

Between Displacement, Layering, Conversion and Drift: The Institutional Construction of the Romanian Freedom of Information Act¹

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Abstract

Using Mahoney and Thelen's four mechanisms of institutional change (displacement, layering, conversion and drift), I argue that the Romanian Freedom of Information Act (Law no. 544/2001 and Methodological Norms no. 123/2002) has proven to be stable in the last two decades since its adoption, it has been accepted by some of us but not all, even though it was created to protect each of us as citizens, there have been failed attempts of institutional destabilization along with a series of institutional consolidations, whereas its enforcement has recorded a gradual deterioration, without attracting attention or encountering major criticism, this change being contrary to the public interest.

Keywords: freedom of information (FOI), Law no. 544/2001, displacement, layering, conversion, drift, Romania.

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1. Introduction

Institutions, formal and informal, are fundamental to understanding the functioning of societies. However, the persistence over time of institutions, once they have been created, does not happen instantly, a continuous effort is needed so that the institutional structures do not erode and/or dissolve.

James Mahoney and Kathleen Thelen³ formulated four mechanisms of institutional change: displacement, layering, conversion and drift.

By “displacement”, new rules take the place of pre-existing rules, as in the case of revolutions accompanied by the breaking of old institutions and their rapid replacement with new ones, colonialism or transitions from socialist to free market economies. “Displacement” can also occur gradually, as new institutions compete with old ones—for example, the free-market economic institutions of China and Cuba, which are increasingly replacing state-controlled arrangements⁴.

According to Thelen⁵, institutional “layering” means the partial renegotiation of a series of institutional elements, progressive changes of the existing rules, while the rest of the elements remain in force. Layering does not introduce new institutions or rules, but it involves institutional changes, revisions and additions⁶. Layering suggests that there is a continuous negotiation of the arrangements of institutions, as well as their functions. These changes might not change the core of the institution

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³ J. Mahoney and K. Thelen, “A history of gradual institutional change”, in J. Mahoney and K. Thelen (Eds.), *Explaining Institutional Change: Ambiguity, Agency, and Power*, Cambridge: Cambridge University Press, 2012, p. 15.

⁴ *Ibidem*, p. 16.

⁵ K. Thelen, “How institutions evolve: insights from comparative historical analysis”, in J. Mahoney and D. Rueschemeyer (Eds.), *Comparative Historical Analysis in the Social Sciences*, Cambridge: Cambridge University Press, 2003, p. 225.

⁶ J. Mahoney and K. Thelen, *op. cit.*, p. 16.

(i.e. changing the legal nature of the institution by increasing its autonomy), but involves only peripheral or operational aspects that do not require radical changes (such as the adoption of different management practices). New operational aspects and new layers of institutional practices overlap pre-existing structures. Examples of “layering” are evident in the transitions to democracy in Eastern Europe, with significant continuities between the pre-communist, communist and post-communist periods. John Campbell characterized the post-1989 institutional building in terms of “bricolage”⁷.

Key actors, however, do not build from scratch, but rather “remake the institutional materials at hand”⁸. As Stark and Bruszt pointed out, the institutional innovators of the post-1989 period faced neither the institutional vacuum that some hoped for, nor a landscape completely scarred by the past that some feared; innovation was possible, but innovators had to work with and around existing institutions⁹. Thus, for example, in the case of public administration, analysts believe that post-communist states continue to function with outdated organizational structures or governmental mechanisms left over from the communist past, with old and new institutions, “grafted” in various ways¹⁰.

Another way in which institutions change is through processes of institutional “conversion”. Institutions designed with a set of goals in mind are redirected to other goals than the original ends¹¹. Conversion suggests that the original institution has already reduced its relevance, effectiveness and/or legitimacy. These conversion processes are set in motion as a result of new problems the actors face, existing institutions being used in new ways or in the service of new goals. For example, institutions created for the military, during World War II, were, in some cases, transformed into active industrial policy after the war. Another example of institutional conversion is the UK National Audit Office, considered to have been transformed, from a simple bureaucratic institution, into a veritable watchdog of government activity¹².

“Drift” describes a pattern of change similar to “layering”, meaning that institutions are subject to erosion or atrophy through slow, invisible and “natural” changes¹³. Rather than dissolving the relevance of old rules with layers of additional rules, “drift” occurs when broader environmental conditions change in the absence of adjustments to ensure the continued vitality of the institution. Those who want a change through drift need only prevent existing rules from being upgraded, so it all depends on how easy or difficult it is to block this upgrading¹⁴. “Drift” can be facilitated by external changes, but, like layering, it can also be an informal political strategy.

2. Methodology

Justifying new attempts of “institutional innovation”, throughout the last two decades of the existence of Law no. 544/2001 regarding free access to information of public interest¹⁵, civil society activists, journalists and even ordinary citizens have been taken by surprise, every time, by the attacks to undermine the access to information, but, nevertheless, the law has proven durability and has stood the test of time, undergoing minor changes, some of which were beneficial. What did these changes of Law no. 544/2001 entail? What exactly was attacked/defended? Why has this institutional

⁷ J. L. Campbell, “Mechanisms of Evolutionary Change in Economic Governance: Interaction, Interpretation and Bricolage”, in L. Magnusson and J. Ottosson (Eds.), *Evolutionary Economics and Path Dependence*, Cheltenham: Edward Elgar, 1997.

⁸ D. Stark and L. Bruszt, *Postsocialist Pathways: Transforming Politics and Property in East Central Europe*, New York: Cambridge University Press, 1998, p. 7.

⁹ *Ibidem*, pp. 6-7.

¹⁰ B. Nunberg, *The State After Communism, World Bank Regional and Sectoral Studies*, Washington, DC: The World Bank, 1999.

¹¹ K. Thelen, *op. cit.*, p. 228.

