

FREEDOM OF INFORMATION ,

**ARTICLE 19(A) OF THE CONSTITUTION OF ISLAMIC REPUBLIC OF
PAKISTAN 1973: A TOOL FOR PUBLIC ACCOUNTABILITY,
TRANSPARENCY AND IMPROVED GOVERNANCE**



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APPROVAL SHEET

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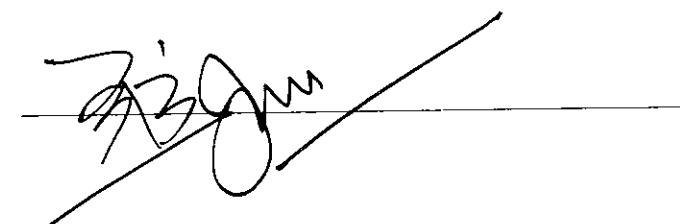
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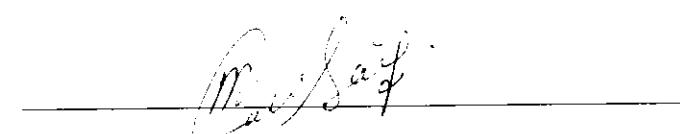


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AUTHOR'S DECLARATION

I, Ambreen Abbasi , candidate for the award of the Ph.D degree, declares that the work is carried out in accordance with the requirements of University regulations. It has not been submitted in any other academic award. Except where indicated in by specific reference in the text, the work is the candidates' own. Any views expressed in thesis are those of the author.

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Date: _____

DEDICATION

This thesis is dedicated to People of Pakistan,
who are the Victims and the Perpetrators of corruption in Pakistan,
People who can still make the change.

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ABSTRACT

Freedom of information or right to know, a more than two hundred years old law but over recent decades it has gained recognition at both international and national levels. The United Nations and the advent of human rights it has become an international right. It has evolved into a fundamental right. Today nearly 100 states have enacted freedom of information laws. Right to information traditionally includes the access to information held by public authorities when requested but now it goes further placing positive duty upon public authorities to publish and circulate the relevant information.

Significance of freedom of information can be understood that it is now widely accepted as either fundamental right itself or as an aspect of freedom of expression. Furthermore the authoritative statements on the issue, policies and practices of national governments, international financial institutions and other IGOs demonstrate the importance of citizen's right to know and their participation towards the social betterment. The remarkable growth in number of countries that have adopted FOI laws in last two decades surely indicates that FOI are now common around the world. No democratic state now deny the public rights to information as the rapid growth of FOI around the world is a dramatic global trend and most important democratic development of modern times indeed.

The FOI laws are not important only as human right but it also played as an important tool to fight corruption and promote good governance and transparency. It can also be anticipated that new laws will be adopted due to international pressure.

through treaties like UN Convention against Corruption and domestic demands for better public participation and accountability.

The development of FOI in context of international laws can significantly influence the global practice. States cannot deny the obligation of being open and fair towards each other in their relations inter se and the people as well. As part of International community every state is now bound to develop FOI law in their national laws to achieve transparency of the systems and combat corrupt practices.

A lot need to be done on many fronts like there are continuing problems in promoting the culture of openness, implementation of weak laws and oversight issue obstruct the efforts in any particular governing system. Record keeping especially in developing countries can be another hurdle. Even in developed countries like US strong opposition to access also slow down the process. Similarly the misuse of exemption and state secrets is another dark side of the picture.

Amongst the developed states United States is where FOI has matured as system where it has achieved its required aims of right to attractive standard and developed into a system that can be adopted by other states. The historical development of the right can be used as guideline or can lead other newly emerging democracies as how all social actors/ factors like people, government and nongovernmental social organizations who in fact participated towards making it as tool for the people to assess the progress of their state.

The United Kingdom, freedom of information regime presents a very interesting conundrum as having a very vibrant media on one side whereby a great emphases is on

freedom of expression and the government, on the other side obsessed with secrecy at least recently. The United Kingdom FOIA incorporated some very fine process guarantees, along with a number of modern promotional procedures. Nevertheless at the same stage, it is gravely diluted by the very wide set of exceptions.

Freedom of Information in India has played a gradual but significant role towards the improved governance and public accountability besides the major political resistance. Pakistan having a common history with India, her legal and political development can be the closest possible examples for better implementation of RTI in Pakistan.

Over Seventy years have passed since independence, but the colonial system of governance, which excluded public participation in the formulation and implementation of public policy, continues to exist in Pakistan. Citizens, have lost confidence in the system and have developed an attitude of apathy towards issues of larger public concern. Recently after the inclusion of article 19(a) recognizing freedom of Information in the Constitution as fundamental right is a step in the right direction however; mere inclusion in the list of fundamental rights will not serve any purpose unless practice of this right is facilitated through development of a system and removal of hindrances in the free flow of information. An effective FOI regime is a need of time.

Democracy without accountability is nothing more than a myth and will remain a paper procedure unless those in power are not held accountable by the people for their actions, policies and decisions. Public accountability is basic ingredient of any modern democratic governance and transparency. Traditionally the accountability was only

fashioned in political context and ensured through the election. The public official and bureaucracy were mainly immune from such scrutiny. But public management reforms have introduced a new facet by making them directly and individually accountable for their acts and omissions and their role played regarding the policy formulation and implementation.

Freedom of expression without information and media is now unimaginable. Media is now used basic medium for expression as well as information source by all, in every society in different context or capacity. Media has played a vital role in providing information and expression but at the same time the negativity of its impact created a chaos in the society. Media as considered more powerful than a nuclear device should also be a subject for regulation and accountability which need special attention by the authorities otherwise results can be far-reaching.

The right to information and the right to privacy, both are fundamental rights in the modern era of technological developments where world have become a global village. In the process of accountability and governance both rights complement each other but at the same time there exist a potential conflict between them. Where two rights overlap, a state needs a mechanism to identify the conflicts to minimize the conflict and for balancing of the rights.

Through this research, it has been tried to highlight the relevant areas in the context of freedom of information regime in Pakistan and also to make some recommendations at the end on the issues.

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LIST OF ABBRIVIATIONS

ADB	Asian Development Bank
BBC	British Broadcasting Corporation
CIC	Central Information Commission
CMP	Common Minimum Program
CNN	Cable News Network
CPI	Corruption Perception Index
CSO	Civil Society Organization
CSS	Central Superior Services
ECP	Election commission of Pakistan
EU	European Union
FAB	Frequency Allocation Board
FBR	Federal Board of Revenue
FIA	Federal Investigation Agency
FIP	Fair Information Practices
FIR	First Information Report
FOI	Freedom of Information
HEW	Dept. of Health Education and Welfare
IMF	International Monterey Fund
ISPAK	Internet Service Provider Association of Pakistan
KPECA	Khaber Paktoonkhwa Ehtasaan Commission Act
KPK	Khaber Pakhtunkha
MKSS	Mazdoor Kisan Shakti Sanghatan
NACS	Nation Anti corruption strategy
NCPRI	National Campaign on People's Right to information.
NTM	Network Television Marketing

OAS	Organization of American States
OECD	Organization of Economic Cooperation and Development
OSA	Official Secret Act
OSCE	Organization of Security & Cooperation in Europe
PBC	Pakistan Broadcasting Corporation
PEMRA	Pakistan Electronic Media Regulatory Authority
PFUJ	Pakistan Federal Union of Justice
PIO	Public Information Officer
PMLN	Pakistan Muslim League
PNNABRO	Press, Newspapers, News Agencies and Books Registration Ordinance
PPP	Pakistan People's Party
PTN	Peoples Television Network
PTV	Pakistan Television
RTI	Right to Information
SIC	State Information Commission
UDHR	Universal Declaration of Human Rights
UK	United Kingdom
UN	United Nations
UNESCO	United Nations Education, Scientific and Cultural Organization
USA	United States of America

Chapter 1

Freedom of Information;

A Tool for Public Accountability, Transparency and Improved Governance

Thesis Statement

An effective freedom of information regime in Pakistan requires promulgation of a formal legislation, assessment of existing laws and action to bring about cultural change towards open governance and public participation.

1.1 Introduction

Right to information is widely acknowledged as a fundamental human right in most of the modern democracies as it is crucial for citizens to be able to make knowledgeable electoral choices. Rightly called 'oxygen for democracy',¹ the right to information is important for revealing inefficiencies and corrupt practices, and guarantee successful public accountability and good governance.²

Globally more than 65 countries have Freedom of Information Law. Sweden was the first country to enact the "Freedom of Information law" in 1766. Pakistan became the main country in South Asia having FOI law, when the Freedom of Information Ordinance was promulgated in 2002.

¹ Sania Nishtar. Freedom of Information, Oxygen for democracy. The News International 12th October 2009. Available at <https://www.thenews.com.pk/archive/print/200905-freedom-of-information--oxygen-of-democracy> last accessed on 14-07-2013. see also <http://www.heartfile.org/viewpoint-57-freedom-of-information-oxygen-of-democracy/>

²Mukhtar Ahmad Ali, Lack of Transparency and Freedom of Information in Pakistan: An Analysis of State Practice and Realistic Policy Options for Reform . Central European university Center of Policy Studies, International Policy Fellowship program, Open society institute, July 2006, 8.

From the inception of United Nation General Assembly in its first session recognized the freedom of information as fundamental right in 1946³ which reads: Freedom of information is fundamental human right... *“the touchstone of all the freedoms to which the UN is consecrated”*; Similarly Article 19⁴ of Universal Declaration of Human Right (UDHR) provided universal status of the right to information without regard to frontiers. The International Covenant on Civil and Political Rights (ICCPR) 1966 through article 19(2)⁵ further elaborates the people's right to know.

In several instances, the Supreme Court of Pakistan has held that the right to information is integral to the freedom of speech and expression as guaranteed under Article 19 of the Constitution.⁶

Article 19 of the Constitution of Pakistan made the freedom of speech and expression a fundamental right of the citizens. According to the 18th Amendment in the Constitution of Pakistan after Article 19, after 37 years, the subsequent new article has been introduced, namely:

19A. Right to information: - “Every citizen shall have the right to have access to information in all matters of public importance subject to regulation and reasonable restriction imposed by the law.”⁷

³ UN General Assembly Resolution 59(1)

⁴ Art. 19 UDHR: Everyone has right to freedom of Opinion and expression; this right includes the freedom to hold the opinion without interference ;to seek , receive and to impart information through any media and regardless of frontiers.

⁵Art. 19(2): Everyone shall have the right to freedom of expression; this right shall include the freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his (her) choice.

⁶ Mukhtar Ahmad Ali, Lack of Transparency and Freedom of Information in Pakistan: institute , 8.

However, in Pakistan; successive governments have either imposed restrictions or allowed the continuation of a large number of existing restrictions on information disclosure and citizens' right to know. These restrictions are often justified on the grounds of national security or public interest. Both the terms can have extremely fluid meaning and in the end can effectively be used to protect vested interests, hide inefficiencies and wrong doings, avoid public scrutiny and pre-empt accountability.⁸

For democracy without a system of government public accountability would remain a paper procedure rather than an effective scrutinizing tool, if those in power cannot be held accountable by the people for their acts and omissions that includes decisions, policies, and expenditures.⁹

Pakistan tenders perceptible examples of a secretive government regimes, as a matter of both law and practice, resulting in damaging the democratic process and has restricted people's participation. For a state like Pakistan which is culturally diverse, effective people's partaking is achievable only where there is a free flow of information. State secrecy results in political exclusion which, when combined with cultural divisions, promotes division, mistrust and economic imbalances.¹⁰

⁷ The Constitution of Pakistan, 1973.

⁸ State of transparency and freedom of information in Pakistan, publisher, Centre for Peace and Development Initiatives, Pakistan (CPDI org-Pakistan).

⁹ Mark Bovens. Ferlie, 'The Oxford Handbook of Public Management' 08-Ferlie-chap08, Proof page 183 23.6.2005

¹⁰ David Banisar, *Global Trends on the Right to Information: A survey of South Asia*, Article 19. Center for Policy Alternatives , Common wealth Right initiative, Human rights commission of Pakistan, July 2001.95

The term public accountability, access to information, transparency and responsible discretion are fundamental tools for bringing about corruption free society therefore needs some clarity itself as how they can be used together to achieve the desired ends. Public accountability means the liability of authorities to account publicly, fully and fairly, before and after facts, for how they are carrying out their responsibilities effecting public in important ways. The information through accountability process will produce not only useful information for citizen but also valuable self regulating influence on the decision of authorities.¹¹

George Washington, the first president of the United States, in 1796 wrote to a friend, "I am sure the mass of citizens in these United States mean well, and I firmly believe they will always act well whenever they can obtain a right understanding of matters...". Later, in 1989, Dr. Ursula Franklin, made clear what "right understanding" means. She explained; "Whenever someone talks to you about the benefits and costs of a particular project don't ask, 'What benefits?' ask 'Whose benefits and whose costs?' Answering the who, question publicly, fully and fairly before they act, is the essence of the public accountability obligation of decision-makers.¹²

The rule of secrecy has contributed a lot to Pakistan becoming one of the most corrupt nations in the world and to the lack of any effective accountability system in government. The link between secrecy and lack of accountability is conducive for corruption. For example, almost all tender notices carry a clause that the grounds for

¹¹ Henry E McCandless,, *Achieving fairness in society depends on holding to account* , May 28th 2012.available at <http://www.centreforpublicaccountability.org> . last accessed on 21-01-13

¹² ibid

rejecting one bid over another cannot be disclosed. One of the major factors contributing to maladministration and corruption in Pakistan has been the misuse of discretionary powers, mainly because decision-makers from the top down have taken advantage of such powers for personal, group or political ends.

In view of the above discussion, the term 'information' has to be defined in very broad terms in Pakistan including as the body of acts relating to the State's functioning and all matters affecting socio economic and political development.¹³

The Developed states like USA or UK having a very well developed freedom of information system and India where in recent past this system has been introduced, can be a model for developments in Pakistan in this regard. An effective freedom of information regime in Pakistan requires promulgation of a formal legislation, assessment of existing laws and action to bring about cultural change towards open governance and public participation.

1.2 People's Right to Know in Pakistan

Over seven decades have passed since independence but the colonial system of governance, which excluded public participation in the formulation and implementation of public policy, continues to exist in Pakistan. Important decisions having significant implications for the lives and welfare of citizens are still made in closed corridors without soliciting public views. Channels for effective public participation either do not exist or have become nearly retarded as a result of undue bureaucratic controls and non-functioning of democratic institutions. Citizens, therefore, have lost confidence in

¹³ David Banisar, Global Trends on The Right to Information: A survey of South Asia, Article 19. Center for Policy Alternatives , Common wealth Right initiative, Human rights commission of Pakistan, July 2001.93

the system and have developed an attitude of apathy towards issues of larger public concern.¹⁴ In BBC Doha Debate 7th series regarding the wiki leaks disclosures, a very important question was asked by a student that “how can we trust the government if we do not know what is it planning?” This question highlights the centrality of public participation and accountability in any democratic process.¹⁵

Recently after the inclusion of article 19(a) in the Constitution the superior courts have given decisions highlighting this right which is a beginning of a new era.¹⁶ Freedom of Information and its inclusion among the fundamental rights is a step in the right direction however; mere inclusion in the list of fundamental rights will not serve any purpose unless practice of this right is facilitated through development of a system and removal of hindrances in its way. For this purpose an analysis of factors which are affecting a free flow of information need to be made, followed by development of proper procedures and system and lastly the right to free information needs to be balanced with the right to privacy.

The relationship between RTI and freedom of expression is noteworthy in the development of the right to receive information. Free expression will not serve its purpose unless the expression is based on clear and unhindered information which will in turn form improved expression. Information rights include rights to create and

¹⁴ Freedom of Information, Consumer Rights Commission of Pakistan, (CRC), Islamabad, Pakistan.

¹⁵<http://www.thedohadebates.com/debates/series/?s=7> last accessed on 21-01-13

¹⁶ Dr Shahid Masood Vs Federation of Pakistan ,SCMR 1849, 2010, Attahullah Kahn Malik Vs Federation of Pakistan ,PLD Lahore, 605,2010,Shabbir Hussain Vs Executive district officer(education)Larkana, CLC Sindh 16, 2012, Muhammad Masood Butt Vs S.M Corporation (PVT) LTD.PLD Karachi 177,2011

communicate information (e.g., freedom of expression, freedom of association), to control others' access to information (e.g., privacy and intellectual property), and rights to access information (e.g., freedom of thought, the right to read).¹⁷

The development of right to information as a penumbral right to freedom of expression, technological advances have rutted these rights against the right to privacy. On first instance, it would appear that the right of access to information and the right to protection of personal privacy are incompatible.¹⁸

Right to information (RTI) laws provide a fundamental right for any person to access information held by governmental departments. Simultaneously, right to privacy laws grant individuals a fundamental right to control the collection of, access to, and use of personal information about them that is held by governments and private bodies. However, the reality is more multifaceted. Privacy and RTI are often described as “two sides of the same coin”—mainly acting as complementary rights that promote individuals’ rights to protect themselves and to promote government accountability.¹⁹

Privacy is increasingly being challenged by new technologies and practices. Sensitive personal data are now collected and used routinely. Public records are being disclosed over the Internet. In response to this set of circumstances, many countries have adopted comprehensive laws that give individuals some control over the collection

¹⁷ Kay Mathiesen, ‘Access to Information as a Human Right’ .School of Information Resources and Library Sciences University of Arizona, September 7, 2008.

