

IMPACT OF COVID-19 ON THE RIGHT TO INFORMATION, A COMPARATIVE PERSPECTIVE FROM INDIA AND EU

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Abstract

The Covid-19 pandemic represents a global public emergency. Many countries have resorted to emergency public health expenditure. The pandemic could justify such expenditure under various emergency provisions bypassing conventional systems. However, it vastly increases the scope for corruption. The pandemic raises formidable barriers on the citizens right to information. This article compares the effectiveness of the Indian RTI Act 2005 and the European Union Acts, focusing on Poland during the pandemic. The right to information is critical at such times, and it empowers the citizens to check bureaucratic malpractices, facilitated by greater discretion in times of a pandemic.

Keywords - Right to Information, Public expenditure, Transparency, Corruption

1 INTRODUCTION

The WHO reports 120667101 Coronavirus cases and 2670274 deaths on 18 March 2021 globally. The number of Covid-19 cases and in India stood at 11474605 and 159216, respectively. The corresponding numbers for Poland were also significant at 1956974 and 48032 respectively.

On 04 July 2020, the corresponding numbers were 625,544 cases and 18,213 deaths for India and 35146 confirmed cases, and 1492 deaths for Poland. These statistics indicate the challenges in managing the exponential growth of the pandemic across countries.

The impact of the pandemic has primarily been on two dimensions. First, the swelling afflictions, a direct result of the virus's rapid spread, have overwhelmed all countries' health systems. The second is the unprecedented scale of the

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looming economic-impact from the lockdown and other mitigation responses to the pandemic.

The deep demand shock is expected to herald a severe global depression in the ensuing months. The Pandemic has imposed high costs, causing widespread job losses, loss of lives and health. All countries, particularly those with a significant share of their GDP from tourism, hospitality, and manufacturing, stare at a grim future. The policy challenges are exacerbated by the competing objectives of socio-economic growth and containment of the Pandemic.

In times of pandemic, the state has frequently resorted to emergency expenditure provisions to procure public health equipment. However, there is a conspicuous drop in the number of cases filed under the various right to information Acts globally. The fall in the number of applications seeking such information has resulted in an infodemic on the state's agencies'. The scarcity of such information during a pandemic enhances avenues for corruption.

In this paper, we discuss the scope and application of India and Poland's right to information laws and their effectiveness during the pandemic.

2 SCOPE OF THE RTI 2005

2.1 *General scope*

Guaranteeing open access to government information employing Freedom of Information (FOI) laws has long been considered to be a robust measure for achieving a variety of goals such as increasing accountability, improving governance, decreasing public sector corruption, empowering citizens and journalists, constraining politicians, and increasing bureaucratic efficiency (Mueller, Engewald, and Herr, 2019).

Accountability is a core democratic value. It envisages that citizens hold power to account for omissions and commissions (Ghosh, 2018). The right to access information is a sine qua non for a democratic state pursuing the values of accountability, transparency, openness, and responsiveness in government institutions' affairs (Arko-Cobbah, 2008). The citizens are informed about the effectiveness of the Government's functioning (Vadlamannati and Cooray, 2017). Government information is collected for the benefit of the public, not for public organizations themselves (Mendel, 2003; Yannoukakou and Araka, 2014).

The FOI laws are believed to increase transparency and can fix the accountability of the government. Transparency laws can reconfigure work practices and between bureaucrats and citizens (Aga and Choudhury, 2018).

About 90 countries have adopted FOI laws to facilitate citizens' Right to access information on government activities expeditiously. Right to information (RTI) means that Government's records are opened up to public scrutiny. In many countries, as in Germany, the FOI legislation has taken place at different levels, namely, the federal and the state levels, due to the nature of the federal sys-

tem (Mueller, Engewald, and Herr, 2019). In some countries, like the Russian Federation, the substantial rights to receive information is stronger (Gritsenko, Babelyuk, and Proskuryakova, 2016).

The RTI 2005 is among dozens of national laws adopted similar to the US Freedom of Information Act (Roberts, 2010). Influenced by the global agenda for good governance, the RTI 2005 was designed to build accountability through transparency and has proved to be one of the significant milestones and an essential step towards the country's transparent development.

