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Significance of and Comparative Trends in Procedural Regulation of Right to Information

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ABSTRACT

Any legal right is (more) efficiently pursued if sufficient procedural regulation supports its substantive setting. This article is dedicated to an analysis of procedural regulation of right to information (RTI) since its significance is increasing in terms of developing good governance and good administration within contemporary transparent, open and collaborative society. The comparative analysis of selected countries (USA, Ireland, Sweden, Austria, Germany, Slovenia, Croatia) included herein proves that selected procedural institutions, such as time limits and an appeal to an independent body or judicial review, contribute to a significantly higher level of implementation of the RTI in practice as also indicated by several international studies. In conclusion, the author recommends certain good practices, especially significance of RTI implementation in relation to different authorities in the context of administrative procedure guaranteeing constitutional and supranational transparency principles.

Key words: *RTI, transparency, comparative analysis, procedural law, administrative procedure, time limit, appeal*

JEL: K23, K41

1 Introduction

The right to information (RTI) has been gaining importance over time. RTI in fact enables the application of two key concepts of modern society, the state, and administration. First, serving as a foundation of the rights of defense of weaker parties against the authorities, access to information contributes to the development of the rule of law as it restricts authoritative power and provides constitutional guarantees to the addressees of the norms. Second, by developing good governance and good administration RTI enables, on the one hand, the establishment of a dialogue between the rulers and the ruled, i.e., partnership and the participation of the latter in designing and implementing public policies and, on the other, the transparency and accountability of the bearers of public authorities. However, typically the principle of transparency and/or openness is difficult to categorize, since

it emerges in different perspectives and legal or policy frameworks and papers as a classical safeguard or/and modern standard (cf. Savino, 2010, pp. 21–30). The modernization of public administration into cooperative open administration is thus both a tool and a target whereby and towards which the state changes the course of public affairs governance from mere administration to integral governance and social progress.[1]

RTI is regulated in almost half of the countries in the world at the constitutional level and implemented by means of a special law known in most cases as the Freedom of Information Act (FOIA) or – generally speaking – RTI law, following the first examples in Sweden (1776), Finland (1919), the USA (1966), etc. According to the Global Right to Information Rating (GRTI), 93 countries had special RTI laws in as of 2013. Furthermore, RTI is recognized as a fundamental right by several international documents, including the UN Universal Declaration of Human Rights (1948), Article 10 of the European Convention on Human Rights (ECHR, 1953), Council of Europe (CoE) Resolution (77)31 on the Protection of the Individual in Relation to the Acts of Administrative Authorities (1977) and Resolution (81)19 on the Access to Information Held by Public Authorities, the EU Ombudsman's Code of Good Administrative Behavior (2005), and Articles 41 and 42 of the EU Charter of Fundamental Rights (2010). However, the above legal acts do not fully concur and differ as to the understanding and regulation of RTI. Resolution 81(19), for instance, underlines that in order to exercise RTI, the necessary means and ways should be provided, namely that RTI should be granted within a reasonable period of time, refusal reasoned and the applicant must be guaranteed judicial protection. This resolution was updated with Rec (2002) 2 on Access to Official Documents, which provided that RTI is to be decided by an independent body and it is necessary to carry out a »public interest override« and »harm test« (Šturm et al., 2011, p. 608). In the event of diverging interests, the burden of proof is on the person opposing disclosure ("reverse FOIA"). Exceptions are allowed, yet not in absolute terms.

The article addresses theoretical overview of procedural functions in order to realize RTI as a fundamental human right. However, it is emphasized that procedural regulation inevitably enhances implementation of legal interests pursued by supra- and national substantive law. Even more, certain procedural institutions prove to be a necessity, such as in a case of RTI (de)formalization of applications and acts, time limits set and in particular an administrative-judicial protection of claimants. In order to examine the significance of these elements of RTI, a comparative analysis was carried out in selected countries of different legal traditions (Anglo-Saxon vs. German vs. Central Eastern Europe). Hence, the main research question addressed herein is the

1 For more on good and open administration and related concepts, cf. Nehl, 1999, pp. 13–26; Kovač, Rakar, & Remic, 2012, pp. 26–61; Kovač, 2013, pp. 2–4. The concept of "freedom of information" as a base in the field is broader than the RTI mostly dealt with herein, since RTI laws imply also the obligation to publish specific public information (proactive transparency) and the re-use of information.

significance and impact of certain procedural institutions to a (higher) level of implementation of RTI in practice. Taking into account legal theory and empirical findings of comparative analysis, finally, several conclusions and general recommendations on RTI de lege ferenda, irrespective of individual countries, are drawn.

