



Research Article

The Right to Information and Transparency in Administration during the COVID-19- Selected Issues from Poland

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Abstract

The pandemic has affected the functioning of society. The threat it posed prompted the administration to take various extraordinary measures to counteract virus transmission. The article will analyze selected legal regulations and actions of the administration during the COVID-19 Pandemic in Poland. The aim is to answer the question of how the introduced laws, administrative actions and applied instruments to fight the pandemic, affected the realization of political rights of citizens, related to the principle of open government or transparent administration. Attention will focus on the proactive right to information and the right to participate in meetings of collective bodies of local self-government units in Poland. There is a gap in the literature on this issue. Unless there is transparency in administration, citizen control and accountability are impossible and the restrictions introduced are not respected. A critical analysis of the law and the practice of application of the legislation by local self-governments' bodies make it possible to state, that the practice restricted citizens' access to the deliberations of the constituting bodies, the essence of the right referred to in Article 61 of the Constitution. Article 15zzx COVID-law allowing remote mode of work of the administration does not exclude the provisions on transparency of the authorities. Local self-government bodies were obliged to organize their meetings/sessions in such a way as to enable citizen participation. The study mainly used the formal-dogmatic method.

Keywords: right to information, transparency, local government, COVID-19

Introduction

Transparency in administration and the political right of citizens to information about the activities of the administration are the

foundations of the modern rule of law. The threat posed by the Pandemic has affected the functioning of society, bringing about a particular challenge to information management by the administration. On 11 March 2020, the World

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Health Organization (WHO) declared COVID-19 to be a pandemic. According to the *dictionary of epidemiology*, a pandemic is defined as “an epidemic occurring worldwide, or over a very wide area, crossing international boundaries and usually affecting a large number of people” (Dictionary 2001, Kelly). ‘A pandemic is a disease outbreak that spreads across countries or continents. It affects more people and takes more lives than an epidemic’ (Epidemics, Pandemics, and Outbreaks, 2022).

The constitutions of many EU countries give legitimacy to restrict civil rights and freedoms in the event of a state of emergency or a state of war and to apply extraordinary measures. In Poland, despite the pandemic, a state of emergency was not introduced. However, a state of epidemic emergency in connection with COVID-19 was introduced in Poland by the regulation of the Minister of Health of 13 March 2020 on the declaration of a state of epidemic emergency in the Republic of Poland from 14 March 2020 until further notice (Journal of Laws 2020, item 433). It was cancelled by the regulation of the Minister of Health of 20.03.2020 on the cancellation of an epidemic emergency in the territory of the Republic of Poland (Dz. U. 2020, item 490, due to the introduction of the state of epidemics by Regulation of the Minister of Health of 20.03.2020 on the proclamation in the area of the Republic of Poland of a state of epidemics (Dz.U. 2020, item 491). However, none of these states is a legal basis for restricting political rights. The epidemic emergency has resulted in restrictions on face-to-face human contact to limit transmission of the virus. Thus, many governments have restricted some political rights. Rodrigues et al (2021) mentioned, that “during the pandemic of the new coronavirus most of the countries mapped by the Right to Information Rating sought to change their Access to Information Laws”. The transition to a remote mode of operation for central and local government had an impact on the realization of, among others, the political right to public information and the principle of transparency of administration, the right to good administration and the right of access to documents. The question arose as to whether the measures applied were legal, proportional, necessary and adequate to the needs?

Methodology

The method use in the paper is the formal-dogmatic method. “(...) This method combines the following elements of legal thinking: dogmatic (the interpretation should always

remain in close connection with the law in force), critical (the interpretation should contain a critical moment), comparative (the interpretation should take into account a broader systemic context) and analytical (the interpretation should be primarily a linguistic analysis of the legal text)” (Stelmach, 2012). The object of research, however, is not only the norms of statutory law (lex), but also the existing application and understanding of the norm and the axiological sphere (Blicharz, 2020).

Legal bases of the right of access to public information in Poland

The right of citizens to obtain information about the activities of public authorities is connected “with the principle of open government, universally approved in democratic countries”, which contributes to building a civil society (Banaszak 2012). “The right to information derives from the right to expression, according to which, in order for an individual to freely express ideas, opinions and thoughts, he should be able to formulate them freely, and therefore be very well informed” (Yannoukakou, Araka 2014).