The RTI 2005 is very effective as compared to similar laws in other countries (Nwoke, 2019). Its most significant achievement is creating a special regime giving any citizen opportunity to obtain information affordably (Singh and Karn, 2012).

The Right to information has brought added responsibility for the governments and their agencies and enhance sustainability transparency (Dhaka, 2009; Alcaraz-Quiles, Navarro-Galera, and Ortiz-Rodríguez, 2020). It is the basis of a democratic regime, which obligates the public administration in many countries to publish the information that clusters.

However, the exceptions to the FOI laws are challenging aspects of access. EU bodies in many areas enjoy a broad discretion which needs to be balanced with the right of the EU citizens to know (Neamtu and Dragos, 2019). Many governments are announcing restrictions to the citizen's right to information explaining its response to the extraordinary challenges of the coronavirus crisis⁴.

2.2 *Scope in India*

Article 19 of the Indian constitution provides the Right to freedom. The Right to freedom in Article 19 guarantees the freedom of speech and expression as one of its six freedoms. The RTI, 2005 applies to the government at all levels. It also applies to entities in recipients of substantial government funds.

The RTI 2005 has empowered Indian citizens to take stock of administrative decisions and actions and ensure that their interests are protected and promoted by the Government (Srivastava, 2010). The RTI 2005 allows Indian citizens to seek information about public bodies' offices and public institutions' works, spending, actions. More than 2 million Indian citizens have requests for information under the RTI 2005 during its first two and half years.

The Right to information includes actions on pandemics, natural disasters, epidemics, and other serious problems for society. The RTI 2005 is designed to prevent arbitrary state action and enhances a responsible democracy (Gopi, 2016).

According to article 2 point 2) (j), "right to information" means the Right to information accessible under this Act which is held by or under the control of any public authority and includes the Right to (i) inspection of work, documents,

⁴ <https://voices.transparency.org/right-to-information-a-matter-of-life-and-death-during-the-covid-19-crisis-d98e6422a174>

records; (ii) taking notes, extracts or certified copies of documents or records; (iii) taking certified samples of material; (iv) obtaining information in the form of diskettes, floppies, tapes, video cassettes or in any other electronic mode or through printouts where such information is stored in a computer or any other device.

The essential features of the RTI Act are that the Right to information belongs to all citizens; the term "Information" is as broad as includes any mode of information (any form of record, document, email, contract sample or electronic data, etc.); Right to information covers many actions like inspection of work, document, record, and its certified copy and information in the form of diskettes, floppies, tapes, video cassettes in any electronic mode or stored information in a computer, etc.; time frame to send information to the applicant is 30 days from the date of request in a normal case and within 48 hours from the time of request where the information involves life or liberty of a person; public authorities have to provide information on written request or request by electronic means.

Exceptions from sharing information are mentioned in art.8 (1) of the RTI Act. There shall be no obligation to give any citizen (a) information, disclosure of which would prejudicially affect the sovereignty and integrity of India, the security, strategic, scientific or economic interests of the State, relation with foreign State or lead to incitement of an offence; (b) information which has been expressly forbidden to be published by any court of law or tribunal or the disclosure of which may constitute contempt of court; (c) information, the disclosure of which would cause a breach of privilege of Parliament or the State Legislature; (d) information including commercial confidence, trade secrets or intellectual property, the disclosure of which would harm the competitive position of a third party, unless the competent authority is satisfied that larger public interest warrants the disclosure of such information; (e) information available to a person in his fiduciary relationship, unless the competent authority is satisfied that the larger public interest warrants the disclosure of such information; (f) information received in confidence from foreign Government; (g) information, the disclosure of which would endanger the life or physical safety of any person or identify the source of information or assistance given in confidence for law enforcement or security purposes; (h) information which would impede the process of investigation or apprehension or prosecution of offenders; (i) cabinet papers including records of deliberations of the Council of Ministers, Secretaries and other officers (...); (j) information which relates to personal information the disclosure of which has no relationship to any public activity or interest, or which would cause unwarranted invasion of the privacy of the individual unless the Central Public Information Officer or the State Public Information Officer or the appellate authority, as the case may be, is satisfied that the larger public interest justifies the disclosure of such information.