2 The Procedural Regulation's Significance for the Exercise of RTI

2.1 General on the functions of procedure

Substantive law alone does not suffice for any right to be fully implemented. Hence, most countries address the procedural aspects of RTI in specific laws, many of them even with additional subsidiary use of the relevant (General) Administrative Procedure Act (APA). The latter certainly makes sense. Namely, an access to public information as such is by definition an administrative matter since individuals, while asserting the right to access data, actually wish to exercise a positive right in their relations with public authorities.[2]

The importance of procedural regulation or procedural law in general has changed over time, in both theory and practice. The once narrow understanding that procedure – in terms of its content or substantive law – has a merely auxiliary or instrumental nature has indeed been overcome, although even under Roman law only a specific form was given a proper substantive weight. Administrative procedure is specifically a tool for balancing collisions between the public interest and the individual rights and legal interests of the parties. However, specific *de iure* procedural rights are perceived in procedural and constitutional law as autonomous components of the subject of procedure. Formal legality is therefore necessary to achieve predictability and thus legal certainty and transparency, and administration's awareness of respect for the legitimate expectations and personal dignity.[3]

As the method affects the result – even in the social sciences despite the limited objectification of scientific verification – one cannot claim that legal procedure as a fact finding and evaluation method is not of crucial importance for the validity of the outcome, i.e., the substance of the decision. The procedure has no a priori determined outcome; at the time it is initiated, the goal is not yet clearly defined as it is influenced over the course of

2 Different countries define administrative relations, procedure, and acts more or less broadly. The German-oriented countries mostly refer to individual administrative decisions or adjudication. Under such doctrine, the main focus in the German circle is on the principle of the administrative act (Hoffmann-Riem et al., 2008, pp. 493, 614). In other countries, e.g., the USA, or at the EU institutions, administrative relations and acts refer to any action by administrative authorities even if it involves rule-making (administrative regulations; cf. Galligan et al., 1998, pp. 17–26; Rose-Ackerman & Lindseth et al., 2011, pp. 336–356).

3 Cf. On evolvement of (administrative) procedure in Rose-Ackerman & Lindseth et al., 2011, pp. 350–354; Hoffmann-Riem et al., 2008, p. 499; Schmidt-Assmann in Barnes, 2008, p. 52; Künnecke, 2007, p. 138; Androjna & Kerševan, 2006, pp. 816–822; Peters & Pierre, 2005, p. 270; Statskontoret, 2005, p. 73; Nehl, 1999, pp. 22, 70; Harlow & Rawlings, 1997, p. 497.

the procedure by several unpredictable interactions between the parties and procedural actions (Hoffmann-Riem et al., 2008, p. 488). Hence, the purpose of the procedure is to mitigate the uncertainties regarding the objective, considering that uncertainty is a component of any problem-solving procedure. If the legislature guarantees a public law entitlement, there is no reason not to also provide for a suitable procedure to ensure its effective protection and direct legitimacy, as well as at least indirect pursuit of the public interest (Androjna & Kerševan, 2006, p. 67). The awareness that procedural principles and rules are important for the enforcement of a(ny) right is indeed present. Experience shows that contrary there might be unacceptable paradoxes, such as making a party theoretically entitled to a certain measure, regardless of whether they will in fact enjoy such treatment. As stated by Nykiel et al. (2009, pp. 34–40), procedural issues are "of paramount importance with a view to turning a theoretical entitlement to a measure into an actual right that may be effectively enforced." Indeed – only procedural elaboration of a substantive law right enables the actual enforcement thereof.

