

Law, Technology, and Administration in Italy and Estonia. A Comparative Analysis of the Right to Information

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Abstract

The paper analyses the right to information's legislative framework in Italy and Estonia, which is the most digitalised European state. The article aims to highlight to what extent the right to information that allows citizens to know and obtain data stored by public administrations represents a fundamental instrument to implement public administration's digital processes. The controvertible nature of the right to information, in addition to the different academic interpretations about its character, reflects its uncertain placement within the legal order. In some states, like Estonia, the right to information is established at constitutional level, whereas in others, like Italy, at legislative level. In Estonia, the aim of the right to information is to allow the re-use and the exchange of public information, while in Italy the right to information aims to enhance the level of transparency of the public administration. This paper will explain that the results of this comparison between the Italian and Estonian right to information's legal framework highlight some peculiar features which influence the relationship between law, technology and administration and, consequentially, their current levels of digitalization.

Keywords

Law and Technology; Right to Information; Italy; Estonia; Digital Administration.

Direito, Tecnologia e Administração na Itália e Estônia. Uma Análise Comparativa do Direito à Informação

Resumo

O artigo analisa o quadro legislativo do direito à informação na Itália e na Estônia, que são os estados europeus mais digitalizados. O artigo tem como objetivo destacar em que medida o direito à informação permite aos cidadãos conhecer e obter dados armazenados pelas administrações públicas e representa um instrumento fundamental para implementar os processos digitais da administração pública. A natureza controvertida do direito à informação, além das diferentes interpretações acadêmicas sobre seu caráter, reflete sua colocação incerta na ordem jurídica. Em alguns estados, como na Estônia, o direito à

informação é estabelecido a nível constitucional, enquanto em outros, como na Itália, a nível legislativo. Na Estônia, o objetivo do direito à informação é permitir a reutilização e o intercâmbio de informações públicas, enquanto na Itália o direito à informação visa aumentar o nível de transparência da administração pública. Este artigo demonstrará que os resultados dessa comparação entre o arcabouço legal do direito à informação da Itália e da Estônia destacam algumas características peculiares que influenciam a relação entre direito, tecnologia e administração e, conseqüentemente, seus atuais níveis de digitalização.

Palavras-chave:

Direito e Tecnologia; Direito à informação; Itália; Estônia; Administração Digital.

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Introduction

Excusatio non petita

This paper focuses on the right to information, which is analysed from a comparative perspective in the context of the Italian and Estonian legal systems. The choice of these two juridical orders shows that this study is concerned with the context of the European Union. The right to information is one of the pillars of modern legal systems, and not just of those of EU countries. For this reason, although this paper is not dedicated to their analysis, it is necessary to highlight how this right is also at the centre of non-EU legislative disciplines, in particular of Central and South America (e.g. as Mexico (2002), Argentina (2003), Chile (2008), Brazil (2011)¹).

Relevant facts and rationale of the paper

In the last fifteen years, the use of information and communication technology (ICT) in the society has become an important ace up in the sleeve to pursue the public interest. In particular, in the groove dug by European Union law and soft-law, (e.g. the “Digital Agenda for Europe”, one of the seven pillars of the Europe 2020 Strategy²) each EU Member State has adopted domestic legislations about the relationship between society and technology. However, as underlined by the

¹ *Ex multis* see MENDEL (2009).

² About it see <https://ec.europa.eu/digital-single-market/en/digital-agenda-europe-key-publications> [28.09.2019].

Digital Economy and Society Index (DESI) 2019 Report³, there is a remarkable divide between those EU Member States which have the most advanced digital economies in the Union (Finland, Sweden, the Netherlands and Denmark) and those which have the lowest (Bulgaria, Romania, Greece and Poland). Considering that the DESI is a generic analysis resulting by different *sub-analysis* based on five indicators (*i.e.* connectivity, human capital, use of Internet services, integration of Internet Technology, digital public services), it is quite evident that in each of them the packs are partially shuffled. In fact, at the top of the Digital Public Services DESI 2019 ranking there are Finland, Estonia, the Netherlands and Spain, whereas at bottom Romania, Greece, Hungary and Bulgaria⁴.

In the field of digitalisation, Italy is taking giant steps, especially regarding the digitalisation of Public Administration and Public Services. Nevertheless, Italian results are rather distant from those obtained in few years in Estonia, which according to the DESI is one of the EU champions of Digital Public Administration: in 2017 it was the leader of the Digital Public Services ranking⁵, and second in 2018 and 2019⁶: for this reason the Baltic State is also nicknamed e-Estonia.

By means of a comparative perspective, this paper will analyse the cornerstone of the Italian and Estonian legal framework about the digitalising process of Public Administration: the right to information⁷. In fact, through the right to information, public administrations are able to consciously use data and to provide ICT data to citizenship and other (authorised) parties. Hence, the right to information represents a fundamental step to develop a tangible digital public administration.

1. Methodological premise. About the difficulties of the comparative perspective

In the Italian Law University classrooms, Professors are used to teaching two ways for the resolution of complicated legal issues. The first one is to analyse how a similar question has previously been solved. The second one is to study how other juridical orders deal with a similar problem. To know the past and to have a glance over the neighbour's hedge. For these reasons, in their academic plans, Italian law students have to sustain several History of Law and Comparative

³ See <https://ec.europa.eu/digital-single-market/en/desi> [28.09.2019].

⁴ See https://ec.europa.eu/newsroom/dae/document.cfm?doc_id=59975 [28.09.2019].

⁵ See <https://ec.europa.eu/digital-single-market/en/news/digital-economy-and-society-index-desi-2017> [28.09.2019].

⁶ See <https://ec.europa.eu/digital-single-market/en/digital-public-services-scoreboard> [28.09.2019].

⁷ About this topic, for a more detailed analysis (in Italian), see ROSSA (2019).

