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The Essential Concepts For The Regulation of The Right To Public Information

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Abstract
Regulation of the right to information is very essential in a democratic country. This is because the more open the government is towards the public, the more accountable it will be. However, theoretical and conceptual studies on the right to information are limited. For this reason, this study intends to specifically review the basic concepts that must exist in an ideal right to information regulation. This research is a normative legal research (doctrinal) with a normative-conceptual approach. Data were obtained through a literature study and analyzed descriptively and analytically. This study concludes that the right to information is conceptually based on the government's obligation to fulfill citizens' requests to access public information without exception (maximum disclosure) as well as on the obligation to proactively submit public information regularly and without being asked (obligation to publish). Conceptually, the right to information can be classified into primary, secondary and tertiary rights based on how far these rights are directly related to access to government information. Several important variables regulating the right to information include normative aspects, institutional design, and the existence of mechanisms or procedures that can ensure that the provisions of the right to information are complied with by all parties. Aspects of restrictions and exceptions to the right to information also need to be regulated, among others, by referring to the concept of the three-part test.

Keywords: Concept, Regulation, Right to Public Information

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Introduction

One of the important elements of realizing good governance is the guarantee of the public's right to obtain information. The right to information is essential because the level of openness by the state administration towards the public determines the level of accountability of the government. People's right to obtain information is also relevant in improving the quality of community involvement in public decision-making processes. Without a guarantee of public information disclosure, community participation or involvement is meaningless (Febriananingsih, 2012: 136).

Transparency and accountability in governance are the *sine qua non* for the existence of participatory democracy. Public services that are not accompanied by information disclosure will actually affect people's expectations regarding the quality of such services and can lead to abuse of authority from state officials. Accountability leads to good governance, which leads to good human rights guarantees (Kristiyanto, 2016: 233).

The importance of protecting and guaranteeing the right to freedom of information has been emphasized by many analysts. In this regard, Mumtaz Laskar stated that "Information is the oxygen that any citizen needs to live in the social structure of society and maintain its democratic balance" (Laskar, 2016: 220). The lack of openness and accountability in government functions not only causes inefficiency, through maladministration (because it escapes public scrutiny) or intentionally by misuse (corruption), but it also maintains all forms of injustice and poverty (Srivastava, 2010:3).

Thus, it should be understood that access to information means access to justice. Citizens who are armed with information can claim what is rightfully theirs, thus avoiding arbitrary acts and manipulation by the government. However, theoretical and conceptual studies on the right to information are limited. For this reason, this study does not intend to specifically review the right to information regulation policies that apply in Indonesia, but to descriptively analyze and explain the basic concept that must exist in a proper legislation of the right to information.

Methodology

As a normative legal research, this study uses secondary data consisting of primary and secondary legal materials. Primary legal materials consist of statutory regulations related to the issues being studied, while secondary legal materials refer to the literature review of previous studies. Therefore, this study is categorized as a doctrinal legal research, which Duncan and Hutchinson (2012: 25) define as "research into the law and legal concepts". Information from various aspects of the issues are discussed in this research using several approaches, such as conceptual and comparative approaches. Data were collected through literature studies and were analyzed using the descriptive-qualitative method.

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Result and Discussion

1. The concept of the right to information

Conceptually, the right to information (RTI) is a fundamental right whose existence is an absolute requirement for participatory democracy. As written by Mark Bovens (2000: 14), the right to information is basically an important element of citizenship. The right to information contains the social function of citizens, not only in relation to public or government agencies but also in reciprocal relationships with fellow citizens and private legal entities. Thus, the right to information must be part of the civil rights guaranteed by law and the constitution, together with other individual rights.

Furthermore, Bovens (2000: 15) divides the concept of the right to information (information rights) into three categories as follows:

a. Primary information rights: Citizens' direct legitimacy to access genuine (government) information.
b. Secondary information rights: The right of citizens to obtain support from the government in order to gain access to important information channels. This right is secondary because it is not a direct right to concrete information, but only a right to access certain channels/parties that may store information needed by the community.
c. Tertiary information rights: A set of rights that protect citizens' access to information about their fellow citizens and private legal entities. It is said to be a tertiary right because the government's role remains solely limited to establishing mechanisms and ensuring that every citizen can meet their own information needs.