¹⁸ David Banisar. *The Right to Information and Privacy: Balancing Rights and Managing Conflicts*, March 10, 2011 World Bank Institute Governance Working Paper.

¹⁹ Ibid

and use of these data by public and private bodies. At the same time, the public's right to information is becoming widely accepted.²⁰

RTI laws are now common around the world, with legislation adopted in almost 90 countries. International bodies are developing conventions, and relevant decisions are being issued by international courts. Thus it is necessary to consider how to adopt and implement the two rights and the laws that govern them in a manner that respects both rights. There is no easy way to do this, and both rights must be considered in a manner that is equal and balanced.²¹

1.3 Factors Effecting Freedom of Information in Pakistan

The current state of public accountability laws and practice in Pakistan does not provide a clear picture as to their formal implementation having various restrictions. Some of the factors that affect freedom of information regime in Pakistan are briefly pointed out in this section.

Firstly the political apathy towards accountability process, weak legal and institutional framework and deficient mechanism for access to information and at the same time, the political interference either directly or indirectly in institutions responsible for accountability cannot be ignored as it is one of the impeding factors for effective implementation of existing laws or towards formulation of any fresh policy or legislation.

²⁰ David Banisar, *the Right to Information and Privacy: Balancing Rights and Managing Conflicts.*

²¹ *ibid*

Secondly some of the existing laws inconsistent with right to know and hindering the free flow of information for the better governance through public accountability are analyzed in this research.

Thirdly the poorly maintained public record keeping by different departments and lack of infrastructure and trained staff is another serious issue in this regard.

Fourthly media as one of the major and most powerful stake holder in this regard need regulations to positively influence and contribute towards the social change.

1.4 Freedom of Information Legislation in Pakistan

There have been many efforts for the FOI legislation in Pakistan. Realizing the international trends towards more openness and transparency, several attempts have been made in the last two decades to introduce FOI legislation in the country with the aim of promoting transparency and accountability in the government departments started in 90s till date.

Although Pakistan is the first country in the subcontinent to have adopted the law, but as far as the implementation is concerned is considered to be the weakest in the region. Many observers see the FOI Ordinance 2002 to be flawed both in terms of concept and content. The exemptions and the procedures were formulated in such a way that defeating making applicants to lose interest and give up their mission. Since it was by a military ruler apparently to meet a benefactor requirement, as well as many shortcomings in the law, have led to negative response to it. This, together with the lack of government interest, has meant that ordinary citizens do not know about the law or see it as relevant to their concerns. The extremely small number of FOI requests

submitted since 2002 is a clear testimony to this. In recent years efforts have been made by individual lawmakers to promote the adoption of a new law by the Parliament.²²

Whilst the research, one of major concern has been resolved and a federal legislation on freedom of information has been promulgated in October 2017. Though a long awaited decision has been finalized but the prevalent political situation in country can also be an interesting side of this development. It has been promulgated while historical event is underway when Supreme Court of Pakistan has given a disqualification judgment for corrupt practices for a sitting prime minister, Panama leaks that shook international politics including Pakistan can also be a catalyst or contributor for this development.

FOI in Pakistan is a fresh event but not to be started from zero rather having an experiment in last decade by a military government and now by an elected government has to be taken seriously by all stakeholders. As rightly suggested by Mukhtar Ahmed, no gradual change rather radical shift from system of secrecy to openness is imperative to fight the sort of corruption we are facing. How effective these laws are is a matter of time but from analysis of the different states practices as discussed here in chapters , it can be concluded that FOI in isolation cannot be of any use, to be effective support from other factors is essential for a successful FOI regime.

1.5 Framing of Issues

The analysis of factors effecting and correlated to freedom of information brings us to following major issues:

²² protifolon_issue-,pdf)id policy brief 04

1. Can Right to Information, be the tool for better governance and transparency in prevailing situation in Pakistan and effective towards public accountability without formal legislation?
2. Who is the competent authority to enact laws after 18th amendment that is federal government or provincial government? What are the grey areas obstructing the promulgation and implementation of the RTI laws in Pakistan?
3. In Pakistan where the secrecy is norm and freedom of information is exception, what steps could be taken for the effective policy for a change from culture of secrecy to the accountability and transparency?
4. What should be the role of judiciary in pre and post legislation regime of the right to information?
5. Can the term “accountability and information” be interpreted effectively? How to reach a balance between right of privacy and freedom of information and other rights?
6. What should be the extent of this freedom that is only applicable to domestic laws or international compliance can also be included?
7. What should be the role and responsibility of media? How can news media involvement in FOI advocacy efforts positively contribute to adoption and quality of FOI legislation?
8. What elements characterize a good whistleblower law and under which conditions is one likely to work effectively.

1.6 Hypothesis

The right to information can only be effective tool for better governance, transparency, public accountability if formal legislation pointing out a disclosure procedure and systems be enacted. However this legislation needs to balance individual right to privacy and freedom of information as well as anomalies in other laws. Another aspect which this legislation needs to define is the extent of the freedom of information available to citizens.

Legislation alone would not suffice since Pakistan has a culture where citizen do not question working of the state. It is therefore imperative that an initiative towards cultural change should be undertaken through advocacy and communication campaigns by the state, civil society and media.

A subsidiary issue that requires special attention is providing adequate protection to the whistle blowers so that a freer flow of information is encouraged.

1.7 Significance of the Research

Pakistan is a late entrant in establishing a freedom of information regime, the erstwhile freedom of information law, like all first laws had a number of short-comings. Since there are number of debates going on the need of an effective legal regime ensuring freedom of information, this research is likely to contribute in strengthening the on-going debate, and also to provide a technical feedback in establishing an effective legal regime. Further different but relevant aspects of the right can also be made part of research that have in/direct connection with idea of FOI regime to have a comprehensive idea of issue for any further action like right that is more people oriented than other rights has to look from public as user and controller of the outcome of the action.

1.8 Methodology

The intended dissertation has focused on analysis for prevailing and prospective legal issues concerning the formulation and implementation of RTI legislation in Pakistan. A socio legal approach has been followed and for this purpose successful and operational RTI regimes are also analyzed to highlight the different aspects, technical and legal, for establishing an optimally effective RTI regime in Pakistan. While dealing with different aspects, it has also interacted with other theories and frameworks such as philosophical and sociological relevant to the issue here. It has been tried to explore the implication of implementation of right to information in Pakistan.

Attempts are also be made to evaluate RTI in matters related to International Law, such as its adoption within international organizations and its effects on its operational efficiency and how it caters to the needs of people around the globe. For this purpose the proposed dissertation has followed the analytical methodology. Further the terms RTI and FOI are interchangeably used.

The chapters and limitations are summarized here;

The first chapter is based on introduction of the background and situation and aims and objective of this research.

The second chapter is focused on international point of view of right to information. The status of FOI in international and regional legal frame works and practices is explored.

In next four chapters, different state practices and historical development of the right has been discussed. Other than Pakistan three states have chosen for specific

reasons. First the USA (third chapter) as amongst the developed states and where the FOI is in practice for a considerable period of time. Then UK (fourth chapter) a developed state but a late beginner in this milieu. Another important ground for UK is that Pakistan and India share same legal background from English law and having a great influence in practice. Third state is India (fifth chapter) where exist a lot of resemblance not only in legal but social, political, cultural and economical systems. In the sixth chapter the FOI development in Pakistan is explained in detail.

In the seventh chapter the state of corruption, anti corruption legal mechanisms or framework in Pakistan and role of FOIA to cope with the issue is discussed. The role of all stake holders and protection of whistle blower is also highlighted.

In the eighth chapter the freedom of information and role of media is highlighted keeping in view the impact and current situation in Pakistan. The current situation and the regulation of media with freedom of expression and FOI development.

In the ninth chapter the relationship of FOI with right to privacy is discussed and feasibility of right to privacy either in separate set or in same legislation with reference of oversight mechanisms.

The last part (tenth chapter) concludes the research with general findings and recommendations on the issue

Chapter 2

RIGHT TO INFORMATION IN INTERNATIONAL LAW

Freedom of information or right to know, a more than two hundred years old law but over recent decades it has gained recognition globally at both international and national levels. The United Nations and the advent of human rights it has become an international right.²³ It has evolved as a fundamental right. Today more than 100 states have enacted freedom of information laws by 2016²⁴ which till 1990 only 13 countries had such laws. Furthermore many international and regional financial institutions like World Bank and many intergovernmental organizations (IGOs) have adopted information disclosure policies.²⁵ As an international right it has taken a force for states not only to recognize it as right but also develop relevant law for protection of this right.

2.1 Introduction

Freedom of information is now become one of the fundamental human rights. It is right of citizen to know or to hold the government accountable for its actions or policies, to have access to official documents. The roots of the people's right to know can be traced back to eighteenth century, the age of Enlightenment. The world's first freedom of

²³ Article 19 UDHR and ICCPR

²⁴ <https://www.statista.com/chart/11757/more-countries-adopt-freedom-of-information-laws/>

²⁵ International standards: Right to information Policy brief. Article 19. 5th April 2012. Available at <http://www.article19.org/resources.php/resource/3024/en/international-standards:-right-to-information>. Last accessed on 15-06-2015

information Act was passed by Swedish parliament in 1766, now almost 248 years old. Andre Chydenius, a politician from Kakkola played a vital role in creating this law.²⁶

The ideas of Democracy good governance , accountability combating corruption all without freedom of information is nothing but just a myth as rightly quoted by Louis Brandeis US Supreme court the '*A little sunlight is best disinfect*'. Right to information also serve for social ends like access to information can help in business practices .The medical records can help to make decision of about treatments, financial planning and so on.²⁷

Right to information or freedom of information has been recognized not only as a basic tool for democracy, good governance and accountability but also one of the basic human rights under international as well as constitutional law worldwide. Interpretations and authoritative statements by major international bodies like United Nations (hereinafter UN), the Council Of Europe (hereinafter COE), Commonwealth, the Organization of American States (hereinafter OAS) and national developments globally recognizing the right of information in this regard sufficiently demonstrate the importance of the RTI regime, also emphasizing the need for effective legislation and adoption of RTI laws in practice.²⁸

²⁶ Juha Mustonen, ed. *The World's First Freedom of Information Act, Anders Chydenius legacy today*,(Anders Chydenius Foundation, www.chydenius.net,Art - print ltd Kokkola 2006)4. Available at http://www.chydenius.net/pdf/worlds_first_foia.pdf. Last accessed on 15 -06-2015.

²⁷Ibid

²⁸ Toby Mendel, "Freedom of information: An Internationally protected Human right", *Comparative Media Law Journal*, 1 (2003).

2.2 International Standards

A number of international bodies including the United Nation(UN),Organization of American States (OAS),Council of Europe (COE) and the commonwealth entrusted with promotion and protection of human rights have recognized the freedom of information as basic human right and also emphasized for the effective legislation and practice by the member states.²⁹

2.2.1 The United Nation and Human Rights

General Assembly, in its very first session 14th December, 1946, adopted Resolution 59(I), stating, "Freedom of information is a fundamental human right and ... the touchstone of all the freedoms to which the United Nations is consecrated."³⁰ In subsequent international human rights instruments the right is not separately mentioned but as a part of freedom of expression which includes right to seek, receive and impart information.³¹

The Universal Declaration on Human Rights (UDHR) a flagship document on human rights adopted in 1948³² also made freedom of expression and information a fundamental human right for the states, making it a part of customary international law through article 19.³³ Similar approach is followed in 1966 by UN in International

²⁹ Global Trends on the Right to Information: a survey of South Asia, Article 19, Center for Policy alternative, commonwealth Human Rights Initiatives, Human Rights Commission of Pakistan ,(July 2001), 8-9.

³⁰ UN General Assembly, *Calling of an International Conference on Freedom of Information*, 14 December 1946, A/RES/59, available at: <https://www.refworld.org/docid/3bo0f0975f.html> Last Accessed--20-10-2015

³¹ Mendel, "Freedom of Information: An Internationally Protected Human Right".

³² UDHR General Assembly Resolution 217A(III),10th December 1948.

³³ Article 19 (UDHR) " everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek , receive and impart information and ideas through any media regardless of frontiers"

Covenant on Civil and Political Rights (ICCPR)³⁴, an international legally binding treaty, through its article 19.³⁵

The UN Commission on human rights established an office of UN special rapportuer (Mr Abid Hussain) on freedom of opinion and expression in 1993. The rapportuer was assigned task to clarify the content of right of freedom of opinion and expression. The special rapportuer had addressed the issue, including the rights of information, in its regular reports since 1997 to Commission of Human Rights (CHR). Further in 1998 report the rapportuer clearly stated that freedom of information includes the right to access the information held by the state, imposing a positive obligation on states to ensure access to information held by government in all types of storage and retrieval systems, which was welcomed by the Commission.³⁶

In the report in 2000 extended its commentary on the issue highlighting its importance not only to democracy but also to right to participate and realization of development. The rapportuer not only showed concerns on tendency of governments to withhold from people the information that is theirs, it also provided in detail for specific contents and general principles of the right and urged that governments either to review or adopt new legislation ensuring its conformity with the principles.³⁷

³⁴ ICCPR ,General Assembly Resolution 2200A(XXI)16th December 1966,entered into force 23 March 1976

³⁵ David Banisar, Freedom of information Around the world; A Global survey of Access to Government information laws 2006. Privacy International 2006.9. Available at: http://www.freedominfo.org/documents/global_survey2006.pdf. Last Accessed 10-10-2015.

See also More Effective Right to Information in Pakistan. Background paper, pildat. 7.

³⁶ Toby Mendel . Freedom of Information: A comparative legal Survey, UNESCO 19. Available at http://portal.unesco.org/ci/en/file_download.php/fa422efc11c9fb15f9374a5eac31c7efreedom_info_law_s.pdf last accessed on 12-02-2015 . See also Mendel, "Freedom of Information."

³⁷ Ibid.

The rapportuer later joined with, the Organization of Security and Cooperation in Europe (OSCE) representative and the OAS³⁸ rapportuer, adopted a joint declaration calling countries for adoption of FOI laws, stating³⁹

Implicit in freedom of expression is the public's right to open access to information and to know what governments are doing on their behalf, without which truth would languish and people's participation in government would remain fragmented.⁴⁰

In the last many years the Human rights Committee has started incorporating the analysis of freedom of information reviews of the countries, in one of reviews it recommended the UK and Uzbekistan to limit the scale of their laws on state secrets, considering them to be in violation of article 19.⁴¹

2.2.2 United Nations Convention against Corruption.

In December 2005, another important international convention is UN Convention on Anti Corruption approved by the General Assembly in October 2003 and adopted after ratification by 30 countries.⁴² The convention has been signed by 140 countries and

³⁸ Organization of American States

³⁹ Joint Declaration by the UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE representative on freedom for Media and the OAS Special Rapporteur on Freedom of expression,⁶ December 2004.

⁴⁰ Mendel, "Freedom of Information: An Internationally Protected Human Right".

⁴¹ Concluding Observation of the Human Rights Committee: United Kingdom of Great Britain and Northern Ireland 05-11-2001, CCPR/CO/73/UK, CCPR/CO/73/UKOT, Concluding observation of the Human Rights Committee : Uzbekistan, 26-04-2001, CCPR/CO/71/ UZB.

⁴²Banisar, Freedom of Information around the World, 2006. A Global Survey of Access to Government Information laws. 10

more than 60 countries have ratified and some 20 of the countries have taken positive steps towards national legislations on FOI laws.⁴³

Article 10 of the convention on “public reporting”, provides for measures to be taken by the states to develop the process to improve the public access to the information as a mean to combat corruption.⁴⁴ Article 13 further emphasis the participation of society to fight corruption and require state to take such measure to provide the public access to information⁴⁵

⁴³United Nations Convention against Corruption. Adopted by UN General Assembly on : 31 October 2003,by resolution 58/4 entered into force on 14 December 2005 in accordance with art, 68(1). Available at <https://www.unodc.org/unodc/en/treaties/CAC/>. Last Accessed15-10-2015

⁴⁴ Art. 10. Public Reporting

Taking into account the need to combat corruption, each State Party shall, in accordance with the fundamental principles of its domestic law, take such measures as may be necessary to enhance transparency in its public administration, including with regard to its organization, functioning and decision making processes, where appropriate. Such measures may include, *inter alia*:

(a) Adopting procedures or regulations allowing members of the general public to obtain, where appropriate, information on the organization, functioning and decision-making processes of its public administration and, with due regard for the protection of privacy and personal data, on decisions and legal acts that concern members of the public;

(b) Simplifying administrative procedures, where appropriate, in order to facilitate public access to the competent decision-making authorities; and

(c) Publishing information, which may include periodic reports on the risks of corruption in its public administration.