Law exams. About the second point, as well known, to make a correct juridical comparison between legal systems is not easy. Indeed, if we consider that the juridical system is the result of a mix of national traditions, popular culture, historical and political events, it is quite evident how complicated it can be. Nevertheless, this paper will examine the right to information with a “general” comparative perspective between two different legal orders, the Italian and the Estonian.

This is a “general” comparative perspective, because it is based on a “wide-ranging” analysis of the right to information, without comparing the various juridical sub-categories through which it can be classified (*f.i.* institutional transparency; procedural transparency; or material transparency). This choice can be attributed, on the one hand, to reasons of the length of the paper, and the other hand, to the distance between the Italian and the Estonian legal orders⁸.

In addition, it is necessary to underline that the analysis in the following paragraphs is inevitably influenced also by extra-juridical factors, which are an alarm bell related to the presence of contingent aspects which have influenced the legal orders. For clear and evident reasons, it is not possible to delve into.

2. The dual nature of the right information

There are some characters of Greek and Roman myths that recur several times across the centuries. Some of them are the centaurs, creatures with the upper body of human and the lower one of horse. Well-known for the *Centauiromachy* legend, in which the drunk centaurs fight against the Lapiths during the wedding feast of Pirithous⁹, this character appears also in the *Inferno* of Dante’s *Divine Comedy*: here the centaur Nessus helps Dante and Virgil to cross the Phlegethon, the river of boiling blood and fire in which the violent souls are immersed¹⁰.

In these ancient representations, centaurs had a symbolic significance because they referred to the duality of human nature, half noble and half beastly. Also in the right to information’s concept it is possible to observe a dualism: a passive aspect and an active one. Considering the broad meaning of ‘right to information’ (a consequence of the amplex of the concept of ‘information’)¹¹, we can consider the right to information as a complex right composed by different juridical elements with passive nature, on the one hand, and with active character, on

⁸ In addition to the pioneering volume of GOODNOW (1893), in general about the comparison related to the Administrative Law see, *ex multis*, CASSESE (1995); FROMONT (2006); NAPOLITANO (2007); ROSE-ACKERMAN and LINDSETH (2010); Seerden (2012).

⁹ See *Ovid: Metamorphoses* – ROLFE, REED (2018), Book 12, lines 209 ss., 291 ss. About this legend see also CERINOTTI (2016), 197.

¹⁰ See Dante ALIGHIERI (1321), *Inferno*, Canto XII, vv. 52-139.

¹¹ About the meaning of the word “information” see COPPEL (2014), 355.

the other. As underlined by Villanueva, the right to information is the right to seek and to receive information, to inform and to be informed¹². In this way, it can be defined as the right to know, to obtain and to exchange data held by the public administration.

Even though the essence of the right to information (as above described) is understandable, there is no clarity about its deep juridical nature. By one side, scholars are divided between those who consider the right to information a fundamental human right¹³ which represents the precondition for political and generic rights¹⁴, and those who sustain that it is a corollary of different rights and not a fundamental human right itself.

By the other side, even if they are closer to the second interpretation *supra*, there are International Treaties (e.g. the Universal Declaration of Human Rights¹⁵, the Convention for the Protection of Human Rights and Fundamental Freedoms¹⁶ and the International Covenant on Civil and Political Rights¹⁷) for which the right to information is interpreted as the right to freedom expression and opinion¹⁸; instead, others (e.g. the Charter of Fundamental Rights of the European Union¹⁹, the Treaty on the Functioning of the European Union²⁰ and the Council of Europe Convention on Access to Official Documents²¹) connect this right to the right to good administration and, for that, to the right to access to public information²² – historically one of the oldest European right²³.

These two aspects about the not-univocal meaning of the right to information reflect the juridical positioning of this right into the hierarchical model of the law. In fact, in some legal orders the right to information is established at the constitutional level, whereas in others it is recognised

¹² In this way VILLANUEVA (2003), XVII: «[d]e la definición apuntada se desprenden los tres aspectos más importantes que comprende dicha garantía fundamental: A) El derecho a atraerse información. B) El derecho a informar, y C) El derecho a ser informado».

¹³ This opinion is sustained *ex multis* by SEDLEY (2000); PELED and RABIN (2011), 357-401; MCDONAGH (2013), 25-55. See also WEERAMANTRY (1994), 99-125 who interprets the right to information as the right of access to information.

¹⁴ In this way YANNOUKAKOU and ARAKA (2014), 334; MENDEL (2003), 41; and PELED and RABIN (2011), 369.

¹⁵ Cf. Art. No. 19 UDHR.

¹⁶ Cf. Art. No. 10 ECHR.

¹⁷ Cf. Art. No. 19 ICCPR.

¹⁸ About the freedom of information see MALANCZUK (2012), 184-205.

¹⁹ Cf. Art. No. 41 and 42 CFREU.

²⁰ Cf. Art. No. 15.

²¹ Cf. Art. No. 2 CECAOD.

²² For a comparative perspective about the right to access see BLAKE and PERLINGEIRO (2018).

²³ This interpretation has a historical basis. In fact, the first State which established the right to access was the Kingdom of Sweden. As written by MACDONALD QC and CRAIL (2003), 849, «Swedish citizens have enjoyed access to official documents and information on administrative matters since 1766», year of approval of the Freedom of the Press Act of the King Adolph Fredrick (it is possible to find the English translation of the act in MUSTONEN (2006) 8-17).

at the legislative one. In the first set of countries *inter alia* there is Estonia, and in the second one Italy.

3. The right to information in the Italian legal system

3.1 The Italian constitutional level

The Italian Constitution entered into force in 1948, when the Constituent Assembly fulfilled its purpose to write down a Constitution for the new-born Italian Republic after the period of the fascism and the II WW²⁴. Even if it has been amended several times, the Italian Constitution does not establish a constitutional explicit right to information, although it is possible to connect this right to the interpretation of the constitutional right to freedom of expression ex Art. No. 21 Italian Constitution²⁵.