¹² P. Bezès and M. Lodge, “‘Historical legacies’ and dynamics of institutional change in administrative systems”, in J. C. N. Raadschelders, T. A. J. Toonen and F. M. Van der Meer (Eds.), *The Civil Service in the 21st Century: Comparative Perspectives*, Pelgrave Macmillan, 2007.

¹³ *Ibid*, p. 133.

¹⁴ J. Hacker, P. Pierson and K. Thelen, “Drift and conversion: Hidden faces of institutional change”, in J. Mahoney and K. Thelen (Eds.), *Advances in Comparative-Historical Analysis (Strategies for Social Inquiry)*, Cambridge: Cambridge University Press, 2015, p. 180.

¹⁵ Regarding an analysis of this law, see Cătălin-Silviu Săraru, *Drept administrativ. Probleme fundamentale ale dreptului public*, Ed. C.H. Beck, Bucharest, 2016, p. 205-209.

innovation been accepted by some of us, but not all, even though it was created to protect each of us as citizens? Why has the enforcement of Law no. 544/2001 recorded a gradual deterioration, without attracting attention or encountering major criticism?

In order to answer these questions, data were collected in the spring of 2023 from two sources: public assumed documents, i.e. the texts of legislative initiatives (parliamentary or governmental), developed during the two decades of the law's existence; and key informant interviews.

The document review included: (1) legislation initiatives and official government strategies to amend Law no. 544/2001 and the Methodological Norms no. 123/2002; (2) statements and reports from think tanks engaged in transparency policy in Romania; and (3) media reports and news articles on transparency from leading Romanian news websites.

The document analysis was complemented with eight semi-structured interviews, carried out between March and April 2023. The respondents were selected from among civil society actors and journalists (coded R1 through R8), involved in the development and implementation of transparency legislation.

<i>Code of respondent</i>	<i>Name of respondent</i>	<i>Affiliation</i>	<i>Date of interview</i>
R1	Ioana Avădani	CJI	April 7, 2023
R2	Diana Hatneanu	Lawyers House of Bucharest	March 30, 2023
R3	Adrian Moraru	IPP	April 5, 2023
R4	Virgil Nițulescu	ex parliamentary consultant	April 13, 2023
R5	Ovidiu Vanghele	CIM	March 22, 2023
R6	Ovidiu Voicu	CIP	April 4, 2023
R7	Codru Vrabie	independent activist	April 14, 2023
R8	Irina Zamfirescu	ActiveWatch	March 28, 2023

Table no. 1: The list of respondents who were interviewed on the topic.

The interviews had open-ended questions, allowing respondents to provide reasoned answers and new perspectives on the researched topic¹⁶. The interviews had the same basic structure, the particularities questioned differed depending on the respondent and his area of specific expertise and the dynamics of the interview. In general, the interviews contained approximately the following questions:

1. Who are the main actors who negotiated the free access legislation in the Romanian public space?
2. Do you think that Law no. 544/2001 has undergone major changes in its two decades of existence?
3. Has law enforcement of this law undergone major changes? Do you think the law is enforced better or worse now than in the early years?
4. Why is the principle of free access to information defended by some of us, but attacked by others? What exactly is being attacked/defended?

During the interviews, additional follow-up questions were asked, depending on the area of expertise and issues raised by the respondent. The interviews were particularly valuable to capture the opinions of the respondents, in relation to the in-depth course of Law no. 544/2001 in the last 20 years.

3. Analysis of the initiatives to amend Law no. 544/2001 and Methodological Norms no. 123/2002

Out of 25 projects to amend Law no. 544/2001, registered in the Parliament of Romania, between 2006 and 2022, only four of them became laws (for each initiative, I took into consideration the texts published on the Senate website).

Below, I present a centralizing table with the 25 legislative initiatives, in order to highlight

¹⁶ B. L. Leech, "Asking questions: Techniques for semistructured interviews", *PS: Political Science and Politics*, 35(4), 2002.

the actions to modify the institutional construction of Law no. 544/2001.

<i>The legislative initiatives to amend Law no. 544/2001</i>				
No.	Year of the initiative	Main initiator's political party	Became/Not became a law	Mechanism of institutional change
1.	2006	Democratic Party (PD)	No	Layering
2.	2006	National Liberal Party (PNL)	No	Layering
3.	2006	National Liberal Party (PNL)	No	Displacement
4.	2006	Independents	No	Layering
5.	2006	National Liberal Party (PNL)	Yes	Layering
6.	2006	Democratic Party (PD)	Yes	Layering
7.	2007	Independents	No	Layering
8.	2007	Democratic Party (PD)	Yes	Layering
9.	2008	Social Democratic Party (PSD)	No	Displacement
10.	2008	Democratic Party (PD-L)	No	Layering
11.	2009	Social Democratic Party (PSD)	No	Layering
12.	2011	Democratic Party (PD-L)	No	Displacement
13.	2012	Democratic Party (PD-L)	No	Layering
14.	2013	National Liberal Party (PNL)	No	Layering
15.	2014	National Liberal Party (PNL)	No	Displacement
16.	2016	Democratic Alliance of Hungarians in Romania (UDMR)	No	Layering
17.	2015	National Liberal Party (PNL)	Yes	Layering
18.	2018	People's Movement Party (PMP)	No	Layering
19.	2018	Save Romania Union (USR)	No	Layering
20.	2019	People's Movement Party (PMP)	No	Displacement
21.	2020	Save Romania Union (USR)	No	Displacement
22.	2020	National Liberal Party (PNL)	No	Displacement
23.	2020	Social Democratic Party (PSD)	No	Displacement
24.	2022	Save Romania Union (USR)	No	Layering
25.	2022	Save Romania Union (USR)	No	Layering

Table no. 2: The list of the legislative initiatives regarding Law no. 544/2001, between 2006-2022.