The RTI 2005 empowers citizens to access information under the control of the public entities' and promotes transparency and accountability in all public authorities. The Act underlines that democracy requires transparency of information

vital to its functioning, decreasing corruption, and holding governments and their instrumentalities accountable to the governed.

The government prominently displays essential information which include details like repairs of roads, schools and bridges. It makes public the purpose and technical specifications of a project, its cost, funding source, executing agency, and commencement date. Baviskar (2010) argues that these actions signal the government's commitment to transparency in public expenditure.

Access to some information could infringe on state security, efficient governance, optimum use of limited fiscal resources, and the preservation of confidentiality in sensitive state information. The State should harmonize these conflicting interests using tools preserving the paramountcy of the democratic ideal.

2.3 *Scope of RTI in Poland*

The first binding EU document that refers to the introduction of open practices, to the obligation of States to provide access to public records, and to the clarification of legislative uncertainties among Member-States is the Directive 2013/37/EU on the re-use of public sector information aims to introduce: open data policies which encourage the wide availability and re-use of public sector information for private or commercial purposes, with minimal or no legal, technical or financial constraints, and which promote the circulation of information not only for economic operators but also for the public, can play an essential role in kick-starting the development of new services based on novel ways to combine and make use of such information, stimulate economic growth and promote social engagement.

Article 10 of the Convention of the Protection of Human Rights and Fundamental Freedoms in the European Union provides the framework for the Right to information. The article provides that 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".

Under Article 15 of the Treaty on the Functioning of the European Union, citizens and residents of EU countries have a right of access to the documents of the European Parliament, the Council, and the European Commission. This means that citizens can obtain documents held by the Commission and other institutions, including legislative information, official documents, historical archives, and meeting minutes and agendas.

Using article 15, the EU entered into force Regulation (EC) no 1049/2001 of the European Parliament and the Council of 30 May 2001 Regarding public access to European Parliament, Council, and Commission documents. To ensure respect for the Right to information, a two-stage administrative procedure should be applied, with the additional possibility of legal proceedings or complaints to the Ombudsman. All of the European Union member' institutions should take the necessary steps to inform the public of new provisions that enter into

force and conduct staff training to help citizens exercise their rights. To help citizens exercise their rights, each institution should ensure access to a register of documents.

Each EU countries' public institutions provide specialized government websites, which are designed to be the first point of call in the search for information. In the event, the required information is unavailable on the websites, the individual can direct specific queries to public entities.

In Poland, one can avail of the Right to Information Act, entered into force in 2001. The seeker of information can send the question directly to the relevant institution via email or postal mail. This right is without restriction and is not subject to any fees (at the beginning, generally).

According to article 61, section 1 of the Polish Constitution, "a citizen has the right to obtain information on the activities of public authorities and persons performing public functions. This Right also includes obtaining information on the activities of economic and professional self-government bodies as well as other persons and organizational units to the extent in which they perform public authority tasks and manage municipal property or State Treasury property." The Access to information act, 2001, widens access to information to everyone, not merely citizens but all persons and legal entities.

Sharing public information in the Supreme Administrative Court takes place through an advertisement in the Public Information Bulletin⁵, or on the court's website⁶. This applies in particular to information on the content of judgments issued by administrative courts, including the Supreme Administrative Court, which are available from the government database⁷ upon a written request (addressed to the Supreme Administrative Court via postal mail or to the email address). The Polish statistics represent cases that are rejected, and on which a petition for the same has been filed with the administrative court.

2.4 *Differences in Indian and Polish RTIs*

India is a large country with a population of 1.38 billion, while Poland is a significantly smaller nation with a population of 38 million. The GDP of India and Poland stands at \$2870 billion and \$595 billion, respectively. Why do we compare a small country like Poland with a vast country like India?

Poland is challenged with many corruption cases connected with public expenditure by state entities during the Pandemic. It is easier to identify the challenges in a smaller country during its response to the pandemic. We draw attention to the areas and actions of public bodies, which are susceptible to corrupt practices during such exigencies. The Polish cases could provide lessons for a significantly larger country like India, the world's largest democracy, on its challenges to the information goals during a Pandemic.