⁴⁵ Art. 13. Participation of society

1. Each State Party shall take appropriate measures, within its means and in accordance with fundamental principles of its domestic law, to promote the active participation of individuals and groups outside the public sector, such as civil society, non-governmental organizations and community-based organizations, in the prevention of and the fight against corruption and to raise public awareness regarding the existence, causes and gravity of and the threat posed by corruption. This participation should be strengthened by such measures as:

(a) Enhancing the transparency of and promoting the contribution of the public to decision-making processes;

(b) Ensuring that the public has effective access to information;

(c) Undertaking public information activities that contribute to non tolerance of corruption,

2. Each State Party shall take appropriate measures to ensure that the relevant anti-corruption bodies referred to in this Convention are known to the public and shall provide access to such bodies, where appropriate, for the reporting, including anonymously, of any incidents that may be considered to constitute an offence established in accordance with this Convention.

2.2.3 Rio Declaration/UNECE. Convention on Access to Environmental Information

UN conference on Environment and Development (the Earth Summit), the Rio Declaration on Environment and Development 1992 is a landmark step towards the trend implementation of policies on public participation and access to information. The Convention⁴⁶ sets out thorough procedural measures that the countries must incorporate in their legislation. Article 4 of the Convention requires governments to adopt and implement laws allowing for citizens to demand information (including documents) about the environment from government bodies. The Convention has been signed by 44 countries and ratified or acceded to by 37 and is a driving force in many countries to implement a FOI laws. Around 36 countries so far have adopted comprehensive laws. In addition, the EU has included it as a Directive that applies to all member states.⁴⁷

2.3 Regional Arrangements/Standards

The three main human rights regional systems i.e. in America Organization of American states (OAS), Europe (council of Europe) and Africa (African union) have also developed their freedom of information standards as basic human rights.⁴⁸ Besides many other regional instruments can demonstrate the importance of RTI in their respective context as discussed in this section.

⁴⁶ Convention on Access to Information, Public Participation in Decision making and Access to justice in Environmental Matters. Done at Aarhus , Denmark . 25th June 1998.

⁴⁷ David Banisar. Freedom of Information around the World, 2006. A Global Survey of Access to Government Information laws. 10-11

⁴⁸ <https://www.article19.org/resources.php/resource/3024/en/international-standards:-right-to-information>. Last Accessed 10-10 2015.

2.3.1 Organization of American States (OAS)

The American Convention on Human Rights (hereinafter ACHR)⁴⁹ a legally binding treaty also provides for freedom of expression in much stronger lines than UN human rights instruments, in its article 13⁵⁰. The Inter American Court of Human Rights while interpreting article 13 opined that freedom of information, is as important as freedom of expression or any other fundamental freedom. The Court stated that "For the average citizen it is just as important to know the opinions of others or to have access to information generally as is the very right to impart his own opinion", concluding that "a society that is not well-informed is not a society that is truly free".⁵¹

⁴⁹ The American Convention on Human Rights, (the Pact of San José,) is an international human rights instrument. It was adopted in the Western Hemisphere in San José, Costa Rica, on 22 November 1969, entered into force 18 July 1978

⁵⁰ Art. 13. "Freedom of Thought and Expression

1. Everyone has the right to freedom of thought and expression. This right includes freedom to seek, receive, and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing, in print, in the form of art, or through any other medium of one's choice.

2. The exercise of the right provided for in the foregoing paragraph shall not be subject to prior censorship but shall be subject to subsequent imposition of liability, which shall be expressly established by law to the extent necessary to ensure:

a. respect for the rights or reputations of others; or

b. the protection of national security, public order, or public health or morals.

3. The right of expression may not be restricted by indirect methods or means, such as the abuse of government or private controls over newsprint, radio broadcasting frequencies, or equipment used in the dissemination of information, or by any other means tending to impede the communication and circulation of ideas and opinions.

4. Notwithstanding the provisions of paragraph 2 above, public entertainments may be subject by law to prior censorship for the sole purpose of regulating access to them for the moral protection of childhood and adolescence.

5. Any propaganda for war and any advocacy of national, racial, or religious hatred that constitute incitements to lawless violence or to any other similar action against any person or group of persons on any grounds including those of race, color, religion, language, or national origin shall be considered as offenses punishable by law."

⁵¹ Mendel . "Freedom of Information: An Internationally Protected human Right". 6

2.3.2 Chapultepec Declaration

Similarly, Hemisphere conference on Free speech organized by The Inter American Press Association, a regional NGO, adopted a declaration of Chapultepec in 1994⁵², setting out the principles on freedom of expression. The principles recognized the freedom of information as fundamental right, including the right to access to information by the public bodies. Originally the declaration had no formal legal status⁵³ but later the governments or heads of more than 29 nations and 3 territories signed the declaration and is becoming the major point of reference in the area of freedom of expression and freedom of information.⁵⁴

In 1999 in an annual report to the commission, the special rappoutuer, whose office was established in 1997 by Inter- American Commission on human rights, stated:⁵⁵

The right to access to official information is one of the cornerstones of representative democracy. In a representative system of government, the representatives should respond to the people who entrusted them with their representation and the authority to make decisions on public matters. It is to the individual who delegated the administration of public affairs to his or her representatives that belongs the right to information. Information that the State uses and produces with taxpayer money.

⁵² Mexico City , March 1994

⁵³ Mendel , " Freedom of Information: An Internationally Protected human Right".6

⁵⁴ Banisar ,Global survey 2006.15

⁵⁵IACHR, Annaual report 1998. Annaual reprt of te office of the Special Rapporteur for Freedom of Expression. OEA/Ser.L/V/II.102.Doc.6rev.April 16,1999. 29

2.3.3 The Inter American Declaration of Principles of Freedom of Expression

The Declaration was approved by, Inter American Commission on Human Rights in October 2000, a significant development, in the context of freedom of information. It is the most comprehensive official document on freedom of information in Inter American system.⁵⁶ The preamble provides:

Convinced that guaranteeing the right to access to information held by the State will ensure greater transparency and accountability of government activities and the strengthening of democratic institutions...

The Principles explicitly recognize freedom of information, including the right to access information:

3. Every person has the right to access information about himself or herself or his/her assets expeditiously and not onerously, whether it be contained in databases or public or private registries, and if necessary to update it, correct it and/or amend it.

4. Access to information held by the state is a fundamental right of every individual. States have obligations to guarantee the full exercise of this right. This principle allows only exceptional limitations that must be previously established

⁵⁶Declaration of Principles on Freedom of Expression. Available at <http://www.right2info.org/international-standards>. see also <https://www.oas.org/en/iachr/mandate/Basics/declaration-principles-freedom-expression.pdf>

by law in case of a real and imminent danger that threatens national security in democratic societies.”⁵⁷

In 2005 the Inter American Commission on Human Rights in a case ruled that by failing to provide access to environmental information Chile has violated article 13 of ACHR⁵⁸. Keeping in view these and other circumstance it can be concluded that in the Inter American system, freedom of information is protected as one of basic human right.

2.3.4 Council of Europe (COE)

The Council of Europe , a treaty based inter governmental organization composed of 46 member states, mandated to promote human rights , education and culture amongst the foundational documents is European Convention on Human Rights(ECHR)⁵⁹, which guaranteed the freedom of expression and information as fundamental human right under article 10. However this article protects the right to receive and impart information excluding the right to seek information unlike guarantees provided by other documents like UDHR, ICCPR (art. 19)or ACHR (art. 13).⁶⁰

In leading cases,⁶¹ the European Court of Human Right dealt the claims the right to receive information from public authorities and found that freedom of expression did not include the freedom to access the information sought. In all three cases however did

⁵⁷ Ibid.

⁵⁸ Marcel Claude Reyes and others Vs Chile 7th March 2005, No 12.108. Inter American Commission on Human Rights , Application submitted to Inter American Courts of Human Right against the state of Chile. Available at <https://www.opensocietyfoundations.org/litigation/claudie-reyes-v-chile>. last accessed on 20-07-2015

⁵⁹ ECHR adopted 4th November 1950, entered into force 3rd September 1953.

⁶⁰ Toby Mendel , Freedom of Information.6-7

⁶¹ Leander vs. Sweden, 26 March 1987, Application No. 9248/81, 9 EHRR 433. Gaskin vs. United Kingdom, 7 July 1989, Application No. 10454/83, 12 EHRR 36, Guerra and Ors vs. Italy, 9 February 1998, Application No. 14967/8.

not specifically denied the possibility of right to access to information under article 10, given a narrower or limited version of the right depending on the circumstances of the cases not as a general right of expression⁶². However, the court recognized a limited right of access to information subject to personal privacy when affecting their well being. European court though recognized the right of information but taken it cautiously and in effect made it more complex to access the information.⁶³

On the other side the political bodies of the Council had taken some significant steps towards recognition of the right to information as fundamental human right. The committee of ministers⁶⁴ adopted a recommendation on access of information held by public authorities in 1981⁶⁵.

Furthermore, The 4th European Ministerial Conference on Mass Media Policy 1994 adopted a declaration recommending the committee to prepare a legally binding instrument ensuring right to access of public information held by public authorities⁶⁶ which later in 2002, the Council of Minister approved a recommendation on freedom of information (access of official documents along)⁶⁷. The Recommendations set out the detailed principles including the procedures, exemptions and appeals that

⁶² Global Trends on Right of Information: a Survey of South Asia.¹⁷ Available at <https://www.article19.org/data/files/pdfs/publications/south-asia-foi-survey.pdf> . last accessed on 10-02-2016

⁶³ Banisar , Freedom of Information Global Survey 2006, 12

⁶⁴ The political decision-making body of the council of Europe, composed of ministers of foreign affairs from each member state.

⁶⁵ Recommendation no.R(81)19 of Committee of Ministers to Member States on Access to Information held by Public Authorities.

⁶⁶ Declaration on Media in a Democratic Society, DH-MM (95) 4, 7-8 December 1994, para. 16.

⁶⁷Recommendation of Freedom of information, Available at http://www.right2info.org/resources/publications/instruments-and-standards/coe_rec_ati_en_2002. last accessed on 10-04-16

governments should take into consideration while drafting national laws on information.⁶⁸

2.3.5 The Commonwealth

An association of 54 countries, based on common historical, institutional and legal frameworks, has taken significant steps towards recognition of human rights and democracy during last decades. In 1991, it adopted Harare Commonwealth Declaration enshrining fundamental political values, including the individual's inalienable democratic right to participate in framing his or her society⁶⁹.

In March 1999 the Commonwealth Expert Group provided for principles and guidelines on the right to know and freedom of information which later in May 1999 were adopted by Commonwealth Law ministers at their meeting⁷⁰. The statement from the meeting was further considered by the committee of the Whole Commonwealth Functional Co-operation whose report was later approved by the Heads of Governments, stated: ⁷¹

The Committee took note of the Commonwealth Freedom of Information Principles endorsed by Commonwealth Law Ministers and forwarded to Heads of Government. It recognized the importance of public

⁶⁸ Recommendation Rec(2002)2 of the Committee of Ministers to member states on the Access to information held by Public Authorities. Trends on Right of Information: a Survey of South Asia. 19. Available at <https://www.article19.org/data/files/pdfs/publications/south-asia-foi-survey.pdf> last accessed on 10-02-2016

⁶⁹ Commonwealth Heads of Government Meeting, 20 October 1991, paras. 4 and 9. See also the Millbrook Commonwealth Action Program, Commonwealth Heads of Government Meeting, 12 November 1995.

⁷⁰ Communiqué issued by Meeting of Commonwealth Law Ministers. Port of Spain, Trinidad and Tobago 10th May 1999 , Para 21.

⁷¹ Communiqué, Commonwealth Functional Co-operation Report of the Committee of the Whole, Commonwealth Heads of Government Meeting, Durban, 15 November 1999, para. 20.

access to official information, both in promoting transparency and accountable governance and in encouraging the full participation of citizens in the democratic process.⁷²

The Commonwealth Secretariat issued, Model Bill on Freedom of Information in 2003 drafting the detailed procedure for Parliamentary systems in Canada, Australia and other member countries based on FOI laws. More than 12 Commonwealth states have adopted FOI Laws and some 20 member states have pending bill on FOI laws.⁷³

2.3.6 The African Union

In 2002, the African Commission on Human and People's Rights adopted a declaration of Principles on freedom of expression in Africa endorsing the right to access information held by public bodies as a basic right.⁷⁴

The African Charter on Human and Peoples Right ⁷⁵ through its article 9(1) provides "every individual shall have a right to receive information". The commission created under the Convention adopted the Declaration of Principles on Freedom of Expression in Africa in 2002 requiring the member states to recognize freedom of expression right.⁷⁶

In June 2003, the African Union Convention on Preventing and Combating Corruption was approved provided for access to information vide article 9 states:

⁷²Global Trends on Right of Information: a Survey of South Asia.¹³. Available at <https://www.article19.org/data/files/pdfs/publications/south-asia-foi-survey.pdf> . last accessed on 10-02-2016

⁷³ David Banisar, Freedom of information around the world²⁰⁰⁶, 16.

⁷⁴ <https://www.article19.org/resources.php/resource/3024/en/international-standards:-right-to-information>. Last Accessed 10-10-2015.

⁷⁵ African Charter on Human and Peoples Rights, Nairobi , Kenya, June 1981.

⁷⁶ Resolution on adoption of the Decalartion of Principles on freedom of Expression in Africa, African Commission on Human and Peoples' Rights , 32 nd Session 17-23 ,October 2002. Banjul, the Gambia. Declaration affirms the right to information in Africa.

Each State Party shall adopt such legislative and other measures to give effect to the right of access to any information that is required to assist in the fight against corruption and related offences.

Among 53 member states, 40 have signed the treaty and ratified by 15, went into effect in July 2006.⁷⁷

Southern African Development Community (SADC) Protocol Against Corruption and Arab Charter on Human Rights, though pending ratifications, are also important instruments towards the progress of RTI laws.

2.4 National or Global Standards/Efforts on FOI

Assuming the right to information as fundamental right leads towards its protection through some general or specific legal provisions in any state. Following the international approach Freedom of information is generally protected through freedom of expression and in some cases specific constitutional provisions or judicial interpretation in many countries around the world.⁷⁸ More than 80 countries constitutional provisions that provide for right to information and nearly 70 states have adopted national FOI legislations and efforts are pending in many others.⁷⁹

2.4.1 Constitutional Provisions and Judicial Interpretations

Right to know as fundamental right has become a common feature and number of such constitutional provisions is significantly increasing in recent years. Typically the right access deals with citizens right to access the information from Government bodies but the South African Constitution even goes beyond and information “that is held by

⁷⁷ Banisar , Freedom of Information around the world 2006, 13-14

⁷⁸ Mendel , “Freedom of information”.12

⁷⁹ Banisar , Freedom of information around the world. 2006. 10

another person and that is required for the exercise or protection of any rights". On the other side Habeas Data provisions in Latin American only gives access to personal information.⁸⁰ Latin Americans constitutions also highlighted an aspect of the right namely petition of *Habeas data*, the right to access information about oneself where necessary, to update or correct it, whether held by public or private bodies.⁸¹

Besides judicial practice many states have adopted it as constitutional guarantee as other human right. Starting from Sweden 1766 the Freedom of Press Act include comprehensive provisions on freedom of information till last few decades many countries have specifically included right to freedom of information in their constitutions. Pakistan and India (art. 19a), Philippines (art. III (7)), Poland (Art. 61), Hungary (art. 61(1)), Romania (art. 31), Thailand (section 58) are a few examples of these countries.⁸²

Judicial interpretations in most of the cases have held that freedom of information is protected by general guarantee of freedom of expression. For instance back in 1969, Supreme Court of Japan established that Principle of *Shiru Kenri* (the Right To Know) is protected by guarantees of freedom of Expression under article 21 of

⁸⁰ Ibid. 17.

⁸¹ Article 43, constitution of Argentina.