2.2 Substantive and procedural aspects of RTI

Procedure thus serves the goal it pursues in the sense of implementing the substantive law right that is the subject of procedure. However, in the context of the development of public law, RTI is understood not as a tool but rather as a target of the procedure per se. Administrative procedure, also in the case of RTI, is thus a tool that, on the one hand, enforces the aim of a substantive regulation, while on the other it indicates the manner in which such aim can be achieved. The necessary level of legal regulation of the relations and of the authoritativeness of the cogent law is in fact thought to be a consequence of the expected conflictuality of relations and the scope of interference with the legal status of individual participants, which is why the regulation and the corpus of parties' rights are not necessarily the same in all relations with the administration (cf. Harlow & Rawlings, 1997, pp. 504, 516; Galligan et al., 1998, p. 44; Künnecke, 2007, p. 46). Procedural rules are intended to guarantee that decisions are correct in terms of content and consistent with substantive law, as well as to protect specific fundamental human rights. However, it needs to be considered that not all procedural guarantees, principles, and rules have the same weight as regards the subject of procedure. The relevance of administrative law institutions is inevitably linked to the right that is the subject of procedure: either (according to Schmidt-Assmann in Barnes, 2008, p. 47) situation-based rules or rights that are independent of concrete occasions, such as RTI. To conclude, a necessary "reasonable balance" (Nehl, 1999, p. 11) is to be maintained between the progressive development of procedural constraints and the administrative leeway needed for efficient policy implementation.

In such context, importance is also placed on the ratio between the substantive and procedural nature of the rights of parties in procedures. Such a problem

is particularly notable in the case of RTI since different legal environments (supra- and national) define RTI sometimes as a substantive right and in other cases as (only) a procedural right, although of the rank of the constitution or international law. Understanding whether the right is considered protected under procedural or substantive law is particularly important when substantive law cannot be properly determined in terms of content (Peters & Pierre, 2005, p. 284). The need for procedural rules is directly proportional to the lack of substantive rules or to the degree of indetermination and discretion (Rose-Ackerman & Lindseth et al., 2011, p. 342). Experience as well as German and Anglo-Saxon theory reveals that it is better to focus on ensuring the correctness of decisions by means of procedure, since the growing complexity of social life and thus the indeterminateness of substantive law are unavoidable and will most probably continue to rise. As a result, procedural rules are being increasingly applied as substantive rules, and the lines between the substantive and procedural nature of the norm are becoming more and more blurred (Galligan et al., 1998, p. 29). In a consequence, some traditional principles and rules of a procedural nature are being subsumed by constitutional or sector-specific administrative substantive law as substantive principles and rules, giving them double or greater protection. These aspects are significantly influenced also by European and national case law.[4]

Both in the Anglo-Saxon environment and in the EU, RTI began to develop first in terms of rights in individual procedures and APA or sector-specific administrative regulations (in the EU particularly in relation to competition and antidumping, cf. Nehl, 1999, p. 43). Parallel thereto, it acquired considerable constitutional significance as a special and independent right to access general information intensified. The latter served as the basis for the growing importance of procedural safeguards in administrative procedures, mainly in terms of judicial activism. Nevertheless, a distinction needs to be drawn between most often substantive RTI, on one side, and the procedural right to access files in concrete and individual administrative relations on the other. These two rights can be understood either as existing in parallel or overlapping. On the other hand, particularly in Scandinavia and at the EU level, a single unified "right to know" is emerging, including all rights to information (Banisar, 2006, p. 6; Savino, 2010, p. 5; Gotze, 2012, p. 4). What prevails is thus a system where RTI is regulated: 1) by the constitution and RTI law, and parallel thereto 2) by APA, in connection with the constitutional provisions

4 Cf. for instance the ECJ cases *Tradax, Cement, and Soda Ash* (Case 64/82 *Tradax Graanhandel BV v. Commission* [1984] ECR 1359. CFI, Joined Cases T-10/92 and *Others, SA Cimenteries CBR and Others v. Commission* [1992] ECR II-2667. CFI, Cases T-30/91, T-31/91, T-32/91 (Solvay v. Commission), T-36/91 and T-37/91 (ICI v. Commission), [1995] ECR II-1775, II-182, II-1825, II-1847, and II-1901; cf. Nehl, 1999, pp. 28–31, 45–55). See also Schmidt-Assmann in Barnes (2008, p. 52), regarding the ruling of the German Federal Administrative Court of 2003 on a constitutional RTI as guaranteed for any potential participant in a procedure, independent of his/her procedural position and standing. For Slovenia, see Kovač, Rakar & Remic, 2012, pp. 45–47, the relevant constitutional-judicial cases are (Nos U-I-16/10 and Up-103/10, 20 October 2011) acknowledging the right of access as the one deserving, despite procedural grounding (only), an independent judicial review.

on the equal protection of rights and effective legal remedies.[5] The US and Sweden model is different: based on the Constitution, RTI is regulated by the FOIA (1966), which is a constituent part of APA (1946) or in Sweden the relevant laws comprise the Constitution itself. However, the second model implies a lack of procedural provisions and a usually relatively low quality rating of RTI Law (Mendel, 2008, p. 101; Banisar, 2006, p. 141; Statskontoret, 2005, pp. 35–43). Given all aspects analyzed we may draw a conclusion: the definition of procedural guarantees in RTI Law or APA is thus an advantage to implement RTI effectively, provided that the formality of the regulation is not too detailed.