⁵ <http://www.nsa.gov.pl>

⁶ <http://bip.nsa.gov.pl>

⁷ <http://orzeczenia.nsa.gov.pl/cbo/query>

The European and Polish provisions are similar to Indian RTI 2005. We underline a critical difference between Polish and Indian RTI laws. In Poland, the rights are broader and are not restricted only to its citizens; it is extended to all residents and legal entities. NGOs and associations have the Right to information. We however argue that the Indian provision of restricting the right to its citizens is better. Although, companies have to induce a citizen to petition information; this has the affect of masking the final recipient's identity.

In Poland, a public body can reject an application if the information is publicly accessible on its official website or not public but concerns a private individual's situation. It may also reject the application if the applicant wants to use it to collect evidence or prepare a petition to the courts or conduct civil/criminal proceedings against any entity.

3 THE COVID-19 PANDEMIC CHALLENGE

Sweden is one of the oldest and strongest democracies in Europe. It did not institute a lockdown, pursuing herd immunity, a policy touted as worthy of emulation. Unfortunately, the herd-immunity approach has proved to be a disaster and has yielded a surge of deaths and no respite to its economy. On the statistics, total cases per million of population, Sweden performance (as of 08 July 2020) is significantly worse off than its neighbours - about 12 times more than in Norway, nine times more than Finland, and about five times more than Denmark. On comparing with India and Poland, the Swedish numbers are 36 and 13 times worse off respectively.

The Swedish case has served to reinforce the beneficial effect of lockdown. Sweden's approach to avoiding deprivation of human rights, privileges, and opportunities in the face of the Pandemic is appreciable. However, its pandemic containment policy is a failure given the significantly more significant casualties with no corresponding benefits to its economy.

The new quarantine norms, social distancing, online work, and severely curtailed travel in an increasingly de-globalising world have changed the usual way of life with the onset of Covid-19. The exponential growth of the Pandemic and scale of afflictions has overwhelmed most countries' public health systems.

Many countries have restored to emergency measures, including invoking war provisions to tackle the health emergency which increases the avenues for corruption. With limited oversight the opportunities for expropriation increases exponentially in the government. The pandemic should not become a means to foster widespread and humongous corruption.

The Council of Europe has warned that the current crisis is an infodemic, with false information on many facets of our lives (see more The Council of Europe Portal, Mitigating a global health crisis while maintaining freedom of expression information).

The UN Human Rights Committee and the Inter-American Commission on Human Rights have mandated freedom of expression at the UN, OSCE, and OAS. They underline that the right to information remains vitally important during a pandemic, and any new limits justified by reference to the emergency should be very limited in nature⁸.

The FOI laws are highly dependent on public demand and supervisory institutions. While FOI non-compliance can be attributed to the limited administrative capacities, the failure to put in place access structures also indicates the erosion of political leadership will occur during the implementation phase due to the lack of public demand (Camaj, 2016).

Freedom of expression and the right to information remain vitally important during a pandemic. Consequently, any restriction, which could be justified by reference to the emergency, should be very limited in nature. The restrictions must be necessary”⁹.

An effective Right to Information Act can be very beneficial in this regard. However, the Indian statistics indicate a significant dip in the number of cases admitted under the RTI Act since the onset of the pandemic. It appears that governments across the globe have effectively limited access to the RTI.

The law provides that the right of access to public documents is not absolute and can be limited by public interest and personal data (Neto, 2018). On the other hand, the Right to privacy of personal health information is not absolute, but the Right to access such information may be given for public safety purposes (Sapukotana, 2017).

3.1 *Impact of COVID-19 on RTI - India*

How can we effectively employ the RTI 2005 during the Pandemic? The Indian RTI Act 2005 is one of the most powerful globally and has provided access to all society sections. Roberts (2010) argues that the administrative mechanisms for enforcing India's law are strained by the rapidly growing numbers of complaints and appeals.

The Right to information is vital for participatory democracy in a democratic country (Hettiarachchi, 2017). There is also the concern of increasing attacks on the law users, suggesting a need for further measures. Civil society action should build an international coalition to protect whistle-blowers, whom we need, especially during the Pandemic. All nations need people ready to fight for democratic rights in their respective countries and a collective future independent of the Pandemic.