⁸² Toby Mendel .Freedom of information .13

the Constitution.⁸³ Similarly Indian Supreme Court in 1982 ruled that right to access is integral part of freedom of speech and expression under article 19 of the Constitution.⁸⁴

On the other side some states particularly United States, national courts are reluctant to include freedom of information in general guarantee of freedom of expression regarding information in government's control arguing that first amendment of the constitution providing for protection of the right to speech ,press assembly and petition does not mandate the right to access to the information held by government .⁸⁵ However international and most national practices regarding freedom of expression are positive, recognizing that state action is necessary, if required to ensure the protection in practice.⁸⁶

2.4.2 Freedom of Information Legislation

The Freedom of information or right to access laws has existed for more than 200 years but some are few years old. The FOI history can be traced back to Sweden since 1766. Another state having a long history of freedom of information laws besides Sweden is Colombia where 1888 Code of Political and Municipal Organization provides access to the document in government archive or held by government agencies to requesting

⁸³ Lawrence Repeta, "Local Government Disclosure Systems in Japan", National Bureau of Asian Research, Paper Number 16, (October 1999)3. Available at <http://unpan1.un.org/intradoc/groups/public/documents/APCITY/UNPAN026259.pdf> last accessed on 17-06-2016. See also Global Trends on Right of Information: a Survey of South Asia 25. Available at <https://www.article19.org/data/files/pdfs/publications/south-asia-foi-survey.pdf> last accessed on 10-02-2016

⁸⁴ S.P.Gupta VS president of India (1982)AIR (SC)149, p234. Supreme court of India 1982, Available at <http://www.right2info.org/cases/r2i-s.p.-gupta-v.-president-of-india>. last accessed on 12 - 06-2016 See also Global Trends on Right of Information: a Survey of South Asia p25. Available at <https://www.article19.org/data/files/pdfs/publications/south-asia-foi-survey.pdf> last accessed on 10-02-2016.

⁸⁵ Houchins vs KQED inc.438 US1, 1978, p15 available at <https://supreme.justia.com/cases/federal/us/438/1/case.html>. last accessed on 170-06-2016

⁸⁶ Toby Mendel p13

individual. USA passed its freedom of information laws in 1967 and followed by Australia⁸⁷, Canada⁸⁸, New Zealand in 1982⁸⁹.

Many other states in different region of globe have adopted legislation on freedom of information including Israel⁹⁰ , Hong Kong⁹¹ South Africa⁹² Peru⁹³ Albania⁹⁴ United Kingdom⁹⁵ and many others (list attached appendix). Furthermore a number of states in all regions of the world have prepared or are considering draft legislation. Therefore it can be concluded that there is a very fundamental inclination towards freedom of information legislation globally. ⁹⁶

2.4.3 Intergovernmental Organization

Parallel to national development the intergovernmental organization (IGOs) are also playing significant role towards the development of freedom of information right which initially operated in secret are now acknowledging that access to information is right not a privilege⁹⁷.

Since the adoption of Rio Declaration in 1992, many International financial institution including the World Bank⁹⁸ and regional financial institutions including the

⁸⁷ Freedom of Information Act 1982

⁸⁸ Access to Information Act ,Chapter A1

⁸⁹ Official Information Act 1982

⁹⁰ Freedom of information law, Law 5758-1998, May 1988

⁹¹ Code on Access to information March 1995

⁹² Promotion of Access to information Act Act no 2. 2000

⁹³ Law no 26301, 2 May 1994, Implementing the constitutional right to Hebeas data

⁹⁴ Law no 8503onthe right to information about official document,1999

⁹⁵ Freedom of Information Act 2000, chapter 36

⁹⁶ Mendel," freedom of information, Internationally Protected Human Right". 11-12

⁹⁷ Global Trends on Right of Information: a Survey of South Asia.30.

⁹⁸ The World Bank Policy on the Disclosure of Information , available at <http://siteresources.worldbank.org/OPSMANUAL/Resources/DisclosurePolicy.pdf> Last Accessed on 17-06-2016.

Asian Development Bank⁹⁹ the African development Bank Group¹⁰⁰ Inter American Development Bank¹⁰¹ and European Bank for Reconstruction and Development¹⁰² have adopted disclosure policies and are still updating. The United Nations Development Bank (UNDP) has also developed an Information Disclosure Policy¹⁰³.

Since early 90s these institutions started developing their access and information disclosure policies and till date making amendments to deal with the new challenges of the time and played a significant role towards the development of FOI laws around the world.

Conclusion

Human rights are not fixed or something static rather it is an ever-growing observable fact and as old as 200 years and still evolving. The access to information includes the citizen's right to truth imposing affirmative duty on states to ensure the safeguard against serious human rights violations and other traumatic social event affecting their life. Right to information traditionally includes the access to information held by public

⁹⁹ Public Communication policy, Asian Development Bank , <http://www.adb.org/site/disclosure/public-communications-policy> last accessed on 17-06-2016

¹⁰⁰ Disclosure and access of Information policy, African Development Bank Group. Available at <http://www.afdb.org/en/consultations/closed-consultations/afdb-group%E2%80%99s-policy-on-disclosure-and-access-to-information/>. Last Accessed on 17-06-2016.

¹⁰¹ Access to Information policy, Inter American Development Bank. Available at <http://www.iadb.org/en/office-of-evaluation-and-oversight/about-us-policies,6728.html> . Last Accessed on 17-06-2016.

¹⁰² Public information policy, European Bank for reconstruction and development, available at <http://www.ebrd.com/what-we-do/strategies-and-policies/public-information-policy.html>. Last Accessed on 17-06-2016.

¹⁰³Information Disclosure Policy, UNDP. Available at http://www.undp.org/content/undp/en/home/operations/transparency/information_disclosurepolicy.html . last accessed on 17-06-2016. See also Global Trends on Right of Information: a Survey of South Asia, 31. Available at <https://www.article19.org/data/files/pdfs/publications/south-asia-foi-survey.pdf>. Last Accessed on 10-02-2016

authorities when requested but now it goes further placing positive duty upon public authorities to publish and circulate the relevant information.

Referring to these international forums and instruments the significance of freedom of information can be understood that it is now widely accepted as either fundamental right itself or as an aspect of freedom of Expression. Furthermore the authoritative statements on the issue, policies and practices of national governments, international financial institutions and other IGOs demonstrate the importance of citizen's right to know and their participation towards the social betterment.

The remarkable growth in number of countries that have adopted FOI laws in last two decades surely indicates that FOI are now common around the world. No democratic state now deny the public rights to information as the rapid growth of FOI around the world is a dramatic global trend and most important democratic development of modern times indeed. It can also be anticipated that new laws will be adopted due to international pressure through treaties like UN Convention against Corruption and domestic demands for better public participation and accountability.

The development of FOI in context of international laws can significantly influence the global practice. States cannot deny the obligation of being open and fair towards each other in their relations inter se and the people as well. It can be concluded that as part of international community every state is now bound, even if not by some treaty but under customary international law, to develop FOI law in their national laws as well as in their external relations to achieve transparency of the systems and combat corrupt practices.

The FOI laws are important not only for human right protection but it can also be used as an important tool to fight corruption and promote good governance and transparency as discussed in detail in next chapters. Recognition as a human right is first step and so far, as discussed, this end is achieved to a reasonable extent but a lot of issues still need to be addressed specially in developing states like there are continuing problems in promoting the culture of openness and keeping record of information which is the primary target of the said freedom, implementation of weak laws and oversight issue obstruct the efforts in this regard. Even in Developed countries like US strong opposition to access also slow down the process. Similarly the misuse of exemption and state secrets is another dark side of the picture that needs special attention in this process of development of right.

Chapter 3

Development of Right to Information in the United States

Amongst the developed states United States is where FOI has matured as system where it has achieved its required aims of right to an attractive an standard and developed into a system that can be adopted by other states. The historical development of the right can be used as guideline or can lead other newly emerging democracies as how all social actors/ factors like people, politicians, journalists, educators, scientists, government and nongovernmental social organizations and media who in fact participated towards making it as tool for the people to assess the progress of their state within their own domain.

3.1 Introduction

America like many other parts of the globe can be divided in different lines depending on the social, geographical, historical and political feature. However, there are some unique common features that unite this part of the globe. Christianity as major cultural and religious social attribute and colonial history has made the dominance of three major European languages, English, Spanish and Portuguese reflected the unity in the region. Today the America is a land of poor and rich nations, and some most politically influential and controversial models and figures from north to south. The United States in 1966 became the third country, after Sweden and Finland, of the world and first in America to adopt Freedom of Information Laws. This was followed by

Canada in 1982 and then many other countries from Southern and Central America in the last few decades.¹⁰⁴

Besides civil society activist, journalist and academics the Organization of American States also played a supportive role in the development of RTI laws in the region. Eduardo Bertoni an OAS Rapportuer on freedom of Expression in 2004 issued a significant report on access to information which successfully pushed the agenda forward. MESICIC¹⁰⁵ an oversight body for inter-American Convention also contributed towards the movement significantly.¹⁰⁶

In Latin America, the first full access to information was Mexican law that adopted in June 2002. Mexico and its functioning RTI law following the United States model also served and helped inspired other countries in the region and globally. Recognition and implementation in last several years has been progressively extended. The movement for RTI was a shift away or a transition from authoritarian rule to democracy and a fight against corruption and can also be linked with “Right to truth” following the human right abuses in past.¹⁰⁷

¹⁰⁴ Gilbert Sendugwa et al., *Global right to Information Update, An analysis by region* (Freedom of information Advocates network July 2013), 25. Available at http://store.aipbg.org/documents/global_right_to_information_update.pdf. Last accessed on 02-02-2016.

¹⁰⁵ The Mechanism for Follow-Up on the Implementation of the Inter-American Convention against Corruption (MESICIC) is an inter-governmental body established within the framework of the OAS. It supports the States Parties in the implementation of the provisions of the Convention through a process of reciprocal evaluation, based on conditions of equality among the states. In this mechanism, recommendations are formulated with respect to those areas in which there are legal gaps or in which further progress is necessary.

¹⁰⁶ The questionnaire for oversight of implementation included questions on access to information and regular recommendation calling for the right to information were made

¹⁰⁷ Ibid.

Twenty countries in America have RTI laws¹⁰⁸ but practice or implementation varies among them and reason could be, among others, only eight have administrative body empowered to receive and decide on complaints and uphold the compliance with the law. There is an essential civil activism in Americas, weaker in some countries like Canada, Panama, Colombia and stronger in others like Mexico, Peru and United States still a few states even without RTI Law includes Bolivia, Costa Rica, Venezuela and Paraguay, and Argentina with a regulatory RTI decree but not a full law on RTI.¹⁰⁹

3.2 Political efforts towards the development of FOIA

US Freedom of Information Act (FOIA) in 1966 has a very interesting political background story when Lyndon B Johnson the then president very unwillingly with heavy heart signed the Act which lead to today's one of the most successful regime of RTI in the world. Quietly he signed while vacationing at his Texas ranch, the Act on 4th July 1966, not a public event which could draw attention to it, with deep reservations attached a statement¹¹⁰ intended to restrict the scope of bill.¹¹¹

¹⁰⁸ Namely Antigua and Barbuda, Belize Brazil, Canada, Chile Colombia, Dominican Republic, Ecuador, Elsalvador, Guatemala, Jamaica, Honduras, Mexico, Nicaragua, Panama, Peru, Saint Vincent and the Grenadines, Trinidad and Tobago Document, United States and Uruguay.

¹⁰⁹ Ibid., 28

¹¹⁰ The controversial statement includes "Draft language from Johnson's statement arguing that "democracy works best when the people know what their government is doing," was changed with a handwritten scrawl to read: "Democracy works best when the people have all the info that the security of the nation will permit." This sentence was eliminated entirely with the same handwritten markings: "Government officials should not be able to pull curtains of secrecy around decisions which can be revealed without injury to the public interest." Another scratched sentence on the document said the decisions, policies and mistakes of public officials "are always subjected to the scrutiny and judgment of the people. The controversial statement as believed by some was intended to undercut the measures purpose of forcing government to disclose records except in narrow cases and 2)at the same time there a doubt as it be the same as was written by himself or not."

The law was a major step towards the working of the government requiring federal agencies to provide access to government record or information when requested by the citizen in writing which still creates friction¹¹² between the government and citizens, journalists, corporations and researchers. ¹¹³

The National Security archive at George Washington University discovered 1966 papers in the Lyndon Baines Johnson Library and Museum in Austin. Thomas Blanton, the archives director pleaded his concerns on the document that the statement was edited by Johnson personally or directed his press secretary, Bill Moyers to make the changes, who later became a PBS journalist, recounted the Johnson's reluctance about signing the law.¹¹⁴

Almost 50 years ago, land mark legislation Freedom of Information came to existence. The back ground of the legislation shows very twisted situations at times towards the finalization of the Act including the government's resistance to outside scrutiny, and role of Donald Rumsfeld as leading co sponsor for the bill freedom of information, the then champion of FOIA, with John Moss, and Bill Moyers an opponent, at least for the time being. ¹¹⁵

¹¹¹ Thomas Blanton,ed.Freedom of information at 40 National Security Archive Electronic Briefing Book No. 194, available at <https://nsarchive2.gwu.edu/NSAEBB/NSAEBB194/index.htm>. see also http://nsarchive.gwu.edu/NSAEBB/NSAEBB194/Document_31.pdf. Last Accessed 10-10-2016

¹¹² Paul Mcmaster of the First Amendment Center, which studies issue of free speech, press, and religion, cited large backlogs of unresolved citizen requests for records and withholding documents by Bush Administration and considered that is the worst time for freedom of Information Act in many ways.

¹¹³ LBJ had Doubts about the Freedom of Information Act. TED BRIDIS, Associated Press, July 4 2006 available at <http://www.chron.com/news/nation-world/article/L>. Last Accessed 15-05-2016.

¹¹⁴ Ibid.

¹¹⁵ For details see http://nsarchive.gwu.edu/NSAEBB/NSAEBB194/Document_31.pdf. Last Accessed 15-05-2016. See also <https://nsarchive2.gwu.edu/NSAEBB/NSAEBB194/index.htm>

Mr John Moss, was the real hero behind the story of FOIA from California elected in 1952 ¹¹⁶, a democratic congress man, during the cold war ,the era when government secrecy was a norm. . In 1955 with lobbying by newspapers editors and supported by extensive press coverage Moss led the hearing that documented and denounce the excessive official secrecy but initially during Eisenhower tenure he could not find much support from republicans for his proposed openness reforms. Later During Kennedy and Johnson's administration with the support of Donald Rumsfeld he received better response.¹¹⁷

Initially not only President L B. Johnson, a Democrat, opposed the bill but in fact, every federal agency and department at the time opposed it. However, when the Senate passed the bill, it was anticipated that the idea of government transparency was going to win out in the end. In his final report Moss clarified the rules and exemption for government agencies and soon after the bill was passed by the House with a vote of 307-0.¹¹⁸

The finalized bill for the President's signature was the last scene of the tale the signing of Freedom of Information bill showing the presidents deep concerns over the law which was done privately unlike for other major bills on the 4th of July, 1966, In fact, the signing statement includes more about the need to keep secrets than the

¹¹⁶ Moss initiated advocating for open government following the president Eisenhower's administration dismissed many federal employees for being communists. When he asked to see the records linked with the firing, the administration refused to do so.

¹¹⁷ Freedom of Information Act. HISTORY. UNICEF. Available at <https://www.history.com/topics/1960s/freedom-of-information-act>. last accessed on 10-06-2019

¹¹⁸ History of FOIA.(USA). Available at <https://www.eff.org/issues/transparency/history-of-foia> Last Accessed 15-05-2016.

urgency of openness. Yet the last sentence of his signing statement is the one that defines the moment: "I sign this measure with a deep sense of pride that the United States is an open society."¹¹⁹

A year later, on July 4, 1967 FOIA went into effect. From that time the FOIA has been strengthened by a number of successive amendments, particularly starting in 1974 as a result of the Watergate scandal. The role of Mr Moss remained instrumental in the course of legislations like the Consumer Product Safety Act 1972 and Federal Privacy Act 1974.¹²⁰

Today the US government deals more than four million FOIA requests a year. In 1966 being the third country with FOI laws but today more than 60 countries enacted similar laws providing for open access to government information in 1966, the U.S. law was the third in world history, after Sweden and Finland.¹²¹

3.3 Legislative History of FOIA in USA

Today the long historical development of FOIA¹²² in USA demonstrates the maturity of the Act, a tool used by the citizens and journalists/ reporters for governmental

¹¹⁹Ibid

¹²⁰ Freedom of Information Act. HISTORY. UNICEF.

¹²¹ Thomas Blanton,ed.Freedom of information at 40 National Security Archive Electronic Briefing Book No. 194,(July 4th,2006) available at <http://nsarchive.gwu.edu/NSAEBB/NSAEBB194/Document 31.pdf>. Last Accessed 10-06-2016.