3 Comparative Analysis of the Procedural Regulation of RTI in Selected Countries

3.1 Selection and characteristics of countries included in comparative research

In order to examine the importance and level of impact of detailed procedural regulation of RTI on the exercise of the right as a subject of procedure, a comparative analysis of several countries was carried out indicating the specifics of national regulations in terms of the openness and quality of regulation in relation to RTI, as assessed by various international organizations. The analysis is based on the assumption that the regulation of procedural issues on time limits and legal protection (appeal) contributes significantly to the implementation of RTI in practice. The analysis thus covers selected countries with different historical and societal backgrounds:

- USA and Ireland – the Anglo-Saxon model with a long tradition of openness;
- Sweden – the Scandinavian model with long acknowledged transparency;
- Germany and Austria – the central model with Rechtsstaat and public interest protection;
- Slovenia and Croatia – the post-socialist heritage upgraded following the German model.

Mostly two countries within the same group were analyzed to check internal factor of differences, too.

5 Austria applies Article 20 of the Constitution, *Auskunftspflichtgesetz* (Austrian RTI Law, Gazette No. 287/1987 and amend.) and the *Allgemeines Verwaltungsverfahrensgesetz* AWG (Austrian APA, Gazette No. 51/91 and amend.). Slovenia applies Article 39 of the Constitution and *Zakon o dostopu do informacij javnega značaja* (the Slovene RTI Law, Official Gazette RS, No. 24/03 and amend.) and *Zakon o splošnem upravnem postopku* (Slovene APA, Official Gazette RS, No. 80/99 and amend.). The main Croatian regulations include Article 38 of the Constitution, *Zakon o pravu na pristup informacijama* (Croatian RTI Law, Official Gazette RC, No. 25/13, and the previous law 2003) and *Zakon o općem upravnom postupku* (Croatian APA, Official Gazette RC, No. 47/09).

Table 1: Characteristics of selected countries and national legal acts on RTI

Country	*USA*	*Ireland*	*Sweden*	*Germany*	*Austria*	*Slovenia*	*Croatia*
Population in mio	303	4.5	9.2	82	8.3	2	4.4
RTI regulated by Constitution	Yes, strong protection of freedom of expression	Only general rights (equality, etc.), no RTI	Yes (the entire Freedom of the Press Act, RTI Law part of the Constitut.)	Yes, yet a passive aspect of RTI, Art. 5/1	Yes, Art. 20	Yes, 1991, Art. 39/2 (freedom of expression), depending on legal interest by law	Since the 2010 amend. (prior only the press), Art. 38/2 (freedom of expression)
RTI Law	Part of APA, FOIA since 1966 & amend.	FOIA 1997 (amend. 2003)	Part of the Constitut.	RTI Law 2005, only 15 articles	RTI Law 1987 & amend., 8 articles	RTI Law 2003	RTI Law 2003, and a new Law in 2013
Application of APA in RTI	FOIA is part of APA	No	No	Yes	Yes	Yes, upon written request	Yes
GRTI 2012/ 93 countries	40th	37th	29th	89th	93rd	3rd	9th
Ask Your Gov!/80 countries	/	/	/	15th	/	12th	11th
Democracy 2012/ 200 countries	21st	2nd	13th	14th	12th	27th–28th	50th

Hence, in terms of good administration four traditions of administrative law may be identified in Europe and broadly: 1) the individual-centered tradition, as in the Ireland, and the USA, 2) the German-Austrian legislator-centered Rechtsstaat, 3) the ombudsman-centered tradition, as in Scandinavia, and 4) additionally, post-communism and some other heritages to be taken into account. The study however has limitations since the RTI implementation depends on a series of other factors, from the general regional culture on openness to RTI tradition in a specific environment.[6]