Nevertheless, at the legislative level the right to information has an important role, at the point that across the years it has been put at the centre of an evolucional legislative interpretation. Originally, the right to information was formulated as right of access, but in the last years other two legal meanings came up beside the first one: the civic access (in Italian *accesso civico*) and the civic generalised access (*accesso civico generalizzato*). These three elements, which graphically represent three concentric circles, make different interpretation of the right to information because each of them pursues different targets – as it will be analysed *infra*.

3.2 The Italian legislative level

3.2.1 Access to administrative documents

In the summer of 1990, Law No. 241 entered was enacted. This law is known as the Italian Administrative Procedure Act (IAPA)²⁶. However, according to its heading (“New rules concerning the administrative procedure and the right to access to administrative documents”) Law No.

²⁴ About the Italian Constitution *ex multis* for a historical point of view see EINAUDI (1948), 661-676; recently instead BIFULCO, CELOTTO and OLIVETTI (2006). For a general view about the Italian Public Law see FERRARI (2008). It is possible to read (in Italian) the complete preparatory work of the Italian Constituent Assembly in SEGRETARIATO GENERALE DELLA CAMERA DEI DEPUTATI (1970). Furthermore, the official English translation of the Italian Constitution is available at https://www.senato.it/documenti/repository/istituzione/costituzione_inglese.pdf [28.09.2019].

²⁵ In this way CARETTI (2013), 18-19.

²⁶ About the Law No. 241/1990 see *ex multis* ROMANO (2016) and SANDULLI (2017). In English see GALETTA (2018), 345-353.

241/1990 is important also because it introduced for the first time a general²⁷ right to access to administrative documents²⁸.

This right is established at Chapter V of IAPA (articles No. 22-28), which has been amended from the original text. Currently, the right to access to administrative documents is defined as the subjective right to view and to obtain a copy of administrative documents²⁹. The exercise of that right is subject to particular conditions. At first, it is necessary to demonstrate a direct, concrete and actual interest legally protected³⁰. In second, this interest must be focused on administrative documents, namely each act already existing through which the public administration can represent facts related to the use of public power³¹. For this reason, this exercise does not refer to information and data which are not incorporated yet in an act³². Besides, Law No. 241/1990 states also that it is necessary to explain the reason for the request of the access providing a juridical motivation³³. In any case, the request could be accepted even if the right to access to administrative documents does not damage other principles and rights established by the law (e.g. State secret, national defence, security, fiscal procedures, etc.)³⁴.

3.2.2 The civic access

In the early years of 2000, some laws that contained innovative rules entered into force in the Italian juridical system. One of them was the Legislative Decree No. 82/2005 (so called Italian Digital Administration Code – IDAC)³⁵, and another one was the Legislative Decree No. 150/2009.

²⁷ 'General' because there were previously sectorial laws about specific rights to access to act for a particular category of people as Councillors of Municipalities and Provinces – e.g. see the Royal Decree No. 383/1934 and the Law No. 142/1990.

²⁸ *Inter alia* see ARENA (1991); ROMANO TASSONE (1995), 315 ss.; MAZZAROLLI (1998); GALLO and FOÀ (2000), 1 ss.; OCCHIENA (2005), 905 ss.; BOMBARDELLI and ARENA (2006), 409 ss.; ARENA and MERLONI (2008); GARGANO (2017), 1287 ss.

²⁹ See Art. No. 22.1.a) IAPA. Even though that law uses the word 'right', most scholars and Administrative jurisprudence consider the access to administrative documents not a subjective right but a legitimate interest. In this way MAZZAROLLI (1998), 58 ss. and MORBIDELLI (2005), 663 ss. Instead *contra* FIGORILLI (1995), 598 ss. PERINI (1996), 109 ss. According to the first interpretation also the Italian Council of State (e.g. see the Plenary Session No. 16/1999). As underlines GALETTA (2018), 347-348(27), a legitimate interest is «an individual interest that is closely connected to a public interest and protected by the law only through the legal protection of the latter». For practical reason in this paper will be used the concept of right to refer to the access to administrative documents.

³⁰ See Art. No. 22.1.b) IAPA.

³¹ See Art. No. 22.1.d) IAPA.

³² In this way CARDARELLI (2015), 263. In fact see Art. No. 22.4 IAPA.

³³ See Art. No. 25.2 IAPA.

³⁴ See Art. No. 24 IAPA.

³⁵ About the IDAC see CARLONI (2005); COSTANTINO (2012); CARDARELLI (2015), 227 ss.; TROJANI (2017); SORACE, FERRARA, CIVITARESE MATTEUCCI and TORCHIA (2017); BOCCIA, CONTESSA, and DE GIOVANNI (2018); CAROTTI (2018), 131 ss.

In these acts, there were some articles which imposed to the public administration the publication of particular information on their official institutional websites³⁶. In the groove dug by these laws, the sprout “publication duties = transparency”, sown some years before, became a luxuriant plant with the entrance into force of the “civic access” introduced by the Legislative Decree No. 33/2013.

The Legislative Decree No. 33/2013³⁷ is known as Italian Transparency Decree (ITD), because transparency is its cornerstone. In fact, the original version of this law established that transparency should be understood as full accessibility to information related to the organisation and the activity of the public administration with the purpose to promote social controls on the use of public resources and on the achievement of public interest³⁸. In order to realise this full accessibility, the legislator imposed to the public administration the legal duty of publication of information, documents and data about the administrative action on their institutional websites³⁹. This duty resulted in two different rights exercisable by “anyone”. On the one hand, the right to know, to use and to re-use for free the information, documents and data object of duty of publication through a direct and immediate (and without username and password) access to the official institutional websites of public administration⁴⁰. On the other hand, the right to demand those information, documents and data objects of duty of publication in case they are not published by public administration as established by the law⁴¹. The mix of this duty and these two rights has been called “civic access” (in Italian *accesso civico* – from Latin *civis*, citizen, commoner) just to underline that this double-faced right is exercisable by anyone.

