Comparative aspects of Freedom of Information: European Union and Member-State dimensions of Open Access to Public Documents

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1. Abstract

The present paper, aims to outline recent and current European Union (EU) and Greek policies and practice concerning the general principles of openness and transparency of the public sector, focusing particularly on the right of access to public documents. It is based on the first major part of an on-going doctoral research, concerning the implementation of the European Union and the Greek institutional framework for Lifelong Learning in contemporary Greece, and is specifically associated with the limitations and difficulties tackled during research conduct, concerning access to European Union and Greek public documents relating to educational policy.

With regard to the aforementioned issues, this paper includes two major parts, referring to the European context and the Greek reality respectively. Each one of these two parts is twofold, on the basis of a fundamental difference between a "passive" and "active" type of transparency. Specifically, the information spread throughout the pages of either the European or the Greek institutions' websites is related to a "passive" type of transparency, whereas the publicity of the same institutions' documents due to citizens' initiative constitutes an "active" type of transparency. In this respect, this paper presentation finally explores the difficulties and limitations of a doctoral research, regarding specific issues relating to access to public documents defining Greek educational policy.

2. Openness and transparency in public administration in the European Union

2.1. Useful distinctions

In democratic states, citizens have a right not only to know the laws that they are called to respect and participate in elections to select their representatives, but also to follow their representatives' activities and constantly monitor the decision making process leading to the setting of norms more or less binding on citizens. All these elements are fundamental in democracies and are commonly described as openness or transparency, with particularly the latter being a buzzword among international organizations and public sector reformers (Gavazza & Lizzeri, 2007).

Although in literature the two principles are used interchangeably, it is important to briefly define their content given the differences that exist between them. The principle of openness has become an important legal principle in European administrative law, allowing European citizens, not only to participate in the decision-making process, but also to obtain all public information on the work of public administration (Curtin & Meijers, 1995). On the other hand, the principle of transparency, referring merely to the accessibility of information and other public administration services, is a narrower term, and in fact, a component of the principle of openness, which covers various forms of active cooperation and communication between the administration and the public (Bugaric, 2004).

These general principles have become critical nowadays, in an emerging environment, where, especially due to outstanding progress in information and communication technologies, transparency and a participatory culture among citizens are promoted. Moreover, these principles remain up-to-date, since the "democratic challenge facing Europe", relating to the "democratic deficit", emerged for the first time during the late 1970s, has been a major topic during recent efforts at EU Treaty reform (Devuyst, 2008).

Therefore, these principles, associated with the Freedom of Information (FOI), are deemed to be necessary to protect the form of democracy that developed through the twentieth century. In this sense, an argument gaining currency in Europe is that FOI and openness should be regarded as a fundamental human right, which deserves to be listed along with those human rights internationally accepted as such: freedom of speech, access to justice and a fair trial or protection of privacy. More specifically, a dual sense of importance promotes FOI to a human right: first, it is instrumental in realizing other human rights, such as those just listed, and second, FOI is also intrinsically important in establishing what governments do on our behalf and in our name (Birkinshaw, 2006).

2.2. The "passive" type of transparency in the EU

The European Union has incorporated in its legal order these principles, which were first introduced in the EU legal order through the Maastricht Treaty in 1992 (Declaration No 17 annexed to the Final Act of the Treaty on the European Union). The EU institutions already make a vast number of documents accessible on-line. EUR-Lex is a daily updated database containing about 3 million documents, available in 23 official languages of the European Union, which provides free access to European Union law and other documents considered to be public. Moreover EU Law, by articles 11-13 of Regulation 1049/2001, enacts the obligation of the EU institutions to provide citizens either with direct access in electronic form or through a register or with publication in the Official Journal.