3.2 A comparison of time limits and legal protection of RTI regulation

Following the initial assumption that procedural regulation contributes to the rate of implementation of RTI, the key aim of the research was to identify whether time limits and legal protection and as key procedural issues to enhance substantive legal right are (more) relevant. Time limits are typical procedural institution (cf. the saying: justice delayed, justice denied), being even a constituent part of the rights to a fair trial and good administration under Article 6 of the ECHR and Article 41 of EU Charter. The requirement

6 Several models or classifications of social and legal environments are relevant in this sense (cf. Schwarze, 1992, p. 1182 etc.; Galligan et al., 1998, pp. 19–25; Peters & Pierre, 2005, p. 260; Statskontoret, 2005, pp. 74–76, etc.). See in particular on administrative culture as a RTI framework in Savino, 2010, p. 13. Due to lack of relevant data central administration-centered group (with France) was not analyzed too.

of timeliness is deriving not only from the goal of the efficacy, but also from the Constitution itself (cf. Mendel, 2008, pp. 101, 127; Nykiel et al., 2009, p. 27; Kovač & Virant, 2011, p. 232). Moreover, particularly in the absence of the right of appeal to an independent body, individuals cannot really be said to have a right, but merely a right to have their requests considered (Mendel, 2008, p. 38). Or as put forward by the ruling of the German Constitutional Court of 1969 (Schmidt-Assmann in Barnes, 2008, pp. 52) effective legal protection "constitutes a significant element of the fundamental right as such".

An indisputable requirement for the actual implementation of RTI is also a clearly regulated procedure, particularly when the body does not give the applicant access to the information to which the applicant is entitled. The comparison of *de iure* regulation reveals a significant degree of convergence as regards the type of procedural institutions regulated by procedural rules in relation to RTI. However, in various countries, the material content and especially the implementation of the rules vary significantly as analyzed by a set model of crucial elements, evident in Table 2.

4 Main Findings

4.1 Significance of RTI procedural regulation and its detail rate

Procedural regulation in principle contributes to the implementation of RTI. This conclusion can also be drawn from even the rather restricted German and Austrian RTI laws with only 8–15 articles, but with subordinate application of the APA, which substitutes for the lack of procedural rules in RTI law. However, it can be observed that the same degree of formalization is seen as an incentive in one country and an obstacle to the development of open society and RTI implementation in another. But at least in the initial decades, the development of RTI was and still is marked by inverse proportionality – if the procedure was more non-programmed, the legal protection of the weaker parties was or is lower.

At several levels, particularly in terms of (endeavors for) membership in international organizations and global comparisons, a convergence may be observed as regards the regulation, the procedure, and RTI implementation. Finally, the countries may be grouped as:

1. traditionally open countries with loose legislation (Anglo-Saxon and Scandinavian);
2. legalistically driven countries with consistent implementation (Central European); and
3. legalistically driven countries with best practices, yet with problems in implementation (transitional Eastern European).

Table 2: A comparative analysis of selected procedural aspects in national RTI laws

	1a	*1b*	*2a*	*2b*	*2c*
Key procedural RTI aspects	***Decision deadlines and possible extensions***	***Consequences of administrative silence***	***Administrative appeal***	***Appeal body and independent status thereof***	***Access to court***
USA	20 + 10 days, possible an urgent procedure, special extension in "exceptional circumstances"	Lack of a timely response deemed a refusal, but an appeal only by the specific regulations	Non-devolutive appeal to head of body asked for information, then direct suspensive court action	Partly, with the amendment to APA, the Government Information Office	Various courts, according to FOIA/APA, only upon action by applicant within two years
Ireland	Confirmation of receipt in 10 days, decision in 20 + 20 days, in 15 days on appeal	Fiction of refusal and consequent legal protection	Non-devolutive appeal to the body itself, then appeal to the IC and direct suspensive court action	An independent IC also as an ombudsman and environmental IC and covering data	
Sweden	No. only "forthwith, or as quickly as possible", practice is correct	N/A, problems with deadlines in practice	No, directly to court	No	Administrative court, a special provision that decisions are to be issued "promptly
Germany	One month/20 working days, 2 months for accessory participants	no RTI Law, APA yes	Yes	Federal IC for RTI in data protection, decisions and opinions not legally binding	Special administrative dispute
Austria	8 weeks without unnecessary delay	no RTI Law, APA yes	Indirectly according to APA	N/A	Indirectly administrative dispute according to APA
Slovenia	20 + 30 working days in exceptional circumstances, executability of a decision not prior to the finality	Appeal when deemed a refusal, over 60% of appeals on such grounds	Yes, appeal and court action are suspensive	Non-governmental IC, separate from the ombudsman, covering RTI and data protection	Administrative dispute (Art. 31) (also based on court action by the liable body) and constitutional complain
Croatia	15 +15 days, deadline for a decision on appeal 30 days, in some cases 60 or 90 days	Appeal when deemed a refusal	Since 2012, to an independent body (previously only non-devolutive appeal to the head of the silent body)	Since 2013 IC, separate from the ombudsman, covering RTI and data protection	Administrative dispute and an administrative complaint, deadline for a decision 90 days from action

