The Metaphor of the "The Right to Know" versus "National Security" in the Law and in Institutional Practices

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Abstract: *Public interest information allows citizens in a democratic setting to take part in public life, form informed opinions, and take rational decisions. At the same time, there are polities, mostly authoritarian, where public information is the prerogative of power, hidden behind a veil of secrecy, with the regular citizens falling outside this privileged realm of knowledge. In this paper I approach Romania, a polity that has a solid legacy of authoritarianism, but has been attempting to turn into a democracy for more than three decades. I try to understand the relative power of 'the right to know' versus 'national security' as powerful metaphors legitimising information as public good, or as prerogative of power, respectively. In order to make sense of the issue, I contextualise the two ontological positions about information, then I study the current Romanian legislation about free access to information versus state secret information. Last but not least, I use an ethnographic approach, with first-hand information from an organisational setting where both principles are applied. I refer to a militarised organisation that is both obliged to provide information as a publicly funded institution, but that has as well a specialised division that deals with secret information. The result of the multi-layered analysis is that while the legislation puts on an equal footing the two principles, actual institutional practices place secrecy in the name of national security above the citizen's right to know.*

Keywords: *the right to know; public interest information; democracy; national security; state secret information; authoritarianism;*

The conceptual context of the idea of individual rights, and the right to know

The right to know is a principle closely linked to citizen rights in a robust democracy. It refers to the right of any regular citizen to be informed on matters of public interest and public decisions. The premise is that a healthy democracy requires informed citizens, and informed decisions. Democracy is more than just voting every four years, but it is about having access to information on issues pertaining to public life, ultimately to the public good.

These generous ideas go back to the early formulations of American republicanism, and they are materialised for centuries in the American Declaration of Independence, The United States Constitution[1], as well as the Bill of Rights. While from a political point of view these ideas have started to produce legal consequences on a general basis in the United States, their origin is in Europe, in the legal and customary liberties of the English subjects (Furedi). At the same time, while the British were still defined as subjects of the monarchy, in the United States white male individuals were receiving the full status of citizen.

No less important, civil rights and universal liberties have been materialised in the Déclaration des Droits de l'Homme et du Citoyen/Universal Declaration of the Rights of Men[2], a direct result of the French Revolution at the end of the 18th century. Citizenship as a new, rational, and responsible way of being in the world was born. While the new understanding of human rights has slowly started to feed the relation of citizens with the state, this has not

[1] https://www.senate.gov/about/origins-foundations/senate-and-constitution/constitution.htm accessed on the 30th of November 2023
[2] https://www.conseil-constitutionnel.fr/le-bloc-de-constitutionnalite/declaration-des-droits-de-l-homme-et-du-citoyen-de-1789 accessed on the 30th of November 2023

prevented the world to go through two world wars. Something more had to be done in order for the institutionalisation of human rights to become regular practices.

After the Second World War, the European nations as well as the Unites Nations, have started to work together to formulate a common human understanding that would prevent future world wars. In this vain, the Charter of Fundamental Rights of the European Union[3] devotes Article 11 to the freedom of expression and information:

> Art 11.1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.

The right to receive information is part of the larger understanding of freedom of expression and information. Article 11.1 can be understood as a coin with two faces. One can form and express informed opinions only when the person has the right of unimpeded access to relevant public information. Is about the right of citizens to be informed about public issues and public decisions.

The same principle is stated in the European Convention of Human Rights, elaborated by the Council of Europe, and effective as of 1950. The 10th Article of the Convention is the one addressing the issue. More recently, the freedom of expression and information has received new public attention in the context of an international effort to enforce a Universal Declaration of Human Rights. According to Article 19: "Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers". A whole movement has got shaped around Article 19 on the freedom of expression in the larger framework of the Universal Bill of Rights[4] :

> Communication is not a one-way process and the right to communicate therefore also presupposes a right to receive information, from both State and private sources. Key elements of the right (…) include the right to (…) equitable access to the means of communication, as well as to the media (…) the right to participate in public decision-making processes; the right to access information, including from public bodies.[5]

The generic right to access to information is constitutive of the democratic understanding of citizenship in the public sphere. Public information, among other aspects, empowers regular people to rationally participate and contribute to public life, and ultimately to the public good. It is about rational people, gathered in public, that make their ideas and information available to others, and that freely face criticism and counter-arguments (Habermas 1992).

