

WHY POLITICAL ACTORS IN DEVELOPING COUNTRIES ENACT FREEDOM OF INFORMATION LAWS: A RATIONAL CHOICE APPROACH

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ABSTRACT**

Control over critical information provides a breeding ground for corruption in the political system and granting ordinary citizens any access to such information is sure to neutralise such scope for corruption. Why even then political actors all over the world, especially in the developing countries in the recent past, took initiatives to enact freedom of information (FOI) laws? Is there any contradiction in terms that political actors who are normally resistant towards transparency initiatives should take the plunge in institutionalising transparency by way of bringing FOI laws? This paper argues that this behaviour of political actors can be best explained with the help of Rational Choice approach. A rational individual is always expected to determine his choices based on his perception of cost-benefit analysis. As a rational human being, he is expected to be tilting in favour of the scenario where his perceived aggregated benefits would be more than his perceived aggregated costs. This paper seeks to establish, FOI laws increase the political costs no doubt; but in certain circumstances that are associated with a deep sense of political uncertainty, their perceived benefits outweigh political costs. And it is mostly under those circumstances of significant political uncertainty that FOI laws have been passed where they have been passed in recent times. A study of political climate that prevailed at the time of passage of such FOI laws goes to establish this hypothesis. The research methodology adopted in this paper is doctrinal and essentially consists of a review of existing literature of political cost-benefit analysis in the backdrop of passage of such FOI laws in a number of developing countries in the recent past and subsequent testing of the same cost-benefit analysis framework in the Indian context without, however, any reference to regression models.

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1. Knowledge is Power: Why Share Inputs?

Information *per se* may not be power, but gaining access to information by an individual marks the significant first step towards empowering himself. In absence of relevant information about what the government professes to do vis-a-vis what it actually does, people's participation in the democratic process loses its significance. Getting to know about the good things that are done on the ground by a government instils a positive feeling in the popular psyche. Similarly, information about governmental shortcomings or deliberate derailments of declared deliverables is liable to galvanize the electorate into political action geared towards their own development. Inaccessibility to critical information in the politico-economic domain thus not only rids a system of its transparency which remains an essential and inescapable feature of good governance but also robs democracy of its pith and substance since the *demos* in such a case suffer from a sense of alienation.

Barring a few countries where Freedom of Information (FOI) laws had been passed much earlier (like in a number of West European countries), there was a spate of passage of FOI laws in nearly 70 countries between 1990 and 2005¹ and I shall restrict myself to considering them in this paper. Isn't it intriguing that so many countries—an overwhelming majority of them '*developing*' countries²—suddenly if not apparently systematically felt an urge to honour transparency and guarantee access to government information in favour of ordinary individuals? Isn't it that the political actors normally should find these FOI laws a thorn in their side?³ In fact, the existing literature in this regard pointedly suggests that the political class normally has been resistant towards sharing of critical information about their

¹ David Banisar, 'Freedom of Information Around The World 2006: A Global Survey of Access to Government Information Law' (Privacy International 2006) <http://www.freedominfo.org/documents/global_survey2006.pdf> accessed 14 February 2018.

² Only 12 countries out of 70 may be said to not have been structurally affected by LPG.

³ Daniel Berliner, 'The Political Origins of Transparency' (2014) 76 (2) *The Journal of Politics* 479-491; In Nigeria, for example, the FOI law was passed in 2011, almost 20 years after the first civil-society advocacy on the issue started in 1993; Media Rights Agenda, 'Campaigning for Access to Information in Nigeria' (Lagos, Media Rights Agenda 2003) <<http://www.mediarightsagenda.net/cain.html>> accessed 12 February 2018; Obe, Ayo, 'The Challenging Case of Nigeria' in Ann Florini, *Right to Know: Transparency for an Open World* (New York, Columbia University Press 2007) 143-175; Passage was delayed for years and even vetoed by President Olusegun Obasanjo, despite his promises to combat corruption and despite his having been a founding member of Transparency International.

activities in office and civil society actors have had a stiff challenge to have access to such information⁴. Let us explore then if there exists any contradiction in terms.

I shall argue that there is no contradiction as such; that the political actors in all these cases adopted a *rational choice* approach to legislate FOI laws. It's not that such an act of exposing themselves to public scrutiny was devoid of political costs⁵. But their perceived benefits from such passage of FOI laws outweighed the perceived costs thereof⁶.