As David Cuillier and Suzanne J. Piotrowski point out in Max Weber's time secretiveness was an inherent feature of bureaucracy (Cuillier, Piotrowski 2009). Nowadays, transparency and the citizens' right to public information are principles of administrative action. This right, counted among the political rights, is guaranteed by the national constitutions of EU states (Cieleń 2008). The constitutions of other countries also guarantee this right. E.g. Article 19A of the Constitution of Pakistan or the Constitution of Brazil “the public administration has a duty of absolute transparency in the conduct of public affairs, (...) Articles 5XXXIII, 5.XLLII 37 main paragraph, 196, 197 and 200 of the Federal Constitution of 1988. “According to CLD's RTI Rating (rti-rating.org), which ranks global right to information laws, 129 countries currently have right to information laws” (UNESCO CI-2020/WTR/4).

The right of access to information is also guaranteed by law under Article 42 of the Charter of Fundamental Rights of the European Union (*OJ C 326, 26.10.2012, p. 391–407*), Article 15(3) of the Treaty on the Functioning of the European Union (*OJ C 326, 26.10.2012, p. 47–390*) or in the Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents (*OJ L 145,*

31.5.2001, p. 43–48, hereafter: Regulation 1049/2001). It reflects the principle of openness in the institutions' activities provided for in the Article 1 of the Treaty on European Union as well as the Article 298 of the Treaty on the Functioning of the European Union (Report of the EC COM (2020)). As the ECJ pointed out in its judgment of 28 June 2012, European Commission/ Agrofert Holding as, C 477/10 P (EU:C:2012:394, pkt 88.), "the principle of openness laid down in general terms in this second paragraph of Article 1 finds concrete expression in this regulation"(Regulation 1049/2001). Art. 3 of the regulation of PE and the Council 1049/2001 defines a document as "*any content whatever its medium (written on paper or stored in electronic form or as a sound, visual or audiovisual recording) concerning a matter relating to the policies, activities and decisions falling within the institution's sphere of responsibility*". In principle, all documents of the institutions should be accessible to the public. However, the institutions should protect their internal consultations and deliberations where necessary, to safeguard their ability to carry out their tasks (point 11, Regulation 1049/2001). Also, the Polish Constitution in Article 61 guarantees the right to information without defining this concept. The legal definition of public information is contained in Article 1.1 of the Act of 6 September 2001 on access to public information (Journal of Laws No 112, item 1198, as amended) and means "any information on a public matter". The obligation to provide access to information in the possession of a given entity rests with the public authorities, entities performing public tasks and other entities "which exercise such authority or manage communal property or property of the State Treasury within the scope of these powers". As indicated by the Province Administrative Court in Warsaw in the judgment of 7 September 2012 (II SAB/Wa 149/12), it will also be "information not created by public entities, but referring to those entities".

Building a civil society and proper execution of public tasks require active participation. As the Constitutional Tribunal in Poland points out, the realization of this right consists "not so much in the availability of certain information to the recipient, but at least in principle it implies the necessity for active action on the part of the body providing information, which consists of providing a certain amount of information to an interested person at his/her request" (Judgment of 20.3.2006). "The right to obtain information includes access to information that already

exists, as the legislature uses the term "documents" (cf. the Order of the Provincial Administrative Court in Wrocław of 7.1.2003, II SAB/Wr 199/02, Legalis). The type of rights arising from this political right is determined by law. Pursuant to Art. 11b of the Act on Municipal Self-Government, "the activities of the municipal authorities are open to the public" and "limitations to transparency may only result from laws". Article 11b (2) indicates that "openness of municipal authorities' activities includes, in particular, the right of citizens to obtain information, access to sessions of the municipal council and meetings of its committees". Citizens have the right to record sound or image and the right to read the minutes of the proceedings of the body (Dolnicki, 2005).