The right to information in the concept of primary rights is the most fundamental from the legal and constitutional point of view because this right gives citizens a direct claim to request and obtain concrete information from the government. This right can be justified by at least three reasons: first, the right to information is an important condition for the transformation of the principle of legality from a formal understanding to a more substantial understanding. Second, its existence is important for the development of democracy and the accountability of state administration. Third, broad access to government information can encourage public participation in the social and economic context of various community groups (Bovens, 2000: 16).

Thus, the right to information is substantially more focused on the right of citizens to access government information. The definition of information itself is basically very broad. However, Article 19, which is a research institution that focuses on the right to information and is based in London, provides a recommendation that in the context of the right to information, the notion of information must be broadly interpreted as follows:

> "..all materials held by a public body, regardless of the form in which the information is stored (document, computer file or database, audio or video

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> tape, electronic recording and so on), its source (whether it was produced by the public body or some other entity or person) and the date of production (Article 19, 2016: 4)."

The definition is not very different from the criteria put forward by Bovens, who opines that, basically, government information must meet two elements: First, the information must be owned by an agency or institution that is included as a government organ. Second, the information must be important in relation to public interest and the social function of citizens (Bovens, 2000: 15).

The Queensland Office of Information Commissioner explains the concept of the right to information as follows:

> "The right to information means that ministers and public sector agencies must give you the information you ask for unless there is a good reason not to. If the government thinks there is a good reason not to give you the information, it must tell you the reason. The only reason for which the government can withhold information is that its disclosure would on balance be contrary to the public interest. The government is not permitted to withhold information from you because it might be politically embarrassing or because it might cause a loss of confidence in the government" (www.oic.qld.gov.au).

Based on the description above, it is seen that in simple terms, the right to information rests on the government's obligation to convey or provide information requested by the public related to the administration of government or related to the public interest. This obligation is also accompanied by a prohibition: the government and public bodies are prohibited from hiding information for political reasons or to maintain the "image" of the agency in the public eye.

However, in a policy recommendation document entitled "The Public's Right to Know: Principles on Right to Information Legislation", it is explained that, ideally, the right to information is not only interpreted as the obligation of public bodies to respond to public requests for information, but also they are to proactively publish and disseminate the information widely. This issue is explained in detail as follows:

> The right to information implies not only that public bodies respond to requests for information but also that they proactively publish and disseminate widely information of significant public interest, subject only to reasonable limits based on resources and capacity. Which information should be published will depend on the public body concerned. The law should establish both a general obligation to publish and key categories of information that must be published (Article 19, 2016: 2)."

Thus, the concept of the right to information does not only include the government's obligation to disclose all information and fulfill public requests for

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certain information (maximum disclosure) but also the obligation to pro-actively announce the information periodically to the public (Obligation to Publish).

2. The Concept of Regulating the Right to Information

Historically, the right to freedom of information was recognized in state law for the first time more than two hundred years ago in Sweden, which was marked by the promulgation of the Freedom of the Press Act in 1776. The emergence of this provision was strongly motivated by the interest of parliament to access information held and monopolized by the King. This practice in Sweden was followed by the United States enacting its first right to information law in 1966, followed by Norway in 1970. Since then, this trend has been continued by many Western democracies by setting up rights to information arrangements in their respective versions. Such countries include France and the Netherlands (1978), Australia, New Zealand, and Canada (1982), Denmark (1985), Greece (1986), Austria (1987), and Italy (1990) (www.cutsinternational.org). Currently, ninety states across five continents recognize the right of individuals to obtain information held by public agencies. Over the last two decades, the right to information has become a universally recognized right in almost all democratic, and even many non-democratic, states. (Peled & Rabin, 2010: 357).

One part of human rights that has been recognized by the United Nations since the first generation is the right to freedom of information. Since 1946, the United Nations General Assembly adopted Resolution 59 (1), which states that "Freedom of information is a fundamental human right and is a sign of all freedoms which will be the focus of the United Nations' attention" (Mendel, 2008: 4). Therefore, the right to information later became one of the internationally recognized rights. It is regulated in Article 19 of the United Nations Universal Declaration of Human Rights, which states as follows:

> "Everyone has the right to freedom of expression and ideas; this right includes the right to hold opinions without interference, and to seek, receive and disseminate information and ideas through any media regardless of national borders."