¹²² 5USC § 552

transparency. History shows that only empowered and vigilant citizens can protect the hard-earned information and transparency rights.¹²³

In United States, the access to public records in many states can be traced back for over a century. The court records and other legislative materials provided for open public access; in 1936, the Federal Register started publishing. Administrative Procedure Act, 1947 (hereinafter APA) was enacted in 1946 requiring the government bodies to publish information regarding their structure, powers and procedures under section 3. However, the APA allowed holding the information in respect of “any function [...] requiring secrecy in public interest.” and for internal management. The media groups and congress later in 1950s started advocating in favor of more comprehensive law.¹²⁴

The brief over view of legislative progress in US is given below:

3.3.1 Freedom of Information Act 1966

Following the long periods of hearing and unsuccessful bills finally in 1966 the first enactment of FOIA took place, despite the opposition from the President Johnson to the legislation. The Act went into effect in 1967. Prior to the legislation there were held long congressional hearing on the issue of need of disclosure law.¹²⁵ In 1982 during President Reagan’s term, issued an Executive Order 12356 tried to create the new rules for withholding the sensitive government information much easier as response to FOIA

¹²³ History of FOIA (USA). Available at <https://www.eff.org/issues/transparency/history-of-foia>. Last Accessed on 1st August,2016.

¹²⁴ David Banisar, *Freedom of Information Around the World; A Global survey of Access to Government information laws 2006*. Privacy International 2006. 158. Available at: http://www.freedominfo.org/documents/global_survey2006.pdf. Last Accessed 1st, August,2016.

¹²⁵ The National Security Archives. The George Washington University. Available at <http://nsarchive.gwu.edu/nsa/foialeghistory/legistfoia.htm>. Last Accessed on 1st, August,2016.

requests. Later many of such restrictions were reversed or relaxed when President Clinton released many of the classified documents for historical and archival purposes.¹²⁶

3.3.2 1974 Amendment

Though a huge step towards the openness of the government but in fact the Act lacked the force needed to compel the agencies to meet the terms of the Act. Until 1974, the Watergate scandal, Nixon's administration and bitter court battles the congress sought to amend the FOIA. After the detailed negotiations between Congress and Ford Administration broke down, the congress in the end amended the FOIA¹²⁷ overriding the veto by Gerald Ford.¹²⁸ It gave more power to the Act by strengthening the administration and the procedures of FOIA requiring the government agencies to publish the government held information and fee regulation for search and duplication of required documents. It empowered the courts to take disciplinary action or penalize in case of failure of government employees withheld the information deliberately.¹²⁹

¹²⁶ History of FOIA (USA). Available at <https://www.eff.org/issues/transparency/history-of-foia>. Last Accessed on 01-08-2016.

¹²⁷ The National Security Archives. The George Washington University..

¹²⁸ Donald Rumsfeld, (President Gerald Ford's chief of staff and an early supporter of original FOIA), along with Antonin Scalia (the head of the Justice Department's Office of Legal Counsel), pushed the president to veto the amendments that Ford finally agreed. Ford called the bill unconstitutional in his veto message, felt that national secrets were at risk, and considered the ten-day deadline was too troublesome. The House and Senate, however, overrode his veto.

¹²⁹Laura L. Stein and Lindita Camaj. Freedom of Information. DOI: 10.1093/acrefore/9780190228613.013.97. Oxford Research Encyclopedia of Communication online published. Feb 2018. 7

3.3.3 1976 Amendment

In 1976, the FOI Act was further amended as part of Government in Sunshine Act, to clarify the terms and exceptions.¹³⁰

3.3.4 1986 Amendment

In 1986, as small part of the bipartisan the Anti-Drug Abuse Act of 1986 the FOIA was amended mainly addressing the fee charged by the different categories of the requestor, and the scale of access to law enforcement and national security records.¹³¹

3.3.5 1996 Amendment

The Act was considerably amended with the Electronic Freedom of Information Act Amendment in 1996 during President Bill Clinton's regime. Separate bills of both Senate and the House were reconciled by their promoters. A "Finding and Purpose" section was included in the public law that was not codified into the text of FOIA.¹³² The President acknowledged in his signing statement that the new technologies would affect the transparency as the agencies were required to make formatted electronic documents available and digital distribution.¹³³

3.3.6 2002 amendment

The incident of 9/11 attacks in 2001 like many other laws FOIA was also amended. The government transparency witnessed number of restrictions. President George W. Bush issued Executive Order 13233 limiting the access to former presidential record and soon

¹³⁰ Exemption 3 of FOIA was amended.

¹³¹ Ibid.

¹³² The National Security Archives. The George Washington University.

¹³³ History of FOIA (USA). <https://www.eff.org/issues/transparency/history-of-foia>. Last Accessed on 1st ,August,2016.

after FOIA was amended to limit the capacity of foreign agents to request record through the Intelligence Authorization Act of 2002.¹³⁴

3.3.7 2007 amendment

FOIA was further amended in 2007 through the Open Government Act of 2007 of unanimously passed by both the House and the Senate in December. It was aimed to fix the most continual problems of FOIA systems like excessive delays, litigations and lack of responsiveness by the federal agencies. ¹³⁵.

The president Bush did sign the Open Government Act and the office of Government Information Services was also established to oversee the governmental compliance with FOIA and also extended services to journalists and bloggers from news media but Bush administration's compliance however was harshly criticized by open government groups and even considered as most secretive administration in the history of US by some critique. In 2009 the president Obama on the first day of office issued a memorandum to reform FOIA by streamlining the agency response, refusing to use many of the exemptions and also promised to lead "the most transparent administration in the history". Unfortunately, the Obama administration could not have achieved the goals stated in the January 2009 memo rather made the government more secretive in many ways even more than Bush administration.¹³⁶

Later in 2016 when 50 years passed when FOIA became law, FOIA Improved Act was signed by President Obama, containing some FOIA reforms. The reformed law

¹³⁴ Ibid.

¹³⁵The National Security Archives. The George Washington University.

¹³⁶ History of FOIA (USA) .available at <https://www.eff.org/issues/transparency/history-of-foia>.
Last Accessed on 1st, August, 2016.

included codifying the idea of “presumption of disclosure” by Obama administration that particularly limits agency discretion to hold back information under FOIA. But in fact the admiring language behind the idea of presumption of disclosure could not be translated into greater information disclosure rather government became more secretive during Obama administration.¹³⁷

3.4 The Working of FOIA in US

Until 2006 nearly 70 states had adopting Freedom of information according to a global survey. Most of the freedoms of laws have similar basic provisions reasons could be that laws adopted by few countries early on have been used by the other as models later. The US FOIA has been one of them and most influential of them. Among those are the states of two kinds depending on the applicability of the Act. First group of states include the information held by the government and private bodies and the other only applies to information held by government bodies only.¹³⁸

The government bodies include ministries or agencies that provide for health, environment, law enforcement, military, communications and transportation on the national level and their subsidiary bodies whereas the private bodies includes the statutory bodies that are not owned by state and working for the profits like companies, businesses, banks, corporations and firms that may or may not be performing public

¹³⁷ Ibid.

¹³⁸ Tran Kieu Hanh, “An Analysis on The US Freedom Of Information and Its Necessity in the Transparency of the US Government”, (Dissertation, Vitenam National University,2011) Available at <https://www.scribd.com/document/62694316/An-Analysis-on-the-Us-Freedom-of-Information-Act-and-Its-Necessity-in-the-Transparency-of-the-Us>. Last accessed on 1st, august 2016.

functions.¹³⁹ The FOIA 1966 has been amended several times as discussed earlier in this part, and recently after 2007 Open Government Act, the Obama government specifically focused on open government policies. ¹⁴⁰

The laws allows any citizen foreign national or organization to ask for information held by any governmental agencies including executive and military departments and corporations and other entities performing governmental functions, excluding the Congress, the Courts and president ¹⁴¹and staff , vice president at White House including the National Security Council. The state governments are also exempted from application of FOIA, rather every state has its own open-records laws.¹⁴² Under the law agencies are required to respond within 20 working days. Generally it is required from the agencies to make available some kinds of information to the public without any such request. There is no governmental assigned central location for handling FOIA requests but every agency deal or responds to the relevant requests. Unlimited Public access however is not granted under the law based on preservation of rights of American Citizens. Information can be denied due to sensitivity and privacy of the content. The law classified the nine-exemption including

- i) The National security,
- ii) Internal Agencies Rules

¹³⁹ Shannon E. Martin Freedom of Information Act United States Law (1966). Available at <https://www.britannica.com/topic/Freedom-of-Information-Act> . Last accessed on 10-08-, 2018.

¹⁴⁰ Tran Kieu Hanh, "An Analysis on The US Freedom Of Information and Its Necessity in the Transparency of the US Government.

¹⁴¹ "The Presidential Records Act of 1978, the public can access most presidential records through the FOIA five to twelve years after the commander-in-chief exits the White House."

¹⁴² Freedom of Information Act. HISTORY. UNICEF. Available at <https://www.history.com/topics/1960s/freedom-of-information-act> . Last accessed on 10-06-2019.

- iii) Information protected by other statutes
- iv) Business information
- v) Inter or Intra agencies memos
- vi) Personal privacy
- vii) Law enforcement records
- viii) Financial institution records
- ix) Oil wells data¹⁴³

The Act was intended to enhance government transparency, but not all information can be made accessible subject to the law. Nine exemptions were set forth that permitted federal agencies to hold back information in cases when doing so can be harmful to national security or other interest like those of personal privacy, law enforcement records, and confidential business information. Right to appeal or to file a laws suit is also provided in case of dissatisfaction of public by the response of any agency to any such request.¹⁴⁴ The federal government in June 2016 received 800,000 requests mainly handled by agencies including Homeland Security and Justice and defense department besides others.¹⁴⁵

The impact FOIA can be inferred from different notable examples of cases like when activists obtained information from Environmental Protection Agency regarding toxic substance discharge (dioxin) into river in 1980s, after Hurricane Katrina, careless government expenditure during the recovery efforts was also uncovered through FOIA

¹⁴³ Ibid.

¹⁴⁴ Freedom of Information Act. HISTORY. UNICEF.

¹⁴⁵ Ibid.

requests, in a recent case of 2016 a major American parmesan cheese supplier case was using wood pulp in its products was also result of FOIA request. ¹⁴⁶

3.5 The Model Inter American Law on information request RTI

On demand of member states OAS developed a model inter American Law on RTI as a guideline for the member states to develop and improve their own RTI laws , was an important regional development. It was developed by the group of experts on Access to information of the secretariat for the Legal affairs of the OAS, coordinated by Department of International Law. The guidelines are mainly based on the principles derived by Inter American Court of Human Rights(IACtHR) in the case of Claude Reyes vs Chile.¹⁴⁷

The debates on model law not only strengthen the legal standards in America but also enhance the capacity of local groups to monitor and assess their relative national laws as for instance the Peru and Dominican Republic RTI laws were reviewed as to add enforcement bodies and establish more efficient system of resource allocations. Further the law not only require public body to provide information but also made it obligatory to act proactively publishes information, protect personal data and create effective management system. Furthermore, it also highlights the importance of the political will of government employees in providing the information, enforcement

¹⁴⁶ Freedom of Information Act. HISTORY. UNICEF.

¹⁴⁷ 19th September 2006, Series C, No. 151. For details <https://www.right2info.org/cases/r2i-claude-reyes-et-al.-v-chile>

bodies, and specific exceptions, administrative and judicial resources to ensure the citizens to benefit from the RTI laws.¹⁴⁸

3.6 Impact of Civil Society Advocacy on RTI in US and America

The United States, amongst the oldest nation with RTI laws, the role and the influence of civil society groups towards the development of RTI laws has been indispensable. The historical events of letting the law through Congress and President L.B Johnson's signature, though not a fan of sharing information, are no secret, but were due to successful campaign by advocates of media freedom. Formative period of FOIA witnessed a strong support from number of civil society groups also known as public interest groups, started to advocate for its proper and full implementation specially through aggressive litigation. The Public Citizen Litigation Group, an organization of young attorneys along with Consumer activists Ralph Nader, was amongst the main advocates. These early litigation successes together with the "public interest and public support" and specially the Watergate scandal led to the major development of many later pro disclosure laws in US to strengthen the RTI.¹⁴⁹

The bold action by civil societies groups advocating the FOIA and United States administration, pressurizing the greater and timely disclosure in a tug and pull with government bodies that mostly resisted disclosure, failing to comply with the law's timeframes. The range of FOIA advocating groups expanded to include litigation advocates, media groups and organizations, government watch dogs, environmental

¹⁴⁸ Global right to Information Update, An analysis by region by Freedom of information advocates Network. (FOIANet) July 2013. Available at https://www.access-info.org/wp-content/uploads/global_right_to_information_update_28-8-2013.pdf. last accessed on 25.09.2015

¹⁴⁹ Ibid.25

groups and others. The challenges and opportunities for FOIA civil society advocates vary as the change in the governments but at no point the issue faced the most challenging for government than aftermaths of the September 2001 terrorist attack in USA called as 9/11.¹⁵⁰

Following the “Ashcroft Memorendum”¹⁵¹ and the Department of Justice, the post 9/11 the federal agencies were required to view the disclosure of information through the new lens and employ the exception to the greater effect. After 9/11 the many federal agencies reduced the posting the amount and types of information which they regularly posted on their website and increase the safe guarding labels were planned and used by many federal agencies like “sensitive and unclassified information” and later “controlled and unclassified information” creating a whole new sphere of pseudo secrecy. This led to another episode of public chaos or perception of excessive governmental secrecy. Many civil society organizations and groups like American Civil Liberties Union, the Project on Government Oversight, and the National Security archive and many civil society organizations successfully advocated against what was seen as overreaction to new security threats, by publicly challenging undue secrecy by the governmental authorities. success stories include the land mark court decisions as well as the ultimately the concession by Bush administration issued an exceptional

¹⁵⁰ Ibid.

¹⁵¹ New Attorney General FOIA Memorandum issued. Available at <https://www.justice.gov/archive/oip/foiapost/2001foiapost19.htm>. Last Accessed on 01-07-2016. See also <http://nsarchive.gwu.edu/NSAEBB/NSAEBB84/Ashcroft%20Memorandum.pdf>. Last accessed on 01-07-2016.

executive order on FOIA backlog reduction to effect delays in responding to the citizen's requests.¹⁵²

The Obama administration in early 2009 especially after Obama's "day one" pronouncement of having "the most open administration in American history" gave civil societies idea to celebrate and believe that they had a friend of open government in the White House. Exceptions were high initially but after many years with mixed results, advocates of government openness in US are no longer rejoicing, though they are as active as before looking to what will come next.¹⁵³

The role of Civil Society Organizations (CSO) in different capacities played a very crucial role towards the development of FOIA in US at every stage of evolution. The strategies adopted by CSOs varied according to the situation and need of areas and have included the parliamentary advocacy as in case of El Salvador, technical assistance and sharing expertise in countries such as Argentina, Mexico Chile, and Guatemala. Campaigns to amend and approve the laws as in case of Colombia and Paraguay. Similarly, in past Coalition building strategy among civil society groups used in Nicaragua, Guatemala and Colombia in 2006,2007 and 2010 respectively. Civil Society groups are also actively working in Ecuador, Peru and Dominican Republic to promote legal reforms. Campaign for RTI reforms in Canada is also but assessed as being weak. In Argentina, various campaigns are being conducted for the adoption of a national law. Due to the difficulty faced by civil CSOs in several countries to get RTI adopted led the civil society groups to adopt the strategy of working together across the region through

¹⁵² Gilbert Sendugwa et al, Global right to Information Update, An analysis by region (The Freedom of Information Advocates Network. July 2013) Available at: http://store.aip-bg.org/documents/global_right_to_information_update.pdf Last accessed 15-10-2016

¹⁵³ Ibid.

regional networks, Alianza Regional, in order to generate the greater pressure for reforms.¹⁵⁴

The RTI progress in Mexico is very important in context of American specifically US RTI regime. Having a federal law and 32 sub national laws besides the constitutional recognition, diverse and active transparency community working in the state. Members of civil society, academia and media played a crucial role in promoting RTI and also helped in articulating in federal, local and constitutional reforms since 2007. CSOs in Mexico are constantly working towards the better legal framework and institutional arrangements and to ensure the proper implementation of transparency laws through exercise of RTI at federal and local levels. Different networks are used to promote and defend RTI by advocacy and awareness campaigns by CSOs.¹⁵⁵

Conclusion

RTI in US has been recognized progressively on national as well as state level in some federal countries. Its recognition and implementation has been increased greatly in last two decades. The movement of RTI was stimulation for the transition from secrecy to openness in the context not only to fight corruption but also the human rights abuses in last few decades. Keeping in view the history of the struggle in social and political context for FOIA, the setback and the advancement in RTI in US show the importance that RTI as powerful tool to be used by the citizens and other stake holders to oversee

¹⁵⁴ Ibid.