FOI laws' effectiveness appears to be enhanced if combined with a higher degree of media freedom, the presence of NGO activism, and political competition (Vad-

⁸ <https://www.law-democracy.org/live/wp-content/uploads/2020/06/ES.RTI-and-Health-Emergencies.pdf>

⁹ <https://gfmd.info/right-to-information-in-the-time-of-covid-19/>

lamannati and Cooray, 2017). The media plays a vital role in exposing corruption and abuse of power. However, such efforts would be universalized; everyone should fight against corruption employing powerful tools like the Internet and social media (Facebook, Instagram, and Twitter), along with traditional media like print and television. They can be powerful weapons to promote transparency in public life in all countries, highlighting corruption cases putting pressure on corrupt entities. India already has several blogs or SNS (social networking sites) dealing with RTI; a social change can be created (Chitra and Neelamalar, 2013).

It is worth mentioning that the Indian news media is the largest globally, with significant experience in exposing government corruption (Relly and Schwalbe, 2013). The media plays a vital role during the Pandemic, as most people have become viewers and passive consumers of media reports ¹⁰.

In the Indian context, an RTI plea to seek information on the amount spent on equipment purchase by the Health ministry was refused¹¹, The Union Health Ministry has refused to share the amount of money spent on equipment purchase to handle the COVID-19 pandemic in the country because such data does not come under the definition of “information” to be provided under the Right to Information Act.

The Central Information Commission (CIC) ¹² India annual report indicates that 12.3 lakh RTI applications were filed in 2017–2018. About 1.230.000 applications in two years period, which gives 615 000 per year. Additionally, under section 4 of the RTI Act 2005 (Suo Motu Disclosure), a wide array of information is mandated to be publicly disclosed, preferably on their websites. More such information could be updated and shared more frequently.

With the onset of Covid-19 Pandemic, there seems to be a brake on RTI activities in all the 28 State Information Commissions, although no such issues at the Central Information Commission ¹³ Information and Communication Technology (ICT) may facilitate collecting and disseminating citizen-generated data to enhance governmental accountability fulfillment of the right to health (Schaaf et al., 2018).

3.2 Impact of COVID-19 on RTI - Poland

The European system, more specifically the Polish system of sharing data under the Right to information, is based on proactive dissemination. The government entities voluntarily release information, including in open public meetings, where information is discussed and released in a public venue, i.e., real-time streaming of municipal council meetings, etc.

¹⁰ <https://www.hindustantimes.com/analysis/the-rti-regime-failed-india-during-covid-19/story-B1zj5939aPdl1Z5MwA1AoK.html>

¹¹ <https://www.newindianexpress.com/nation/2020/may/29/covid-19-rti-plea-seeks-to-know-amount-spent-on-equipment-purchase-health-ministry-refuses-info-2149636.html>

¹² <https://cic.gov.in/>

¹³ <https://www.moneylife.in/article/covid-19-puts-a-brake-on-rti-act-all-28-state-information-commissions-in-limbo/60170.html>

Generally, access to public information is to ensure transparency in the State's institutions' activities. Most public information is publicly shared in the Bulletin of Public Information (BIP). Additionally, public information may also be announced in another way, e.g., by displaying in publicly accessible places (e.g., in showcases in the city hall). Access to such public information is subject to restrictions if such information is classified.

Possible refusal to disclose public information and discontinuation of proceedings for disclosure of information by a public authority body are made employing a decision of the President of the Supreme Administrative Court, to which the provisions of the Code of Administrative Procedure apply, with the application for the re-examination of the case, the President of the Court recognizes within 14 days.

The provisions of the Act of 30 August 2002 - Law on proceedings before administrative courts (consolidated text of the Journal of Laws of 2018, item 1302) shall apply to complaints considered in the procedure for granting public information, with the transfer of files and response to the complaint takes place within 15 days of receipt of the complaint. The complaint is examined within 30 days of receipt of the file, along with the response to the complaint.