If we consider that only the individual who is able to demonstrate a direct, tangible and actual interest legally protected may exercise the right to access to administrative documents, it is possible to understand the big difference between that kind of access and the civic access. Actually, this is a specific legislative choice: the *ratio* of the civic access is to have a social and spread control on the public administrations to contrast maladministration phenomena: in fact, for that reason a juridical motivation is not necessary for the civic access⁴². In this way, the Italian legislator tried to implement the principle of transparency through the duty of publication. However, the duty of publication represents a huge limit to obtain the “fully accessibility”: indeed, the transparency as described by the civic access is extremely restricted by the cases pre-established by the Legislative Decree No.33/2013 – cases that are obviously imposed in consideration of other rights’ protection

³⁶ In particular see Art. No. 54 IDAC and Art. 11.1 Legislative Decree No. 150/2009.

³⁷ *Ex multis* PONTI (2013); SAVINO (2013), 795 ss.; PATRONI GRIFFI (2013), 1-12; GARDINI (2014), 875 ss.; D’ARIENZO (2015), 123 ss.; FRACCHIA (2015), 483 ss. In English see GALETTA (2014), 212 ss.

³⁸ See Art. No. 1.1 ITD in the original version published in the Italian Official Gazette (IOG).

³⁹ See Art. No. 2.2 ITD in the original version published in the IOG.

⁴⁰ See Art. No. 2.2 and No. 3 ITD in the original version published in the IOG

⁴¹ See Art. No. 5.1 ITD (its original version published in the IOG is currently into force).

⁴² See Art. No. 5.2 ITD in the original version published in the IOG.

with law's dignity (e.g. State secret, personal data protection, etc.)⁴³. In this way, the principle of transparency seemed to be a blunt weapon. For that reason, the Italian lawmaker decided to elaborate another juridical tool in order to rethink the principle of transparency's interpretation of mere social control on public administration: the civic generalised access.

3.2.3 The civic generalised access

The civic generalised access⁴⁴ has been introduced in the Italian legal system with the entrance into force of the Legislative Decree No. 97/2016. This law modified most of the rules of Legislative Decree No. 33/2013. It represents an attempt to draw a *fil rouge* to link the Italian juridical framework to those of other states, in which there are well-known models of Freedom of Information Acts⁴⁵. However, according to important scholars⁴⁶, this attempt was not really successful, also because the Legislative Decree No. 97/2016 has introduced the civic generalised access in the same law and in the same article in which the civic access is disciplined. In this confused contest, there is no clear and evident separation between them⁴⁷.

In particular, the Legislative Decree No. 97/2016 has introduced in the art. No. 5 the right of anyone to access documents and data held by the public administration which are not object of duty of publication according to the civic access *ex* Legislative Decree No. 33/2013⁴⁸. With this legislative action, the access is no longer relegated into the limits fixed by publication duty: it is generalised, and for that, this kind of access is defined as civic generalised access⁴⁹. The legislator of the 2016 amendment stated that, as in the case of the civic access's the exercise, it is not necessary neither the demonstration of a specific legal interest nor a juridical motivation of the request of civic general access. However, it diverges from the civic access for the object of the request: instead of documents, information and data⁵⁰, only data and documents fall under its

⁴³ See Art. No. 1.2 ITD in the original version published in the IOG.

⁴⁴ *Inter alia* see CARLONI (2016a and 2016b); SAVINO (2016), 593 ss.; PONTI (2016); GARDINI (2017); FOÀ (2017), 65 ss.; PORPORATO (2017); GARDINI and MAGRI (2019).

⁴⁵ First of all United States of America, but also for instance Portugal, Czech Republic, Estonia, Polonia, Romani, Slovenia, Ireland and Spain, as underlined by CARLONI (2016b), 3.

⁴⁶ In this way *ex multis* PATRONI GRIFFI (2013).

⁴⁷ This is the reason why, in the footnotes *supra*, who is writing has used the original text published in the Italian Official Gazette of Legislative Decree ITD to refer to civic access, while to refer to civic generalised access will be used in this paper the current text of ITD, as amended by the Legislative Decree No. 97/2016.

⁴⁸ See Art. No. 5.2 ITD current version.

⁴⁹ The periphrasis "civic generalised access" has been used for the first time by the guide lines of the Italian National Agency for the Contrast of the Corruption (see ANAC, 'Linee guida recanti indicazioni operative ai fini della definizione delle esclusioni e dei limiti all'accesso civico di cui all'art. 5 co. 2 del D.lgs. 33/2013', in https://www.anticorruzione.it/portal/public/classic/AttivitaAutorita/AttiDellAutorita/_Atto?ca=6666 [28.09.2019]), even though some scholars initially used the Italian periphrases "accesso civico improprio".

⁵⁰ See Art. No. 5.1 ITD current version.

wording⁵¹ (although the laws above do not explain the meanings of these words⁵²). As drawn by the Legislative Decree No. 97/2016, in the civic generalised access there are not normative limits to regulate what is published *ex lege* or not. In this case, the public administration (*i.e.* the individual administrative functionary) that has received the request of civic generalised access is the subject legally appointed to balance the request's interests with others of legislative and constitutional level⁵³.

The civic generalised access does not replace the accesses *supra* described, considering that it has a different juridical extension. It comes up beside the civic access and the access to administrative documents in a relationship of interiority with the latter, and of autonomy with the last⁵⁴. At the present moment, these three dissimilar accesses coexist in the Italian legal order. The reason for this is related to the different *ratio* of the civic generalised access: the lawmaker has established this juridical tool to promote public participation to the administrative action and activity⁵⁵.