Thus, the regulatory framework appears to be a necessary and stimulating yet not sufficient factor of development of open and good administration. Some authors (e.g., Mendel, 2008, p. 144) argue on the other hand that precisely as regards procedural guarantees, RTI laws in different countries demonstrate a high degree of consistency – in our case only the in USA and Sweden. But the provisions on the procedure present even more differences than the substantive law definitions of information and exceptions, namely in terms of the formalization of the procedure as a whole, and even more so in terms of the time limits, the requirement that acts be issued in writing, etc. As expected, procedure is more formalized in continental states than in

the USA and Scandinavia. This indicates that the impact of legal tradition on the implementation of the law and procedures is very important, not only in the sense of the post-transition gap in the implementation of laws and reforms in the countries of Eastern Europe, but also when comparing the Scandinavian and American openness and sufficiency of general standards with the German-Austrian and EU striving for legalism.

4.2 On importance of time limits set for RTI to be granted or refused

Some provisions are particularly important for the implementation of RTI, time limits being at the top of due process doctrine and case law. As regards the deadlines for decisions, thus the regulation in general is rather formalized and practice has shown that setting a time limit is a basis for enforcing a right. For such reason, all RTI Laws, with the exception of the Swedish one, devote considerable attention to time limits and extensions. It is evident on the other hand that these rules develop over time depending on the extent of requests and movement of indicators, such as the number of granted and refused requests within specific time periods. For example, approximately 600,000 applications per year were filed in the USA in 2010–2012 (OIP reports, 2012), yet a significant share thereof were refused owing to various exceptions, which points to the need for more unified regulation in general. Croatia, for instance, amended its law to introduce a special IC because of the low culture among public bodies, which often fail to decide on a matter, with 60% of appeals due to administrative silence.

In certain cases there is only a "promptly" or "without undue delay" rule, but in most cases time limit to reveal data requested is 20 days with possible extension in the event of objective circumstances (but should not exceed 30 days, cf. Savino, 2010, p. 30). All the respective countries apply a negative fiction that allows for eventual judicial protection (cf. more in Mendel, 2008, pp. 127, 152; Kovač, 2013, p. 11). The increase in requests and appeals related to RTI is growing, and a good third (e.g., USA, Slovenia) to a half (e.g., Ireland) thereof are granted in all countries despite different regulations and cultures; approximately a third are partially granted, while the ratio between the number of requests and appeals is around 1 % (e.g., around 11,000 v. 600,000 in the USA and 500 v. 51,000 in Croatia). This in particular points to the significance of the procedural regulation of RTI, if one compares the otherwise similar USA and Ireland. The Irish law provides a clear definition of the entire procedure, which leads to as many as 58 % of requests being granted (with an additional 19 % partially granted), while the insufficient procedure in the USA leads to only 37 % of requests being fully granted (with an additional 27 % partially granted).

4.3 On significance and forms of effective legal protection in a case of RTI

Practice in various countries reveals that legal remedies are the very essence of RTI law as well as a tool for enforcing such right. In general, several systems of legal protection of applicants are known throughout the world, either in a formal sense with direct appeal to the court or with an administrative appeal to an independent state body (the Information Commissioner or some other non-governmental agency), or through a (more) non-formal devolutive objection to the head of the body at issue or via the ombudsman (cf. Banisar, 2006, p. 23). Overall, review should be independent, centralized and specialized (Savino, 2010, p. 41). Most countries have formalized legal and judicial protection enshrined in RTI law as well as parallel protection through the ombudsman, or the level of RTI is considered to be very low (Austria). So called non-formal protection can be "afforded" only in countries with a long and solid tradition of openness (such as Sweden). On the other hand, particularly where following the (Eastern European) transition, transparency and other institutions of democracy are yet to be fully implemented in practice (cf. Savino, 2010, p. 4), either as regards legal protection in general or in the event of appeals to an independent body.

