THE LEGAL NATURE OF THE RIGHT TO INFORMATION UNDER ROMANIAN REGULATIONS

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Abstract

The author aims at establishing the limits and components of the right to information in the actual Romanian legal system, departing from the provisions of art.31 of the Romanian Constitution and of Law no.544/2001 regarding the free access to information of public interest.

To this purpose, the notion of the right to information will be analyzed, alongside its components by reference to both the special legal and the Constitutional provisions. After pointing out some particularities regarding the relation of the right to information and mass media, the substantial limits of the right will be identified.

After the analysis undertaken, the author will establish a dual nature of the right to information.

Keywords: *right to information, constitutional rights, civil rights, freedom of expression, mass-media.*

1. Notion

In constitutional law literature[1], the right to information has been qualified as a fundamental right, necessary for the material and spiritual development of mankind. Other authors[2] have shown that this is an essential right, without which humans cannot exist as a social being.

Although the importance of the right to information appears to be essential for the field of public communication, we observe that legal literature avoids to offer a definition.

Considering the dynamic nature of social relations in the field of public communication, we appreciate that a definition of the concept is relatively difficult, as the right to information appears to be linked to freedom of expression, being seen as a dimension of the latter.

In order to provide a definition, we consider that the starting point must be the fundamental regulations, in this case art. 31 of the Romanian Constitution and art. 10 of the European Convention on Human Rights, which provide the content of the right to information, in the first case separate from the freedom of expression, and in the second case as a component of the freedom of expression.

In both cases, the essence of the law is the communication of information between people or between people and institutions.

Formulating our own definition, we consider that *the right to information is a human right, to receive data and information in its area of interest, either from public authorities and institutions, or from other people, under the provisions of the law, without unjustified limitations imposed by other entities.*

2. Sedes materiae

Regarding the regulation, we distinguish between the fundamental norms, which in this situation are found in the Constitution and in the European Convention on Human Rights and the special regulations, respectively Law no. 544/2001 on free access to information of public interest[3], together with its application norms, contained in the Government Decision no. 123/2002[4].

Art.31, paragraph 1 of the Constitution provides: "The right of the person to have access to any information of public interest may not be restricted".

According to art.1 of Law no.544/2001: “The free and unrestricted access of the person to any information of public interest, thus defined by this law, is one of the fundamental principles of relations between people and public authorities, in accordance with the Romanian Constitution and with the international documents ratified by the Romanian Parliament”.

The same normative act regulates the categories of information subjected to communication, the procedure for requesting that information and the remedies against the refusal to communicate.

Another normative act of reference, in this sense, is represented by Government Decision no. 123/2002 on the norms of application of Law no. 544/2001 on free access to information of public interest, which stipulates a series of clarifications in order to apply the provisions Law, along with models of documents, respectively requests, complaints in order to obtain access to information of public interest.

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[1] I. Muraru, E.S.Tănăsescu (coordinators) - *Romanian Constitution, Commentary on articles*, CH Beck Publishing house, Bucharest, 2008, pg.299.

[2] V. Dabu - *Law of Social Communication*, course support, Faculty of Communication and Public Relations „David Ogilvy” SNSPA, Bucharest, 2001, pg.38.

[3] Published in the Official Gazette, Part I, no. 663 / 23.10.2001.

[4] Published in the Official Gazette, Part I, no. 167 / 08.03.2002.

3. Content of the right to information

A. Starting from the provisions of art. 31 of the Constitution, the right to information brings together three components:

(i) *the right of access to information of public interest*

The regulation expressly refers to the information of public interest, as stipulated in art. 31, paragraph 1 of the Fundamental Law. Although the notion is not defined by the Constitution, it is found in art. 2, letter b of Law no.544/2001, adopted in order to effectively apply the constitutional provision.

Consequently, private and secret information cannot be made available to citizens on the basis of the constitutional text, but can, possibly, on the basis of national law.

(ii) *the right to be properly informed by both the authorities and the media*

Public authorities have the obligation to communicate real information at the request of citizens, both in matters of public interest and in matters of personal interest[5]. We notice a difference in terminology compared to the provisions of the previous paragraph, because the term "public affairs" is used, opposed to "information of public interest". Apparently, the distinction is superficial, the information related to public affairs being information of public interest.

We appreciate that by "issues of personal interest" the legislator did not want to designate "issues of private interest", but a problem belonging exclusively to the person making the request or his representative. Consequently, the text does not allow one person to receive information about the private interests of another person.