The conceptual context of information control, and the powerful metaphor of 'national security'

Authoritarian regimes are political systems that tend to place the rulers above the rule of law and citizen control. In this line of thinking, "effective authority was rooted in the personality of the leader rather than in popular consent" (Furedi 84). Power is gathered in a few firm hands, and the state becomes an apparatus for the control of the polity. Individual freedoms and political mobilisation are actively discouraged, as they are conductive to challenging the *status*

[3] https://www.europarl.europa.eu/charter/pdf/text_en.pdf accessed on the 30th of November 2023
[4] https://humanrights.gov.au/international-bill-rights accessed on the 30th of Novemebr 2023
[5] https://www.article19.org/data/files/pdfs/publications/right-to-communicate.pdf accessed on the 30th of November 2023

quo of the ruler (Furedi 85). Recent history from the first part of the twentieth century shows that disenchantment with democracy and its lengthy ways can lead to embracing an authoritarian alternative. At the same time, the ruler cannot expect to be followed as an individual, but as the embodiment of public will. It is the reason why an authoritarian ruler does not speak of his wishes, but of common interest and common good, that symbolically consolidate his authority over the ruled.

Moreover, in authoritarian regimes, information is tightly controlled and censored. Censorship is an intervention of the governmental power over information of public nature (Green, Karolides xviii). The main argument of power is that in this way people are protected of their own limits, corruption, and irrationalities. Actually, "censorship has traditionally been fed by the fears of governmental or clerical power of the public revealing of information that jeopardises their own *status quo*" (Green, Karolides xviii).

One of the favourite metaphors used by the authoritarians, that manages to keep people away from direct scrutiny, is that of 'national security'. In Romania, this is a powerful discursive device, that keeps on making sense even after the formal demise of the authoritarian rule of Ceaușescu in 1989. The Romanian press, for example, has been using the metaphor of 'national security' as a justification for not providing clear information, or in order to justify unverifiable information (Codău 2023). One eloquent example is presented in Codău's research on the phony investigative journalism from 2001, the newspaper stating that: "for reasons easy to understand, related to national security, we will not offer too many names in this investigation"[6]. This was a justification employed by journalists with secret service connections, using the powerful discursive device of 'national security' that would cultivate the aura of secrecy and importance, but as well keeping away the issue of responsibility, verifiable information, and corroboration of sources.

When it comes to control of information in the public space, the discourse of 'national security' is a powerful metaphor that allows placing public interest information under the shield of secrecy. Information that falls under secrecy rules is inscrutable by regular citizens, thus is beyond transparency and accountability. I argue along recent scholarship (Zulean, Șercan 2018) that while there is indeed information that can endanger the nation, a lot of the unaccountable information that is kept secret is actually a large space of inscrutable maneuvre for its custodians. It is interesting to ask ourselves the same question that Zulean and Șercan did: *Quis custodiet ipsos custodes*/ Who is guarding the guardians of secret information? In light of recent quality investigations on the issue[7], it is not exaggerated to question whether these overpowerful are actually not really focusing on national security, but placing themselevs above the law, in the space of discretionary action.

The powerful demonstration of Zulean and Șercan (2018) show that the legacy of authoritarianism and of military control over the civil realm is hard to erase, even in decades of democracy. The case of Romania is used to illustrate the case, because Romania is a polity that is formally a democracy since 1990, but it is still haunted at the institutional level by legacy practices of tight control of information and lack of accountability. These institutional practices have triggered the case study in this work as well.

At the same time, it would be naïve to suppose that the idea of democracy itself has been the sole engine of enforcing the principles of free access to information and civil control. "Democratic control of the military was predicated on the fear that the armed forces have a monopoly of violence in a state and could therefore potentially orchestrate military coups d'états" (Zulean, Șercan 3). The larger issue at stake is control over the polity, civil or military, democratic or autocratic.

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[6] In *Ziua Journal*, "Neamul STS", 10th of May, 2001.