2. Passage of FOI Laws: A Rational Choice Approach

Despite their broad differences, rational choice theorists basically argue that human beings are mostly guided by a cost-benefit analysis in terms of their own interests and preferences. Of course there can be situations like *Prisoner's Dilemma* where an absolute adherence to one's own benefit in the strictest sense of the term can veritably lead to disasters that mercilessly engulf such *rational* individuals as well and they suffer severely in the long run. In fact, the theory of *Bounded Rationality* as propounded by Herbert Simon unfailingly brings out the stark limitations of human rationality at the individual level and thereby highlighting the importance of collective responsibility in social life. But left to themselves, human individuals do remain mostly motivated in terms of maximizing their own payoffs measured in their unique utility scale.⁷ I shall try to see how far this has been true in the context of passage of FOI laws in a number of countries ridden with political uncertainty in the recent past.

⁴ Irma, John Ackerman and Sandoval-Ballesteros, 'The Global Explosion of Freedom of Information Laws' (2006) 58 (1) *Administrative Law Review*, 2006 85-130; Ann Florini, *The Right to Know: Transparency for an Open World* (New York, Columbia University Press 2007); David Banisar, 'Freedom of Information Around The World 2006: A Global Survey of Access to Government Information Law' (Privacy International, 2006) <http://www.freedominfo.org/documents/global_survey2006.pdf> accessed 15 February 2018.

⁵ J. G. Pinto, 'Transparency Policy Initiatives in Latin America' *Communication Law and Policy* (2009) 14 (1) 41-71.

⁶ Terry Moe, 'The Politics of Structural Choice: Toward a Theory of Public Bureaucracy' in Oliver Williamson, *Organization Theory: From Chester Barnard to the Present and Beyond* (Oxford University Press 1990) 116-153.

⁷ Roger Myerson, *Game Theory* (1st paperback edn, Harvard University Press 1997).

My assumptions are that legislators too are *rational individuals*. They are expected to be weighing political options as to what course of action would be most beneficial⁸ to them and they are expected to be acting accordingly. The more rational ones amongst them would be in a position to anticipate which way the political wind blows.

3. The Cost Benefit Analysis of FOI Legislation

Let's try first to understand in simple terms as to what could be the possible costs for the political actors to incur as they embark upon a process of institutionalizing transparency. We would grasp it better if we seek to delineate in the first place the benefits that political actors enjoy when they have a monopoly of access to information. What are those benefits? There are always significant segments of population who remain dissatisfied with the performance of the occupants of political office and exert pressure on the latter to perform more. There are also rival constituencies who are eager to see exit of current political actors from office so that favourites of the former can enjoy perks of power. In both the cases access to critical information plays a big role. How the present incumbents conduct themselves, how they are going back on their electoral promises, whether they are taking bribes for awarding contracts, what consideration they are accepting if they show undue favours while awarding contracts, what sort of institutional inaction is resorted to in the face of actionable complaints against those who flout rules just because they may happen to be cronies of powerful actors, whether there is any hypocritical hiatus between what the actors profess and what they practise, all these are liable to be fairly less unclear if critical information in this regard would reach the public domain.

FOI laws interestingly seek to ensure flow of such information into the public domain. They empower individuals towards eliciting critical information and create and strengthen rival constituencies. FOI laws have a structured framework within which it is fairly difficult to withhold flow of most information, i.e. barring in regard to a few exceptional areas such as

⁸ When I say most beneficial, I assume the legislators are not absolutely blind to some costs associated with such passage of FOI laws but they are guided by the overall cost-benefit analysis where aggregated benefits would outweigh aggregated costs.

national security, etc. And once politically sensitive information comes out into the public domain, the same may be used by a number of interested stakeholders and not just by those who initially sought it. An average political actor is not expected to welcome this because in such an eventuality his political fortunes are liable to confront a threat of reversal.

The tricky question, thus, emerges as to why then important political actors would be interested in FOI laws getting enacted and exposing themselves to such a scenario where their own perks of power would face a prospect of being diminished.

The answer lies in the fact that FOI laws bring not just costs, but also benefits. Just as a well-functioning, independent Central Bank or a robust judiciary actually goes to benefit—*despite certain inherent costs*—the rational political elite in a modern democracy accommodating multiple stakeholders, often with conflicting interests, similarly the very institutionalization of FOI laws provides the key to some political benefits for the calculative political actors.