The mass media, regardless of the source of financing, the owner or the specifics of its activity, has the obligation to correctly inform the public opinion, respectively the recipients of the information, as it results from the provisions of art. 31, paragraph 4 of the Constitution. We consider that the reason behind the text is that of preventing the manipulation and misinformation of public opinion, given the impact that the communication of information through media has on people.

(iii) *autonomy of public radio and television services*

The regulation only applies to public radio and television services, which cannot be imposed on privately owned media. In essence, it is a guarantee of the equidistance of the main radio and television services from the spheres of public influence, both from the political environment and from outside it. We also note that the organization of the activity of public television and radio services is done by organic law[6].

We note, starting from the three dimensions, that they combine two prerogatives, namely (i) the right of the person to be informed correctly and (ii) the right to access public information directly.

We consider that these prerogatives represent the essence of the right to information, as guaranteed at constitutional level.

Some authors[7] state that the right to information also includes the right to inform, but, in our opinion, the latter is provided by the freedom of expression as regulated by art.30 of the Constitution.

B. Starting from the provisions of Law no. 544/2001, in order to determine the content of the right to information, it is necessary to start from the special terminology, found in art. 2 of the Law:

„a) by *public authority or institution* it is understood any public authority or institution that uses or manages public financial resources, any autonomous administration, a 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, as the case may be, an administrative-territorial unit is sole shareholder or majority, as well as any operator or regional operator, as they are defined in the Law on community services of public utilities no. 51/2006, republished, with subsequent amendments and completions. Political parties, sports federations and non-governmental organizations of public utility are also subject to the provisions of this law,

b) *information of public interest* means any information concerning the activities or resulting from the activities of a public authority or public institution, regardless of the medium or the form or manner of expressing the information;

c) *information on personal data* means any information on an identified or identifiable natural person".

Given the terminology used by the national legislator, we can note that the information of public interest is related to the activities carried out by public authorities or institutions, being both information on how to carry out the activity within the public institution and information resulting from the activity carried out within public institution, such as financial statements, professional balance sheets, etc.

In our opinion, the definition given by art. 2, letter b of Law no. 544/2001 is inaccurate, as we cannot consider that all the information resulting from the activity of a public institution is information of public interest, some of them having an eminently professional or administrative nature, such as drawing

[5] Article 31, paragraph 2 of the Constitution provides: "Public authorities, according to their competences, are obliged to ensure the correct information of citizens on public affairs and on issues of personal interest".

[6] Gh. Iancu - *Constitutional Law and Political Institutions*, ed. IV, Ed. Lumina Lex, Bucharest, 2007, pg.168.

[7] C.A. Păiușescu, O.Duță - *The law of communication. Theoretical Considerations and Relevant Legislation*, Universitară Publishing House, Bucharest, 2011, pg.113.

up income registers obtained for each taxpayer, or conducting research on improving the main activity.

They cannot be included in the category of information exempted from the free access of citizens, but they also do not appear as information of public interest, in a legitimate sense. In reality, the text of the law provides a general classification of the designated category, which has an indirect effect on the interpretation of the constitutional text we referred to earlier, which does not define the notion of information of public interest, although it uses it.

4. Categories of information subject to communication

We note that in accordance with the provisions of art. 5, paragraph 1 of Law no. 544/2001, certain categories of information are communicated *ex officio* by any public authority or institution, respectively: "a) normative acts governing the organization and functioning of the authority or the public institution; b) the organizational structure, the attributions of the departments, the functioning program, the audience program of the public authority or institution; c) the name and surname of the persons from the management of the public authority or institution and of the official responsible for the dissemination of public information; d) the contact details of the public authority or institution, respectively: the name, the headquarters, the telephone numbers, the fax, the e-mail address and the address of the Internet page; e) financial sources, budget and balance sheet; f) own programs and strategies; g) the list containing the documents of public interest; h) the list comprising the categories of documents produced and / or managed, according to the law; i) the mean of appeal to the decision of the public authority or institution in the situation when the person considers himself / herself injured regarding the right of access to the requested information of public interest".

Considering the text of the law previously indicated, we note that the first four categories of documents[8] refer to ordinary data concerning the functioning of an institution. The information regarding the normative framework that regulates the activity, the management bodies of the institution and its contact data are made public in order to facilitate the communication with the respective institution.