3.2.4 The evolution of the Italian right of access

In the three previous subparagraphs, it is possible to highlight one point. Starting from the access to administrative documents, passing by the civic access and arriving at the civic generalised access, the Italian legislator has traced an evident normative evolution. In fact, through Law No. 241/1990 (IAPA), it has been established a right exercisable only by individuals with a direct, tangible and actual interest legally protected; a right directed to protect individual's other rights against the action of the public administration. The original text of the Legislative Decree No. 33/2013 (ITD) has introduced the civic access, a type of access that is due to anyone, without particular conditions and legal motivation. Its goal is to promote the social and spread control on the public administrations, that is built on the duo "duty of publication of documents, information and data to public administration-right of the individual to obtain what is object of publication". Then, with the Legislative Decree No. 97/2016, which represents an attempt to link the Italian legislative framework to foreign FOIA experiences, it has been introduced the civic generalised access. This kind of access, for which a juridical justification is not needed, consists in the right of

⁵¹ See Art. No. 5.2 ITD current version.

⁵² About it see GARDINI (2017), 4.

⁵³ See Art. No. 5-*bis*.1-3 ITD current version.

⁵⁴ See ANAC, 'Linee guida recanti indicazioni operative ai fini della definizione delle esclusioni e dei limiti all'accesso civico di cui all'art. 5 co. 2 del D.lgs. 33/2013', *cit.*, 2.2.

⁵⁵ See Art. No. 5.2 ITD current version. A part of the Italian scholars is quite critical about the effective results of the realisation of the public participation principle. In this way, for instance, CAUDURO (2017), 601 ss.

anyone to request and obtain data and documents held by the public administration, also those documents and data that are not object of the duty of publication according to the civic access' rules. In this way, it is possible to observe an undeniable evolution of the *ratio* of the right of access because, through the civic generalised access, the law has established the purpose of the promotion of public participation at the administrative action.

4. The right to information in the Estonian legal system

4.1 The right to information in the Estonian legal system

The current Estonian Constitution (*Eesti Vabariigi põhiseadus*)⁵⁶ entered into force in 1992, after the political consequences of the fall of the Berlin Wall. The Estonian Constitution is composed by 168 articles divided into fifteen chapters. Some of its rules are related to the European continental juridical tradition⁵⁷, while others are not present the most of modern Constitution, as in the case of the right to information.

The Estonian Constitution establishes the right to information at the article No. 44⁵⁸. In the first paragraph of this article, it is affirmed at the constitutional level the right «to free access to information disseminated for public use»⁵⁹. This is a universal right, because it is not exercisable only by Estonian citizens but also by every individual regardless its personal status. The object of that right is not “generic” information, but the specific type of «information disseminated for

⁵⁶ *Ex multis* about the Estonian Constitution, which is available in English and in Estonian in <https://www.riigiteataja.ee/en/eli/ee/rhvv/act/521052015001/consolide> [28.09.2019], see ROOSMA (1998) 35 ss.; NARITS (2002), 10 ss.; ERNITS (2014), 444 ss.; RULL, TAMME and VÕHANDU (2016). Moreover, in Estonian see ERNITS (2011); TRUUVÄLI (2008); UNIVERSITY OF TARTU (2017).

⁵⁷ As underlined by NARITS (2002), 10, «it is important to take into account that the Estonian legal system has belonged, and still belongs, to the legal culture of continental Europe». An example could be the right to resist to attempts to change the constitutional order (see Art. No. 54.2 Estonian Constitution: «In the absence of other means of opposing a forcible attempt to change the constitutional order of Estonia, every citizen of Estonia has the right to resist such an attempt of his or her own initiative»), which is contemplated for instance also in the Constitutions of Germany (Art. No. 20.4) and Greece (Art. No. 120.4). About this argument see GINSBURG, LANSBERG-RODRIGUEZ and VERSTEEG (2013), 1184 ss.

⁵⁸ Art. No. 44 Estonian Constitution: «1. Everyone is entitled to free access to information disseminated for public use. 2. Pursuant to a procedure provided by law, all government agencies, local authorities, and their officials have a duty to provide information about their activities to any citizen of Estonia at his or her request, except for information whose disclosure is prohibited by law and information intended exclusively for internal use. 3. Pursuant to a procedure provided by law, any citizen of Estonia is entitled to access information about himself or herself held by government agencies and local authorities and in government and local authority archives. This right may be circumscribed pursuant to law to protect the rights and freedoms of others, to protect the confidentiality of a child's filiation, and in the interests of preventing a criminal offence, apprehending the offender, or of ascertaining the truth in a criminal case. 4. Unless otherwise provided by law, citizens of foreign states and stateless persons in Estonia enjoy the rights specified in paragraphs two and three of this section equally with citizens of Estonia».

⁵⁹ See Art. No. 44.1 Estonian Constitution.

public use», namely that information which the legislator has previously provided with the feature of “public use”⁶⁰.

The second subparagraph of the Art. No. 44 affirms that Agencies of the Government, the local authorities and their functionaries have the duty to provide information about their activities, whenever any Estonian citizen submits a request of access. This information could be provided pursuant to a legislative procedure and only if the disclosure is not prohibited by the legislator (and except for the information that is intended exclusively for internal use⁶¹). This rule establishes three important things: first, that only the citizens of Estonia can exercise this right, which consequentially has not a universal feature; secondly, it appears as a right to access directed to a social control on the public administration; lastly, this subparagraph states that public administrations can act pursuant to the legislative framework.

The third subparagraph of the Art. No. 44 declares that Estonian citizens are entitled to access information about themselves held by public administration (i.e. Agencies of Government and local authorities) in their archives⁶² according to the law. This kind of access can be limited pursuant to legislative procedures in order to safeguard other rights⁶³. In this case, at the *ratio* of control on the public administration is also added to the interpretation which links the access to personal information to the property right⁶⁴.

The last subparagraph of that right refers to those who are not Estonian citizens, conversely to the second and third ones which refer only to citizens of the Republic of Estonia. This subparagraph establishes that citizens of foreign countries and stateless people who are in Estonia may enjoy the rights specified in Art. No. 44.2 e 44.3 Estonian Constitution, as Estonian citizens, unless the law has decided differently⁶⁵. This means that these rights have constitutional nature

⁶⁰ About it see the next sub-paragraph about the Estonian Public Information Law. Even if the Constitution does not establish anything about it, it is possible to interpret the constitutional rule as that only a legislative act can decide what public information is.