However, it has been frequently argued that the quantity, quality and accessibility of the information provided through registers and on the websites of the EU institutions need a serious improvement. For example, the European Parliament in its reports (Cappato, 2008) has repeatedly raised issues concerning either publicity of the EU legislative works or access to documents in the field of non-legislative works, calling upon all the European institutions to improve the user-friendliness and interconnection of their websites by creating a single EU portal to access all EU documents and procedures. The creation and maintenance of such a register is an essential aspect of genuine engagement with citizens. Such engagement should be seen as part of the core business of every institution designed to fulfill the Union's promises of transparency, participation and good administration.

2.3. The "active" type of transparency in the EU

However, treaties and transparency mechanisms would remain on paper only, as has happened in the past, without implementation and enforcement. Therefore, after the Maastricht Treaty, the Council and the Commission adopted a Code of Conduct on public access to documents (93/731/EC, OJ L 340, 31.12.1993). Following, this right of access was enshrined, firstly, in article 255 of the Treaty establishing the European Community, as amended by the Amsterdam Treaty in 1996, and, secondly, in Regulation (EC) 1049/2001 regarding public access to documents, which was adopted to ensure the concrete application of this right.

Specifically as regards article 255 (EC), it enacts a right "general" in nature, since it does not require or presuppose appeal and establishment of legal interest.

Furthermore, the Lisbon Treaty, by the new Article 15 amending Article 255 E.C., provides for greater openness and transparency in the activities of EU institutions, bodies, offices and agencies, by increasing the public right of access to EU documents, expanding the coverage under the current Treaties from the Parliament, Council, and Commission to "documents of the Union institutions, bodies, offices and agencies, whatever their medium" (Sieberson, 2008).

Additionally, article 42 of the Charter of Fundamental Rights constitutes a significant improvement and enshrines a quasi-constitutional right (Dunin-Wasowicz, 2010), since it also extends the right of access to not only documents of the European Parliament, Council and Commission but to all EU institutions, bodies, offices, and agencies, including, for the first time, the European Council.

2.3.1. Regulation (EC) 1049/2001

The adoption of Regulation 1049/2001 was a milestone in the development of transparency at the EU level, characterized as, to a certain extent, the European Union's equivalent of the American (dated back to 1966) or British (since after 2000) Freedom of Information Acts (FOIA) (Dunin-Wasowicz, 2010; Birkinshaw, 2006). Only a few years before, the EU institutions operated on the basis that confidentiality was the rule and that giving access to information and documents was a discretionary exception to that rule. Regulation 1049/2001 enshrines the opposite principle: openness is the basic rule and secrecy is the exception. Regulation 1049/2001 is primarily about dealing with requests for public access to documents. Applicants who are denied access to a document under Regulation 1049/2001 may either go to the EU General Court, or to the European Ombudsman.

Firstly, the right to a judicial remedy is a fundamental guarantee of the rule of law. The obvious advantage of going to court is that the court's decision is legally binding on an institution. As regards public access to documents, this means that the EU courts can annul a decision refusing public access to documents, thereby obliging the institution holding the documents to review the request for public access.

On the other hand, the Ombudsman's role, established as part of the citizenship of the Union by the Maastricht Treaty, which was the first Treaty to mention transparency, is complementary to that of the courts: it provides an alternative remedy that applicants may use, if they consider it appropriate in their case. One main advantage of the non-judicial remedy which the Ombudsman represents is the fact that he inquires into whether or not there has been maladministration by the European institutions, bodies, offices or agencies.

Furthermore, it has to be pointed out that the Ombudsman acts not merely reactively, but also proactively. Through his experience dealing with complaints alleging lack of transparency – it is also worth noting that more than a third of all inquiries the Ombudsman carries out every year concern "lack of transparency" – he actively contributes to the adoption by the EU institutions of rules, for example on public access to documents, which safeguard the principle of transparency (Diamantouros, 2010).

In general, it has been argued that as a result of the Regulation, the public's ability to monitor the exercise of power by the Union's institutions has perceptibly increased. The Regulation empowers citizens in relation to the flow of information, to the extent that it makes it possible for them to take the initiative to obtain information, in its original context, that has not yet been put into the public domain (Diamantouros, 2010).