Until April 2023 (the date this research ends) there are four laws amending Law no. 544/2001 on the free access to information of public interest, adopted exclusively through parliamentary procedure, during the last two decades of existence of this law. None of these amending texts were likely to weaken Law no. 544/2001, did not affect the main mechanism for granting access to information existing when the law entered into force, but were minor and welcome—free and unrestricted access to information of public interest is still the rule, and limiting access to information is only an exception. Law no. 544/2001 has proven institutional robustness, despite the failed attempts from the representatives of all political parties, either government or opposition, as the civil society reacted promptly and blocked any attempt to invalidate the law.

Most initiative laws concerned “layering” (17 initiatives), eight initiatives—“displacement” and no project concerned “conversion”/“drift”, which implies that, from a quantitative point of view, the legal assault towards Law no. 544/2001 was not one of high proportions. Out of 17 “stratifications”, four projects adopted by the Parliament became laws. “Layering” and “displacement” have been used either to formally strengthen FOI legislation or to weaken the law, as it was enacted two decades ago. However, the proposals aimed at weakening the law were blocked in the Parliament and did not become laws.

I will present, in detail, five of the most important projects, which were the most visible and attracted the greatest attention of public opinion.

1. Deputy Florin Alexe from PNL, together with 48 other PNL, UDMR, national minorities and non-affiliated MPs, submitted a proposal to amend Law no. 544/2001 (Senate registration number L487/2015), to complete art. 2 with a new letter, respectively a¹). Although the project was rejected by the Senate, as the first Chamber referred to it, it was nonetheless adopted by the Chamber of Deputies and became Law no. 144 of July 12, 2016. The adopted text is the following: “a) by public

authority or institution is meant any authority or public institution that uses or administers public financial resources, any self-managed public company, company regulated by the Companies Law no. 31/1990, republished, with subsequent amendments and additions, under the authority or, as the case may be, in 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 the 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 additions. *Political parties, sports federations and non-governmental organizations of public utility, which benefit from financing from public money, are also subject to the provisions of this law.*"

It was the first time that political parties in Romania were compelled to communicate information of public interest to civil society. Therefore, Law no. 144/2016 represents a real institutional "layering", because it established a new principle in the matter of information of public interest, namely that political parties obey Law no. 544/2001 and must provide, upon request or *ex officio*, information of public interest.

Although the law applies to all political parties, not all of them abide by it. According to the Romanian-language Radio Free Europe/Radio Liberty (RFE/RL), Free Europe journalists sent, in 2021, similar requests to the three main political parties that use the subsidy collected from the state budget: PSD, PNL and USR. The interest in the parties' contracts with the press is legitimate, as fair information of the public may be distorted; in 2021, 250 million lei of public money (50 million euros) were allocated for the subsidy from the state budget¹⁷. The amounts have grown rapidly in recent years, but the lack of transparency, especially in the case of PSD, blocks access to information¹⁸.

The only party that did not provide the information requested by the press was the Social Democratic Party; each time, Free Europe stated that the answer was incomplete, but PSD did not provide the requested details. According to Free Europe, the PSD leadership decided, in 2021, not to allow the information regarding the contracts signed with the press to be disclosed, arguing that this information is protected by the copyright law. According to the answer signed by the PSD president Marcel Ciolacu, "copyright protects most human intellectual creations (...) as long as they are also original. Related rights protect specific contributions that are important for the dissemination of protected works. Moreover, these contracts include confidentiality clauses that aim to protect information exempted from the free access, depending on its nature"¹⁹.

It is obvious that PSD was avoiding the answer, by invoking the copyright principles that would protect press contracts, belonging to the sphere of "private law information".

Ovidiu Voicu, from the Center for Public Innovation (CIP), revealed in the press that he won a case with PSD, on December 17, 2021, in the first instance, because of the lack of transparency of the leadership of this party. In the case of *PSD vs. CIP*, PSD lawyer Viorel Mocanu argued that the contracts and contractual clauses are not included in the sphere of public interest information, and the financing of political parties is achieved, mainly, through party members' contributions and secondly by the state budget. However, from the data presented in the last five years by PSD it turns out that the subsidy from the state budget was the main source of funding whereas the contributions registered lower rates. For example, in 2019, the party collected over 143 million lei from the state subsidy and only 10 million from member contributions²⁰.

Also, the journalist Ovidiu Vanghele, from the Media Investigations Center (MIC), definitively won a trial with PSD, started in 2018, after the party refused to communicate information related to the rally organized in the summer of 2018, during the mandate of Liviu Dragnea. Even

¹⁷ C. Andrei (January 19, 2022), "Comandă politică în PSD: nu dezvăluți contractele cu presa. Avocații apără 'opere confidențiale'", *Europa Liberă*, <https://romania.europalibera.org/a/psd-contracte-presa-secreatavoca%C8%9Bii/31660090.html>, accessed January 24, 2022.

¹⁸ C. Andrei (January 6, 2022), "Investitorii ascunși din presă. PSD ține informațiile la secret, deși plătește milioane pe lună", *Europa Liberă*, <https://romania.europalibera.org/a/investitorii-din-presa-ciolacu-st%C4%83nescu-tin-informatiile-la-secret/31642342.html>, accessed January 24, 2022.

¹⁹ C. Andrei (January 19, 2022), *op. cit.*

²⁰ *Ibid.*

though he won in court, Ovidiu Vanghele still did not get what he requested, and he continues to sue the party in order for it to respect the decision of the magistrates²¹.

2. In July 2020, Claudiu Năsui from USR and Andrei Pop from PSD, together with other 17 USR and PSD MPs, initiated a bill amending Law no. 544/2001 (Senate registration number L532/2020)²², which introduces the obligation that public institutions:

- to publish and communicate all information and data of public interest in an open and automatically processable format, which allows the automatic search in the content of the documents and usage of the data, without the need for their additional manual transcription by the applicant;
- to draw up and update a public electronic register of requests and responses issued on the basis of Law no. 544/2001, with the anonymization of the personal data contained therein, which will allow, on the one hand, a greater transparency and access of interested persons to the information of public interest communicated, and on the other hand the possibility of avoiding duplication of requests where the answer may already be found.