The first is to gain greater support from constituencies evaluating promises of transparency, anticorruption and good governance since an FOI law entails more credible commitment. Ferejohn argues that greater accountability can project politicians in a better light and grant them greater public support. While the fact remains that political actors in general have a tendency to flout election promises of transparency, passage of an FOI law however makes this more difficult and thus makes promises of transparency at least look more credible. Moreover, positive evaluations of such commitments may come from the public at large or from specific constituencies, such as civil society, local political leaders, or the press, which a mass of less informed voters may look to. Thus, the more competitive the political environment, the more obvious the potential gains from offering a credible reform to such constituents, which can yield support or neutralise potential avenues of criticism.⁹

⁹ Berliner (n 3).

Second, political actors who apprehend their days in office are numbered can go for certain legal or institutional reforms so that they can access critical information for political purpose in the wake of their exit from corridors of power. This is similar to insurance models in which political actors institutionalise independent judiciaries in order to protect their own future safety and property in case they lose office¹⁰. Similarly, civil service regulations, accounting offices and anti-corruption laws too may be seen as ‘*a way of constraining one’s political opponents from exploiting state resources for their own gain*’ in case incumbents lose power.¹¹

Political office-bearers who monopolise access to information for ulterior motive are not expected to be completely disinterested in accessing such information when they are out of office. Institutionalizing transparency helps to ensure future access both as an end in itself (*and thus, garnering political support*) and as a means of future monitoring. Moreover, when these actors become more or less sure that their continuance in office will soon come to an end, they are interested in ensuring that their political opponents likewise are restricted by such costs of exposure forced by an FOI law. In a way, this goes to reduce the perceived costs of enacting FOI laws and at the same time heightens the perceived benefits thereof during their days of prospective political *unemployment*. As uncertainty over maintaining office in the future increases, this option becomes more attractive. By binding themselves to transparency, they likewise bind their opponents as well.

4. Case Studies

While standalone unique features of certain political environments may influence passage of an FOI law in individual countries, there are two unmistakable features which can be expected to result in greater political uncertainty: (i) when opposition parties are able to present themselves as veritable rivals to those in office and (ii) when frequent turnovers in

¹⁰ Tom Ginsburg, *Judicial Review in New Democracies: Constitutional Courts in Asian Cases* (Cambridge University Press 2003); Brad Epperley, ‘The Provision of Insurance? Judicial Independence and the Post-Tenure Fate of Leaders’ (2013) 1 (2) *The Journal of Law and Courts* 247-278.

¹¹ Anna Grzymala-Busee, ‘The Discreet Charm of Formal Institutions: Post-Communist Party Competition and State Oversight’ (2006) 39 *Comparative Political Studies* 271-300.

office have taken place. It is in such circumstances where, all else equal, FOI passage should be more likely.

I refer to logistic-regression models presented by Daniel Berliner¹² based on Beck, Katz and Tucker¹³ where two independent variables—*strength of political opposition*¹⁴ and *duration of party control of political executive, i.e. turnover frequency*—were studied along with certain control variables like pressure from national and international civil society initiatives, robustness of media, strength of intervention by judiciary and the desire to be in league with other countries around passing similar FOI laws.

The regression results reveal that other factors remaining unchanged the factors representative of political uncertainty, i.e. strength of opposition parties and turnover frequency in political office remain the most significant factors associated with passage of FOI laws. The other factors can play a supporting role in this regard but the probability of success of their support largely hinges on the perceived level of uncertainty prevalent in a given political landscape.

5. The Indian Context

The UPA-I government may have passed the RTI Act in 2005 at the national level but a number of states in the country had already passed their own FOI legislation much prior to such federal enactment. In fact, the first legislation of this kind was passed by Goa in 1997 followed by the government of Tamilnadu in the same year. Subsequently, this was emulated by states such as Rajasthan (2000), Karnataka (2000), Delhi (2001), Maharashtra (2002), Assam (2002), Jammu and Kashmir (2004), etc., before the federal law rendered redundant

¹² Berliner (n 3).

¹³ Nathaniel Beck, Jonathan N Katz & Richard Tucker, 'Taking Time Seriously' (1998) 42 (4) American Journal of Political Science 1260-1288.

¹⁴ This was measured in terms of share of electoral votes garnered by the parties in major elections.

such provincial endeavours and exposed all government bodies alike across the country to the demands of the RTI Act 2005.