In 1990, the number of countries that had legislated on the right to freedom of information rose to thirteen. One monumental step forward was the adoption of the European Union Charter of Fundamental Rights in 2000, which recognized freedom of expression and the right to access documents. As of 2010, more than eighty-five countries have passed laws relating to the right to information. In the Asian region, there are almost 20 countries that have adopted regulations regarding the right to information, including Kazakhstan, Afghanistan, Bhutan, Maldives, and Indonesia (Laskar, 2016: 220). Currently, more than 90 countries have adopted freedom of information laws. Basically, most of the regulations regarding the right to information in several countries of the world have similar structures, but there are a number of differences that

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substantially affect their effectiveness (Article 19, 2016: 6).

The question that arises then is this: what is the ideal legal arrangement orconcept to guarantee the right to information? As explained, the existence of the right to information is inherent in democratic functions and, thus, is a prerequisite for good governance and the realization of all other human rights. For this reason, the right to information should urgently be institutionalized in formal legal rules, such as laws. In this regard, Ansari (2008: 5) explains that the main objectives of drafting legal regulations regarding the right to information are as follows:

a. to put the fundamental right to information into action;
b. to establish systems and mechanisms that allow for easy access to information;
c. to promote government transparency and accountability;
d. to reduce corruption and inefficiency in public office and to ensure that everyone has the opportunity to participate in governance and decision-making.

In India's experience, as stated by Singh Yadav (2009:3), since the enactment of the Right to Information Act in India (Act of Right to Information 2005), this regulation has significantly become a barrier to corrupt government transactional activities. The Right to Information Law presents two of the most important tools, namely "transparency and accountability," which are jointly used to eradicate corruption, collusion, and nepotism, which are barriers to the realization of good governance. The modernity of legal support and the law on access to public information also indicate positive trends in Ukraine. For example, according to the parliamentary commissioner for human rights, in 2019, there were 23% fewer reports of violations of the right to public information in Ukraine compared to 2018 – from 4,201 to 3,237 (Chub, 2020: 10).

To realize the ideal regulation of the right to information, it is important to pay attention to the quality of the legislation or the drafting of the law. Many people pay great attention to the quality of legislation that actually touches on the essential aspects of the right to information. Based on studies by a number of parties, many countries have established regulations regarding the right to information but substantially have not been able to guarantee that its implementation goes well. This is partly due to errors in formulating the concepts and restrictions regarding the right to information. In this regard, the Center for Law and Democracy's survey of the global right to information yields unexpected results. Based on an assessment of 89 countries and 61 assessment indicators, including the legal regime for access to information, this survey ranks developing countries such as Serbia, India, and Slovenia as having the highest scores, or being the most transparent to the public. In comparison, Indonesia is ranked 20th, Denmark is ranked 69th, and Austria is ranked the lowest (89th) (www.rti-rating.org). This demonstrates that even advanced countries that appear

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to be more democratic are not always able to draft regulations on the right to public information that are consistent with their implementation.

The Global Right to Information Index bases the concept of regulating the right to information on three main indicators, namely: 1) normative provisions (law/law provisions); 2) institutional design for implementation of the RTI laws; 3) procedures for accessing information, reviewing processes and mechanisms for dissemination (Article 19, 2016: 4).

In terms of the normative provisions, the regulations regarding the right to information must determine the scope and content of the right. This includes clearly defining the boundaries of the right to information, which essentially should not be considered an absolute right/freedom. Besides, guarantees to ensure that each party complies with the provisions that have been made should be provided.

Table of Indicators of legislation on the right to information

Principal Variables	Internal Variables
Normative provisions	• Recognition of the RTI: constitutional rights, other legislation, principles and objects, provisions on access; • Exemptions
Institutional design	• Internal institutions for access to information; • Promotion of the right to freedom of information; • Regulatory bodies for RTI
Procedures for access to information, for filing appeals for review and for the proactive dissemination of public information (obligations of transparency)	• Procedures for access to information • Procedures for review • Procedures for the proactive dissemination of public information • Sanctions for violations of RTI obligations

Source: *Secondary Data*

From the aspect of institutional design, the regulation on the right to information must provide a conducive institution to implement the existing law effectively. In this case, it is necessary to have a special agency or unit whose duties are related to law enforcement and the right to information. This institution will function as a mediator between the state and society. Finally, the right to information law should also provide for transparent and simple procedures that allow individuals to exercise their right to freedom of information and ensure that the state will comply with its obligation to pro-actively disseminate public information. As stated by Roberts, public services are now delivered through a

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variety of governmental, quasi-governmental and private organizations. Many controversies have arisen over the withholding of government-held information relating to contracts with private providers. An important question is whether to recognize a right to information held within contracting organizations or institutions that have no contractual or financial relationship with government at all (Roberts, 2001: 1).