¹⁵⁵ México Infórmate, is a network of activists and journalists with representation in the nation's capital and 22 states. Each year they make the most of Right to Know Day with a week of activities throughout the country, including around 25 local events and workshops around the country and a Transparency Fair (Feria de la Transparency) organized with other local groups. The occasion is used as an opportunity for the organization to present key findings and concerns of the network to the government and the public"

the governmental activities towards accountability. Apart from political history towards formulation of FOIA, a very significant impact can be seen from different examples where FOIA used for transparency and accountability. In many cases misconduct by government departments and waste has been uncovered and threats to safety and health has been exposed. From the very beginning the FOIA in US, the act remained contentious and has been weathered by advocates of transparency as well as by the politicians.¹⁵⁶

RTI laws in United States are focused on both aspects of law, firstly enacting and improving existing laws, as number of laws and relevant provisions have been enacted and amended through various executive and classified legislative acts and secondly promoting the better implementation of them to meet the ends, that experimentation lead to maturity of FOIA regime in US and which can also be taken as legal guidance for others. Another side of RTI activities is strongly working for the countries that do not have a law yet and to ensure these countries and progress the enactment and implementation of these laws in accordance with the standard set by Model American Law on Access to information. Strong regional networks and relationship playing a key role towards better RTI regime in the region. CSOs are exploring for new opportunities to work together to facilitate local works to create greater positive impact on RTI.

Though amongst the most developed legal regime still need a constant check and updating. It is an evolving phenomenon which needs some adjustments in accordance with every new social and legal change. A change in Government is also a change in

¹⁵⁶ <http://www.newspaperlinks.com/public-records/what-is-the-freedom-of-information-act-foia-and-why-is-it-important/>

polices which needs a compatible relation of these two as in case of US. For instance during Obama's regime 2012 though specifically announced by the government but in as test 19 out of 20 agencies failed to respond to the FOI based requests by Bloomberg News though required by law. This can be concluded as citizens must continue to demand and hold the responsible accountable when they do not deliver.

The strong and comprehensive legal framework based on Model Inter American RTI can be used as guidelines not only in US and America but also the other states of the globe. Pakistan is a federal state where RTI is at its infancy stage can also take guidance from the experienced states. The case study of Mexico and other states can also be used as considered to the one of the best in the world as being the extract of the long-standing experimentation.

Chapter 4

Development of right to Information in the United Kingdom

The United Kingdom, Freedom of information regime presents a very interesting conundrum as having a very vibrant media on one side whereby a great emphases is on freedom of expression and the government, on the other side obsessed with secrecy¹⁵⁷ at least recently, the FOIA was passed until November 2000 long after many established democratic states have already adopted such laws. The United Kingdom FOIA incorporated some very fine process guarantees, along with a number of modern promotional procedures. Nevertheless at the same stage, it is gravely diluted by the very wide set of exceptions. ¹⁵⁸

UK followed the same line while enacting the FOIA in policy and strategic issues US government faced. The social and political attitudes and approaches were not much different as those of USA in their own context. The FOIA in UK are relatively recent and easily traceable and besides an interesting back ground story to tell how the legislation reached the destination.¹⁵⁹

¹⁵⁷ Benjamin Worthy and Robert Hazell. Draft from Worthy, B., & Hazell, R. (2013). 'The Impact of the Freedom of Information Act in the UK' in Nigel Bowles, James T Hamilton, David Levy (eds) Transparency in Politics and the Media: Accountability and Open Government, London: L.B. Tauris, 31-45 The Impact of the Freedom of Information Act in the UK. 9-10

¹⁵⁸ Toby Mendel. Freedom of information ,a comparative legal survey .91 .UNESCO 2003

See Mendel, Toby (1999):, "Freedom of Information as an Internationally Protected Human Right",1-5. Available at <https://www.article19.org/data/files/pdfs/publications/foi-as-an-international-right.pdf>, last accessed on 28-07- 2015

¹⁵⁹ Freedom of Information: History, Experience and Records And information management implication in the USA , Canada and United Kingdom. The Constitution Unit, Department of Political Science/ School of Public Policy. University College London UK. October 2006. ARMA International Education Foundation. available at <http://www.global-dcc.com/documents/FreedomofInformationinUSUKandCanada-FINA.pdf>. last accessed on 28-06- 2015

4.1 Introduction

Federal FOI laws can vary subject to where they are executed or practiced. Among the developed states like United Kingdom, United States and Canada, the federal FOI legislations were enacted at three different periods of FOI's evolution, yet common challenges and issues were faced by the governments regarding their respective laws. The Freedom of Information Act (FOIA) that originally passed in 1966 in US and has been amended four times has given 40 years of experience the rest of the world to sketch when writing and implementing their FOI laws. Access to Information Act (ATIA) in Canada, passed in 1982, can be acclaimed for a cautiously structured act that has included most of the key points essential for good FOI law. The FOI Act 2000 in UK, subjecting around 100,000 U.K. public authorities, is one amongst the most recently passed law, having been enforced in 2005.¹⁶⁰

The analysis of FOI regime before Freedom of Information (FOI) 2000 in UK reveals that successive governments initiated consecutive efforts for openness from 1960s onwards at two different levels. Firstly at central level started the debate for reform the Official Secret Acts of 1911 which lead to transformation of discussion to the access to information. Secondly at local level more efficient and consistent efforts with noteworthy statutory or access laws passed every decade between 1960 till 2000.

Information legislation though a strong representation, is rarely a policy which attracts the vote or electoral interest and reliance on lobbying, media pressure and other focusing events helped politicians from time to time to be pressured into action. Like

¹⁶⁰ Sarah Holsen. 'Freedom of Information in the U.K, U.S and Canada". *The Information Management Journal* May/June (2007):50.

many other FOI regimes the media played a vital role. During 1960 to 1970s by exposing the secrecy in local government systems and in voluntarily highlighting the scandals, the media kept the openness on the political agenda. Later since 1980s, media along with the network of NGOs remained a key defender, promoter and leading user of FOI in UK.¹⁶¹

Some of major events during the developmental stages of FOI in UK are briefly given below;

- 1960 Local Government (Access to Meetings) Act
- 1969/70 White Paper Information and the Public Interest Labour and Conservatives commit to reform of Official Secrets, Aitken Trial
- 1974 Labour enters power with manifesto pledge to pass FOI
- 1977-78 Croham Directive introduced and controversial ABC trial takes place.
- 1979 Government White Paper Clement Freud's FOI Private Members' Bill.
- 1984 Data Protection Act 1985 Local government Act
- 1994 John Major's Code of Access
- 1996 Tony Blair commits to an FOI Act
- 1997 Your Right to Know White Paper
- 2000 Freedom of Information Act receives Royal Assent-comes into force 1 Jan 2005¹⁶²

¹⁶¹ Ben Worthy, The Development of FOI in Britain. Birkbeck College, University of London, Draft Chapter for Felle, T. and Mair, J. (2014) FOI 10 years on: freedom fighting or lazy journalism? London: Abramis UK. 1-5. Available at www.SSRN-id2593511.pdf. Last accessed on 02-10-2016

¹⁶² ibid

4.2 Background

The ratification and effect took 5 years, slowest among the states; FOIA was finally enforced in 2005. Tony Blair as leader of Labor Party was elected in 1997 having the agenda among others to pass freedom of information legislation. Before that there had been tenure of conservative administration since 1970s under Margaret Thatcher and John Major. The Conservative administration till early 1990s showed reluctance to enact a full fledged law on freedom of information rather as an alternative for FOIA, operated through a non statutory Code on Open Government. There were two versions of the Code first was made effective in 1994 and revised edition was made effective 1997¹⁶³ which later was superseded by FOIA, 2000 effective on 1st January 2005. Though the code was a non binding and simple but in the hindsight worked effectively as shown by Cabinet Office monitoring data substantial increase in release of information as an outcome of the Code.

In the Early period of Labor administration the Freedom of Information regime developed quickly in UK.¹⁶⁴ The White Paper, "Your Right to know-The Government's proposal for a Freedom of Information Act" was published by the Labor government in December 1997, setting out government's stance on access to government

¹⁶³ The Code of Practice on Access To Government Information, second Edition 1997. Available at <https://www.gov.im/media/622055/codeofpractice.pdf>. last accessed on 15-13-2017.

¹⁶⁴ Jeremy Hayes. A Shock To the System: Journalism, Government and the Freedom of Information Act 2000. Working paper. May 2009. Reuter institute for the study of journalism, university of Oxford. 5. Available at <https://reutersinstitute.politics.ox.ac.uk/sites/default/files/2017-11/A%20Shock%20to%20the%20System.pdf>. Last accessed on 15- 12- 2017.

information.¹⁶⁵ The Proposal was widely welcomed as a forward looking document with a promise of public consultation on it (in preface from Prime Minister)¹⁶⁶.

In its foreword the Cabinet Minister Dr David Clark (Chancellor of Duchy of Lancaster) remarked:

Openness is a fundamental to political health of a modern state.....There are matters such as national security or personal privacy, where information has to be protected. Government itself needs some protection for its internal deliberations. This white paper strikes a proper balance between extending people's access to official information and preserving confidentiality where disclosure would be against public interest. It is a new balance with scales now weighted decisively in favor of openness

The draft legislation was published in 1999, which was a substantial shift from the balance from openness to government's adherence to secrecy by the extensive regime of exemptions undermining the purpose of the Act¹⁶⁷. The chairman of the campaign of freedom of information James Cornford mentioned to the select committee on Public Administration that in June 1999.¹⁶⁸

We are pleased that there is going to be a Freedom of Information Act...We have to say that we are deeply disappointed in the substance of the Bill. It represents a very substantial retreat from the Government's

¹⁶⁵The Full text of White Paper is available @https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/272048/3818.pdf
Last accessed on 25-01-2015

¹⁶⁶ ibid

¹⁶⁷ Freedom of Information: History, Experience and Records And information management implication in the USA , Canada and United Kingdom. 21

¹⁶⁸ Minutes of Evidence for Tuesday 22 June 1999 Freedom of Information Draft Bill: Rt Hon Jack Straw MP, Mr Timothy Middleton; Mr James Cornford and Mr Maurice Frankel. HC 570-i. (1998-1999) <http://www.publications.parliament.uk/pa/cm199899/cmselect/cmpubadm/cmpubadm.htm>. Last accessed on 10-12-2017

White Paper which was published only 17 months ago with the backing of the whole Cabinet and a preface from the Prime Minister. As you know, the White Paper was very warmly received, both domestically and internationally. The Information Commissioner who supervises Canada's FOI Act...said that this proposal in the White Paper "left Canada trailing in the dust". While the White Paper has been seen as a yardstick for best practice, the draft Bill is already being cited in the opposite context.

The Bill proved to be a different version of the proposed white paper firstly the change in number exemption starting from seven and landed on twenty four in the final draft. Secondly the proposed "substantial harm test" for withholding information which the draft bill (and the act)had only a simple harm test by which at lower level power to withhold information can be invoked and fact was admitted by Jack straw to the same select committee 1999 ¹⁶⁹.

The interim story reflects the reasons as one of the major instances was the David Clark, the minister responsible for white paper was removed from his position who was strong supporter of FOI legislation. Secondly his responsibilities were transferred to Home Office under Jack Straw who was known for having little sympathy for FOI. Since clear evidence could not be disclosed as the cabinet discussions were exempted under the new FOI regime. The general view is that a possible open access regime instills nervousness at the top levels of the government which lead to the leaders to retrench. The Act was passed in 2000 but made effected in 2005 January.¹⁷⁰

¹⁶⁹ Freedom of Information: History, Experience and Records and information management implication in the USA, Canada and United Kingdom. 21

¹⁷⁰ Ibid

Besides other issues the implementation of fees was another major alarm towards the delayed FOI regime as the fee to be charged or not. Some suggestions lead to a wish to load fee in order to make it difficult to cost barrier that would hold back access for the average citizen however this did not happen. Even after implementation there has been further reviews on fee structure with continue fear that it might be revised as to introduce some upsetting additional costs.¹⁷¹

The Campaign for freedom of Information in July 2006 in a press release¹⁷² on New Information charging rule would “reverse openness trend” and that stated

According to reports of a leaked cabinet document, authorities would be allowed to take into account the time officials spend considering whether to release information as well as the time they spend looking for it. This means that the cost limit would be reached more quickly and more requests would be refused on cost grounds - even if the information itself was not exempt.

Maurice Frankel, the campaign director was also reported to have said in a press release that;¹⁷³

These proposals would make it harder for requesters to ask penetrating questions and easier for authorities to avoid scrutiny. As the Act begins to bite we have finally begun to see some weakening of the traditional obstacles to openness. The last thing we need is to reverse this process by giving authorities better armor to defend themselves against

¹⁷¹ ibid

¹⁷²New Information charging Rule would “reverse the openness Trend “The Campaign for Freedom of Information, press release 31stJuly 2006.Available at <https://www.cfoi.org.uk/foi310706pr.html>. last accessed on 10-07-2015

¹⁷³Cracknell ,D Governments U turn on free information “. The Sunday Times July 30, 2006. Available at <http://www.timesonline.co.uk/article/0,,2087-2291779,00.html>. Last accessed on 25-06-2015.

requests. Instead of making it easier to refuse requests, government should be encouraging authorities to become more open by publishing more information without being asked, handling requests more expertly and organizing their records more efficiently.

It was further reported referring to a leaked document in Sunday Times press release that about 17% of requests that are processed could be refused on account of cost in future and about 800 requests were refused on same basis in 2005 according to official statistics. FOI campaign had concerns that if new proposal had been imposed it might increase by more than three times.¹⁷⁴

The FOIA passed after a long journey whether good or bad but illustrated that government officials can be placed under pressure when given way to extra scrutiny through free flow of information.¹⁷⁵

4.3 Over view of Working of FOIA in UK

United Kingdom freedom of information Act was adopted in November 2000 but came into effect in January 2005 giving right to any individual a right to access to the information held by more than 100,000 public bodies. In response public bodies are given 20 working days to respond to any such request by the any concerned person. This time frame is extendable depending on the public interest test ground till the time period that deemed “reasonable in the circumstances “of the case. Fees are also

¹⁷⁴ Ibid.

¹⁷⁵ Freedom of Information: History, Experience and Records and information management implication in the USA, Canada and United Kingdom. 21

exempted if in case the request cost less than 600GBP for central government and 450 for local authorities except for postage and copying.¹⁷⁶

The Act provides for three categories of exceptions.

- i) Firstly absolute exemption which gives exemption to the courts records and information about personal life of an individual or information related to security services , where disclosure cause a breach of confidence or protected under any other law cannot be disclosed.
- ii) Secondly qualified class exemption gives exclusion to the cases if they need to be determined to be within a broad class of exempted information, can be related to safeguarding national security, royal communication, Government policy formulation, any legal privilege, public safety, or received in confidence from a foreign government. In such cases a " Public -interest test "is a yard stick to decide if the information can be withheld only when the public interest outweigh the public interest in disclosure.
- iii) Thirdly a more limited exemption where the government body to withhold the information has to show the prejudice to specific interests including the information relating to the defense, economy , foreign relations crime prevention, commercial interests. The public interest test also applies to this category of exemption.¹⁷⁷

¹⁷⁶ David Banisar, Freedom of Information around the World. Global Survey of Access to Government Information Laws, 2006 Privacy International. 154

¹⁷⁷ Ibid.,155

4.3.1. Information Commissioner.

The procedure in case of withholding of any information is initial appeals are made to the authority and if that is completed, an external review to the information commissioner is obtainable. To oversee and enforcement of the Act is the responsibility of information commissioners' office who is authorized to receive complaints and give binding decisions and can issue guidance for many of the exemptions and practices.¹⁷⁸

4.3.2. Information Tribunal

Commissioner's decision can be appealed to Information Tribunal and appeal from information tribunal on points of law lies to High Court of Justice. Information based on public interest test if released by the order of Commissioner, the ministerial certificate can overrule the decision. In 2004 it was announced by the government that it would be collective decision of cabinet and will be declared in parliament and subject to judicial review.

The public authorities are mandated to publish the information about their structure and activities. Some of the categories are required to be relapsed automatically. Many organizations have adopted publication scheme with approval of the Commissioner.¹⁷⁹

¹⁷⁸The commissioner received 2385 complaints and issued 135 decision notices till 2005 as reported in David Banisar, Freedom of Information around the World. Global Survey of Access to Government Information Laws, 2006, Privacy International. 155

¹⁷⁹Ibid

4.3.3 Department of Constitutional Affair

The Department of Constitutional Affairs (DCA) previously the Lord Chancellor's Department) is responsible for implementing and monitoring the Act for central government .DCA also provides advice or guidance to the public authorities, and submit its annual report to the Parliament on implementation.