Nevertheless, on 30 April 2008, the Commission put forward a proposal to amend and replace Regulation 1049/2001, aiming at facilitating the widest possible access to

documents held by the Institutions, so as to enable citizens to scrutinize, and participate in, processes of governance at the Union level. However, while discussions on this legislative revision are ongoing, it has been argued that the so-called "Transparency Regulation", although it contributed to the emergence of a supranational system of regulatory accountability, it has actually failed to enhance the democratic legitimacy of the European Union (Dunin-Wasowicz, 2010).

3. E-government and transparency in contemporary Greece

The rapidly changing socio-economic environment, especially the growing demand for transparency, all around the world, requires that governments review and adjust their laws and mechanisms to ensure that principles of good public administration are implemented.

3.1. The "passive" type of transparency in Greece

E-government has been proposed as one solution to the lack of the public's trust in the performance of the core institutions of representative governments (Tolbert & Mossberger, 2006). E-government "refers to the delivery of government information and services online through the Internet or other digital means", which frees citizens to seek information at their own convenience, while the interactive aspects of e-government allow both citizens and bureaucrats to send and receive information or may include opportunities for online political participation (West, 2004).

Therefore, e-government policies promoting electronic administrative servicing systems have increasingly been implemented lately in Greece. Firstly, about three or four years ago, the Greek e-Government Interoperability Framework (Greek e-GIF) was a project placed among the overall design of the Greek Public Administration for the provision of e-Government services to public bodies, businesses and citizens. It was the cornerstone of Digital Strategy 2006-2013 for the transition and adjustment to the requirements of modern times and was directly related to the objectives and direction of European policy 2010, that is, European Information Society 2010 (Papadakis, Rantos & Stasis, 2008).

Secondly, as regards the current situation in the country, last year Greek government took a legislative initiative, in an attempt to tackle with the publicly discussed lack of public trust – diffused and increasing lately due to the recent deep economic crisis – which might undermine and even destroy political stability.

More specifically, with regard to access to public documents, a recently enacted Law, establishing "Transparency" concerning both political and public administration levels (Law 3861/2010, entitled "Diavgeia"), promises to make e-government a reality, by laying down the obligation (art. 1 of Law 3861/2010) of public authorities to provide the public with timely, accessible and accurate information through the internet on decisions and performance in the public sector. More generally, this Law aims at securing responsibility and accountability of the government services, while, in parallel, it enhances citizens' possibility to enjoy their constitutional rights, such as the right to information (according to article 5A, paragraph 1 of the Greek Constitution) and, consequently, the constitutionally founded rights associated with or dependent on the right to information, such as the right to personality development and participation in social, economic and political life (art. 5 par. 1), as well as the right to participation in the Information Society (art. 5A par. 2).

However, as it is mentioned in the Law Explanatory Report, for over a decade, public services' internet sites providing such information have operated in a not so well organised, extensive or thorough manner, varying remarkably, given the lack of binding rules regarding the overall organization of the relevant websites. In this

respect, the aforementioned Law on transparency ensures the quality of provided publicity services, by setting rules regarding easily accessible and comprehensible information about government policy and administrative action.

3.2. The "active" type of transparency in Greece

Indeed, a right to access to documents as a constitutional or legislative principle is enshrined in the legislation of most member states (Birkinshaw, 2006). Likewise, in Greece the right to individual access to public documents is established by the Greek Constitution and relevant Laws. However, the demand of transparency of administrative action is interwoven with numerous additional citizen rights. In order to meet all these legal, although diverse, prerequisites, legislation, as well as judicial and other institutions' pratice have significantly contributed to the formation of several provisions or criteria orienting and, at the same time, delimiting the possibility of access to documents and information held by public administration (Spanou, 2010). More specifically, the right to access to public documents is currently enshrined by two articles of the Greek Constitution, that is, article 5A paragraph 1 and article 10 paragraph 3, as they were reformulated by the Constitutional reform of 2001, and by article 5 of the Code of Administrative Procedure (Law 2690/1999).