With regard to information on financial sources, budget, balance sheet, own programs and strategies, we note that they are published in order to ensure the transparency of the activity in that institution.

The provisions of art. 5, paragraph 1, letters g and h of the Law generate difficulties in legal practice. Usually, the list of documents of public interest is not common to all institutions, even in the same field of activity, as its establishment depends on the interpretation of the law by the governing bodies of that institution. In addition, the list of categories of documents produced or managed is subjected to an even greater degree of relativity, as any public institution, by its nature, manages a variety of documents either from third parties or from its work.

With regard to the last category of information, concerning the manner of appealing the decision not to provide information of public interest, we note that this has a procedural nature, being, thus, irrelevant for defining the content of the law.

In accordance with the provisions of art. 5, paragraphs 2 and 3 of Law no. 544/2001, the information bulletins published by the public authorities and their periodic activity report are subject to *ex officio* communication.

We note that the law stipulates the obligation of the authority to communicate information *upon request*. This category is represented by: (i) the information of public interest as defined by art.2, letter b of Law no.544 / 2001, under the conditions of art.6, paragraph 1, of the same normative act, (ii) the privatization contracts concluded after the entry are subject to communication in force of the Law, under the conditions of art. 5, paragraph 5 of Law no. 544/2001 and (iii) the public procurement contracts concluded by the contracting authorities from among the public authorities or institutions, according to art. 11^1 of Law no. 544/2001.

We note that the legislator has expressly stipulated the obligation to communicate privatization contracts, on the basis of a procedure for transferring state participations to private property of individuals, carried out at national level, in the last three decades. The legal provision is intended to respond to an urgent social need for decisional transparency regarding large privatizations, but, in order to respect the principle of non-retroactivity of the law, the obligation to communicate contracts operates only for those concluded after December 22, 2001, the date of entry into force of the law.

For the same reasons, respectively for the transparency of the procedures, public procurement contracts concluded by contracting authorities from public authorities or institutions shall be subject to communication, upon request.

We consider that, essentially, the communication of information of public interest has as a premise the existence and possession of that information by the authority to which the request was submitted. In this regard, in accordance with judicial practice[9], we appreciate that the previously mentioned legal provisions do not oblige the public institution to compile statistics or reports that would involve a high

[8] Found in art.5, paragraph 1, letter ad of Law no.544 / 2001.

[9] Civil decision no. 2047/2010, Bucharest Court of Appeal, Administrative and Fiscal Litigation Section, cited by A.Moraru, E.Iorga, L.Lefterache - *(un)Restricted access to information of public interest 10 years after the adoption of the law*, Institute for Public Policies, Bucharest, 2011, pg.11, available online at:https://www.juridice.ro/wp-content/uploads/2012/02/Studiu-544.pdf, accessed on 24.03.2021.

degree of complexity and information processing. To this end, the institution shall provide only the data necessary for the preparation of the study, report or statistics in question.

If, in addition to the information of public interest mentioned, copies of documents issued by the public authority or institution to which the request was submitted are also requested, the cost of the copying services shall be supported by the applicant[10]. According to art.18, paragraph 5 of Government Decision no.123 / 2002, the cost of the copying service cannot exceed 0.05% of the minimum wage per economy, calculated per page.

5. Access of the media to information of public interest

The access of the press to information of public interest is a guarantee of its role in a democratic society.

The law establishes a series of special rules regarding the way in which information of public interest reaches the knowledge of the press, in addition to the common law rules on requesting information by any person, under the conditions of art. 5 and 6 of Law no. 544/2001.

In this sense, public authorities and institutions have the obligation to appoint a spokesperson, usually from the information and public relations departments[11]. Public authorities have the obligation to organize, periodically, press conferences for the communication of relevant information, on which occasion they will respond to requests for information of public interest[12]. In addition, public authorities shall, upon request, grant accreditations to journalists and media representatives[13] and inform the press in due time about the organization of press conferences or public actions, to which access of the media cannot be prohibited[14].

6. The right to reply. A guarantee of correct information according to art.31 of the Romanian Constitution

The right to reply does not benefit from a general regulation applicable to the written press, the online press and audiovisual content, as special provisions exist only for the latter. Despite this fact, it has been held in the jurisprudence of the Constitutional Court that the right to reply has a constitutional nature.