As regards legal protection, it primarily needs to be underlined that the experience of several countries are more inclined toward administrative than direct judicial protection, provided that the objection procedure is conducted by the body that is to disclose the information (Ireland) or – as a rule – a body that is independent (from government), since it is far more accessible and cheaper to people than the courts and has a proven track record with regard to being an effective way of ensuring RTI. The reasons for an appeal are generally rather broad, from the refusal of an application to the request to submit another one as provided, from excessive costs on. The countries have similar, if not the same, reservations regarding disclosure both in terms of the regulation and administrative and court practice, which is also demonstrated by a large share of appeals on grounds of administrative silence in the USA, Ireland, Slovenia, and Croatia.[7] Likewise, it is advisable to consider RTI and exceptions thereto, such as personal data protection (e.g., in Ireland, Slovenia, and Croatia through the same non-governmental appellate body) as directly correlated.

7 Therefore, a major provision of various RTI Laws is that the burden of proof in a dispute is on the public bodies rather than on applicants. Cf. legal protection and separately the status of the appeal body in Bugarič, 2003, p. 120; Mendel, 2008, p. 38; Kovač, 2013, p. 13. However, it should not be disregarded that in view of the separation of powers, practice also shows that only courts really have the authority to set standards and ensure a well-reasoned approach, especially regarding controversial areas and difficult disclosure issues.

5 Conclusion

The major guarantee of respect for RTI is a combination of the circumstances in a country or supranational community. Among them, particular importance is attributed to the culture and tradition of transparency in the society, open and good public administration and to adequate regulation of RTI. An accurately prescribed procedure on RTI, setting the rules of the game for applicants and public bodies, is an inevitable aspect of the effectiveness of the implementation of this fundamental right in particular. However, the application of APA, where RTI law does not provide otherwise, appears to be useful both in view of covering all relevant procedural aspects and given the fact that public bodies know such rules and easily observe them. This shows that also the sample countries, such as the USA and Sweden, usually countries considered as most transparent, have problems with openness in practice given the regulatory deficiencies of their generalist legislative approaches (e.g., the lack of an independent appeal body or deadlines).

Moreover, in a complex society as ours, there is a need to have a trade-off between different interests, in particular by means of public interest override and harm tests, which are by the nature of the matter possible only in a procedure that is at least partly formalized. The initial hypothesis of this paper that procedural institutions contribute to a higher level of implementation of RTI in practice is therefore confirmed, especially as regards timely decision-making and legal protection in the event RTI is refused or restricted. Procedural principles and rules are thus among the foundations that contribute to enforcing the importance of RTI in terms of personal dignity and the democracy of modern society.

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POVZETEK

1.01 Izvirni znanstveni članek

Pomen in primerjalni trendi procesnopravne ureditve pravice do informiranja

Ključne besede: pravica do informiranja (RTI), preglednost, primerjava, procesno pravo, upravni postopek, roki, pritožba

Vsaka pravica se (bolj) učinkovito uveljavlja, če njeno vsebinsko pravno ureditev podpirajo učinkovita postopkovna pravila. Članek je posvečen analizi procesnopravne ureditve pravice do informiranja (RTI), saj se njen pomen povečuje pri razvoju dobrega vladanja in upravljanja znotraj sodobne pregledne, odprte in sodelovalne družbe. V članku vključena primerjalna analiza izbranih držav (ZDA, Irska, Švedska, Avstrija, Nemčija, Slovenija, Hrvaška) dokazuje, da izbrani postopkovni instituti, kot so roki in pritožba neodvisnemu organu ali sodni nadzor, prispevajo k znatno višji stopnji izvajanja RTI v praksi, kar navaja tudi več mednarodnih študij. V zaključku avtorica priporoča določene dobre prakse, zlasti pomen izvrševanja RTI s strani različnih organov oblasti v upravnem postopku, ki zagotavlja ustavna in nadnacionalna načela preglednosti.

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