3.2.1. Access to public documents: Constitutional regulations

Firstly, the aforementioned reformed Constitutional articles respectively establish each person's general right to information and the obligation of public authorities to give a written and reasoned reply to the requester of information or public documents within concrete time limits. Thus access to public documents is raised to a Constitutional right – individual and political, as far as particularly Greek Citizens are concerned – which is directly associated with major principles governing public administration, such as legitimacy, transparency and popular sovereignty (Tahos, 2009; Karakostas, 2005).

3.2.2. Access to public documents: Legislative regulations

Secondly, article 5 of the Code of Administrative Procedure specifies matters concerning the exercise of the Constitutionally founded right to access to public documents, constituting a significant improvement compared to the restrictive establishment of this right for the first time in Greece, by art. 16 of Law 1599/1986 (Karakostas, 2005).

The first paragraph of the article, by introducing the term "anyone interested", sets no presuppositions requiring legal interest on behalf of the requester of administrative documents, except for a written request to the public service concerned (Tahos, 2009). Further, administrative documents are specifically defined as documents edited by public services, Organisations of Municipal Administration or Public Law Legal Persons (Tahos, 2009).

Nevertheless, judicial practice until recently has frequently proved rather to diminish this right by posing special terms to its exercise. For example, it has established a term, unknown to the Greek administrative law, that is, "justifiable interest" (Council of State Decisions Nos 1214/2000, 841/1997 and 3321/1995, as well as Legal Council of the State Opinion No 366/2006 regarding technical offers submitted in public competitions), This "justifiable interest", by contrast to the general wording of article 5 of the Code of Administrative Procedure, seems to require at least a "particular bond" between the applicant of public documents and the case to which these documents refer (Gerontas, 2000; Tahos, 2009).

Finally, the exercise of the right to access to public documents is delimited by the rest paragraphs of article 5 of the Code of Administrative Procedure, which, among other exemptions, in paragraph 5 stipulates that the exercise of the right occurs under the

reservation of rights of intellectual property.

The case of no access to documents: Citizen Rights

In case no access to documents is achieved, citizens may activate a good deal of possibilities. Fistly, if they receive a negative reply from the administration, they can file petition for remedy to the same authority or file for quasi-judicial appeal to the hierarchically superior authority or, following, file petition for judicial review (annulment) before the Hellenic Council of State (Symvoulio tis Epikrateias), the Supreme Administrative Court of Greece (Karakostas, 2005). Secondly, competent authority's denial to reply constitutes omission of legal action and is enforceable administrative act, also subject to petition for judicial review (annulment) before the Council of State (Council of State Decisions Nos 794/1986, 3943/1995; Gerontas, 2000). Moreover, mostly worth noting is an admittedly successful practice enacted by Law 1756/1988 (art. 25 par. 4 recital b), that is, after relevant citizen request, access to public documents is ordered to the competent public authority by the Public Prosecutor of District Court Judges (Skiadaresis, 1992).

Last but not least is the citizen's right to submit a complaint to the Greek Ombudsman operating as an Independent Authority established both by the Creek Constitution (articles 101A and 103 par. 9) and Law 3094/2003, who exercises supervision to the public administration and is competent to "combat of maladministration and maintenance of legitimacy" (art. 1 par. 1 of Law 3094/2003) (Karakostas, 2005). Nonetheless, despite the unequivocal advantages of the enactment of Independent Authorities in general, since they constitute a "form of enforcement of the rule of law", they are at the same time "a manifestation of the deep crisis of the democratic phenomenon" (Venizelos, 2004).

4. "Transparency in action": The case of a doctoral research

At this point, we finally proceed to outline the difficulties and limitations concerning access to research data, which we had to handle while conducting a doctoral research in the field of sociology of law. What is mainly at issue here is that, although, as it was discussed earlier, great progress has been made regarding the "transparency relevant" institutional framework in Greece, practice affirms that the "administrative culture" of public sector and its various institutions has not yet fully come to terms with openness as a basic principle.

