

Dacian C. Dragos, Polonca Kovač, Albert T. Marseille, *The Laws of Transparency in Action, A European Perspective*, Cham: Palgrave Macmillan 2019, hardcover, ISBN 978-3-319-76459-7, xxi+666 pp., € 217.99

In the United States and in most European countries, public access to documents is considered a necessary right to guarantee the democratic character of institutions and allow the clear formation of public opinion. Therefore, in many legal systems, the so-called ‘Freedom of Information Act’ (FOIA) has emerged as a model of legislation which aims to affirm the exercise of ‘public power in public’, in that it should support the democratic processes, namely those of participation and accountability.

Also, in the European Union, the right of access to documents – now expressly required by Article 42 of the Charter of Fundamental Rights of the European Union and by Article 15 TFEU – is conceived as a right strictly connected to the democratic principle.

In light of these considerations, this book analyzes the structural elements of the right of access to documents and the practical application of this model of decentralized and individualistic transparency. In particular, the book plays an important part in the academic debate, by engaging in a comparative assessment of the implementation challenges facing FOIAs in the administrative law of several European jurisdictions and at the level of European Union law.

The starting point for the authors’ investigation is that the progressive proliferation of the right of access to public documents can stimulate a comparative analysis between the various laws on administrative transparency, including the European regulation on public access (in particular, Regulation (EC) 1049/2001). However, there are many reasons that would suggest particular caution in this type of analysis, taking the peculiarities – including constitutional – of the various European legal systems into consideration. In this vein, it is good to point out that authors are aware that ‘the problems that occur in the implementation of FOIAs are different due to the legal and institutional context; nevertheless, patterns of best practices and malfunctioning are comparable’.

First of all, comparing FOIAs in different legal models is not a simple operation. Although the ‘Freedom of Information Act’ often presents common features (access granted to ‘anyone’, absence of reason for the request of access, categories of absolute and relative exceptions, etc.), in reality the laws are subject to a specific rationale in their application in the individual legal system. For example, the peculiar path of affirming the right of access to EU documents is due to the important and original relationship it had with the problem of the ‘democratic deficit’ of the European Union.

In the light of this premise, the greatest value of this book lies in its conclusive findings, where it is stated that ‘...although modern FOIAs are comparable in terms of structure, parties, procedure, and exceptions covered, they are still not uniform in their interpretation and application. The specifics of the legal system in which these rules apply still play a significant role in their interpretation,

and the administrative practice is also different. However, the comparative law finds here a fertile ground for assessment, as the legal institutions enabling freedom of information are in large part similar, and thus they can be compared, so that good practices from one country can be easily shared and referred to by other countries’.

The authors are aware of these difficulties and – without underestimating the relevance of the different legal contexts in which FOIA is placed – seek to carry out a detailed analysis of ‘the empirical evidence of enforcement of the main elements of the freedom of information laws in 13 jurisdictions from continental Europe and in the EU legal system’.

In the book, all contributions follow a similar structure, which analyzes: 1) the beneficiaries of access to public documents and the notion of public authority (with specific focus on the number, type and content of the request for access); 2) the relationship between public access and proactive publication of documents; 3) the exceptions to public access (with a specific analysis of the annual reports of public authorities, which shows the type of exceptions most used, such as ‘privacy’); 4) the special type of access to environmental information; 5) the legal protection against the refusal to provide information (in the form of both administrative and judicial remedies).

All these topics are described in depth, with an accurate analysis of the law and, above all, the case law and various sources of soft law (such as, for example, the important opinions of the European Ombudsman).

The conclusions of the book are very interesting in the light of this comparative analysis. Although each domestic arrangement has its own peculiarities, the book highlights that on at least three points (parties, procedures and exceptions) it is possible to discern some common trends. In this direction, tables, graphs, and careful analysis of the annual reports published in the various legal systems greatly help the reader to understand the phenomenon and its application.

With reference to the ‘parties’, it was pointed out that in all FOI legislation, the right of access is open to very large groups. In this sense, many contributions also reveal the important use that NGOs make of freedom of information. The book also underlines the particular aspects of some systems, such as the Italian one, in which for a long time (from 1990 to 2016) the right of access has been conditioned by the demonstration of a direct, concrete and currently existing interest corresponding to a legally protected position linked to the requested document.

Regarding the ‘procedures’, the book highlights how an important guarantee of the effectiveness of the law is at stake. The book claims that the comparative analyses reveals that the legal remedies are the very essence of the right of information law as well as a tool for enforcing such rights. In the various systems examined, legal protection is provided either in a formal sense – with direct appeal to the court or with an administrative appeal to an independent state body or through a non-formal instance to the head of the body at issue – or via

the Ombudsman. All these defined procedures give substantive content to the right of access. In fact, procedural issues are of paramount importance with a view to turning a theoretical entitlement into an actual right, that may be effectively enforced. In this sense, it is clearly stated that 'legal remedies can support an effective RTI [right to information] only if and when there is some minimal (administrative) procedure formalized and pursued as such in practice'.

Finally, one of the most important aspects of all compared countries' legal frameworks for providing access to public information, is the theme of 'exceptions'. That is, the issue of the limits that prevent the disclosure of information. Indeed, in every legal system transparency is not of absolute value, but must be balanced with other public and private interests. In this area, the authors identify that in most FOI legislation the exceptions revolve around the use of two criteria, commonly called "harm test" and 'public interest test', which limit the discretion of the administration in the decision of access to public documents. The harm test and public interest test can have different definitions and aims. In an attempt to provide a general definition, it is possible to argue that, based on the criteria of the harm test, the administration can refuse access if it proves that the dissemination of the document could cause concrete and highly probable damage to other private or public interests protected. On the other hand, the public interest test requires the administration to ground its decision on a real balance of interests. It considers the relationship between the disclosure public interest and the interest protected by the exception (for example, commercial interest, court proceedings and legal advice, data protection, etc.).

The application of these criteria results in the concrete limitations of access to documents. Therefore, it would have been interesting to have, in the conclusion of the book, a further and more in-depth analysis on two related topics: 1) the discretion of the administration in the application of these criteria; 2) the specific role of the 'public interest test' in the distinction between absolute and relative exceptions. Indeed, a clearer result in comparative terms on the role played by public interest in the disclosure of documents in balancing with the 'protected' interests would have been interesting, since this interest can condition both in a restrictive and extensive sense the guarantee of the individual right of access.

In general, because of its extensive comparative analysis of the topic, the book deserves to become a point of reference for comparative research on FOIAs model, thanks to its coherence, linearity of analysis and application of legal method.

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