As it appears in the information available on the Senate's website, the initiative was initially also signed by some PSD MPs, but they later withdrew their signature²³.

The Senate, as the first Chamber notified, adopted the draft law in the meeting of September 2, 2020, the Chamber of Deputies being the decision-making Chamber. According to the file of the act, available on the website of the Senate, the last registration in this file took place on November 7, 2021, the project is in the Chamber of Deputies for an indefinite period, without knowing any other details about when it could be put back into the debate. The legislative initiative is walked around the plenary and the committees, as "the silence in the coalition is more important" than the transparency project, according to parliamentary sources quoted by Europa Liberă²⁴.

Civil society embraced this legislative project. According to the Center for Independent Journalism²⁵, which actively participated in the initial writing of Law no. 544/2001, the amendments to the law do not radically change it, they do not suddenly transform access to information, but they help by clarifying the institutions obliged to comply with it. The proposal "clears up which institutions are obliged to comply with the law—the principle is *public money = obligation of transparency*—and, above all, it says in black and white that the presence of personal data in a document is not a reason for rejecting the request (as still happens very often now). Personal data can and must be anonymized, but the rest of the information must be provided".

Free Europe journalists²⁶ wrote that the USR initiative was blocked by UDMR, which wanted to introduce an exception in the project, so that national minority organizations, even if they receive public money, are exempted from providing information about what they do with these funds. UDMR would like only organizations formally recognized by a government decision to be subject to the law, so that UDMR would no longer be put to provide information of public interest²⁷.

According to Free Europe²⁸, compared to the form adopted by the Senate, which stipulated the obligation of public institutions to present on their own web page an updated register of requests

²¹ C. Andrei (January 11, 2022), "Secrete de 50 de milioane de euro. De ce ascund partidele pe ce cheltuie banii publici", *Europa Liberă*, <https://romania.europalibera.org/a/judecatori-achizitiile-partidelor-sunt-de-interes-public/31647721.html>, accessed January 24, 2022.

²² <https://www.senat.ro/legis/PDF/2020/20L532FG.PDF> and <https://www.senat.ro/legis/PDF/2020/20L532EM.PDF>, accessed January 28, 2022.

²³ C. Andrei (March 25, 2021), "Cum se îngroapă un proiect privind transparența pentru liniștea Coaliției", *Europa Liberă*, <https://romania.europalibera.org/a/cum-se-ingroapa-proiect-transparenata-linii-C8%99tea-coali%C8%9Biei/31169455.html>, accessed January 28, 2022.

²⁴ *Ibidem*.

²⁵ Centrul pentru Jurnalism Independent (CJI) (March 1, 2021). *Modificări necesare ale Legii 544/2001 privind liberul acces la informații de interes public*, <https://cji.ro/modificari-necesare-ale-legii-544-2001-privind-liberul-acces-la-informatii-de-interes-public/>, accessed January 28, 2022.

²⁶ C. Andrei (March 3, 2021), "Cultura secretomaniei. UDMR a blocat Coaliția să voteze un proiect privind un registru al transparenței", *Europa Liberă*, <https://romania.europalibera.org/a/cultura-secretomaniei-udmr-a-blocat-coalitia-vot-proiect-registru-al-transparenței/31131697.html>, accessed January 28, 2022.

²⁷ C. Andrei (March 15, 2021), "Accesul la informații publice sparge Coaliția. UDMR amendează radical un proiect USR PLUS", *Europa Liberă*, <https://romania.europalibera.org/a/informatiile-publice-sparge-coalitia-udmr-amendeaza-radical-un-proiect-usr-plus/31152257.html>, accessed January 28, 2022.

²⁸ *Ibid.*

of public interest, but also of the answers provided, USR came up with an amendment that each request or response to appear in 15 days in electronic format on the institution's website. But the UDMR proposed the removal of the article, so that public institutions are no longer obliged to have this register on the website, arguing that in this case the person who requested the information would be identified, thus violating the General Data Protection Regulation (GDPR).

However, the amendments belonging to UDMR were rejected, and moreover, the Culture Commission decided that the fines the institutions are to pay if they do not respond to requests regarding public information should be between 500 and 7,500 lei; also, the fine will be determined by the National Agency of Civil Servants (ANFP). USR's initial proposal was for the fine to be between 2,000 and 10,000 lei, but a compromise was reached for UDMR to vote on the amendment²⁹.

A point of view contrary to the project was expressed by the journalist Dan Tăpălagă³⁰ from the Group4 Media Freedom & Democracy Association, according to which no journalist, let alone an investigative one, wants to see his/her questions and answers displayed on the website of the institution from which (s)he wishes to obtain certain information. If they were published within 15 days, as the proposal provides, numerous investigations, on which some journalists work for weeks or even months, risk being compromised and the entire effort of documentation and investigation would be put in jeopardy. According to Tăpălagă, "no citizen will do archaeology work in this register to check if the institution has already given answers to his questions. Consequently, the utility of the registry seems extremely low compared to the collateral damage it may produce".

According to the file of the project, available on the Senate website, the last entry in this file took place on November 7, 2022, so the project has been in the Chamber of Deputies since then, without any other details about when it could be put back into the debate.

The draft law would have constituted a genuine institutional "displacement", because new operational rules would have taken the place of the existing rules in the matter of free access to information: the introduction of the electronic register, which contains the requests and answers provided under Law no. 544/2001, as well as the establishment of financial sanctions for the communication department, all represent a change of great proportions, with important consequences for the authorities and public institutions of Romania.