The FOIA has overriding effect over the other laws in case of contradictions/inconsistency or to restrict the release of required information by any other statutory instrument. DCA in 2005 review pointed out 210 such conflicting provisions limiting the disclosure of information. Out of which 27 could not be eliminated either as part of international obligation or were adopted after FOIA law. Rests were under review or had been repealed.¹⁸⁰

The implementation of the Act was very slow, adopted in 2000 but right to demand the information from public bodies did not enforced till 2005 almost 5 years which was slowest of any country in the world. According to 2006 survey, the initial problem with implementation of the Act was the delay in responses by the authorities and Information Commission which significantly affected the purpose of the Act. No fixed time limits were provided for the decision of the bodies and Information commission and commission also declined to fix deadlines. Furthermore the users also reported the issue of too much use of exemption by the public bodies. Another reported controversy which also raised reservations was increased number of files were

¹⁸⁰ Ibid., 156

4.4.3 Environmental Information Regulation 2004

The Aarhus Convention ¹⁸⁷ was signed by UK in 1998 and ratified in February 2005. The Environmental Information Regulation 2004 replacing the 1992s the providing more access to information than FOIA, is a step towards the implementation of Aarhus convention and EU Directives 2004 /4/EC on public access to environmental information. ¹⁸⁸

4.4.4 The Data Protection Act 1998

The Act provides individual to access and correct personal information in files held by Government authorities. Appeals can be made to information commission or the courts. The FOIA even broadened the scope of right to access the non electronic records. ¹⁸⁹

4.4.5 Freedom of Information (Scotland) Act 2002

The Scottish parliament adopted the Act in May 2002 and came into effect In January 2005. It has comparatively more effective public interest test criterion and also restricted the ministers' right to veto commissioners' decision. It provided for separate information commissioner. Under the Act appeals are to Session courts from commissioner's decision. Scotland also approved the environmental. ¹⁹⁰

¹⁸⁷ Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters also known as Aarhus convention, was adopted on 25 June 1998 in the Danish city of Aarhus (Århus), as part of the "Environment for Europe" process

¹⁸⁸ David Banisar. Freedom of information Around the world 2006. 157. See also Banisar, Freedom of Information Around the World 2006: A Global Survey of Access to Government Information Laws (September 20, 2006). Privacy International, 2006, Available at SSRN: <https://ssrn.com/abstract=1707336> or <http://dx.doi.org/10.2139/ssrn.1707336>

¹⁸⁹ Ibid. 158

¹⁹⁰ Ibid

4.4.6 The Local Government (Access to Information) Act ¹⁹¹

Another relevant legislation in the context of RTI regime in UK is the Local Government (Access to information) Act which granted right to access the local body meetings record and disclosing the “background Papers” on the policies and practices of local authorities. An amendment order of the act was adopted to bring the exemption in accordance with the FOIA in January 2006 and affected in March 2006.¹⁹²

The FOIA in UK is relatively a recent development amongst the western world. UK like most of the states around the globe FOI also faced political resistance and still evolving.

Ben Worthy classified the generally accepted objective of FOI in two categories with reference to the progress in UK and its impact on FOI user and public in general.¹⁹³ The core or the primary objectives and the secondary which flows from primary objective, that includes;¹⁹⁴

- i) Increased transparency and openness
- ii) Accountability
- iii) Improved government decision making
- iv) Better public understanding of decision making
- v) More public participation

¹⁹¹ Local Government (Access to Information) Act 1985 available at <http://www.legislation.gov.uk/ukpga/1985/43>.

¹⁹² Ibid.

¹⁹³ Ben Worthy. More Open but Not More Trusted? The Effect of the Freedom of Information Act 2000 on the United Kingdom Central Government. Constitution Unit, School of Public Policy, University College London Governance: An International Journal of Policy, Administration, and Institutions, Vol. 23, No. 4, October 2010 (pp. 561-582) available at http://www.accountabilityindia.in/sites/default/files/ben_worthy_more_open_but_not_more_trusted.pdf

¹⁹⁴ Ibid. 564

vi) Increased public trust.

The primary objective of transparency and accountability has been met in general in relevant circumstances in United Kingdom. Yet the dense network of restrictive rules and traditional attitude proved to be a significant barrier resulting in respect of secondary aims because of resistance and uneven levels of openness. Nonetheless FOIA lead to transparency and accountability in correct circumstance brought the changed by questioning and answering based on information. The international growing trend of access to information along with information and communication technologies (ICTs) have made the change in rules and attitudes towards openness and paved for better implementation of objectives of FOI.¹⁹⁵

Conclusion

The access to information laws in UK is comparatively a recent development which has changed the earlier governing system of secrecy. The culture of secrecy was prevalent but after adoption of FOIA in 2005, a breakthrough took place towards openness of the government. Having a vibrant media and freedom of expression on one side and long history of colonial system of secrecy presenting a conflicting picture.

Amongst the developed western world UK is no exception which had to face resistance in respect of development of FOI regime. Governments are reluctant to enforce such legislations that held them accountable for their policies and activities. FOIs are most commonly used to achieve the transparency in any system. The analysis of first decade presents a mixed picture of success and at times deficiencies in the law.

¹⁹⁵ Ibid 577

The required institutions are in places and have started working in their areas. The users of FOI are increasing with time and it can be hoped that in next few years situation will improve further.

Chapter 5

Right to Information in India

Freedom of Information in India has played a gradual but significant role towards the improved governance and public accountability besides the major political resistance. Pakistan having a common history with India, her legal and political development can be the closest possible examples for better implementation of RTI in Pakistan.

5.1 Introduction

The Right to Information Act 2005 was approved by the Indian Parliament Lok Sabha on 11th May 2005 and Rajya Sabha on 12th May and assent from the President of India was received on 15th June 2005.¹⁹⁶ Some of preliminary clauses went into effect immediately, but the whole Act came into force in October 2005. The Act substitutes the Freedom of Information Act, 2002 adopted in January 2003 but never came into force.¹⁹⁷ India's Right to Information Act (RTIA), is among dozens of national laws recently adopted that are similar to the United States' Freedom of Information Act.¹⁹⁸

¹⁹⁶ Analyzing the Right to information Act in India. Briefing Paper, (Cuts International 2010) 1. Available at [http://www.cutsinternational.org/cart/pdf/Analysing the Right to Information Act in India.pdf](http://www.cutsinternational.org/cart/pdf/Analysing%20the%20Right%20to%20Information%20Act%20in%20India.pdf). Last Accessed on -02-05-2015.

See also Right to Information Act, No. 22 of 2005. Available at http://www.ilo.org/dyn/natlex/natlex4.detail?p_lang=en&p_isn=71891&p_country=IND&p_count=510 last accessed on 30-07-2016.

¹⁹⁷ Freedom of Information Act 2002, Act No. 5 of 2003, 6 January 2003.

David Banisar, Freedom of information Around the world; A Global survey of Access to Government information laws 2006. Privacy International 2006. 84. Available at: http://www.freedominfo.org/documents/global_survey2006.pdf. Last Accessed 10-05-2016

¹⁹⁸ Alasdair Roberts, "A great and Revolutionary Law? The First Four Years of India's Right to information Act", *Public Administration Review* 70:6 (2010). Available at www.ssrn.com. Last Accessed 10-05-2016

Among the 93 countries, adopted FOI laws, four are from south Asia and India's FOIA is one considered to be one of the best. Bangladesh, Nepal and Pakistan are the those who have adopted FOI regimes recently. Indian Parliament adopted RTI Information Act in 2005. Efforts continue towards the adoption of these laws in other parts of the region.¹⁹⁹

5.2 Socio-political history of India

The right to information in India developed alongside the history of the country's independence and still processing towards better formation by both the people and government at different stages. India is a country with vast cultural, lingual and custom diversities and is one of the most populated countries. The overwhelming problems of low literacy, high birth, social and economic tensions, poor record of civil rights, gender discrimination and political instability (frequent election and government with small majority) can be seen. Despite these issues India has a dynamic constitution, a strong democracy and numerous civil society groups working on variety of the issue including health, education and other civil and political rights.²⁰⁰

Like many Commonwealth countries India has a colonial past and most of the legal framework adopted is from that period. After Independence in 1947 the first constitution was adopted setting up a federal parliamentary democracy with universal

¹⁹⁹ Ananya Raihan and Syeed Ahamed,ed. Challenges of Right of information in South Asia. Protifolon.IID, Policy Brief, Institute of Informatics and Development. (February 2012) ,5. Available at https://assets.publishing.service.gov.uk/media/57a08a5f40fob6497400057a/Protifolon_5.pdf. Last Accessed on 15-06-2016.

²⁰⁰ Global trends on the right to information: a global survey of South Asia Article 19, CHRI, CPA, HRCP. July 2001,53. Available at <https://www.article19.org/data/files/pdfs/publications/south-asia-foi-survey.pdf>. Last Accessed on 10-05-2016

adult franchise. The Bill of Rights²⁰¹, preserved in the constitution has been instrumental to in human rights protection. India has bicameral federal legislature and unicameral state legislature. Another tier in form of local government is also added later including the village level local bodies known as Gram *Panchayats*, directly elected by the local people and vested with wide powers over development funds and revenue collection and generation lately.²⁰²

The civil administration follows the same lines as those of colonial period, a set-up of centrally controlled strong bureaucracies supported by state. The administrative structure divides the country into 463 districts each headed by a District Magistrate, a senior bureaucrat or the Collector. Through this administrative structure people are dealt at different levels primarily at the local level, people (in mostly cases) find themselves tackling with the issue of access to information.²⁰³

Most significant provision of the Act is that the requestor needs not to give any reason for it or prove his locus standi. Still implementation is not without major challenges. Lack of public awareness, especially in rural areas, lack of proper system to store and circulate information, incapacity of the public information officers (PIOs) to deal with the requests, bureaucratic mindset and attitude are amongst major obstacles in implementation of the law.²⁰⁴

Persistent public efforts and attention lead to adoption of RTI Act in 2005, one of the best in the world as it provides for maximum disclosure with minimal exceptions

²⁰¹ Chapter III of the Constitution.

²⁰² Ibid

²⁰³ Global trends on the Right to Information: a Global Survey of South Asia, 53.

²⁰⁴ Analysing the Right to information Act in India, briefing paper, Cuts International 1/2010. 1-2. Available at <http://www.cuts-international.org/CART/index.htm>.

which again subject to a Public interest override. It is one of the most empowering and most progressive legislations passed with an excellent implementation track record. The Act demands the public authorities to act proactively disclose the wide range of important information regarding their finance and business plan. The strict punishments and independent information commission provisions helped the quick responsible response from authorities. The success of Indian RTI regime is widely celebrated. The media played a significant role in exposing the corruption in public bodies through RTI applications and also the benefit of such exposures. The public enthusiasm echoes the success of RTI as only in 2010-11 approximately 550,000 applications were received by the central and state levels. And this increase in number of applications is a serious concern among the authorities complaining on increase in work load and government's consideration to amend the law faced serious public opposition.²⁰⁵

5.3 Background

The Official Secrets Act (1923) was the governing law for disclosure of information in India enacted during the British rule. The Indian Supreme Court in several judgments prior to enactment of the RTI Act, had construed Constitution to read RTI as the fundamental right as implied in 'right to freedom of speech and expression and right to life.²⁰⁶

²⁰⁵ Challenges of Right to Information in South Asia. Protifolon, policy brief. Issue 5 February 2012, Institute of informatics and development, research network, 1

²⁰⁶S.P.Gupta vs president of India (1982)AIR (SC)149, p234. Supreme Court of India 1982, Available at <http://www.right2info.org/cases/r2i-s.p.-gupta-v.-president-of-india>. Last accessed on 12 - 06-2016. State of Uttar Pardesh vs Raj Narain and others (1975) 4 SSC428. Available at <http://www.right2info.org/cases/r2i-state-of-uttar-pradesh-v.-raj-narain>. Last Accessed on 12 -06-2016.

Gradual but strong evolution of RTI in India starting from Rajasthan mainly because of a grass root organization Mazdoor Kisan Shakti Sanghatan(MKSS) along with a group of villagers in central Rajasthan , mostly poor workers class , asserted their RTI by reacting against ghost entries and collecting money by public official of local bodies, which was the sign of unchecked corruption in the system, and demanding official information in government records related to drought relief work in public hearing. The movement spread to other parts of Rajasthan, and then became a nationwide movement for the RTI and related state legislations ²⁰⁷ .

Initially FOI Bill was passed in the Parliament in 2002 but not notified, hence, never came into effect. The demand for national law started under the leadership of National Campaign on People's Right to Information (NCPRI).²⁰⁸ The RTI campaign received a major boost when the UPA Government's Common Minimum Program (CMP) undertook that the RTI Act will be made more progressive, participatory and meaningful. The National Advisory Council, which was established to administer implementation of the CMP. This along with many other factors, including pressure from the civil society groups paved way for the enactment of the RTI Act in India in 2005.²⁰⁹

²⁰⁷ Indian Express newspaper Bombay private (LTD) vs Union of India (1985) 2S.C.R.287. Available at <https://globalfreedomofexpression.columbia.edu/cases/indian-express-newspapers-bombay-private-ltd-v-union-of-india/>. Last Accessed on 12-06-2016.

²⁰⁸ Development on Right to Information in India From Commonwealth Human Rights Initiative. Available at:<http://www.humanrightsinitiative.org/programs/ai/rti/india/articles/The%20movement%20for%20right%20to%20information%20in%20India.pdf.pdf>. Last Accessed 12-06-2016.

²⁰⁹ Analyzing the Right to information Act in India. Cuts international briefing paper, 2010, 3.

²⁰⁹ Ibid.

Eight states and one territory had passed their own RTI laws when National Act was promulgated in 2005 including Tamil Nadu and Goa (1997), Rajasthan and Karnataka (2000), Delhi (2001), Maharashtra and Assam (2002), Madhya Pradesh (2003), and Jammu and Kashmir (2004). With the emergence of National Act the state laws are either being repealed or lapsing except the Jammu and Kashmir as Central Government cannot legislate due to its special constitutional status.²¹⁰

5.4 Working of Freedom of Information Act

National Act provides citizens (including the overseas citizen of India) to have access to public information not only from Central Governmental authorities but also local authorities (panchayats) at states level. It includes bodies established under Constitution or statutes, government controlled or financed and non government organization funded by the government²¹¹. The Act is applicable on whole of India except the Jummu and Kashmir region. An interesting aspect of the laws is that disclosure provisions are specifically given preference over the secrecy under OSA 1923.²¹² The citizens can not only request to inspect a copy of information but they can also apply to inspect public works, documents and records, certified of material samples from any public authority or anybody working under it.²¹³

5.4.1 Procedural Guarantees

Applications can be sent to public Information Officer (PIO) appointed in every unit of authority through an Assistant PIO, who shall respond within 30 days and 48 hours in

²¹⁰ Banisar, Freedom of information around the World .2006, 86

²¹¹ Section 2(h)

²¹² Mendel. Freedom of Information. A comparative legal Survey. UNESCO. 59.

²¹³ Challenges of Right to Information in South Asia. Protifolon .3.

case request is on issue of life or liberty of a person.²¹⁴ Application should be precise and there is no specific format for application for seeking information. Submission of application is subject to the payment of prescribed fee. ²¹⁵

5.4.2 Exemptions

The Act provides for the list of exceptions or exemptions from disclosure (including those provided in Official Secret Act), however they are subject to blanket override whereby information may be released public interest for disclosure prevail over the harm to the protected interest.²¹⁶ The exempted material includes the disclosure that prejudicially affect sovereignty, integrity of India, security and strategic interest of the state and foreign relations and other specifically prohibited disclosures. ²¹⁷

5.4.3 Appeals

Act also provides for appeals in case where required information is not supplied within specific time or in case when the applicant is not satisfied with the information supplied to him, can prefer first internal appeal to a nominated person senior in rank to PIO. Second appeal can be made to CIC (Central Information Commission) or SIC (State Information Commission) within prescribed time. ²¹⁸CIC are not only given the power to hear cases under the Act but also given investigative powers and made their decisions binding. They can also give orders to the authorities in matters like to publish

²¹⁴ David Banisar. Freedom of Information around the World; A Global survey of Access to Government information laws 2006. Privacy international .85

²¹⁵ Section 6 and 7 prescribe procedure for securing information and fixes time for PIOs for providing information.

²¹⁶ Section 8(1)(2), 9 of FOIA 2005

²¹⁷ Ibid.