A rough application of the same Barliner model, i.e., the one projecting political competitiveness as the most significant factor behind an FOI legislation would give us a strong reason to suspect that all these provincial initiatives had been embraced by the political actors in a desperate bid to minimise the apprehended losses in the event of being out of political office. Goa probably presents the most appropriate case study in this regard as the coastal state saw more than 10 Chief Ministers within a span of 10 years between 1990 and 2000!

Tamil Nadu too presented a fiercely competitive political field following the demise of Marudur Gopalan Ramachandran in 1987 when either of two parties— Dravida Munnetra Kazhagam or All India Anna Dravida Munnetra Kazhagam—ran the show and in extremely close succession. Whether it was in Rajasthan (2000) or in Delhi (2001) or in Maharashtra (2002) or in Assam (2002) or in Jammu and Kashmir (2004), there prevailed in all the cases a sense of acute uncertainty in the political milieu around the time of passage of FOI laws¹⁵ and the political actors sought to institutionalise transparency by way of embedding these legislative safeguards in the political system.

And it would be extremely naïve to deny the tell-tale signs of acute instability that clouded the federal political environment in India in the years preceding the final passage of the RTI Act in 2005. The NDA regime had to go through its own initial tremors following the

¹⁵ In Rajasthan, Congress (I) finally succeeded for just one term in 1998 after having conceded to BJP for nearly a decade since the late 1980s and was very unsure about its continuance in future. In 2003, it lost to BJP once again. In Delhi, Congress (I) ruled till 1990 when BJP took over and Congress (I) had to sit on the opposition till 1998 when it returned to office and enacted the law in 2001. The Maharashtra political landscape was perilously exposed to coalition politics since 1995 when the BJP-Shiv Sena combine formed the first coalition government while in 1999 the state witnessed a new coalition government of NCP and Congress (I). None could be very sure about its political continuance. Assam presented a political landscape characterised by intense turf war between Congress (I) and Assom Gana Parishad since late 1980s and the FOI law was passed after Congress (I) returned to office in 2001. Similarly in Jammu and Kashmir, after years of dominance, the political fortunes of National Conference declined in 2002 when the People's Democratic Party and Congress (I) combine formed government. Naturally, the new government was not too sure about its political future.

1998 elections and the political environment was fraught with significant pressure from internal actors and uneasy nudges from the apex court at the turn of the millennium. In the wake of some strong civil society moves, the political actors at the federal level did come out with the Freedom of Information Act in 2002 but interestingly enough, it was never notified.

Why was it not notified? Did the NDA-II government foresee any signs of stability for itself? In fact, a study of the-then national media would provide an impression that the ruling actors had been almost very sure about the NDA-II being comfortably re-elected in 2004 and form NDA-III.¹⁶ This provided a political opportunity to UPA-I to ratchet it up further in the form of RTI Act in 2005.

In contrast, the non-contemplation of such an FOI law in a State like West Bengal which had been far removed from any spectre of political uncertainty in electoral terms at least till 2005 was all too evident.

6. Conclusion

Thus, it remains to be said that despite the perceived high costs of rendering government information accessible to the people, the rational political actors have exhibited their calculative ability in recognising political benefits outweighing the accompanying costs. And such perceived benefits are at their highest when the political certainty is at its lowest. In other words, the probability of passage of FOI legislation varies in direct relation to the degree of perceived political uncertainty and in inverse relation to the perception of political stability. The other socio-political factors too may have their bearing on such passage but in subservience to the original factors of political uncertainty or the lack of it. This has been vindicated here not only in the context of country studies but also in relation to a number of Indian provinces that had taken such FOI initiative even prior to the federal legislation in India.

¹⁶ I wonder if this over expectation of NDA-II could be responsible for such non-notification and suppression of the FOI Act passed in 2002; Prabhu Chawla, 'Face Off' India Today (26 January 2004).

Of course, this paper has not studied as to what the political actors do to minimise the costs of FOI implementation as and when it hurts them or what they do when such laws face them in a political environment which does not smack of political uncertainty. There may be cases ranging from accommodating multiple restrictive provisions in the legislation to rendering monitoring bodies deliberately weakened by way of understaffing them or imposing on them excessive political controls. I have not looked at those issues here since my point of concern was to study the politics which remains primarily responsible for the *genesis* of FOI laws if one would choose to study the issue from the rational choice perspective.