One of the problems that arise regarding the regulation of the right to information concerns the limitations and exceptions to the right to information. As mentioned earlier, the normative aspect of regulating the right to information must clearly define the right to information as a derogable right. Empirically, it can be ascertained that every legal provision regarding the right to information recognizes that governments can sometimes deny public access to certain confidential information, such as information in business matters, including information provided during negotiations or the execution of an agreement. The settings regarding these restrictions and exclusions vary widely. Regarding the terms and conditions under which the denial of access to information can be justified, Roberts explained that Canadian federal law is quite strict on information disclosure, since the law requires the government to deny access to confidential commercial information even though there is no evidence that contractors will be harmed if the information is made public. On the other hand, a number of laws in other countries have very loose provisions. For example, access can only be denied when there is a strong indication that certain parties will be harmed by the disclosure of information (Roberts, 2001:245).

Issues related to restrictions and exceptions to the right to information have become very strategic and need to be discussed, because if they are not regulated properly, instead of maintaining a balance in regulating freedom of information, restrictions can actually become an "apologetic" reason for the government to close itself from public scrutiny. In this regard, Article 19, a global indexing agency regarding the right to information, offers a concept known as the "Principle of Limited Scope of Exceptions". This principle stems from the argument that all individual requests for information from public bodies must be met unless the public body can show that the information is within the scope of a very limited exception. Refusal to disclose information is not justified unless the government or the public can prove that the information meets the so-called three-part test requirements. The provisions contain three indicators that are used as a touchstone to determine whether information can be excluded from being disclosed to the public. The three indicators are as follows (Article 19, 2016: 7):

1) The information must be related to a legitimate goal as defined by international law.
2) Disclosure must threaten to cause significant harm to that goal.
3) The harm to the goal must outweigh the public interest in knowing the information. That means the violation or loss must outweigh the public interest in having the information.

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Basically, no public body can be completely excluded from the provisions regarding information disclosure. This applies to all branches of government (executive, legislative and judicial) and to all spheres of government functions (eg security functions and defense agencies). Confidentiality of information must be justified on a "case by case" basis. This limitation clearly does not apply for reasons that aim to protect the government from embarrassment or disclosure regarding abuse of power, including acts of human rights violations and corruption. The concept of restrictions and exclusions should also be based on the content of the information, and not the type of information requested.

For this reason, in Bovens' view, the right to information must be limited to information that is public, and not information that is categorized as private. Thus, the right to access public information is not absolute. The safety and security of the state is a sensitive issue and requires special protection to keep information from falling into the hands of the country's adversaries. Information that is available to the public is, of course, also available to enemy states, and it follows that certain information must be exempted from disclosure (Van Heerden, et al., 2014: 51). However, the determination of information that is public and non-public should not be left to public bodies or the discretion of the government, but must be stipulated explicitly and clearly in the laws and regulations.

Conclusion

The right to information is based on the government's obligation to fulfill citizens' requests to access public information without exception (maximum disclosure) as well as the obligation to proactively submit public information regularly and without being asked (obligation to publish). Conceptually, the right to information can be classified into primary, secondary and tertiary rights based on how far these rights are directly related to access to government information. The right to information is not absolute. In this case, the limitation lies in the nature of the information that meets the criteria as public information. The legal regulation of the right to information is very crucial for the sake of guaranteeing and protecting the implementation of the right itself, among others reasons. Several important variables in regulating the right to information include normative aspects, institutional design, and the existence of mechanisms or procedures that can ensure that the provisions of the right to information are complied with by all parties. Aspects of restrictions and exceptions to information rights also need to be regulated, among others, by referring to the three-part test concept, namely that the information is related to a legitimate goal, that disclosure of the information will cause violations or harm to certain parties, and that the harm or loss must outweigh the public interest if the information is disclosed.***

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