⁶¹ See Art. No. 44.2 Estonian Constitution.

⁶² See Art. No. 44.3 Estonian Constitution.

⁶³ According to Art. No. 44.3 Estonian Constitution «this right may be circumscribed pursuant to law to protect the rights and freedoms of others, to protect the confidentiality of a child’s filiation, and in the interests of preventing a criminal offence, apprehending the offender, or of ascertaining the truth in a criminal case».

⁶⁴ For some scholars the right to property may represent an ace up in the sleeve to resolve some of the theoretical issues about personal data which derive from the relationship between law and technology. In this way *inter alia* PURTOVA (2011), 61: «as a result of chain informatisation, cloud computing, and the advent of ambient intelligence, the number of actors involved in processing of personal data and relationships and the connections between them have grown and will keep growing in geometrical progression. The resulting structure of the data flow is too complex for the existing data protection approach to grasp; namely, the paths taken by personal data and participation of individual actors are difficult to trace and, hence, to regulate. Property, with some limitations resolved by regulation, due to its *erga omnes* effect and fragmentation of property rights, has the potential to reflect and control this complexity of relationships».

⁶⁵ See Art. No. 44.4 Estonian Constitution.

for Estonian citizens, whereas they have the same nature for foreign citizens and stateless people unless noted otherwise provided by law.

From the analysis of the Estonian Constitution, it is possible to underline the central role of the right to information. Art. No. 44 diverges from the interpretation of some international treaties⁶⁶, that link the right to information to the freedom of expression and opinion, considering that these rights are present in other articles of the Estonian Constitution⁶⁷. In fact, the Art. No. 44 is closer to the vision of those international treaties⁶⁸ that connects the right to information to the right of access, and to the right to a good administration in a context of control on the public administration. However, through this interpretation, the Estonian Constitution adds a kind of access linked to the right to property.

Nevertheless, the right to information of the Art. 44 of the Constitution of the Republic of Estonia is formulated as a juridical tool to stimulate the improvement (economic, social, etc.) of the Baltic Country, more than like an instrument to control the action of public administration. It is more evident in the application of the constitutional rule actuated by the Public Information Act.

4.2 The legislative level: the Estonian Public Information Act

The Public Information Act (EPIA – in Estonian *Avaliku teabe seadus*)⁶⁹ is the juridical materialisation of the right to information at the legislative level, as established by the Estonian Constitution.

This law, which has been amended several times⁷⁰, has a double purpose: on the one hand, to ensure that every person has the opportunity to access information intended for public use; on the other one, to provide a social control over the public administration in order to control and monitor the achievement of public duties (in compliance with the principles of a democratic and social rule of law and of open society⁷¹).

Here the concept of “information intended for public use” has a central role: the EPIA establishes that “public information” is any recorded or documented information «obtained or created upon performance of public duties in provided by law or legislation issued on the basis

⁶⁶ About it see paragraph 3 of this paper.

⁶⁷ Cf. Art. No. 41, 42 and 45 Estonian Constitution.

⁶⁸ About it see paragraph 3 of this paper.

⁶⁹ This law was approved on November 15th, 2000 and entered into force on January 1st, 2001. The official text of the Public Information Act is available in English and in Estonian in <https://www.riigiteataja.ee/en/eli/ee/Riigikogu/act/529032019012/consolide> [28.09.2019].

⁷⁰ The last time was in February-March 2019.

⁷¹ See Art. No. 1 EPIA.

thereof»⁷². Another fundamental concept, that is related to the meaning of “public information”, is the “re-use of public information”. As affirmed by the law, in accordance with the EU rules⁷³, it is «the use of such public information, the public use of which is not restricted by law or pursuant to the procedure established by law (hereinafter open data), by natural persons or legal persons for commercial or non-commercial purposes other than the initial purpose within the public duties for which the information was obtained or produced»⁷⁴. For this reason, public information object of re-use must be open and must have an open and machine-readable format⁷⁵. In any case, the re-use of public information has to respect some fundamental principles (inviolability of the private life of persons, protection of copyrights, protection of national security, and protection of restricted information and business secrets)⁷⁶.

The access, which is (basically)⁷⁷ granted without charge, must be ensured pursuant to the procedure provided by law, in the quickest and easiest way, without damages to the inviolability of the private life of people and to the copyright⁷⁸. In case of a violation of its rights or freedom caused by a restriction on the access, everyone has the right to contest this restriction⁷⁹. The ensuring of access is a duty assigned to a specific subject: the information holder. According to the EPIA, the information holders are authorities of the State or of the local government, legal persons in public and in private law and natural persons under particular conditions⁸⁰. The obligations of the information holder⁸¹ are: to grant access to information in their possession in accordance with the legislation; to provide documentary evidence of the request of access and data object of it, in compliance with the principle of transparency; to assist the person who makes the request of information⁸²; to provide information to the public about the action of the public administration and about the performances of public duties. In case of acceptance of the request of access, the information holder must provide accurate and correct information⁸³: on the contrary, indeed, this fact could involve all the informative system in structural weakness.

⁷² Art. No. 3.1 EPIA.

⁷³ See the Directive 2013/37/EU amending the Directive 2003/98/EC on the re-use of public sector information. The Directive 2013/37/UE has been amended by the recent Directive (UE) 2019/1024. On this argument see *inter alia* JANSSEN (2011), 446 ss.; CERRILLO-I-MARTÍNEZ (2012); RICOLFI (2013), 23 ss.

⁷⁴ Art. No. 3¹.1 EPIA, which specifies that «the exchange of information between holders of information for the performance of their public duties does not constitute re-use of information». See also Art. No. 2.1 EPIA.

⁷⁵ See Art. No. 3¹.4 EPIA.

⁷⁶ See Art. No. 3¹.3 EPIA.