Many EU governments have restricted citizens' Right to information on their response to the Pandemic. Only 336 cases based on Polish Right to Information Act were filed. However, in the Polish context, only court' cases/petitions in the Polish courts connected with the Right to information are considered. Therefore, the Polish statistics do not show the actual numbers of applications or numbers of people searching for information. Before submitting a request under the relevant acts, one needs to check the website with BIP.pl, which Poland's public bodies have to provide.

There are two more ways of accessing government information as indicated in Cuillier and Piotrowski (2009), reactive dissemination, when government information is released upon request and leaks for whistle-blowers, e.g., WikiLeaks.

Lockdown is considered a medieval approach, with disastrous economic and social consequences. The lockdown is an effective emergency measure, but it can also be a tool to contain people and constrain their democracy privileges. The lockdown has provided many politicians valuable time to stave off legal proceedings, as reported in the Israeli prime minister's case, and forge a governing majority that was elusive since late 2018.

The Polish Government expended five million PLN for procuring COVID-19 masks without certification from the Ministry of Health. It was later identified that the purchase was made from a family friend, a skiing' coach, with no experience in marketing and business. The company was set up only a few days before the signing of the contract with the Ministry. These masks provided little if any protection against the Covid-19 virus.

A few days later, the Government notified a new law provision that compulsorily mandated wearing masks in public places like offices, shops, etc. The law forced all law-abiding people living in Poland to procure the defective masks at short

notice.

The above episode was replicated a couple of weeks later when the Polish Government signed the contract to procure respirators. The agreement was with an entity on the list of banned arms dealers, an entity shunned worldwide.

Subsequently, the Polish Government enacted new provisions in the Act from 05 December 2008 on prevention and combating infections and infectious diseases in people (Ustawa o zapobieganiu oraz zwalczaniu zakażeń i chorób zakaźnych u ludzi). Article 46c indicates that public service contracts shall not apply to contracts for services, supplies, or works awarded to prevent or control an epidemic in an area where an epidemic emergency or epidemic status is declared. This provision provides avenues to bypass the more stringent requirements in the Public Procurement Act of 2004 while contracting with a non-public company.

It appears that the Polish Government has used the Pandemic to empower itself with provisions to act without public scrutiny, to sign government contracts, also with family and friends of government members.

Information is more valuable than money [p.198] (Gora-Blaszczykowska, 2017). The Polish cases indicate that even during a pandemic, society needs to access information about government decisions and actions, including public expenditure. Freedom of information can be used to generate disclosures about inside government practices (Luscombe and Walby, 2017). Invoking emergency provisions to save people's lives is an essential government function of the Government; however, public spending should not be capricious.

4 CONCLUSION

RTI Act 2005 is a powerful tool and one of the most important human rights and modern democracy achievements worldwide. In these difficult times, the public is more focused on survival, employment, and health preservation. When governments are overly occupied with the crisis, their capacity becomes constrained for dealing with RTI cases. Consequently, the government may restrict access to the RTI.

Governments across the world are effectively limiting access to the Right to information. However, public entities may feel incentivized to appropriate public money for personal gains in an environment of lower public scrutiny as in a pandemic. The prevention of corruption during such situations is a valued goal.

The pandemic times are the best moments to check the conscience of the nation. The unfettered decisions made by the government in such times can have long-term consequences for democracy. Our responsibility towards society is to assist in maintaining the standards of modern democracy or risk losing all.

The Right to information is one aspect of the Right to freedom; basic awareness of the same can assuage half the problem. The Right to information can be a valuable tool in a democratic environment during a pandemic when strong legislation backs it. The Polish case explains how Right to Information quickly

engenders into Right to Live during a pandemic. Public expenditure on defective equipment or orders to firms ill-equipped to meet the demand is not in the public interest.

The traditional channels, social media, and NGOs in India become less active; this tends to distort perceptions during a Pandemic. Consequently, acts of omissions and commissions of the governments are not adequately reported, increasing the scope for corruption.

The governments should not use the Pandemic as an opportunity to impose blanket restrictions on RTI. The measures to restrict RTI must conform to the legal framework in any given state. It is necessary for the public to exercise oversight over the government and public entities during the Pandemic, lest public officials expropriate public money for personal gains.

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