3. PSD deputy Eliza-Mădălina Peța-Ștefănescu, together with three other PSD deputies and one PNL deputy, initiated a proposal to amend Law no. 544/2001 (Senate registration number B584/2020)³¹.

According to the proposal³², the current form of Law no. 544/2001 favors "various NGOs and various individuals or Facebook trolls, who, under the pretext of being in the civic interest, abuse (...) excessively absurd provisions, aiming to put the authorities and institutions in difficulty".

This initiative scandalized the civil society in Romania³³, which urged the Parliament to defend this essential instrument in guaranteeing the transparency of the government represented by Law no. 544/2001, and to reject the draft law which, in practice, makes a mockery of a fundamental right guaranteed by the Romanian Constitution and the European Convention on Human Rights, namely the access to information of public interest.

According to the initiators³⁴:

- information of public interest is defined too generally, so that it leaves the impression that "all documents that concern the activities or result from the activities of a public authority are, in fact, information of public interest". As such, the project proposes to limit the access only to "administrative acts of a normative nature that concern the general public interest";
- the law binds authorities to make public too much information *ex officio*, "whole piles of

²⁹ C. Andrei (March 17, 2021), "PNL și USR-PLUS resping amendamentele controversate ale UDMR", *Europa Liberă*, <https://romania.europalibera.org/a/pnl-usr-plus-resping-amendamentele-controversate-udmr/31155731.html>, accessed January 28, 2022.

³⁰ D. Tăpălagă (March 23, 2021), *O mică lovitură aplicată jurnaliștilor*. <https://www.g4media.ro/o-mica-lovitura-aplicata-jurnalistilor.html?fbclid=IwAR2WAeTcb7eFIKZ8M7r5Pmkh8cbQ1GckSrPtWY6NFzPifUYSPRladxdI7E4>, accessed January 28, 2022.

³¹ <https://www.senat.ro/legis/PDF/2020/20b584FG.PDF>, accessed January 28, 2022.

³² <https://www.senat.ro/legis/PDF/2020/20b584EM.PDF>, accessed January 28, 2022.

³³ <https://cji.ro/politicienii-de-toate-orientarile-se-inversuneaza-impotriva-accesului-la-informatii/>, accessed January 28, 2022.

³⁴ <https://www.senat.ro/legis/PDF/2020/20b584EM.PDF>, accessed January 28, 2022.

papers which, according to the current provisions, must be displayed in various forms and formats”. Such a requirement would block “the entire activity of the institution for days on end”;

- with the provisions that allow requests to be submitted online and without a signature, “public authorities, with their staff, are practically put in the service of anyone” and thus are exposed to “various forms of blackmail, directed either against city hall officials or against the companies with which the halls in question have signed various contracts”. The proposal sets to eliminate the possibility of online submission of requests and the publishing on the website of the answers to all requests. Also, public authorities can refuse to issue documents longer than 50 pages;

- the provision according to which the multiplication costs must be paid by the requester and the imposition of limits on these costs at the market level creates for the public institutions “a huge volume of work, but free work, which generates an exceptional situation at the level of public institutions, practically leading to their blocking”. The new project proposes the introduction of fees for multiplication, anonymization, scanning and searching, to be determined by the respective public authority.

According to the proposal, within only six days after the registration, the initiators withdrew their project.

The PSD deputy’s proposal would have constituted an institutional “displacement”, because Law no. 544/2001 would have been subjected to a large-scale aggressive legal assault, a redirection of the principles of access to information to other purposes than the original ones and the total damage of this regulation.

4. In 2013, PNL deputy Alina Gorghiu initiated a legislative proposal to amend Law no. 544/2001 (Senate registration number L669/2013)³⁵ which concerned:

- completing the provisions of art. 5 with two new letters, respectively j) and k), in the sense of establishing the obligation for public institutions to communicate *ex officio* the monthly table with the persons and functions within them, as well as the incomes of employed staff and the *curriculum vitae* of staff with completed studies, professional experience, IT skills and language skills;

- inserting into the law of the following provision: “the archive of the newsletter is kept electronically on the official website of the structure”.

The government viewed this proposal negatively³⁶ and considered that it conflicts with Law no. 677/2001 for the protection of individuals with regard to the processing of personal data and the free movement of such data, in force at that time.

Thus, the proposal refers to a multitude of personal data that would have been disclosed to the general public through the Internet pages of public institutions: name, completed studies, professional experience, IT skills, language skills, salary, or other personal data contained in the *curriculum vitae* of the employees. This information not only directly identifies a certain person, but also exposes the individual’s private life to the public. Moreover, according to the Government, carrying out personal data processing operations such as the disclosure of all personal data to the general public, by posting it on the Internet for an indefinite period, through the medium of a newsletter, can lead to increased risks for the rights and freedoms of the persons concerned, these being publicly exposed through the excessive processing of their data.

The government considered that with regard to the “public interest”, which according to the initiator “is above the private one”, compliance with it cannot be invoked at any cost, even to the detriment of private life, without taking into account thoroughly justified situations. When the fundamental right to intimate, family and private life, especially the right to the protection of personal data, is confused with other fundamental rights, such as the right to information, a balance must be identified, as they are of the same nature and importance.

Following the parliamentary debates, the initiative was definitively rejected by both chambers of the Parliament.

Deputy Gorghiu’s proposal would have constituted an institutional “layering” because Law

³⁵ <https://www.senat.ro/legis/PDF/2013/13L669FG.PDF>, accessed January 28, 2022.

³⁶ <https://www.senat.ro/legis/PDF/2013/13L669PV.PDF>, accessed January 28, 2022.

no. 544/2001 would have been subjected to a large-scale legal assault and a redirection of the principles of access to information to other purposes than the original ones, with the consequences of unballancing of some socio-professional categories against others, respectively of officials against ordinary citizens, and the overall destruction of the public support that Law no. 544/2001 enjoys in Romania.