⁷⁷ See Art. No. 4, 25 and No. 26 EPIA.

⁷⁸ See Art. No. 4 EPIA.

⁷⁹ *Ibidem*.

⁸⁰ See Art. No. 5 EPIA, that clarifies the conditions of which a legal person in private or natural law could be considered as information holder.

⁸¹ See Art. No. 9 EPIA.

⁸² About it see also Art. No. 15 EPIA.

⁸³ See Art. No. 9.2.8, that establishes also that «in the case of doubt, [the holder of information] is required to verify the correctness and accuracy of the information released».

The EIPA draws three big types of hypothesis. In some cases, the information holder has not juridical discretion about the request and it shall refuse to comply with a request for information⁸⁴ (for instance if the person who makes the request does not have the right to access the requested information, or if the information holder does not possess the requested information). In other cases, the holder of information has a legal decisional power and it may refuse to comply with the request⁸⁵ (e.g. if there are no contact details related to the person who makes the request for information, or if the compliance with the request for information would require a change in the work organisation of information holder). Then in other cases – the law makes a list of thirty-four of them – there are juridical obligations of the information holder to disclose the requested information⁸⁶ (like if the information is related to generalised economic statistics and economic forecasts of the state and local authorities, or to research or analyse orders by the state or local government authorities) through a publication on the official information holder's website or in other public ways⁸⁷. Moreover, the EIPA establishes that there is a restricted information, namely information to which access is restricted pursuant to legislative procedures. This may be classified as information intended for internal use⁸⁸, through the decision of the head of an agency (as in case of information the disclosure of which would damage the foreign relations of the State or information related to the methods and tactics utilised by investigative bodies in their activities).

The re-use of the public information is supported and advantaged by databases⁸⁹, which are technical tools through which it is possible to efficaciously share data and information, in consideration of their purpose to collect data and information in order to concretely allow the access. For this reason, the EIPA states some rules about databases. For instance, it affirms that data contained into databases is generally accessible to the public⁹⁰. Or that databases are established by the law or on the basis thereof⁹¹ and they must be interconnected and connected to the data exchange layer of the information system that forms the State information system⁹². In addition, the State or the authorities of local government (or another legal person in public or

⁸⁴ See Art. No. 23.1 EIPA.

⁸⁵ See Art. No. 23.2 EIPA.

⁸⁶ See Art. No. 28 EIPA.

⁸⁷ See Art. No. 29 EIPA. This point is related to Art. No. 31-33 EIPA which establish the disclosure of the Information in Public Data Communication Network called Estonian Information Gateway (in Estonian *Eesti teabevärv*).

⁸⁸ See Art. No. 34-43 EIPA.

⁸⁹ According to Art. No. 43¹.1 EIPA, a database is «a structured body of data processed within an information system of the state, local government or other person in public law or person in private law performing public duties which is established and used for the performance of functions provided in an Act, legislation issued on the basis thereof or an international agreement».

⁹⁰ See Art. No. 43⁸ EIPA.

⁹¹ See Art. No. 43³.1 EIPA

⁹² See Art. No. 43² EIPA.

private law in particular cases) are the subjects appointed to the organisation and the management of databases⁹³.

The EIPA prescribes also the bodies (their competences) that must supervise over the compliance with the rules of this law: the Data Protection Inspectorate, the Estonian Information System's Authority and Statistics Estonia⁹⁴. Briefly, the System's Authority must «exercise administrative and state supervision over the application of the system of security measures for information systems and the connection to the data exchange layer of information systems»⁹⁵. The Data Protection Inspectorate in specific cases «shall exercise state and administrative supervision over holders of information»⁹⁶. Instead, the Statistics Estonia «shall exercise administrative supervision over compliance with data governance requirements»⁹⁷. However, because of limitations of space, it is not possible to reflect here on this theme. In any case, individuals have the right to claim with administrative courts if their rights established in the EIPA are violated⁹⁸.

To summarise what the EIPA establishes, first of all, it is necessary to underline the two purposes of that law (which are balanced with other principles and rights as, for instance, the protection of national security and copyrights): to promote and to allow to access and exchange information. The access is related to the individuals who make the request of access, that in this way are able also to control the action of the public administration. Furthermore, the exchange concerns the relations between administration-individual, individual-individual and administration-administration. The first relation is clear in the access made by the interested person to the information held by the public administration-information holder. Considering that the information, which is the object of access *ex lege*⁹⁹, is at the same time object of re-use, individuals have the right to re-use this information also with the sharing goal. The third case is realised when the different administrative entities who are information holders share among them data bases and information, activating the sharing between all the parties involved. To achieve these two purposes the EIPA gives a central role to the quality of the information, that must be correct and accurate and must have an open and machine-readable format. But the good quality of the information is not sufficient, because it must be ensured in the quickest and easiest way: it is possible only through the ICT, as the Estonian lawmaker of the EIPA knows.

⁹³ See Art. No. 43⁴ EIPA.

⁹⁴ See Art. No. 44 EIPA.

⁹⁵ Art. No. 53¹ EIPA.

⁹⁶ Art. No. 45 EIPA.

⁹⁷ Art. No. 53² EIPA.

⁹⁸ See Art. No. 46 EIPA.

⁹⁹ According to Art. No. 8.3 EIPA «access to open data also includes the right to re-use that information».

Final reflections

By comparing the right to information in the Italian and Estonian legal frameworks, it is possible to highlight some aspects that reveal the current condition of the digitalising process of the public administration in these two countries.

The right to information has an explicit constitutional dignity only in Estonia. This detail has deeply influenced the right to information's conception of the Baltic State, which is considered a fundamental *pivot* for digital processes: all the digital policies are based on it. On the contrary, in Italy, where this right is established at the legislative level, the right to information has been subjected to a relevant conceptual evolution: initially drawn as juridical instrument to safeguard individual's right, it later became a right focused on the social control to the public administration at first, and on the promotion of the public participation to the administrative action on a second time. Furthermore, in Estonia, the main purpose of the right to information is to allow the re-use of the information. This is another point of discontinuity between these two legal orders. If in the Baltic State the re-use of public information is a subjective right¹⁰⁰, in Italy it is not an individual right but only an obligation for the public administration¹⁰¹.

