THE TEMPORAL STABILITY OF ROMANIA'S FREEDOM OF INFORMATION ACT – A NEOINSTITUTIONALIST APPROACH

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Abstract

The paper discusses the temporal stability of Romania's Freedom of Information Act (Law no. 544/2001), using a neoinstitutionalist paradigm. I argue that none of the five amending laws of Law no. 544/2001 did not change the fundamentals and mechanisms of granting access to public information that existed when this law entered into force, all of them being limited and even beneficial. I will demonstrate that the most important difficulties that appear in the enforcement of Law no. 544/2001 do not come from the perspective this law was written, but from the interpretation of the legal norms according to some subjective practices existing at the level of public authorities/institutions depositing the information.

Keywords: *neoinstitutionalism, freedom of information, legal stability, public interest, transparency.*

JEL Classification: H83, K23, K40

1. Introduction

The subject of free access to information of public interest has a pronounced interdisciplinary character, no less than five different fields claiming this issue - "the freedom of information topic is one of great interest for different fields such as law, public administration, political sciences, sociology, communication sciences, all over Europe and elsewhere"[2]. Therefore, any of these perspectives of analysis can become central, depending on the affiliation of the researcher to one field or another.

Within the international conference "Contemporary Challenges in Administrative Law from an Interdisciplinary Perspective" – Section II: "Challenges of Interdisciplinary Approach in Administrative Sciences in the 21 Century", the paper aims to analyze the access to information of public interest in Romanian public administration with the help of the neoinstitutionalist paradigm, namely the issue of stability over time that this regulation enjoys in Romania. The Romanian Freedom of Information Act (FOIA), which entered into force on December 22, 2001, represents "a modern regulation, necessary for a society that still retains reflections of authoritarianism in the communication of the administrative sector with the citizenry"[3].

Between the adoption of Romania' new Constitution, in 1991, and the adoption of Law no. 544/2001 "access to information held by various state institutions and bodies was regulated in a non-unitary way, either by specific organic laws (...) or by internal norms (...). The lack of coherence in establishing a regime of free access to information has generated arbitrary or, in the happiest case, ineffective decisions, so that the state has maintained its monopoly on public information in relation with the citizens"[4].

Before 1989, the Communist Party had absolute control over the citizens through administration, and the public agenda was the agenda of the state party, which led to a great mistrust of the citizens in the state's institutions, a fact that still continues at different levels of the Romanian society.

The opening of public institutions to civil society is all too often limited to information provided by the media, while the good intentions of the public administration in terms of access to public information and the organization of public consultations are seen as image exercises, there is

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[2] D. C. Dragos, P. Kovač & A. T. Marseille (Eds.), *The Laws of Transparency in Action. A European Perspective*, Palgrave Macmillan, 2019, p. 7.

[3] A. Mogoș, *Cultura secretului, inamic al accesului la informațiile de interes public*, "Revista Transilvană de Ştiinţe Administrative", IX, 2003, p. 173.

[4] Ibid, p. 175.

a perception of the lack of authenticity of the dialogue between the state and its citizenry.

Law no. 544/2001 (Romania's FOIA) was an important breach in the culture of secrecy that has dominated Romania for decades. It has produced, most likely, one of the most profound changes in the approach of Romania's political and administrative thinking. For the first time, public authorities and institutions are legally obliged to provide information from their own activity to anyone who requests it.

Law no. 544/2001 *on the free access to public information*, Government Decision no. 123/2002 approving the methodology for the enforcement of Law no. 544/2001, Government Ordinance no. 27/2002 on the resolution of petitions and Law no. 52/2003 on decision-making transparency in public administration compose the legal reform of transparency in Romania. However, almost 20 years after the adoption of these laws, the opening of the state to its citizenry is not yet a closed process, the bureaucratic apparatus has not become more responsible and responsive, the legal mechanisms to correct possible deviations of the institutions intervene imperfectly and they are quite difficult to enforce, and the citizens are not more aware of their rights.

"Conflicting rights" in this area are not always kept in a fair balance. For example, the right to receive information sometimes collides with the right to privacy. According to David Pozen and Michael Schudson, "[c]ertain forms of transparency may be a prerequisite for the effective exercise of human rights or the flourishing of political discourse, among other goods. But the provision of transparency also can have deleterious impacts. Free citizens require privacy and security, both of which require some amount of secrecy. A growing body of evidence suggests that effective negotiation and decision-making within political institutions requires the same"[5]. The right to information also runs counter to the protection of the sources or the identity of journalists, which is crucial for guaranteeing the right to free speech. Another situation is the unjustified recourse to the limitations of access to information, although these are exceptions of strict interpretation, or the unjustified refusal to communicate public information or granting partial access.