Analogous solutions are in Article 8a of the Act of 5 June 1998 on Poviats Self-Government; (Journal of Laws of 2020, item 920) in relation to the Poviats Self-Government and in Article 15a of the Act of 5 June 1998 on Voivodship Self-Government; (Journal of Laws of 2019, item 512 as amended) with regard to the Voivodship self-government. At the same time, in accordance with Article 10.1 of the law on access to public information (Dz.U.2022.902) "making public information available in the Public Information Bulletin excludes the obligation to make it available again at the request of the interested party" (The Provincial Administrative Court in Warsaw, judgment of 7.9.12 II SAB/Wa 149/12). Analogous solutions are also found in the internal law of other EU Member States. In turn, EU law guarantees EU citizens, among other things, transparency in the EU administration, the right of access to documents of the EU institutions and the right to good administration. The year 2020, due to the pandemic, was special in this respect. The European Ombudsman has repeatedly intervened on the transparency of the EU administration. Especially Ombudsman asks EU institutions to ensure transparency of EU COVID-19 response (SI/1/2020/TE). According the European Parliament resolution of 16 February 2022 on the annual report on the activities of the European Ombudsman in 2020 (2021/2167(INI)) having regard to Article 10(3) of the Treaty on European Union (TEU), having regard to the European Code of Good Administrative Behaviour adopted by Parliament on 6 September 2001, in 2020 the Ombudsman opened 370 inquiries, of which 365 were complaint-based and 5 own-initiative, while closing 394 inquiries (392 complaint-based and 2 own-initiative); whereas most of the inquiries concerned the Commission (210 inquiries or

56,8%), the main topics of Ombudsman activities were transparency, accountability (access to information and documents) (25%), culture of service (24%) (Resolution of PE 2021).

Information activities of the administration during a pandemic

The particular life and health threat situation during the Pandemic has increased the information needs of EU citizens. Not only was access to documents expected (with some exceptions: see Case Judgment of the Court of 28 June 2012, C-477/10 P), access to information on actions taken by the administration both at governmental and regional level (upon request), but also for them to be made public and updated. J. Piotrowski in book *Governmental Transparency* (2007) indicates four main kinds of accessing government information by citizens (Cuillier, Piotrowski, 2009):

- 1) proactive dissemination by agencies through press releases, posting documents online, or providing in a library or depository;
- 2) requester release where citizens and journalists specifically request information from agencies not provided proactively;
- 3) leaks from whistleblowers and others (e.g., Pentagon Papers case); and
- 4) open public meetings where information is discussed and released in a public venue.

Public expectations concerning information about the activities of public administration in a dynamically changing environment made it necessary to reorganize information activities. Public accessibility, ease of obtaining information and the way of presenting it, taking into account also the needs of the disabled, were crucial for the introduced restrictions to be implemented by the society, as a result of social acceptance. As A. Gesser-Edelsburg (2021) points out citing the opinion of Alex Schilman, a behavioral psychologist, "A crown is a cork. The more the government and policy makers provide us with information about it manages to create in us a sense of control (...) that I will feel better and more secure".

The release of information can be proactive or reactive. Reactive dissemination is when government information is made available upon request. Proactive dissemination, on the other hand, is when government information is

released voluntarily by government agencies, as a result of leaks to whistleblowers such as WikiLeaks, or at open public meetings where information is discussed and shared in a public setting (Cuillier, Piotrowski, 2009).

The pandemic increased public demand for proactive information activities of the administration. It concerned, in particular, universal access to information on the basis of which decisions were made by governments concerning the introduced restrictions. Further restrictions were introduced in everyday life, up to the so-called lock down under normative acts and recommendations of doctors and international organizations (WHO), or the European Commission. Citizens wanted to know on what basis decisions were made by local and national authorities regarding pandemic restrictions and what actions would be taken. For this reason, the government in Poland made available a special website containing the most important information: <https://www.gov.pl/web/koronawirus>. Some actions were taken by the local government. Therefore, many citizens had a special need to participate in the deliberations of local government units. In the epidemic state, most of the local government bodies in Poland worked remotely. Thus, the question arose whether this particular dimension of the right to information was not limited during the pandemic?

Limitation of the right to information

The right of access to public information is not absolute and the Polish Constitution allows for its limitation. Such conditions are set forth in article 62 paragraph 3. These include: protection of public order, security or an important economic interest of the state as well as statutorily defined freedoms and rights of other persons and economic entities. For a restriction to be justified, the principle of proportionality must also be respected. Among these premises, there is no threat to public health. Secondly, limitation of the right to information is possible if a state of emergency indicated in article 228 paragraph 1 of the Constitution was introduced on the territory of the Republic of Poland. Neither a state of epidemics nor a state of epidemic threat may be deemed a state of emergency as defined in Article 228 clause 1 of the Constitution, which would justify a limitation of the right to information, including the right of access to sessions of local government bodies. Therefore, holding sessions in a remote mode does not

exclude or limit this aspect of the principle of transparency.