Therefore, it is clear into the Estonian juridical framework that the accent is put on the system functionality through the social and economic growth activated by the re-use of the information. This is the Estonian purpose: to increase social and economic growth. In Italy, it does not happen as easily because the leading purpose is to realise the principle of transparency through the control of the public administration¹⁰². This is the main reason why in Estonia it is easier than in Italy to build up digital projects about the society and, in particular, about the public administration¹⁰³, as evidenced by the numerous digital public services, among which it is possible to mention "X-Road" and "e-Residency".

X-Road is a fundamental Estonian digital project created in 2001. It is a digital infrastructure that represents the national data exchange layer and platform, known as «the backbone of e-Estonia»¹⁰⁴. With X-Road, each public administration entity elaborates, stores and exchanges its

¹⁰⁰ See the previous footnote.

¹⁰¹ In this way also Italian scholars as PONTI (2006), 819. See Art. No. 5.3 and No. 6 Legislative Decree No. 36/2006 as modified by Legislative Decree No. 102/2015, that introduces in the Italian juridical system the Directive 2013/37/UE on the re-use of public sector information. See also Art. No. 52.2 Italian Digital Administration Code (Legislative Decree No. 82/2005), which establishes the principle of openness by default of documents and data held by the public administration.

¹⁰² As written by GARDINI (2014), 878, in this way the Italian legislator has to invert the medium (the transparency) with the purpose (the right to information).

¹⁰³ About the digitalising process of the Estonian public administration see *ex multis* KITSING (2011); KARO, DRECHSLER, KATTEL and STILLINGS (2012); FRIEDRICH, GREILING and HALDMA (2014); E-GOVERNMENT ACADEMY (2016); TAMMEL (2017).

¹⁰⁴ See <https://e-estonia.com/solutions/interoperability-services/x-road/> [28.09.2019].

own data during their operations, but only with authorised parties (*i.e.* others administrations, agencies, etc.) in order to satisfy the public interest. In this way, it is possible to make public functions and public services more efficient and, at the same time, to safeguard the citizens' rights¹⁰⁵.

Instead, e-Residency is a digital project elaborated in 2014. It allows people who are not physically residents in Estonia to become Estonian digital residents. In this manner, even if they are foreign and live thousands of kilometres far from Estonia, through the Internet they can use digital infrastructures and public services as Estonian residents. This is convenient for entrepreneurs who want to run a company, because the Estonian bureaucracy is more efficient and smarter than the average of that of other countries¹⁰⁶.

However, in Italy, the above-mentioned evolution of the right to information's concept is related to the development and the spread of the "Open Government" paradigm¹⁰⁷, of which open data is one of the most important constitutive elements. In Italy, open data is becoming a central juridical instrument to realise the purposes of the civic and civic generalised accesses: the control on the public administration's action and citizenship participation. In consideration that open data represents a motor of growth for the economy and for an effective dynamic social participation to public and administrative life, the Italian legislator and the Italian agencies specialised in the digital field (in particular AGID, the Agency for Digital Italy, in Italian *Agenzia per l'Italia digitale*, and Team for the Digital Transformation, *Team per la trasformazione digitale*) have elaborated important projects in which open data has a crucial role.

Among them, it is necessary to highlight the "Three-Years Plan 2019-2021 for ICT in the Public Administration", that represents the «strategic and economic policy document for all [Italian] Public Administrations that oversees the digital transformation of the country»¹⁰⁸. Or the "Data and Analytics Framework", a project with the goal «of improving and simplifying the interoperability and exchange of data between Public Administrations, promoting and improving

¹⁰⁵ *Funditus* about X-Road see <https://www.ria.ee/en/state-information-system/x-tee.html> [28.09.2019]. About this project see *ex multis* KALJA (2012).

¹⁰⁶ About the e-Residency see <https://e-resident.gov.ee/> [28.09.2019] and *inter alia* KOTKA, VARGAS ALVAREZ DEL CASTILLO and KORJUS (2015).

¹⁰⁷ *Inter alia* see CARLONI (2014); COSTANTINO (2015); WIRTZ, BIRKMEYER (2015), 381 ss.; LEE, DÌAZ-PUENTE and MARTIN (2019), 144 ss. The Open Government was at the centre of one of the first acts of USA President Barak Obama, who on January 2009 approved the "Transparency and Open Government Memorandum for the Heads of Executive Departments and Agencies" according which the Government should be transparent, participatory and collaborative (about it see <https://obamawhitehouse.archives.gov/the-press-office/transparency-and-open-government> [28.09.2019]).

¹⁰⁸ See <https://pianotriennale-ict.italia.it/en/> [28.09.2019]. The plan is available in English at <https://docs.italia.it/italia/piano-triennale-ict/pianotriennale-ict-doc-en/en/stabile/> [28.09.2019].

the management and usage of Open Data, optimizing activities of analysis and knowledge generation»¹⁰⁹. Or the official governmental digital portal of Italian open data Dati.gov¹¹⁰.

All these aspects represent important progress points made by Italy in the last years. In particular, they underline that the path taken by the Italian Parliament and Government proceeds in the right direction traced by the most advanced EU Member States, as Estonia. This is the right direction through which the public administration may move kilometres away from the not-transparent, arbitrary and alienating public administration model described by Franz Kafka in his novel "The Castle"¹¹¹.

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¹⁰⁹ See <https://teamdigitale.governo.it/en/projects/daf.htm> [28.09.2019]. About it see Art. No. 50-ter Italian Digital Administration Code.

¹¹⁰ See <https://www.dati.gov.it/> [28.09.2019].

¹¹¹ See KAFKA (1926).

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