Thus, in the Constitutional Court Decision no. 8/1996 regarding the exception of unconstitutionality of the provisions of art. 74 paragraph 2 and of art. 75 paragraph 2 of the Press Law no. 3/1974[15], it was noted that "the right to reply is not expressly mentioned in the provisions of the Constitution, but, through a systematic interpretation of its provisions, the constitutional character of this right results".

In order to reach this statement, the Court took into account that under Article 15 of the Constitution, citizens enjoy the rights and freedoms provided for therein, including freedom of expression and the right to information, guaranteed by Article 30 and Article 31 of the Constitution. Thus, given that freedom of expression cannot prejudice the dignity, honor, privacy and the right to one's own image, and the media are obliged to ensure the correct information of public opinion, the Court held that the right to reply has the value of a constitutional right correlative to the right to free expression and the right to information.

Most probably, the Court's reasoning took into account the first prerogative of the right to information.

In the jurisprudence of the European Court of Human Rights, it was held that the journalist has the obligation to adopt an equidistant and professional position, ensuring the person referred to, in its material, the opportunity to express its own view of the situation, by ensuring the right to reply[16].

Equally, in the cases of Ediciones Tiempo SA v. Spain and Haider v. Austria[17], it was ruled that freedom of expression also includes the right to reply, as the latter is a guarantee of informational pluralism.

In what concerns the normative system of the European Union, the right to reply is ensured by the provisions of art. 23 of Directive 89/552/EEC, on the coordination of certain laws, regulations and administrative provisions of the Member States concerning the dissemination of television programs. However, as shown in legal literature[18], the extension of the applicability of this provision in the online press has not been formally achieved.

Specifically, we note that in the matter of written press and online press the right to reply does not benefit from an express regulation, but, given the mandatory jurisprudence of the ECHR, along with the interpretation given by the Romanian Constitutional Court in Decision no. 8/1996, we can note that the right

[10] As it results from the provisions of art. 9, paragraph 1 of Law no. 544/2001.
[11] As provided by art. 16 of Law no. 544/2001.
[12] Fact resulting from the provisions of art. 17 of Law no. 544/2001.
[13] According to art. 18 of Law no. 544/2001.
[14] As provided by art. 19 of Law no. 544/2001.
[15] Published in the Official Gazette, Part I, no. 129 / 21.06.1996.
[16] ECHR case Europapress Holding DOO v. Croatia, judgment from 22.10.2009, available online at http://www.5rb.com/wp-content/uploads/2013/10/Europapress-Holding-v-Croatia-ECHR-22-Oct-2009.pdf/, last consulted on 24.03.2021.
[17] Both quotes by S. Stoicescu - *Freedom of expression versus the right to reputation*, Hamangiu Publishing House, Bucharest, 2019, pg. 232
[18] A. Koltay - *The right to reply. A comparative approach*, Iustum Aequum Salutare, III.2007 / 4, pg. 207-208, quoted by S.Stoicescu - *op.cit*., pg. 233.

of reply is correlated with freedom of expression and the right to information, as constitutionally guaranteed, resulting from these regulations.

7. Limits of the right to information

A. From the *constitutional regulation* perspective, the right of access information of public interest cannot be restricted, a fact expressly stipulated in art. 31, paragraph 1 of the Fundamental Law. We note that the text should not be seen as absolute. Thus, the right is susceptible to limitation under the conditions of art. 53 of the Constitution, by law, for: "the defense of national security, order, health or public morals, the rights and freedoms of citizens; conducting criminal investigation; prevention of the consequences of a natural calamity, of a disaster or of a particularly serious disaster".

In addition to the general limitation mentioned above, the right to information must not prejudice measures to protect young people and national security, as provided in Article 31, paragraph 3 of the Constitution. In legal literature[19] these limitations have been designated by the terminology "value coordinates" which should not be prejudiced by the exercise of the right to information.

Although the field of national security appears to be a justified limitation and does not involve further discussion, a fact directly stated in the jurisprudence of the Romanian Constitutional Court[20], "youth protection measures" cannot be precisely determined. First of all, the terminology leads to the conclusion of the pre-existence of some measures, activities or rules adopted at national level for the protection of the age category of young people. Secondly, the classification of a person in the category of young people does not benefit from any constitutional landmark.

In these conditions, the limit imposed by art. 31, paragraph 3 of the Constitution, regarding the measures for the protection of young people, is susceptible in a high level, to arbitrary appreciation from the person interpreting the legal text.