[7] *Recorder investigation*, "The Controller in the Shadow", June 2023
https://www.youtube.com/watch?v=TR3KxiGRAf8 accessed on the 3rd of December 2023

The 'right to information' versus 'national security' as constitutional principles

The general principles that we find inscribed in European documents on human rights are further transposed in the national legislation of the Member States of the European Union. The fundamental regulatory framework of European states is their constitution. It is in this document that we find the main legal principles that are guiding the life in common in a given polity. When it comes to the right to access to information, we find this right articulated in Article 31 of the Romanian Constitution[8]:

> (1) The right of a person to have access to any kind of public interest information cannot be restricted.
> 2) Public authorities, based on their specific authority, are obliged to provide accurate information to citizens on public issues, as well as on issues of personal interest.

Nevertheless, the principle of the right to access to information has an antidote in the same fundamental act, in the same article even. On the third point of Article 31 of the Constitution, it is stated that "(3) The right to information does not have to bring prejudices to the measures protecting the youth or national security". We discover that the counterpart of 'the right to know' is 'national security'.

The principle of 'the right to know' is operationalised in Law 544/2001[9] along its rules of application. According to this law, all publicly funded institutions are informationally accountable to citizens. On the other hand, the 'national security' principle is operationalised in the Law 182/2002 along the rules for its application: HG 585/2002 for the approval of National Standards for the protection of classified information in Romania. In the sub-section analysing this law we will see that the legal definitions and means of application are giving an upper hand to the ones making the rules, over the ones called to apply them. Moreover, it is interesting to observe how the principle of free access to information became operational in 2001, to be immediately followed the next year by the legislation on State Secret Information, Law 182/2002 and HG 585/2002[10].

The Law on the Free Access to Public Interest Information, 544/2001

The constitutional principle of the free right to information is operationalised by the Law 544 from 2001 and its rules of application[11], that has been amended and clarified over the years. While the first article of the law states the principle of the free and unimpeded right to information, the second article of the law defines who falls under the obligation to provide information to citizens. The most important principle is that institutions that are publicly funded should be accountable to the tax paying citizens. In simple terms, if the money come from the state budget, thus from the citizen base, then the institution is obliged to give back to the citizens public interest information in their specific field.

There are two main ways to provide information, according to Article 5, and Article 6 of the Law 544/2001. The first way is *ex officio,* directly provided and made available by the institution by virtue of its status as publicly funded organisation. For the information falling under the ruling of Article 5, there is no need for a formal request, but the information needs to be made public and be at hand for the users. The second way to access public interest information is by request, as stated in Article 6, and the following. Information that does not

[8] https://www.cdep.ro/pls/dic/site.page?id=339 accessed on the 1st of December 2023
[9] https://legislatie.just.ro/Public/DetaliiDocument/31413 accessed on the 1st of December 2023
[10] https://legislatie.just.ro/Public/DetaliiDocument/35209 accessed on the 1st of December 2023
[11] https://legislatie.just.ro/Public/DetaliiDocumentAfis/34417 accessed on the 3rd of December 2023

fall under the requirements of Article 5 can be obtained by means of a formal request. The institution needs to provide an answer to the request within 10 working days, but it can extend the terms to up to 30 days in special cases.

To sum up, public interest information that is not provided *ex officio*, can be accessed by written request. The process of asking for information is clearly stated in the law, and the norms for the enforcement of the law state as well the ways to contest the answer provided by the institution, if not satisfactory to the one requesting information.

At the same time, there are exceptions in the law regarding certain areas of information that cannot be freely accessed. Article 12 of the Law defines these exceptions, among which we find: "information from the field of national defence, public order and safety, if they belong to the category of classified information, according to the law". It is quite clear from the law that classified information represent the reference against which what is possible to access is defined. One can ask for information that is not a secret, and what is a secret is defined beforehand, thus one has access to non-secrets without a clear understanding of the range of information that is outside the realm of public. This legal understanding provides with a considerable power the category of people that are asked to classify and guard secret information. In order to understand how secret information is managed, and what kinds of dispositions are active in this field, it is useful to analyse the regulation on state secret information.

The regulation on State Secret Information, Law 182/2008 and HG 585/2002

In principle, it is quite normal that information that can be harmful to the country and its security cannot freely float in the public realm. On the other hand, it is legitimate to ask how this category of information is managed, and who are the ones that define what is classified and what is not. Moreover, who is guarding the guardians of information, and is there a clear right of appeal when it comes to making information secret, thus removing it from public accountability? On the same token, is there a right to appeal of the ones that have their access to secret information removed? How do we know that something is putting in danger national security, and what are limits of this definition? In this section of the paper I will address these issues by a short analysis of current Romanian regulation on state secret information.