5. In 2012, PD-L deputy Andrei-Valentin Sava registered an initiative aimed at amending Law no. 544/2001 (Senate registration number L118/2012)³⁷, to introduce the obligation for the public institutions, central or local, to install information boards exclusively intended for the permanent display of all communications coming from the Government, regarding the decisions taken in the government meetings. Communications would be displayed on notice boards within 48 hours of their submission and should be kept for at least 30 days from the date of display.

Moreover, the proposal stated that the access to information of public interest is done *ex officio* and upon request, through the department for public relations or the person designated for this purpose, information notices, local publications supported by public funds, as well as the institutions' official websites. The same initiative stipulated that local publications, newsletters and websites supported by public funds would have the obligation to publish ads coming from the government's communication department.

According to the initiator³⁸, these changes aimed to facilitate citizens' access to information on legislative changes, objectively, directly from the source, and not through media channels that, recently, distort the information.

The Government's (negative) point of view³⁹ took into account the fact that Law no. 544/2001 regulates the management and dissemination of public information belonging to public authorities and institutions, namely information related to their own activity or resulting from their own activity. Only in this way can public institutions guarantee and be responsible for the correctness of the information they are obliged to make public. The Government also considered that the display of government announcements on bulletin boards would be obsolete, given the technological advances in the field of communication and the variety of mass media. Displaying the press releases on notice boards would be very difficult to achieve given that the Government publishes an average of ten press releases per week, and according to the legislative initiative, the releases should be kept for at least 30 days.

The Government specifies that the obligation established for local publications and websites supported by public funds to broadcast the ads coming from the Government's communication department cannot be accepted either, as this could be interpreted as a limitation of the freedom of the press.

Following the parliamentary debates, this initiative was definitively rejected by both chambers of the parliament.

Deputy Sava's proposal would have constituted an institutional "layering", because Law no. 544/2001 would have been subject to atrophy through slow changes, marked by retrograde upgrades, signifying the return to a previous stage of bureaucracy marked by paper support, which would have once again occupied the central place of communication with citizens.

Regarding the Methodological Norms no. 123/2002, the main concern of non-governmental organizations at the moment of the drafting of these norms referred to the possibility of the government to alter the principles established a year before, a situation that never took place⁴⁰.

The norms were amended for the first time in 2016, when the technocratic government of Prime Minister Dacian Cioloș adopted Decision no. 478 of July 6, 2016, these changes being beneficial for the existence of the legal framework of free access to public information in Romania.

The Ministry for Public Consultation and Civic Dialogue, led by Violeta Alexandru, proposed

³⁷ <https://www.senat.ro/legis/PDF/2012/12L118FG.PDF>, accessed January 28, 2022.

³⁸ <https://www.senat.ro/legis/PDF/2012/12L118EM.PDF>, accessed January 28, 2022.

³⁹ <https://www.senat.ro/legis/PDF/2012/12L118PV.PDF>, accessed January 28, 2022.

⁴⁰ S. Ioniță and L. Ștefan, "Implementing Right to Information: A Case Study of Romania", in S. E. Trapnell (Ed.), *Right to Information: Case Studies on Implementation*, Washington, DC: World Bank, 2014, p. 250.

the following changes:

- the publication of official information should be done mainly in electronic format, on the Internet page, in the same format for all public authorities/institutions;
- it was established that the responses to be communicated the way the applicant wishes (on paper or electronically);
- new annexes containing models of applications, responses, registers, annual reports, evaluations were introduced;
- response deadlines and their calculation method were made clearer;
- the price for the copying services was defined;
- in case public information is contained in a document that also refers to information exempted by law, the document will be made available with the necessary limitations to protect the exempted information, namely their anonymization by barring the areas that contain the excepted information;

Decision no. 478/2016 represents, both a “layering” and a “displacement”, by partially rewriting a series of institutional elements belonging to the mechanisms of access to information of public interest, while the rest of the elements remained in force.

In June 2017, the electronic publication PressOne wrote that PSD minister of Public Consultation and Social Dialogue at that time, Gabriel Petrea, was running, within Grindeanu Government, a consultation process to change the principles of free access to information, officials from the Ministry of Health proposing even the abrogation of the law⁴¹.

The arguments used by the government officials law were an alleged abuse of rights from behalf of the petitioners, who would have resorted too often to Law no. 544/2001, while a large part of the requested information would have been 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 law appeared in the press, including an address according to which two officials from the Ministry of Health even proposed the repeal of the law. According to sources from the Ministry of Justice, the Government was working on a project to amend Law no. 544/2001, which referred to the introduction of provisions that “prevent journalists from requesting information such as lists”; civil servants also complained that they were asked to create new information and not provide pre-existing information⁴².

The attempt of 2017 to amend Law no. 544/2001 (an institutional “displacement”) was harshly criticized by the civil society, the perception being that it could reduce the modest efforts that institutions do in explaining how and why make decisions.

On August 18, 2020, the General Secretariat of the Government (SGG) published on its website, in transparency procedure, a draft of decision amending the Methodological Norms no. 123/2002, with which, declaratively, intended to improve the way in which the norms were working.

According to the non-governmental organization APADOR-CH⁴³, among the announced changes was one according to which public institutions will no longer be bound to provide the information requested by the petitioner in a statistical, synthesized form, but only in the form existing in the institution’s databases. This way, public institutions could have refused to provide the most ordinary information, for example how many applications of a certain kind they received in a period of time, on the grounds that they do not have that information in the format requested by the petitioner.

Another provision referred to the principles of “good faith” and “abuse of law” that were supposed to be introduced for the first time in the FOI legislation, principles that would have been appreciated according to the Civil Code.

