG	Administrative Court (Verwaltungsgericht)
WJP	World Justice Programme
WJP	World Justice Project
WTO	World Trade Organization
ZUM	Zeitschrift für Urheber- und Medienrecht

Chapter 1
Essentials of the Right of Access to Public Information: An Introduction

Hermann-Josef Blanke and Ricardo Perlingeiro

Contents

The author Hermann-Josef Blanke is responsible for Sects. 1, 2.1, 4.1.1, 4.1.2, 4.1.2.1, 4.1.2.2, 4.1.2.3, 4.1.3, 4.2, 4.2.1, 4.2.2, 4.3, 5, 5.1, 5.2, 5.3, 5.4, 6.1, 6.2.2, 6.5, 6.6, the author Ricardo Perlingeiro for Sects. 2, 4.1, 6.2, 6.2.1, 6.3, 6.4, 6.2.2, and 7 of the following chapter. Both authors are responsible for Sects. 2.2, 2.3, 3, 7.1, 7.2 and 8.

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H.-J. Blanke, R. Perlingeiro (eds.), *The Right of Access to Public Information*,
DOI 10.1007/978-3-662-55554-5_1

1 History of Codification of the Right of Access to Information

The first freedom of information law was enacted in Sweden back in 1766 as the "Freedom of the Press and the Right of Access to Public Records Act" (*Tryckfrihetsförordningen*).[1] This code inspired by *Anders Chydenius* (1729–1803), an eminent philosopher of liberalism, abolished the censorship of all printed publications in the spirit of the Age of Enlightenment while at the same time establishing the legal principle of public access to official records ("transparency"—*offentlighetsprincipen*) as a binding requirement for public administration (Jonason, Chap. 5, Sect. 1). The legal formulation of the "public nature of official documents" in Chap. 2 of the Freedom of the Press Act (1999) still serves as a model, not least because of its rank among the basic constitutional principles of the Kingdom of Sweden.

Nevertheless, the global trend of freedom of access to state-held information was noticeably late in coming, triggered first by the U.S. "Freedom of Information Act" (FOIA), which was signed into law by President *Lyndon B. Johnson* in 1966. That Act was rooted in the 1960s movement for civil rights and democracy. It is based on the duty of all executive areas of government[2] to provide information to citizens, and impose any necessary exceptions to the general rule of transparency. Thanks to the FOIA, the U.S. Federal Government agencies practice a high degree of

[1] Ackermann & Sandoval-Ballestros 2006, p. 88.

[2] In European constitutional law the term "government" refers to the collegial body of the government which forms in accordance with the constitutional requirements the head of the executive branch (government in the institutional sense), or to one governmental branch as a whole, i.e., the executive branch (the national government agencies), in so far as it is entrusted with basic issues of the state (government in the sense of effective power to govern). In the American legal context, however, "government" means the legal system, i.e., an umbrella concept which refers to all three governmental branches, and the various political institutions of the state. This system provides a series of checks and balances because each branch is able to limit the power of the others. The U.S. executive branch consists of the President and the Vice-President, and government departments and agencies.

transparency, which is regarded as a key feature of good governance and an indicator of a genuinely democratic and pluralist society (Blanke, Chap. 3, Sect. 1.2). The right to access to official documents is considered essential to the self-determination of the people and to the exercise of fundamental human rights, while helping administrative agencies appear more legitimate and trustworthy in the public eye. A substantial number of auditing and investigative agencies are capable of functioning independently of political influence.[3] Such bodies are often spurred to action by the investigative work of journalists. U.S. Federal agencies regularly publish online information relevant to their terms of office to broaden public access. In an action widely praised by scholars and civil libertarians, Barack Obama ordered in 2009 that millions of government documents from the Cold War era be declassified, and instructed federal agencies to adopt a cooperative attitude toward public information requests.[4] However, the Obama administration came under criticism for its lack of openness towards the press and public and its determination to punish leaks by government officials (most famously in the case of *WikiLeaks*).[5]

As early as 1969, a groundbreaking precedent of the Supreme Court of Japan established the principle that *shiru kenri* (the "right to know") is protected by the Article 21.1 of the Japanese Constitution (guarantee of freedom of expression).[6] Then, in 1989 the Constitutional Court of South Korea ruled that the right to information (a "right to know") is a sine qua non for freedom of speech and of the press as guaranteed by Article 21 of the South Korean Constitution, and that sufficient access to the information held, collected, and processed by the government is essential to proper exercise of that right. Further, the Court stated that the public is entitled to demand disclosure of government-held information, and the government must comply with such requests. However, in accordance with this case-law, access to information can be reasonably restricted by balancing the direct interests of the person requesting information against the potential harm to the public interest.[7] In India, the Supreme Court has made several statements grounding the right to access to information in freedom of expression,[8] but it has also held that

[3]Freedom House, Report on the United States (Chapter: Political Rights and Civil Liberties), 2016 (Accessed on 20 October 2016).