The active regulation on secret information is Law 182/2002, followed by HG 585/2002 for the approval of National Standards for the protection of classified information in Romania. The standards are defined in a 130 pages documents, full of specific rules and regulations as to securing lists of secret documents and perimeters against unlawful access and use. While both the law and the standard of application contain multiple references to 'national security', the term is never defined. It is not clear what constitutes 'national security', but the legislation is there to prevent its breaches. While the regulation on free access to public interest information defines very clearly what falls in this category, when it comes to defending 'national security', we are left to wonder what people in the field are protecting exactly, when the term itself is not defined. How can it be recognized and categorized when there is no clear operationalisation.

The regulation gives power for all issues related to secret information to an organisation subordinated to the prime-minister. ORNISS[12] is the Office of the National Register of Secret State Information. It is a centralised structure, and it is the one to approve and remove the right to access to secret information. We notice that while the implementation of the free access to information is decentralised to each public organisation, the management of secret information is tightly oversighted by a single organisation. While it seems sensitive not to let state secrets be managed in a fragmentary way, the opacity of ORNISS when it comes to making lists of secret information, giving, but especially removing the rights to access to secret information to

[12] https://orniss.ro/ accessed on the 4th of December 2023

people inside the system is problematic. Article 27 of HG 585/2002 states that: "security certificates pertaining to people whose behaviour, attitudes or manifestations can create premises of insecurity for state secret information will be immediately removed". Again, there is no clear definition as to what constitutes problematic behaviour, attitudes or manifestations in this matter. Moreover, Article 36 of HG 585/2002 states that:

> (2) People that receive the right to temporary access to state secret information will sign a confidentiality agreement that will be communicated to ORNISS immediately so that security verifications can be undertaken on these people.

At the same time, people that do follow the procedures to obtain these permits after a central verification, can have the permit removed at any moment, with no prior notice and with no right to appeal. The annexes to HG 585 contain the declarations that the ones that apply to get access to secret information sign beforehand. They contain commitments as to take full responsibility about the secret information handled as well as the agreement not to appeal the denial of access.

On a more mundane level, ORNISS has the same leader since its coming into being in 2002. While in Romania officers are withdrawn from their active duty by the age of 45, this leader graduated high-school in 1975, according to his CV, thus he is in his late 60' at the moment, and still energetically running this fundamental institution that is the sole organisation to define, grant, and withdraw permission to handle classified information.

An ethnographic approach to information related practices in a Romanian organisation

In the last part of this paper I approach the field of a militarised Romanian organisation in an ethnographic way. I keep the legal aspects in mind, but I try to understand how the legal frameworks are translated into everyday practices in an institution where both 'the right to know' and 'national security' are active, legal principles to be observed. The research was possible with the help of an employee with access to classified information; that nevertheless did not want to jeopardise classified information or his/her own position within the organisation. He/She explained that he/she has to report his/her activities, in and out of job, and that he/she is regularly checked because he/she has access to classified information. We agreed that we do not need any classified information, but just a first-hand understanding of the circuits of information inside the organization. I wanted to understand what makes most sense to people inside a militarised organisation when it comes to information. It was my decision not to disclose the name of the person and of the organisation, after understanding how easy an employee can lose access to classified information and be sidelined inside the system.

Peter Gross explains in his most recent piece of scholarship (2023) that in order to make sense of a culture, we should look at what makes sense to the elites that drive the system. In the Romanian case, the author observes that there is a long and quite unshaken culture of pleasing the superiors, of referring to people over formal rules in the current institutional practices: "The old culture encourages behaviours and practices permanently adapted to the exigencies and perceived needs of the ones in power" (Gross, qtd. in Stan, Vancea 168). My own doctoral research on the transformation of the practice of journalism has reached the same conclusion, that people in positions of authority are more likely to be a reference for the employees, rather than formal rules. I observed a "legacy of the actor in the field, rather than that of rules and procedures, thus a pre-modern type of setting (…) than a rational-legal authority" (Petre 58). These ideas have driven the analysis itself, by providing a key to look and interpret information related activities in the organisation under study.