The legal conflict between "access to documents" and "access to information" was the subject of a decision of the European Court of Human Rights (ECHR), in *Roșiianu v. Romania*. On June 24, 2014, the Court held Romania to pay almost EUR 9,000, after the former mayor of Baia Mare between 1993-2010, Cristian Anghel, refused to communicate to the journalist Ioan Romeo Roșiianu information of public interest, although national courts concluded this in three final judgments. According to the Association for the Defense of Human Rights in Romania - the Helsinki Committee (APADOR-CH), "before the ECHR, the Romanian government claimed that the applicant had been provided with the requested information, but he did not turn out at the City Hall to collect it. Or, precisely to discourage him from asking for more, the mayor 'offered' the journalist a whole series of documents for absurd sums (amounting to hundreds of euros) for their photocopying" [6].

Until 2016, many city halls charged a fee several times higher than the market price for photocopying documents of public interest, which was equivalent to an abusive restriction of the right of access to information. According to a study of APADOR-CH from 2014[7], regarding the tariffs of local authorities for issuing photocopies of documents requested under Law no. 544/2001, Drobeta Turnu-Severin City Hall was on the first place with a fee of RON 18/page, followed by Bacău City Hall (RON 5/page), Tulcea City Hall and Cluj County Council, both with RON 4/page. On the opposite side, nine institutions did not charge any tariff, namely the county councils of Bihor, Maramureș, Satu Mare and Vaslui and the city halls of Botoșani, Brăila, Cluj-Napoca and Satu Mare.

Although there have been attempts to standardize the application of Law no. 544/2001, in particular as regards the *ex officio* publication of information on the website of public authorities/institutions, the practice is still non-uniform, it differs from one institution to another, and there is often confusion in the management of public information and difficulties in the interpretation of legal norms.

[5] D. E. Pozen & M. Schudson (eds.), *Troubling Transparency: The History and Future of Freedom of Information*, Columbia University Press, New York, 2018, p. 5.

[6] http://www.apador.org/category/asistenta-cedo/procese-castigate-la-cedo/page/2/, accessed on August 8, 2020.

[7] https://www.apador.org/autoritatile-locale-vand-informatiile-publice-cu-adaos-de-boutique/, accessed on August 8, 2020.

In this regard, the General Secretariat of the Government (SGG) and the Ministry of Internal Affairs (MAI) carried out, between July 2018 and December 2019, the project "Transparent, open and participatory governance - standardization, harmonization, improved dialogue"[8], funded from European and national funds, in order to increase the transparency of the governing performance at central and local levels. The public policy developed in the project recommends that all public institutions will adopt an internal procedure for the *ex officio* communication of information in a standardized and open format, as well as the standardization of their websites, in order to simplify the identification and provision of information. In the digital age, "Open Data" can increase the predictability, efficiency and accountability of the governing performance, accelerating the pace of development of the future "smart city" communities to generate innovation.

The legal conflicts, most of them being anomalies of the application of Law no. 544/2001, ending in the unjustified restriction of the access to information, can find their resolution in court, by suing the public authority/institution depositing the information.

Other conflictual situations were corrected, in July 2016, by the legislative amendments adopted by the technocratic government of Romania, which correlated the methodology of the FOIA with the technological evolution and with the socio-economic reality of the moment. For example, this methodology provides from then on, that the answers must be communicated on the support requested by the applicant, either in electronic format or in paper format, and in the case of a paper answer the cost of the copying service cannot exceed 0,05% of Romania's minimum wage calculated for one page.

2. FOIA's limitations

However, requesting information through the use of the FOIA has its own limits. The existence of the FOIA does not guarantee the automatic access of applicants to information, this depends on many factors, most of them being subjective practices.

Public transparency is not a natural feature of state power. For the ordinary citizen who is waiting for the answer in the shortest possible timeframe (usually in 10 calendar days) and who looks at the FOIA from the perspective of the legal norm in the Official Gazette, not from within the institution where he handed in the request, it often seems that the entire administrative apparatus formed the antibodies necessary for the reconstruction of the opacity.

Although the applicants' requests trigger the force of law, they are still facing the subjective practices of the information depository authority/institution, as well as the assessment of the officials designated to formulate and/or communicate the answers.