[4]Obama 2009; see also Orszag 2009.

[5]Freedom House, Report regarding the U.S. (2014).

[6]Article 21.1 of the Japanese Constitution, as interpreted by the Japanese Supreme Court, also protects "the freedom to gather news for informational purposes"; see Japanese Supreme Court, *Kaneko v. Japan* (Judgment of 26 November 1969), 23 Keishu 1490; quoted also by Peled & Rabin 2011, p. 373); see Kadomatsu and Rheuben (in this volume), Chap. 12, Sect. 2.1.

[7]The Constitutional Court of Korea (2001). The first ten years of the Korean Constitutional Court, p. 132. Public Release. http://www.ccourt.go.kr/home/att_file/ebook/1255848884375.pdf.

[8]See Indian Supreme Court, *S. P. Gupta v. President of India and Ors.* (Judgment of 30 December 1981), 1981 Supp SCC 87; Indian Supreme Court, *Dinesh Trivedi, Union of India v. AS & Soacnioatthieorn for Democratic Reforms* (Judgment of 2 May 2002), 2002 INSC 244; and Indian Supreme Court, *People's Union of Civil Liberties (P.U.C.L.) & Anr v. Union of India and Anr* (Judgment of 13 March 2003), 2003 INSC 173.

the right to information flows from the right to life (Article 21 of the Indian Constitution).[9]

Even before the Inter-American Court of Human Rights (I/A Court H. R.) had to face the issue of a right of access to information under the American Convention on Human Rights (ACHR) in 2006, the African Commission on Human and Peoples' Rights had given a broad interpretation to Article 9.1 of the African Charter on Human and People's Rights,[10] concluding that its guarantee includes a "right of access to information".[11] For the same purpose, the I/A Court H. R. considers it evident that Article 13.1 of the American Convention on Human Rights[12] not only implies a fundamental right to seek and receive information, but also the positive obligation of the OAS States "to provide it, so that the individual may have access to such information or receive an answer that includes a justification when, for any reason permitted by the Convention, the State is allowed to restrict access to the information in a specific case".[13] Much more reticent is the European Court of Human Rights (ECtHR), which has not yet accepted that access to government information is a general right, but that it may exceptionally be granted to applicants having a special legal interest (Sect. 3).[14]

In 1979, the Parliamentary Assembly of the Council of Europe adopted the Recommendation No. 854 (1979) on "Access by the public to government records and freedom of information", whose principles were repeatedly refined by the

[9]Indian Supreme Court, *Reliance Petrochemicals Ltd., v. Proprietors of Indian Express Newspapers, Bombay Pvt. Ltd. and Others*, (Judgment of 23 September 1988), 1988 (004) SCC 0592 SC, para. 3: "Right to know is a basic right which citizens of a free country aspire in the broader horizon of the right to live in this age in our land under Article 21 of our Constitution." See also Rao and Chingale, Chap. 9, Sect. 3.

[10]Article 9.1 of the African Charter on Human and Peoples' Rights provides: "Every individual shall have the right to receive information."

[11]Cf. the "Declaration of Principles on Freedom of Expression in Africa", adopted by the African Commission in 2002, to supplement Article 9 of the African Charter which provides that "every individual shall have the right to receive information". While the Declaration has expanded on States Parties obligations under the African Charter, it does not specifically provide guidance on the form and content of the legislation to be enacted to give effect to these obligations at the domestic level. In adopting the "Model Law on Access to Information for Africa", the African Commission has therefore gone a step further than the Declaration, by providing detailed and practical content to the legislative obligations of Member States to the African Charter with respect to the right of access to information. This "Model Law" is available at: http://www.achpr.org/files/news/2013/04/d84/model_law.pdf.

[12]"Everyone has the right to freedom of thought and expression. This right includes freedom to seek, receive, and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing, in print, in the form of art, or through any other medium of one's choice."

[13]I/A Court H. R., *Case of Claude-Reyes et al. v. Chile* (Judgment of 19 September 2006), Series C No. 151, para 58 (a)-(b) (regarding the Commission's arguments) and 77 (regarding the Court's findings).