4.1. Access to public documents

Specifically, during the process of gathering public documents to be used as research data, we had to access European and Greek documents concerning education policy on lifelong learning. Firstly, with regard to the "passive type of transparency" as defined earlier, either EU documents (such as Regulations, Decisions, Recommendations, Opinions, Communications, Reports and other documents) or Greek documents (such as Laws, Ministerial Decisions, Announcements of educational programmes and so on), more or less legally binding, associated with the research aims, were directly accessed through the relevant websites respectively, without facing major impediments, despite reported weaknesses, as it was discussed earlier.

By contrast, as far as the "active type of transparency" is concerned, an impasse arose when we requested access to excerpts of several Greek documents edited by a Centre of Vocational Training, that is, the Utility Undertaking of Vocational Training of the Municipality of Serres (Greece), containing the "technical offer" made by the Municipal Undertaking in a public competition, regarding the realization of a recent training programme, as well as the "evaluation report" regarding the same

programme. The certain public service invoked reasons concerning the right to intellectual property (according to the relevant art. 5 par. 5 of Code of Administrative Procedure, as formerly discussed), whereas this did not seem to be the case, since these documents were filed by the public service. Besides, the aforementioned paragraph merely defines a "reservation", that is, the right to access to documents cannot ipso facto be abrogated. Moreover, we should bear in mind that the aim of our request was inherently connected with scientific research; consequently, even if intellectual property had been concerned, indication or use of excerpts of any intellectual property would have been permitted "in favour of the progress of science", according to Law 2121/1993 (article 19) on intellectual property (Kallinikou, 2005).

Despite numerous efforts dealing with the certain public service involved in our case, after the legitimate deadline had elapsed and no written and reasoned reply was provided, justifying why the requested information should not be disclosed, we submitted a complaint to the Greek Ombudsman (File No 135811), since he has the authority to intervene, particularly the Department of State-Citizen Relations, as it is defined in the law establishing the Ombudsman, in cases involving public bodies such as municipalities, in order to handle cases relating, among others, to information and communication. Further, the Greek Ombudsman's mission is to investigate administrative actions or omissions by public services that infringe upon the personal rights of individuals.

Following, the case-handler proceeded with retrieving the requested material from the public service concerned. Operating as a mediator, he made recommendations to the certain public service and, finally, only after repeated efforts, made our access to photocopied requested public documents possible.

4.2. Access to personal data

Last but not least, in our attempt to reach the research target population, we dealt with the same public service, operating also as a data controller by keeping personal data in its files, that is, the names and telephone numbers of trainees, which this time invoked reasons concerning personal data (according to Law 2472/1997) not to allow disclosure of their identity, thus leading our endeavour to an impasse once again. Subsequently, we filed a complaint with the Hellenic Data Protection Authority (HDPA) (Case No GN/50/20-1-2011, currently still processed), which informed us that although our research regarded sensitive personal data (Inglezakis & Intzessiloglou, 2003), since they belonged to vulnerable social groups, such as Roma, the Authority had the competence to intervene and make the scientific research possible by overcoming obstacles or limitations concerning personal data, according to Law 2472/1997 (article 7, paragraph 2, recital 6).

All things considered, we come to the conclusion that, admittedly, the reality of administrative services practice may be at odds with legislative intent and regulation, principally as far as access to public documents is concerned. Nevertheless, non-judicial alternative remedies provided by the Greek institutional framework, prove to be of invaluable help in handling practical problems.

5. Concluding Remarks

In conclusion, some final remarks have to be made. Apparently, in the light of all the theoretical and practical issues elaborated in this presentation, the quality of the institutions' systems for managing and retrieving information and documents, either in the European Union, as a supra-national political organization, or in member states, such as Greece, has significantly improved over the last twenty years, thereby

enabling them to operate more efficiently and effectively, as well as more transparently. However, this presentation additionally attempted to mark a further step forward in terms of posing some questioning on the practical terms and conditions required to make transparency a reality.

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