The research questions that drive the empirical analysis are: Who has the upper hand on information at institutional practice level? What happens in an organization where both the right

to access to public interest information and national security are active principles? How about the everyday practices of a militarised institution, that is both a publicly funded organisation, as well as one governed by military rules and obligations? Which of the two principles takes precedence in the application of the specific laws?

The method used was the case study, whereby a single exemplary case is illuminating as to larger definitions and practices on the matter under scrutiny (Yin 2009). It is especially the case for militarised organisations that are quite uniform in structure and formal procedures. The everyday institutional practices, the ones that make sense to the ones within an organisational setting, are illuminating as to the common sense when it comes to information, its circuits, and the responsibilities around it. The analysis starts with the formal understanding of an organigram, that is the same in every organisation of the kind, and then moves deeper, with a first-had, ethnographic approach to the actual practices that provide meaning to the organigram. The premise is that if practices in one organisation of many of the same kind make sense to people involved, then this is the *doxa*, the common sense around the issue under scrutiny (Bourdieu 1992).

In practical terms, when one observes the internal circuits inside the militarised institution, it is noticeable that one can find in an organigram both a security structure, as well as a public relations one. The obligation to have a public relations bureau in every public institution was institutionalised in the top-down manner in Romania, by law, in 1996 (Coman 2003).

The security structure deals with classified information, while the public relations bureau with public interest information. At a formal level they seem to be of equivalent importance, being both subordinated units within the larger setting of the organisation. But which one has the upper hand in the logic of practice of dealing with information? When we zoom in inside a militarised organization, an emergency inspectorate in this case study, the operational circuits show that when a request for information is made under the auspices of Law 544/2001, it first needs to be processed by the security structure that falls under the requirements of Law 182/2002. This department checks whether the information requested is in a document that is classified or not. In case it is, the answer to the citizen is that the requested information cannot be provided because it is in a classified document.

For example, if a citizen asks how many fire tracks there are, he/she will never find out, for this information is in a document defined as secret. It is reasonable to ponder over the utility of this information for the citizens, and to consider what kind of national security threat is there if people just know about this.

It is interesting to observe from the interviews with the employee in the institution, that the ones working there genuinely share the view that the regulation of state secret is superior to the one on free access to information. It is considered natural at the institutional level that the state secret legislation takes precedence over the access to information one. Thus, the employees tend to value 'national security' more than 'the right to know'. They are oblivious of the equivalence of the two laws in judicial terms, and offer a high symbolic value to the legislation in secrecy, even if it directly, and many times, negatively affects their own professional, and even private lives. They seem to be symbolically dominated by the imperatives of secrecy, rather than by the imperatives of the right to know. Moreover, the ones working with classified information are constantly afraid not to have their permit of access to information removed, thus they tend to expand the definition of classified information, just not to be on the wrong. It turns out that while classified information seems of utmost importance, public interest information is more of a public relations decoration in the current institutional practices.

Conclusion

This paper was about two equally powerful principles, and discursive metaphors, that are active in a polity that is struggling to be democratic, but emerging from a tight legacy of authoritarianism, with a huge score when it comes to the distance to power[13]. In this paper I attempted to understand what has the upper hand between 'the right to know' and 'national security'. In light of the comparative analysis of the legislation of free access to information, versus the state secret information legislation, we observe that the right to appeal is present in the former, but not in the latter. In this context, the issue of *quis custodiet ipsos custodes* becomes of upmost importance. We observe that from the legal point of view, there is no clear procedure for holding accountable the guardians of classified information. Moreover, the ethnographic case study inside a militarised Romanian organisation showed that the ones working there believe the regulation of secret information is superior to the one on free access to information. In current institutional practices, secret information takes precedence over public interest one.

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[13] According to the research conducted by Geert Hoftede, Romania scores 90 on this indicator, out of a maximum of 100 https://study.com/academy/lesson/hofstedes-power-distance-definition-examples-quiz.html accessed on the 3rd of December 2023.

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HG 585/2002 for the approval of National Standards for the protection of classified information in Romania
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Law 182/2002 on Protection of Classified Information
Romanian Constitution
The United States Constitution
Universal Declaration of Human Rights
Universal Bill of Rights