[14]ECtHR, *Leander v. Sweden* (Judgment of 26 March 1987), Series A No. 116, para 74; ECtHR *Társasága Szabadságjogokért v. Hungary* (Judgment of 14 April 2009), No. 37374/05, para 35 to 39, with reference to ECtHR, *Chauvy and Others v. France* (Judgment of 29 June 2004), ECHR 2004-VI, No. 64915/01, para 66.

Committee of Ministers of the Council of Europe.[15] Then, in June 1998 the UN Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters was signed in Aarhus.[16] This Convention has implemented Principle 10 of the Rio Declaration on Environment and Development (1992)[17]: All citizens concerned by environmental issues should have access to the relevant government-held information, even if their statutory rights have not been violated.[18] Finally, in June 2009, the Convention on Access to Official Documents was opened for signature by the Parties to the Council of Europe.[19] Its preamble explains the reasons for implementing the Convention through appropriate national laws and other measures:

[15]See Declaration of the Committee of Ministers of the Council of Europe on the freedom of expression and information, adopted on 29 April 1982, as well as recommendations of the Committee of Ministers to Member States No. R (81) 19 on the access to information held by public authorities, No. R (91) 10 on the communication to third parties of personal data held by public bodies, No. R (97) 18 concerning the protection of personal data collected and processed for statistical purposes, No. R (2000) 13 on a European policy on access to archives and Rec (2002)2 on access to official documents.

[16]Cf. the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (25 June 1992).

[17]Principle 10 reads as follows: "Environmental issues are best handled with participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment which is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided."

[18]Under the title "Objective" Article 1 of the Aarhus Convention lays down: "In order to contribute to the protection of the right of every person of present and future generations to live in an environment adequate to his or her health and well-being, each Party shall guarantee the rights of access to information, public participation in decision-making, and access to justice in environmental matters in accordance with the provisions of this Convention."

Recitals 8, 9 and 10 of the Convention read as follows: "Recognizing also that every person has the right to live in an environment adequate to his or her health and well-being, and the duty, both individually and in association with others, to protect and improve the environment for the benefit of present and future generations,

Considering that, to be able to assert this right and observe this duty, citizens must have access to information, be entitled to participate in decision-making and have access to justice in environmental matters, and acknowledging in this regard that citizens may need assistance in order to exercise their rights,

Recognizing that, in the field of the environment, improved access to information and public participation in decision-making enhance the quality and the implementation of decisions, contribute to public awareness of environmental issues, give the public the opportunity to express its concerns and enable public authorities to take due account of such concerns [. . .]."

[19]"This Convention enters into force on the first day of the month following the expiration of a period of three months after the date on which 10 member States of the Council of Europe have expressed their consent to be bound by the Convention" (Article 16.3 of the Council of Europe Convention on Access to Official Documents). It has been signed by five countries of the Council of Europe and ratified by nine as of 18 Sep. 2016, so it may be expected to enter into force soon.

[T]he exercise of a right to access to official documents:

- provides a source of information for the public;
- helps the public to form an opinion on the state of society and on public authorities;
- fosters the integrity, efficiency, effectiveness and accountability of public authorities, so helping affirm their legitimacy.

After its ratification this Convention will be the first binding international legal instrument to recognise a general right to access to official documents held by public authorities including natural or legal persons insofar as they exercise administrative authority.

2 The Development of the Right of Access to Information in Constitutional and Ordinary Legislation of the Nation State

In the past few decades, the access to information has become consecrated by many Constitutions as a self-standing fundamental right,[20] and even in those that do not expressly refer to such access we find traces of transparency or principles that depend on public disclosure, and constitutional court precedents suggest that transparency is a basic prerequisite for a constitutional state (legal state)[21] guided by the principles of democracy and rule of law. It should also be noted that in most cases legislators have defined the right to information as a fundamental right (Perlingeiro et al., Chap. 2, Sect 2; Blanke, Chap. 3, Sect 2).