B. From the perspective of the *special regulation*, the limitations are found in art.12, paragraph 1 of Law no.544/2001, according to which „(1) It is exempted from the free access of the citizens, provided in art. 1 and, respectively, to art. 11^1, the following information: a) information in the field of national defense, security and public order, if they are part of the categories of classified information, according to the law; b) information on the deliberations of the authorities, as well as those concerning the economic and political interests of Romania, if they are part of the category of classified information, according to the law; c) information on commercial or financial activities, if their publicity infringes the intellectual or industrial property right, as well as the principle of fair competition, according to the law; d) information on personal data, according to the law; e) information on the procedure during the criminal or disciplinary investigation, if the result of the investigation is endangered, confidential sources are disclosed or the life, bodily integrity, health of a person are endangered as a result of the investigation carried out or in progress; f) information on judicial proceedings, if their publicity impairs the assurance of a fair trial or the legitimate interest of any of the parties involved in the proceedings; g) information the publication of which prejudices the measures for the protection of young people".

Regarding the limitations of art.12, paragraph 1, letters a and b, against the decision to classify certain information, an appeal may be filed under the conditions of the special law, respectively art. 20 of Law no. 182/2002: "Any Romanian natural or legal person may appeal to the authorities that classified the information respectively, against the classification of the information, the duration for which it was classified, and against the manner in which one or another level of secrecy has been assigned".

In what concerns the limitation from art.12, paragraph 1, letter c, it is necessary that the disclosure of information leads to an effective infringement of intellectual property rights or the principle of fair competition, a simple fear in this regard being not enough. In addition, the existence of a confidentiality clause in the contract is not, *per se*, sufficient to lead to a refusal to disclose information of public interest.

Regarding the limitation from art.12, paragraph 1, letter d, we note that personal data do not fall into the category of information of public interest, but they will be provided if the data affects the person's ability to perform a public office[21].

Information on criminal or disciplinary investigation procedures, or on judicial proceedings, enjoys a special protection regime, which is not susceptible to communication if ongoing legal proceedings are affected or if a person's rights or legitimate interests are endangered.

Similar to the provisions of art. 31, paragraph 3 of the Constitution, previously analyzed, art. 12, paragraph 1 letter g of Law no. 544/2001 limits the communication of information whose publication prejudices the measures for the protection of young people. The above considerations regarding the inaccuracy of the regulation remain relevant.

8. Conclusions

As we have previously observed, the right to information in Romanian legislation benefits from both

[19] M. Năstase-Georgescu - *Communication Law*, Universitară Publishing House, Bucharest, 2009, pg. 88
[20] Romanian Constitutional Court Decision no. 37 / 29.01.2004, published in the Official Gazette no. 183 / 03.03.2004
[21] As it results from art.14, paragraph 1 of Law no. 544 / 2001

a constitutional regulation and a national regulation made by special law.

Given the field of interest of this paper, we note that the provisions of Article 31 of the Constitution determine the content of the right to information, in our opinion, as: (i) the right of the person to be properly informed and (ii) the right to access public information directly.

Although the first prerogative is slightly limited, being related only to the obligation of public authorities and the media to communicate correct information, we note that this has the nature of a fundamental right, inherent in the social dimension of the human personality.

In what concerns the second prerogative, regarding the right to access public information directly, we note that this is detailed in national legislation, for which we have analyzed the relevant provisions of Law no. 544/2001. In reality, this right is limited to information of public interest related to the activity of public authorities and institutions, having the nature of a subjective civil right, guaranteed by law in order to ensure the transparency of administrative activity.

The existence of a legal discrepancy between the two meanings of the right to information lies precisely in the nature of this right, as regulated in the Constitution. Thus, the first meaning takes the form of a dimension of freedom of expression, as defined by international instruments, such as Article 10 of the European Convention on Human Rights or Article 11 of the Charter of Fundamental Rights of the European Union, respectively the right to receive information freely, without unjustified intervention by the authorities. The second meaning takes the form of a new right, consisting in ensuring the transparency of decision-making and administrative activity for institutions financed from public funds, which cannot be elevated to the rank of a fundamental right.

For these reasons, we consider it appropriate to qualify the right to information, as regulated by art. 31 of the Romanian Constitution as a complex right, which includes both a fundamental right and a subjective civil right, in its meanings.

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