Citizens, having a need for a sense of control, on the one hand sought information and, on the other hand, wanted to continue to be able to exercise their political right to participate in debates and sessions of local government bodies. It was common to suspend plenary sessions of elected collective bodies (e.g., municipal councils, county councils). In some states, the plenary sessions of parliament were also suspended, e.g., Bulgaria's National Assembly suspended all regular sittings on 26th of March 2020 and convened only for legislation related to the State of Emergency or other urgent legislative amendments. Questions to Cabinet ministers were only solely in written form (Sofiaglob 2022).

During the epidemic, the Office of the Ombudsman in Poland received many complaints from citizens deprived of the possibility to exercise this right in connection with the introduced remote proceedings. (RPO Zapewnić dostęp, 2020)

In turn, in the EU law, the principles, conditions and limits of the right of access to documents of the EU institutions are indicated in Article 15 TFEU, and Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents (OJ 2001 L 145, p. 43). According to Article 4(3) of the Regulation, "Access to a document containing opinions for internal use as part of deliberations and preliminary consultations within the institution concerned shall be refused even after the decision has been taken if disclosure of the document would seriously undermine the institution's decision-making process, unless there is an overriding public interest in disclosure." This seems to be the situation we are facing now. The threat of a pandemic and the information expectations of the EU citizens may provide a rationale for disclosure also of opinions that were taken into account in decision-making e.g., in connection with the so-called covidien passport in the EU. Although the concept of public interest is variable and dependent on the specific situation. A possible refusal could be justified when "access to the requested documents could pose a real, concrete and serious threat to the protection of the institution's decision-making process and that the risk that the protected interest will be jeopardized is reasonably foreseeable rather

than purely hypothetical" (Judgment of the Court of Justice of the EU of 28 June 2012).

The Right to information and the remote mode of organization of collegial meetings of public administration bodies

The possibility of remote deliberation and decision-making (using means of remote communication or correspondence) by, among others: collegial bodies functioning in the structures of local self-government units of metropolitan associations, regional chambers of audit and local self-government appeal colleges, was introduced by art. 15zzx (Covid- law, 2021, item 2095) on 2.03.2020. This includes, in particular, real-time transmission of the meeting between the participants of the meeting of a given body, multilateral real-time communication in which the participants of the meeting of a given body may speak in the course of its meeting, with the necessary security rules. (COVID law, O.J 2021, item 2095).

Remote deliberations are ordered by a person authorized to preside over the respective local government unit's governing body and other collegially acting bodies. This law contains incidental provisions that apply only during the epidemic or state of epidemic emergency, and thus constitute a *lex specialis*, among other things, in relation to the constitutional laws applicable to individual local government units (supervisory decision 2021). The remote mode of meetings is to be an instrument of anti-epidemic measures, prevention of the spread and control of the infection or infectious disease caused by the SARS-CoV-2 virus involving COVID-19, which is a task of the administration under Article 1. (COVID law, O.J. 2021, 2095).

According to the glossary in Article 2 of this law, "countering COVID-19" is understood to mean "all activities related to the eradication of infection, prevention of spread, prophylaxis, and control of the consequences, including socio-economic, of the disease" of COVID-19. As a condition for the exercise of the right to information, information on the date and subject matter of the sessions must be made public well in advance. This applies to both traditional and remote sessions. Under normal circumstances, there is also an "obligation to make available to citizens and other authorized persons (e.g., journalists) seats in the meeting room" (Banaszak 2012).

Remote mode does not exclude the obligations associated with the openness of local government. As the Supreme Administrative Court observed, when interpreting these provisions, one must bear in mind the provisions of Article 11b of the Act of 8 March 1990 on communal self-government (Journal of Laws of 2020, item 713, hereinafter referred to as the u.s.g.) in conjunction with Article 18 of the Act on access to public information with respect to openness of sessions, Art. 14 of the u.s.g. with respect to voting, including the need to ensure voting by roll call, Article 20 of the u.s.g. with respect to broadcasting and recording of sessions, Article 24 of the u.s.g. with respect to active participation of a counselor in the work of the council. There have been cases in which municipalities have denied citizens the right to record proceedings (Chciał nagrywać, 2021).