[20]See for example in Europe: Albania (Article 23 Const. 1998), Austria (Article 20. 3 and 20.4 Const. 1920), Belgium (Article 32 Const. 1831), Bulgaria (Article 41 Const. 1991 as amended through 2007), Estonia (Article 44 Const. 1992), Finland (Sec. 12 Const. 1999), Greece (Article 5A Const. 2001), Hungary (Article VI.2 Const. 2011), Macedonia (Articles 16.2, 16.3 and 18 Const. 1991), Moldova (Article 34 Const. 1994), Spain (Article 20 Const. 1978); en Latin America: Bolívia (Articles 21.6 e 242.4 Const. 2008), Brasil (Articles 5 XXXIII, 37 § 3 II, e 216 § 2 Const. 1988), Costa Rica (Article 30 Const. 1949), Equador (Articles 18.2 e 91 Const. 2008), Guatemala (Article 30 Const. 1993), Mexico (Article 6A Constitution 1917 as amended in Feb. 2016), Nicarágua (Article 66 Const. 1987), Panamá (Articles 43 e 44 Const. 1972), Paraguai (Article 28 Const. 1992), Peru (Articles 2.4 and 5 Const. 1993), Dominican Republic (Article 49.1 Const. 2010) and Venezuela (Article 143 Const. 1999); in Asia: Afghanistan (Article 50 Const. 2003), Armenia (Article 23, 27, 33.2 and 83.5 Const. 2005), Azerbaijan (Article 50 I, II and III Const. 1995), Georgia (Articles 24 and 41 Const. 1995 as amended in 2006), India (Article 19.1 Const.), Kazakhstan (Articles 18, 20 and 31 Const. 1995 as amended in 1998), Maldives (Article 27, 28 and 29 Const. 2008); in Africa, Burkina Faso (Article 8 and 101 Const. 1991), Cape Verde (Article 29 and 48 Constitution 2010), Democratic Republic of Congo (Article 24 Const. 2006), Egypt (Article 31 and 68 Const. 2014), Eritrea (Article 19.3 Const. 1997), Ethiopia (Article 29 Const. 1994), Ghana (Article 21 Const. 1992), Guinea Bissau (Article 34 Const. 1996), Kenya (Article 35 Const. 2010), Malawi (Article 37 Const. 1994); and in Oceania, Fiji (Articles 17, 24 and 25 Const. 2013).

[21]See Sommermann 2010, p. 12, 19.

Legislative codification of the right to access to information has been a global tendency. There are currently about 130 special information access laws in effect that may be characterised as codes; yet the right of access to information does not necessary have to be regulated in a statutory system.[22] Most such laws were ratified in the 1990s and thereafter,[23] and about 50% of them reflect constitutional provision that expressly provide for information access as a fundamental right.[24] As established by the I/A Court H. R., the right to access to information has two different dimensions (individual and collective dimensions),[25] which it uses as a basis to confirm its universal nature and that everyone should be granted access to government-held information, even without a specific legal interest in such disclosure: to obtain access to information, it should suffice to invoke "citizen oversight".[26]

The right of access to official information is no longer consecrated only by the national laws of "western" nations, although the US-American "Freedom of Information Act" has had a big impact on the legal development of many countries in this regard (Bachilo, Chap. 10, Sect. 2.4). Especially in Latin America, the Brazilian Law N° 12.527/2011, the Mexican General Law on Transparency and Access to Public Information (2002/2015[27]) and most recently the Argentinian Law 22275/2016[28] exemplify the development of specific national forms of codification. For example, Article 2 of the above-cited Mexican law explicitly aims at democratisation (subsections 7 and 8) and reinforcement of judicial protection (subsection 4). African countries, such as Nigeria,[29] and albeit to a lesser extent, Indonesia and other Asian countries,[30] have now enacted their own national transparency laws. It may be legitimately asked, however, whether this abundant legislation has actually broadened the scope of the right of freedom of access to information as an enforceable right in reality (Sects. 6.5 and 6.6).

In fact, the right of access to information is mainly regulated by constitutions and international conventions, so that administrative and judicial authorities

[22]http://www.right2info.org/laws/constitutional-provisions-laws-and-regulations (Accessed on 29 October 2016).

[23]See Perlingeiro 2014, p. 2.414. Available at: http://dx.doi.org/10.2139/ssrn.2416760. See also http://www.rti-rating.org/country-data (Accessed on 29 October 2016).

[24]http://www.rti-rating.org/by-indicator?indicator=1 (Accessed on 29 October 2016).

[25]Inter-American Commission on Human Rights, *Case of Gomes Lund et al. (Guerrilha do Araguaia) v. Brasil* (Judgment of 24 November 2010), Available at: http://bit.ly/1KdWmN3 (Accessed on 14 March 2016).

[26]See Case Claude Reyes et al. v. Chile. § 157.

[27]Cf. "Ley General de Transparencia y Acceso a la Información Pública", *Diario Oficial* of the Mexican Federation of 4.5.2015.

[28]Cf. "Derecho de Acceso a la Información Pública", Boletín Oficial de la República Argentina, available at: https://www.boletinoficial.gob.ar/#!DetalleNorma/151503/null.

[29]http://www.right2info.org/laws/constitutional-provisions-laws-and-regulations#nigeria (Accessed on 29 October 2016).