Given the negative signals received from the civil society, the proposal was withdrawn from the website of SGG on September 2, 2020. The draft would have constituted a “displacement”, because the Methodological Norms no. 123/2002 would have been subjected to an institutional

⁴¹ C. Simina and B. Felseghi (June 9, 2017), “Guvernul se pregătește să modifice Legea accesului la informațiile publice”, *PressOne*, <https://pressone.ro/guvernul-se-pregateste-sa-modifice-legea-accesului-la-informatiile-publice/>, accessed August 8, 2020.

⁴² *Ibidem*.

⁴³ <https://apador.org/en/guvernul-vrea-sa-mai-restranga-un-pic-accesul-la-informatiile-publice/>, accessed May 1, 2023.

erosion, through the partial change of the philosophy of the mechanisms of free access to information.

In June 2022, the Government adopted the Decision no. 830/2022 to amend the Methodological Norms no. 123/2002. According to the proposal⁴⁴, SGG pursued, mainly, the following measures:

- clarified the registration and evaluation of requests received by public authorities/institutions, as well as the situations in which the requests are subject to Law no. 544/2001 and the legislation of petitions;
- introduced the possibility of *ex officio* publication of information whose request triggered a high frequency from the public;
- introduced deadlines regarding the updating of information of public interest displayed on the Internet pages, to avoid situations in which old or no longer applicable information is presented and which can create confusion among citizens;
- updated and standardized some indicators of the annual report on the implementation of Law no. 544/2001, in order to eliminate redundant data;

The Decision no. 830/2022 represents an institutional “layering”, with small-scale changes that do not affect citizens’ access mechanisms to public information.

4. Enforcement of freedom of information (FOI) legislation

Looking in evolution at all the changes to the free access to information legislation, the existence of Law no. 544/2001 and its Methodological Norms no. 123/2002 was marked, in the two decades since their adoption, by a continuous process of interactions: settlements and re-settlements within the Romanian bureaucratic system, destabilizations, consolidations, attempts to block or even destroy the two regulations.

The Romanian legislation on free access to information demonstrated stability and temporal robustness in the face of some initiatives aimed at limiting access to information, it has resisted the attempts of institutional destabilization, civil society reacting promptly when there were attempts to transform, block (restrict) or even destroy the access to information in Romania, as a key element of democracy, the responsibility of the authorities and independent mass media.

The picture is different when analysing the enforcement of the law that currently registers a downward slope, between “conversion” and “drift”, all respondents participating in the interview agreeing that Law no. 544/2001 is applied with increasing difficulties. Due to the multitude of public institutions that are required to apply this law and a non-uniform practice in the application of the legal norms, the deterioration took place gradually, without attracting attention or encountering major oppositions, and this change was predominantly against the public interest, Law no. 544/2001 ending up to be applied “randomly and at will of those who receive the requests” (R2).

Domestic institutions often seem to show a true “institutional amnesia” in the way they apply Law no. 544/2001, forgetting their own practice. According to Recorder⁴⁵, the Presidential Administration of Romania classified, in 2023, information that in 2015 had considered of public interest. Recorder journalists did a test, asking the Presidential Administration to communicate the cost of the first official flight of President Klaus Iohannis, in January 2015; they already had this information from this institution which in the past used to communicate it at the request of any journalist, but in 2023 the journalists were told that it was secret, given that it was the same information, the same institution and the same president.

In the context of the Covid-19 pandemic and the health crisis that emerged, a number of non-governmental organizations raised alarm signals regarding the way in which the authorities in Romania respected and applied the legislation on free access to information of public interest.

⁴⁴ <https://gov.ro/ro/guvernul/procesul-legislativ/note-de-fundamentare/nota-de-fundamentare-hg-nr-830-27-06-2022&page=1>, accessed May 1, 2023.

⁴⁵ A. Simina (May 22, 2023), “Din absurdul epocii Iohannis: șah-mat cu propriile ‘secrete’”, *Recorder*, <https://recorder.ro/din-absurdul-epocii-iohannis-sah-mat-cu-propriile-secrete/>, accessed July 20, 2023.

According to the Center for Independent Journalism⁴⁶, several public authorities responded to requests for information submitted by journalists under Law no. 544/2001 either negatively, stating that they have suspended their entire activity of public information and petitions during the state of emergency (for example, Cluj Public Health Directorate-DSP), or stating that, based on the Presidential Decree no. 195/2020 regarding the establishment of the state of emergency on the territory of Romania, the communication of information is done only through the National Strategic Communication Group (Botoșani DSP), or that they will release the information within 60 days, double the maximum period provided by the law (Brașov DSP).

The enforcement of Law no. 544/2001 started from a total mistrust and ignorance by the Romanian public administration, and the first years of enforcement were marked by difficulties (R1). Spokespersons began to appear in public institutions, an obligation imposed by Law no. 544/2001. Some of these positions, however, were occupied by people from mass media who knew how to sneak in through the freedoms provided by the law or how to give information that, in fact, did not say anything (R1). The initial period (2002-2003) was marked by the desire for transparency of public institutions, the process of joining the European Union, but also by the political will to enforce the law and the officials who took part in trainings (R2).

As the political climate in Romania deteriorated, in the sense of the decrease in the level of political discourse, the decrease in the level of performance of political actors, a kind of movement against access to information arose: on the one hand, the movement was generated by the heads of institutions who were political actors, on the other hand, it was facilitated by law enforcement officials, who declared themselves to be overwhelmed by the number of requests, with a feeling of resentment towards the requester of information (i.e. abusive requesters, etc.) (R1). According to Respondent 1, the public information officer's presumption is that the petitioner has bad faith, is coming to harass you, wants to do something against the institution or against you if he asks for that information.