Among the most common practices that rule the resolution of the application I mention the following: the applicant's ability to accurately identify what information s/he requests, how much information is intended to be made available to the applicant, how much the documents were processed, the timing of application (for example, if it is a busy or a less intense timeframe in the activity of the public authority/institution), the dis/interest of the official to whom the application is assigned for writing the answer (there may even be two different answers on the same topic, as the application is replied by an official or another within the same department or a more prompt or delayed answer), the willingness of the head of service to countersign the answer, the use by the dissatisfied applicant of the legal remedies after receiving an unsatisfactory response (administrative complaint and/or lawsuit).

The bureaucratic functioning of the public administration is much less linear and predictable than the applicants may imagine when they fill in the requests. Once the application is submitted, the applicant ceases to know what is happening with his/her application, although some generalizations may be inferred, depending on the experience of the applicants with the addressed institutions. Most often, the application is designed to be dealt with by a faceless bureaucratic apparatus – especially in

[8]https://sgg.gov.ro/new/guvernare-transparenta-deschisa-si-participativa-standardizare-armonizare-dialog-imbunatatit-cod-sipoca-35/, accessed on August 8, 2020.

the case of electronically formulated requests that involve no contact with the bureaucratic apparatus, but in the end the application is assigned to a specific official, who assumes the answer by signature.

The FOIA even stipulates disciplinary sanctions for the officials who obstruct the access to information of public interest, but in practice there are very few cases of such sanctions. The sanction is not automatically filed based on the FOIA, but it is subject to the requirements of the Labor Code or the legislation applicable to the civil servants.

3. The concept of change in neoinstitutionalism

Neoinstitutionalism draws the researcher's attention to the exercise of power in building the rules and procedures that structure reality; we live in a world of institutions born as a result of political struggles. How are institutions created? Who do they favor? Who do they exclude? These are the main areas of interrogation for the neoinstitutionalist paradigm.

For neoinstitutionalism, the concept of "institution" does not have a unanimous definition – it can refer either to the institutions deliberately created for the implementation of public policies, or to the formal rules that structure the relationship between the state and the interest groups. This concept also describes the official administrative institutions, as well as informal rules, agreements and customs within the state and between the state and society[9].

Neoinstitutionalists conceive institutions as something broader than any other organizational makeup, focusing on the role of routines, common and discursive practices that occur in a multitude of social frameworks, sustainable over time, which are often formalized and have a rational purpose.

Far from being neutral mechanisms, institutional procedures, routines, norms and conventions favor certain actors (results) over others. In other words, the institutions themselves are politically challenged and challengeable. These rules function as resources that can be exploited by the privileged actors – they create winners interested in perpetuating the institutions, as well as losers determined to change them. By analyzing the institutions and the institutional change we can understand which groups have the power in a certain realm and which interests are neglected.

Traditionally, the concept of change is a controversial topic for the old institutionalism, which did not include topics such as "change" or "adaptation", but only concepts such as "inertia" or "persistence".

Paul DiMaggio and Walter Powell[10] describe institutional environments as "those which need conformity and acceptance, a fact that makes the organizations turn into 'iron cages,' prisoners of the institutional isomorphism", suggesting that "the actors, making rational decisions, construct around themselves an environment that constrains their ability to change further in later years"[11]. Thus, the principle of stability of classic institutional theory conflicts with the theories of adaptation, which portrayed organizations as continuously changing their structures and practices to fit a dynamic environment. Even though neoinstitutionalism is not a change theory, it is a valid approach with which to explain not only the similarity of isomorphism and stability of the organizations, but also organizational behaviour, heterogeneity, and the creation of competitive position as a response to dynamic environments.

4. The failure to limit freedom of information

According to Richard Scott[12], "[i]nstitutions exhibit stabilizing and meaning-making properties because of the processes set in motion by regulative, normative, and cultural-cognitive elements. These elements are the central building blocks of institutional structures, providing the

[9] B. G. Peters, J. Pierre & D. S. King, *The Politics of Path Dependency: Political Conflict in Historical Institutionalism*, "The Journal of Politics", 2005, 67(4), p. 1286.
[10] P. DiMaggio & W. W. Powell (Eds.), *The New Institutionalism in Organizational Analysis*, University of Chicago Press, Chicago, 1991, pp. 13-14.
[11] Ibid, p. 148.
[12] W. R. Scott, *Institutions and Organizations: Ideas, interests, and identities*, Sage, Thousand Oaks, 2014, p. 57.

elastic fibers the guide behaviour and resist change".