[30]http://www.right2info.org/laws/constitutional-provisions-laws-and-regulations#indonesia (Accessed on 29 October 2016).

are confronted with the challenge of surmounting the obstacles created by infra-constitutional provisions restricting such access. This means that the constitutional courts, especially, but not only those with administrative jurisdiction, are particularly well-suited to enforce such rights. In that context, to compensate for the excessive number of vague concepts that permeate the laws of information, principles and general rules, when properly systematised and interpreted by the legislators, make a positive contribution by reducing the margin of appreciation of the authorities in teleological exegeses that give rise to controversy and uncertainty.[31]

2.1 *Reasons for the Development of National Laws on Access to Information*

The progressive codification of freedom of information can be mainly attributed to three factors: first, the end of the vast majority of military dictatorships and the breakdown of the former Eastern Bloc have led to a process of democratisation in these "de-liberated" countries. One result of this liberation is that citizens are interested to come to terms with past wrongs through critical confrontation with their recent history, and are interested in obtaining information about their own past. At the same time, they wish to "supervise" the political actors who previously used to withhold from the public information about "internal" issues of state and public administration so as to act at its own discretion.[32]

Simultaneously, at the international level, a broad interpretation of the classical right to information or, as in the Council of Europe, a codification of a special right to access to information has taken place. The global and regional covenants on human rights provide explicitly only for the right to freedom of expression, including the freedom to seek, receive and impart information and ideas of all kinds (e.g., Article 19.2 of the International Covenant on Civil and Political Rights—ICCPR, Article 10.1 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (1950—ECHR), i.e., the right to communication which is limited to a mere defensive right ("Abwehrrecht"). Although Article 19 ICCPR does not oblige public authorities—in terms of a "positive right" of the citizen—to disclose available information, the guarantee under the convention may be assumed to serve as a motivating factor for the development of the right of access to information. The effects of such motivation are obvious in the interpretation of Article 9.1 of the African Charter on Human and People's Rights by the African Commission on Human and Peoples' Rights, and the interpretation of Article 13.1 ACHR by the I/A Court H. R. (Sect. 3). The preamble to the European Council Convention on Access to Official Documents (Sect. 1) explicitly mentions "Article 19 of the Universal Declaration of Human Rights" and to

[31] See Perlingeiro 2015.

[32] Ackerman & Sandoval-Ballesteros 2006, p. 86 et seq.

"Articles 6, 8 and 10 of the (European) Convention for the Protection of Human Rights and Fundamental Freedoms".

In a nutshell, the socio-economic change together with a restructuring of the economy in favor of the tertiary sector, the digital revolution, particularly the growing importance of the Internet (Sect. 2.2), and the global transformation into an Information society have speeded up the development of the right of access to information.

The right of access to information will take a few years to develop fully, as shown by the experience with the U.S. Freedom of Information Act. The highest costs have proven to be the hiring of additional civil servants, i.e., bureaucracy, to examine the individual requests.

2.2 *The Catalytic Role of the Internet for the Development of the Right of Access to Information*

The internet has now taken on a role of inestimable importance in protecting the right of access to information. The medium promises unprecedented dissemination of information, culture and knowledge, and is a vehicle for innovation, creation and wealth generation.[33]

The significance of the internet is inseparably intertwined with the significance of data for the societies of the twenty-first century. Digital data, in particular, as an important foundation for research and opinion-building, as well as basis for decision-making, has repeatedly been called the "fuel of the future" or "the new petroleum". In addition, it is necessary to consider Open Data's economic impact ("digital gold"), which the European Commission expects to attain the value of EUR 75.7 billion in Europe by 2020.[34] Countries can create an economically valuable basis for innovations and new business models—especially "start-ups"—by making their "data" available free of charge in machine-readable format.

Unlike traditional media, the internet enables individual users not only to be consumers of information but also to become involved as active participants and even interactive producers,[35] transforming the information society into an interactive society[36] ("social media"). The internet can also foster the rapid emergence of a knowledge-based economy through free access to public-sector research. Hence, the

[33]Cf. the Explanatory Memorandum regarding the French "Digital Republic Law"; available at http://www.republique-numerique.fr/pages/digital-republic-bill-rationale (Accessed on 29 October 2016).

[34]European Commission, Creating Value through Open Data: Study on the Impact of Re-use of Public Data Resources (Capgemini Consulting), 2015: "Between 2016 and 2020, the market size of Open Data is expected to increase by 36.9%, to a value of 75.7 bn EUR in 2020."

[35]Woods 2012, p. 141.

[36]Wiberg 2005, p. 1 et seqq.