Added to this is the fact that Law no. 544/2001 "was made weak from the start, namely, there are no sanctions in the law (...) if the person responsible for Law no. 544 or the head of the institution you ask for does not give the information to you, nothing happens by default"; "when we have an absolutely rudimentary judicial system (...) the option of sanctioning the person who does not respect his/her part, at a given moment, in court, in the Romanian system, does not work" (R5). In the interview, Respondent 5 stated that he sued the Social Democratic Party for not providing public information about the August 2018 rally and won the case definitively, he obtained the right to receive information, but he is still suing this party for enforcement of the court decision. "The question is: what do I do with that information six years later? (...) A possible criminal act that I would discover committed in connection with the organization of that rally is time-limited", Respondent 5 said.

Respondent 2 believes that another cause of the deterioration in the enforcement of Law no. 544/2001 is a lack of a specialized body of officials, since "things have not been simplified, they have become more complicated, for example in the area of personal data (...), there should be some officials capable of applying the GDPR and to make a concrete analysis, from case to case, what must be refused under the GDPR".

Moreover, any request for information must be approved by the administrative head of the institution. Communicating public information is still an administrative act, and in Romania administration is equally political, so communicating public information is a political act (R1).

According to Respondent 3, another factor that makes it difficult to enforce the law is the very frequent change of political decision-makers at the top of the institutions who decide to communicate or not information of public interest ("shortening the mandates, the functions they hold, on the one hand and, on the other hand, the pace in which the information flows does not help you to hurt them, to offend them, to expose them with this thing, that they do not last" in that position), too frequent changes of leadership are equivalent to restarting law enforcement practices from scratch, with no

⁴⁶ Centrul pentru Jurnalism Independent (CJI) (March 19, 2020), *Accesul la informațiile publice nu trebuie să devină o victimă a pandemiei de COVID-19*, <https://cji.ro/accesul-la-informatiile-publice-nu-trebuie-sa-devina-o-victima-a-pandemiei-de-covid-19/>, accessed July 6, 2022.

continuity in practice, “it’s an endless story, because people come and go in the administration”.

Respondent 2 believes that another reason for the decrease in interest for Law no. 544/2001 is the poor quality of the court decisions handed down in the cases regarding the access to public information, especially with regard to unclear issues solved by “copy/paste” solutions.

Unfortunately, not all the refusals of public institutions end up in court. In order to improve the practice in this domain it would be necessary for more and more petitioners dissatisfied with the obviously unjustified refusal to apply more intensively to courts, considering that the action is relatively easy to formulate, with no stamp duty. According to Respondent 2, this kind of passivity “softened” the application of Law no. 544/2001, since the fear of a trial, in the case of officials who obstruct the access to information, could have a mobilizing effect in favor of communication. Respondent 2 specifies that “the fear of a trial does not motivate him/her (the official) very much either, we have this problem with enforcing” of court decisions. The mechanism for the enforcement of court decisions must be strengthened and, within the framework of Law no. 544/2001, a new mechanism for the enforcement of court decision, similar to the general one in administrative litigations, to be created.

Respondent 6 identifies the problem of “access to information that is in the form of data”, there are many public institutions that do not communicate the information as a database: “they print the Excel sheet, stamp it, scan it and send it like this, which sometimes makes it unusable as a database, some do it out of malice, but most do it out of ignorance, they say they are afraid that someone will alter the information in it”. He believes that the free access to information of public interest and the reuse of data in the public sector “must be addressed together, because the way we function as a society has changed, we use technologies intensively, and they have to be have taken into account together”.

5. Conclusions

In Romania, there have been failed attempts at institutional destabilization, along with a series of institutional consolidations, in the last two decades of existence of Law no. 544/2001. However, the institutional construction of the law has proven temporal stability, despite the attempts to undermine the main mechanisms of granting the access.

Although in the last 20 years several legislative proposals to amend the law were registered in the Parliament of Bucharest, belonging to deputies and senators from various political parties, some being even impossible to put into practice, they did not become reality, the political class as a whole did act neither in the sense of restricting the right of access to information already conferred, nor of revoking the law.

Attempts to block/collapse the mechanisms of access to public information coming from various bureaucracies demonstrate that they intend to challenge a type of bureaucratic order that puts the citizen at its center, having the right to request and obtain information and exercise, indirectly, an explicit control over the Romanian public authorities and institutions.

The blocking of free access to information legislation seems to create the impression of the construction of two state models: one aiming at progress, the other aiming at stagnation and a return to the secrecy of the past. With Law no. 544/2001 things have become more uncontrollable for the officials, their activities are brought into the light of public opinion, which can always ask questions about their activity, or the way public money is spent.

This model belonging to the past, to which one would like to return, could be a reinvented system, a state model that could be called a system far from the eyes of the world. A new strategic discourse seems to be building, one that accuses a real “blackmail” to which the authorities would be subjected by citizens who would “block” them with the avalanche of requests.

Beyond the struggle of “us vs. the others”, i.e. political actors versus civil society, the contestation approach unfolds, in a complex way, on numerous twisted plans, which collide, separate or converge: decision-makers from all political parties seem animated, from time to time, of the idea of absolute control, without giving account to the public opinion, joining hands to promote all kinds

of legislative initiatives to destabilize the mechanisms of access to information. Some continuous wars of positioning take place between various social groups, which compete for the production and/or possession of information (power and opposition, decision-makers, non-governmental organizations, journalists or even ordinary citizens).

The ongoing battle constitutes a genuine conflict to control the field of public transparency: the governors, along with the bureaucracies of the Romanian public institutions, claim that Law no. 544/2001 either failed or became counter-productive, while supporters of the regulation praise its benefits, critics lament the practical shortcomings of the law, generated by the enforcement of the law, while its supporters emphasize the symbolism of the law and its modern principles.

Political decision-makers, who two decades ago had believed in the opening up the state to its citizens, now seem disappointed that open access legislation can actually produce an increase in the trust and efficiency of the state, there is a feeling that the law is not being used adequately or in an honest way, but it often becomes an instrument of pressure on the politicians who come to power.

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