The implementation of the right to information could have been done in different ways. The first of them was placing information on the website about the possibility of registering the desire to participate in the meeting and sending the interested person a link to the meeting. Another solution was to conduct sessions in a hybrid mode, where councillors were present through online transmission and the chairman was at the seat of the body. Appropriate announcements about the possibility to apply for participation in a session of an organ should appear not only on the organ's website, but also in other ways provided for the given unit. Applications could be dropped into a suitably marked box in the lobby of the body's building. If the session is held only remotely, a good solution is to make available to the citizens a room in the building of the body where the sessions of the constituting bodies are broadcast live.

This organization of the deliberations provides opportunities for participation of those citizens who, due to lack of adequate digital competence, are unable to use ITC or do not have a suitable device. This is especially true for some citizens over the age of 65 and other digitally excluded people. Therefore, enabling this right in a hybrid way seems appropriate. It was possible to enter the hall where the meeting of the body was held for citizens willing to participate in the deliberations of the body, while maintaining a sanitary regime adequate to the epidemic threat. Doubts may arise as to whether a councillor or a citizen should and can be asked about vaccination who will attend the meeting on the spot? Information about vaccination is sensitive data, which is classified as personal health data under RODO.

According to Art. 11, Para. 1 of the Act on Special Solutions for Preventing, Counteracting and Combating COVID-19, Other Infectious Diseases and Crisis Situations Caused by Them, the provincial voivode may issue orders binding all government administration bodies operating in the province and state legal persons, local government bodies, local government legal persons and local government organizational units without legal personality in connection with counteracting COVID-19. However, these orders could not concern political rights, because a state of emergency had not been declared. However, the Lower Silesian Voivode has issued an order to the governing bodies of local government units in the voivodship to temporarily hold sessions of the municipal council, the county council and the voivodship assembly without the participation of residents and the public from 12 March to 31 March 2020 (Order 2021).

Thus, the temporal scope of limitations on physical access to the meetings was determined by the state of epidemics or epidemic threat. In the current state of the law, there is no possibility to introduce into the statutes of territorial self-government units the possibility of remote and hybrid meetings outside these states, despite the usefulness of such a solution. Although some self-governments introduced such solutions in contradiction to the law, which was challenged by the provincial governors.

The question remains whether such organizational changes could be introduced in the future. It remains an open question whether the degree of digital maturity of citizens of a given country and the extent of digital readiness, digital poverty (lack of appropriate equipment and access to the Internet), is so high that the introduction of remote deliberations will not be a factor strongly limiting the ability of digitally excluded citizens to exercise their right to information. For people with disabilities, the pandemic was a special time. For some of them, those who were digitally competent, transferring part of their social activity to a boarding school provided an opportunity for wider participation in social life. This happened through instruments of inclusion, e.g., transmission of government announcements using sign language, applications submitted on line. In turn, for those disabled and elderly people living alone and others who did not have digital competences or necessary equipment, it was a time of digital exclusion. During the epidemic, the Ombudsman in Poland found that many local governments did not allow the implementation of the right of

citizens to information - to participate in deliberations (RPO Remote deliberations 2020). Some municipalities introduced an order of the head of the municipality to restrict the performance of public tasks by the municipal office, and denied citizens' access to the proceedings (Niewpuszczenie obywatela 2021).

Conclusion

A critical analysis of the COVID-law, and the practice of application of the legislation by local self-governments' bodies in Poland during COVID-19, makes it possible to state that the practice restricted citizens' access to the deliberations of the constituting bodies, the essence of the right referred to in Article 61 of the Constitution. Article 15zxx COVID-law allowing remote mode of work of the administration does not exclude the provisions on transparency of the authorities, and did not limit the right of citizens to participate in meetings of collective bodies of local government units. Some local governments did not allow participating in deliberations or denied citizens' access to the proceedings. If sessions could only be attended remotely, the time of the pandemic was a time of civic exclusion for digitally excluded citizens. In order to prevent this, some self-governments introduced hybrid meeting. It was possible to enter the hall where the meeting of the body was held for citizens willing to participate in the deliberations of the body. This law contains incidental provisions that apply only during the epidemic or state of epidemic emergency. The critical analysis of the activities of the Ombudsman in Poland and the European Ombudsman, as well as the jurisprudence of provincial administrative courts in Poland, indicated that the COVID-law did not restrict transparency in administration or the right to information, but the practice of certain local government bodies was illegal. In addition, for citizens who are digitally excluded or who lack sufficient digital readiness, the time of the Pandemic was a time of civic exclusion.

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