Although the FOIA provided stability and order to the field of public transparency, however, there have been a few legislative changes in the 20 years following its enactment by the legislative body.

None of these five changes, adopted by parliamentary procedure, were likely to weaken the FOIA, they did not affect the main mechanism for providing access to information existing when this law entered into force, they were limited and beneficial – the free and unrestricted access to public information is still the rule, whereas limiting access to information is only an exception.

Thus, two consecutive changes took place in 2006. The definition of public authority/ institution was regulated more precisely to extend the application of the FOIA to national enterprises and companies, as well as to "any commercial company under the authority of a central or local public authority and for which the Romanian state or a local administrative division is the sole or majority shareholder" – Law no. 371/2006 for the amendment of Law no. 544/2001. It was also established that "any contracting authority, as defined by the law, has the obligation to make available the procurement contracts to the person concerned, under the conditions provided in article 7" – Law no. 380/2006 for the amendment and completion of Law no. 544/2001.

One year later, the Romanian Parliament decided that "the public authorities and institutions have the obligation to make available to interested persons the privatization contracts signed after the entry into force of this law, by consulting them at their headquarters" – Law no. 188/2007 for the completion of Law no. 544/2001.

In 2012, Law no. 26/2012 for the implementation of Law no. 134/2010 on the Civil Procedure Code replaced the term "appeal", with "recourse", in the text of article 22, paragraph (5).

The last change took place in 2016 and involved increasing the accuracy in defining the public authority/institution, including in the FOIA the political parties, sports federations and non-governmental organizations of public utility receiving public money, as well as any "company regulated by the Companies Law no. 31/1990, republished, with subsequent amendments and completions, under the authority or, as the case may be, under the coordination or subordination of a central or local public authority and in which the Romanian state or a local administrative division is sole shareholder or majority shareholder, as well as any operator or regional operator, as they are defined by the Law on Community Services of Public Utilities no. 51/2006, republished, with the subsequent amendments and completions" – Law no. 144/2016 for the amendment of Law no. 544/2001.

Although in the two decades since the enactment of the FOIA there were registered in the parliament several amending proposals of the congressmen from various political parties, some being even impossible to put into practice, they did not materialize, the political class as a whole did not act either in the sense of restricting the right of access to information already conferred, or abolishing the FOIA, when, from time to time, officials exceeded by the large number of applications campaigned for this purpose.

The most recent attempt to amend the FOIA took place in June 2017. The web publication *PressOne* reported that the socialist minister for Public Consultation and Social Dialogue, Gabriel Petrea, conducted a consultation in order to amend the law, officials from the Ministry of Health even proposing its abolition. Subsequently, the whole process was abandoned.

The arguments used by government officials in favor of amending the law were in line with an alleged abuse of rights by the applicants, who would too often resort to the use of the FOIA, while a large part of the requested information would be published ex officio anyway, being available to anyone on the websites of public institutions.

On this occasion, a series of documents related to the amendment of the FOIA appeared in the press, including an address according to which two officials from the Ministry of Health even proposed the abolition of the law. According to some sources from the Ministry of Justice, the Government was working on a project to amend the FOIA which referred to the introduction of provisions that "prevent journalists from requesting information such as lists"; for their part, civil servants complained that they were being asked to create new information and not to provide pre-

existing information[13].

The attempt of 2017 to amend the FOIA has been harshly criticized by the civil society, like every time when the legislative changes aim to restrict the leeway in relation with the state, the perception being that it could reduce the modest efforts of the institutions to explain how and why they make general decisions.

Moreover, the temporal stability of the FOIA is also due to the fact that the Romanian politicians, regardless of the political orientation of their party, get, sooner or later, most often from opposition, to use it as a form of coercion of political rivals in power, either in their name, or by the help of the activists whom they work with.

The subsequent mechanism of the transparency legislation consists in a tacit presumption that public participation is likely to improve the quality of decisions taken/the act of governing and, indirectly, through the effect of petitioning, deficiencies signaled in the applications become better known and subsequently, faster addressed.

5. Conclusions

Romania's Freedom of Information Act (Law no. 544/2001) is a modern regulation, inspired by the best international practices in the field of public transparency. Although the enforcement of this law is accompanied by some difficulties, as a result of a series of misinterpretations of its provisions that unjustly restrict the access to information, nevertheless the law still benefits from a temporal normative stability. Attempts to change the most important principles of the law have not materialized, the Romanian political class as a whole has not moved towards restricting the right of access to information already conferred in 2001.

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