²¹⁸ Analyzing Right to Information Act in India. cuts International.4

information or annual reports, or to appoint PIOs. They are authorized to impose penalties or compensations.²¹⁹

Section 23 attempts to bar appeals to the lower courts but as a constitutional guarantee if any citizen feels that his/her right has been infringed they still can appeal under the writ jurisdiction of in High court and Supreme Court²²⁰

5.4.4 Penalties and Protection

Disciplinary proceeding and fines can be imposed for range of offences for instance refusing to access an application, delayed furnishing information for which every daily penalty can be imposed, Further misleading, false and incomplete information cases by information official are also provided.²²¹

5.4.5 Duty to Publish

Every Public authority under the Act is required to proactively publish 16 categories of information including the particulars of its organization like functions, powers and duties of the office and officer concerned. Procedures rules, regulations manuals and records used by the authority in discharge of obligations under the Act.²²² The Information commission must monitor implementation and annual report production

²¹⁹ Chapter IV, section 18-20. The Right to Information Act, section 9 provides for two tier appeal mechanism.

²²⁰ Articles 32 and 225 of the Constitution.

²²¹ Section 20.

²²² Section 4.

by the authority. Government is also required to take steps towards the training of the official and conducting public awareness activities.²²³

5.5 Implementation and challenges of RTI in India.

The Right to Information Act implementation varied across the country. The Central Government has been comparatively active, even though it was slow in putting in place systems to ensure and setting up proactive disclosure and the Central Information Commission. So far more than 20 states have appointed Information Commissioners, though setting up and providing sufficient resources to the Information Commission offices has often been slow. Applications are being made, with varying levels of success throughout the country. The local panchayat officials have been reported to be mainly slow in coming to terms with their duties under the new law.²²⁴

The Official Secret Act 1923²²⁵ (OSA most controversial law in the context of FOI regime based on 1911 UK official Secret Act) still exist though the RTIA provides that its provision will have effect notwithstanding anything in OSA or any other law.²²⁶ On the other hand the OSA forbids the unauthorized collection and disclosure of secret information which is repeatedly used specially against the media.²²⁷

²²³ Banisar. Freedom of information around the World 2006. 86.

²²⁴ Ibid.

²²⁵ The Official Secret Act, 1923, Act no.19 of 1923.

²²⁶ Section 22

²²⁷ Ibid. 86

The Public Record Act 1993, ruled for 30 years access to archives. The RTIA provides the information shall be provided after 20 years but further specifies that certain exceptions will apply beyond this period.²²⁸

The Central Information Commission (CIC) established under the RTI Act 2005 mandated CIC to prepare a report on the status of implementation at the end of each year binding the concerned officers and departments within jurisdiction to provide the information as required by CIC to prepare the report. In 2010-11 report some decreasing trends were seen as only 67.5 % public authorities submitted their reports under the statutory obligation according to collected data though number of application has been progressively increasing since 2007. ²²⁹

This decline could be viewed as a kind of deviation and reason could be the growing threat to RTI applicants. In 2010-11 many RTI activists like Satyenderdra Dubey, Ramdas Ghadegavkar, Shashidhar Mishra, Data Patil and others were killed²³⁰ and many faced serious physical assaults for seeking information about the illegal activities of corrupt public authorities , political leaders and other mafias who do not want to be disclosed. In some cases the applicants or activists tried to seek protection are turned away and even refused to register FIRs by the police. Lack of protection of the vulnerable applicants is one of the main reasons for such deviation or decline.²³¹

CIC and its other state correspondent are not given mandate either to protect or provide shelter rather can only act as spectators. The court orders are not even given any

²²⁸ Ibid.

²²⁹ Challenges of right to information in South Asia. Protifolon, policy brief.

²³⁰ Analyzing the Right to Information Act in India. Briefing paper Cuts International, 5.

²³¹ Challenges of Right to Information in South Asia. Protifolon, 5

consideration by the government as in Bombay High Court in 2010 ordered for police protection to any person or organization that complaint for any such threats or attacks. Still there has been no reported decline in such attacks. On the other side a positive element of RTI in 2010-11 is the significant decrease in rejected application as compared to previous year from 6.43% to 5.14%.²³²

5.6 Barriers to RTI in India

Before RTI Act, India had some legislation that provided for limited access to official information²³³ and a line of constitutional guarantees and their interpretation²³⁴ incorporated into constitutional guarantee of freedom of expression. However, the free flow of information was and still controlled by three major factors besides others, those are, firstly the legislative framework includes a few restrictive legislations, like Official Secret Act. Secondly the pervasive culture of secrecy and superiority of bureaucracy and thirdly the illiteracy and unawareness of the rights among the people.²³⁵

²³² Ibid.

²³³ Indian Evidence Act 1876, section 76, which is termed as freedom of information in its embryonic form. The Factories Act 1948 provides for the compulsory disclosure of information regarding dangerous health hazards and preventive measures for such hazards arising from the exposure to dangerous material. The Water(Prevention and Control of Pollution)Act 1974, section 25(6),The Air (Prevention and Control of pollution)Act,1981, contains similar provision for disclosure of information in respect of air pollution, The Environment (Protection) Act, 1986, The Environment (Protection) Rules, 1986 and the Environmental Impact Assessment Regulations provide for public consultation and disclosure in various circumstances.

²³⁴ Bennett Coleman & Co. vs. Union Of India, AIR 1973 SC 783., Manubhai D. Shah vs. Life Insurance Corporation, AIR 1981 Guj 15. Indian Express Newspapers (Bombay) Pvt. Ltd.vs. India, (1985) 1 SCC 641, D.K.Basu vs. State of West Bengal, (1997) 1 SCC 216, Prabha Dutt vs. Union of India, AIR 1982 SC 6. 193. Reliance Petrochemicals Ltd. vs. Proprietors of Indian Express Newspapers Bombay Pvt. Ltd, AIR 1989 SC 190, State of UP vs. Raj Narain, AIR 1975 SC 865. See also S.P. Gupta vs. Union of India, AIR 1982 SC 149, Bombay Environmental Action Group vs. Pune Cantonment Board, Bombay High Court, A.S. Writ Petition No. 2733 of 1986, L.K.Koolwal vs. State of Rajasthan, AIR 1988 Raj 2.

²³⁵ Global Trends on the Right to Information: a global survey of South Asia Article 19, CHRI,CPA, HRCP.63

5.6.1 Culture of (legal) Secrecy

The opaque traditional Colonial system of state governance still exists in India, retaining the Official Secret Act (OSA) 1923 a replica of British Official Secret Act 1911 which having been amended substantially in Britain, but original form with minor amendments in 1967 is still followed in India, operating at administrative level. The right to information Act specifically provides that its provisions will have overriding effect notwithstanding anything in contained in OSA or any other law.²³⁶

This has been intensified with cultural feudal approach of “the Ruler and the Ruled” with the former being a privileged class against the later. Openness in government against the culture and never promoted consciously till recent laws like Environmental protection Laws imposing mandatory requirements of public hearing and disclosures.²³⁷

The OSA section 3 and 5 are amongst the most critical sections of the said legislation dealing with spying and wrongful communication of Information respectively. These provisions are so widely worded that any act can be justified to be a crime leading to custodial sentence up to three years, even on the basis of circumstantial evidence and can become a tool arbitrary exercise of authority by the government. These provisions are severely criticized specially with reference to Narmada Valley Sardar

²³⁶ Banisar. Freedom of Information Around the World.86.

²³⁷ Global Trends on Right To Information: A survey of South Asia .66

Sarovar Dam Project,²³⁸ when Journalists and activist were prevented to access the dam site. ²³⁹

The First Press Commission, one the major critics of OSA , initially (in 1954) did not recommend amendment of the Act pertaining to the to the international tensions and need for ensuring the secret policies not to be disclosed. But later the position changed in 1982 and viewed the Act as causing “chilling effect on the press”, demanding the modification of the severity of section 5 with a more moderate one. A.G Noorani²⁴⁰ concluded his critique of OSA by declaring it as a breach of fundamental right of freedom of speech and expression, as well as right to life and liberty. He further suggested that allegation of an offence under the Act to be strictly proven and to provide for defense of public interest.²⁴¹

The Central Civil Service Conduct Rules, 1964,²⁴² the Manual of Office Procedure,²⁴³ Indian Evidence Act, 1872 ²⁴⁴further strengthen the OSA and restrict the disclosure of information by the government officials or allow restricted information disclosure subject to authorization by the specific officer.

²³⁸ One of India's most controversial dams project and widely debated on its benefits, net costs and environmental impacts. The Narmada Dam remained center of severe controversy since late 80s

²³⁹Ibid.67

²⁴⁰ Abdul Gafoor Abdul Majeed Noorani, known popularly as A. G. Noorani, is an Indian lawyer, historian and author. He has practiced as an advocate in the Supreme Court of India and in the Bombay High Court.

²⁴¹ Ibid.68

²⁴² Rule 11

²⁴³ Section 154and 161

²⁴⁴ Section 123 and 124

5.6.2 Social Mindset

Inflexible approach towards disclosure of information is also an issue of social mindset rather than any legal prohibition. The requests for information are met either with hostility or apathy even where there is no conflict of interest, question of money and the requestor inquire about a simple question like information about minimum wages or land records. Requesters have faced abusive and hostile responses on making such requests.²⁴⁵

5.6.3 Poor record keeping

Moreover, the situation of poor record keeping is also a matter of concern. Dusty files in cupboards, shelves and even on floors provides for an easy excuse for refusal for request as have been misplaced. Besides getting information from any record section is accompanied by delays and demands for bribes.²⁴⁶

With the beginning of era of computerization, most of them were provided to senior staff, record keeping not part of their job description. Recently with rapid growth in information technology, most states are trying to promote better systems significantly contributing towards free flow of information. trained staff is also an issue to achieve the end even when they are available. Recent steps towards investment in technology

²⁴⁵ "In one case, the applicants were questioned about their 'qualification' to ask for information and in another case, the applicant was threatened with physical harm. In Bihar, a well-known and respected activist was imprisoned for several months on a false charge for daring to demand the details of expenditure for a local school building.²⁰⁸ Also in Bihar, a woman who requested information on the Indira Awaas Yojana, a housing scheme for the poor, was rudely asked, "aainey mein mooh dekhli ba?" In Rajasthan, where the right to get information from local bodies was established in 1997, civil society groups have had to battle to get records relating to ordinary development work from the local Gram Panchayats. After a series of manoeuvres to avoid giving the records, including a formal 'resolution' of the gram sabha²¹⁰ denouncing the requester²¹¹ as a 'trouble maker working to create disharmony in society', the matter was taken to court and a temporary injunction against giving the documents was obtained by the gram sewak, a local functionary". As cited in FOI South Asia survey(68-69)

²⁴⁶ Global Trends on Right to Information: A survey of South Asia.⁶⁹

positively resulted for instance Gyandoot²⁴⁷ project in Madhya Pradesh, in 2000. Information about land records or market prices can be checked on payment of fee from a computer setup in local body office. Complaints can also be sent to authorities through emails. Andhra and Rajasthan are also providing information through computerized systems but these and others development stories still suffers from other factors like lack of electricity, connectivity, and software in the regional languages.²⁴⁸

5.6.4 Means of Communication and illiteracy

One of the negatively effecting factors is unawareness or illiteracy about rights granted by the RTIA, particularly among marginalized groups or rural areas and there is sharp difference regarding awareness even amongst men and women. PWC's²⁴⁹ survey of the general public found that only fifteen percent were aware of the law²⁵⁰

Linked with these are also the illiteracy and poor means of communication hindering the way. Communication relying on modern styles like signs or written words taken over the traditional style of drum beating or announcements over loud speakers are considered as old methods which was easily understandable by the locals. Excessive reliance on English instead of indigenous languages also an issue.²⁵¹

²⁴⁷ Which means 'purveyor of knowledge' in Hindi, is a government-to-citizen, intranet-based service portal, implemented in the Dhar district of the state of Madhya Pradesh India, covering around 600 villages. The project won the Stockholm Challenge Award for Public Service and Democracy.

²⁴⁸ Global Trends on Freedom of Information. 69

²⁴⁹ Price Waterhouse Coopers

²⁵⁰ Alasdair Roberts, "A great and Revolutionary Law? The First Four Years Of Indian's Right to information Act", Public Administration Review70:6 (2010). Available at www.ssrn.com. Last Accessed 10-10-2015.

²⁵¹ the traffic authorities in New Delhi used the slogan 'Lane driving is sane driving' to encourage people to adhere to traffic safety, although the majority of bus and truck drivers are, if not illiterate, at least unable to understand this rather cryptic English. Few years back, a cyclone warning to fishermen in coastal Gujarat was flashed across the screen of the national TV channel while a popular film was being screened. The warning was flashed in English, which few fishermen can read, instead of Gujarati or Hindi.

Similarly, the law notices or other public related official documents are drafted in legal style and poorly worded, without keeping the user in mind. The role of mass media in recent times is important. Public awareness programs are helping significantly particularly the public funded broadcast media.²⁵²

CONCLUSION

Any legislation in any particular state depends on the social and political views of that particular society but generally, RTI is a strong tool for providing strong support democracy, effective public participation and accountability. Further it also serves as a watchdog ensuring anything coming in purview of the Act to work in accordance with the rule and regulations. In India the Right to Information Act was finally introduced in 2005. Since its inception the law has proven to be a weapon for the people to combat corruption and for ensuring transparency in Government department but at the same time presents a mixed picture with conflicting legislation still in place restricting the free flow of information.

Though weak in many aspects like broad regime of exceptions, oversight mechanism, internal appeals within governmental apparatus, protection of whistleblowers, proactive and *Suo moto* publications and actions. Despite all of the above it is but a first step towards the protection of public right to know and a free flow of information.

The Indian legislative developments represent the realization of the constitutional guarantees of RTI and are being effectively used by the courts in recent years. Presently the RTI in India is passing through a decisive phase a lot needs to be done to facilitate

²⁵² Global Trends on Right to Information, 70.

the growth and development of law to be mature. Mere protesting against the poor implementation is not sufficient. The stricter implementation requires not only political will but also efficient backing and mobilization work by civil society and grass root originations.

Pakistan and India are not only twins at birth but also largely represent similar social and political set ups therefore the Indian experience is the most relevant for Pakistan in context of FOI evolution. The mileage covered by India provides Pakistan with the knowledge of how to develop an RTI regime right without making as many errors as India had to make.

Chapter 6

Freedom of information in Pakistan

Over Seventy years have passed since independence, but the colonial system of governance, which excluded public participation in the formulation and implementation of public policy, continues to exist in Pakistan. Citizens, have lost confidence in the system and have developed an attitude of apathy towards issues of larger public concern. Recently after the inclusion of article 19(a) recognizing freedom of Information in the Constitution as fundamental right is a step in the right direction however; mere inclusion in the list of fundamental rights will not serve any purpose unless practice of this right is facilitated through development of a system and removal of hindrances in the free flow of information. An effective FOI regime is a need of time.

6.1 Introduction

Although Pakistan was the first country in the subcontinent to have adopted the law, its performance in implementing the FOI Ordinance 2002 was considered to be the weakest in the region. Many Pakistani observers see the FOI Ordinance 2002 to be flawed both in terms of concept and content. The biggest flaw is that it exempts several important types of information from the public. Moreover, the procedure is so cumbersome that many applicants are said to lose interest midway and give up their quest. The top-down manner in which the FOI Ordinance was promulgated in Pakistan and the fact that this was done by a military ruler ostensibly to meet a donor requirement, as well as many shortcomings in the law, have led to civil society rejection of it. This, together with the lack of government interest, has meant that ordinary

citizens do not know about the law or see it as relevant to their concerns. The extremely small number of FOI requests submitted since 2002 is a clear testimony to this. In recent years efforts have been made by individual lawmakers to promote the adoption of a new law by the Parliament.²⁵³²⁵⁴

The Constitution of Islamic Republic of Pakistan, 1973 provided an comprehensive list of rights in its chapter I (Article 10-28) including right to freedom of speech and expression, however the right to information was inserted under 18th Constitutional Amendment in 2010. ²⁵⁴

Pakistan's Legislative history reflects that law making has not always been fueled with public interest. In fact law making has been subject to certain expediencies and variety of other internal or external factors ranging from inadequate knowledge of issue, lack of interest, weak democratic institutions, political compromises, protecting vested interests. More significant has been the pressure of international financial institutions which include World Bank and IMF. Consequently, undesirable policies and laws have been introduced or enacted that hinder the process of good governance. The fate of FOI legislation could not find any exception and marked with the same expedience and practicality. ²⁵⁵

Pakistan being first country in South Asia to enact freedom of information laws in 2002, started its journey in 1990s and still on its way towards its final destination. In the last decade number of legal and procedural deficiencies in effective RTI regime has

²⁵³ Challenges of Right To Information in South Asia .Protifolon policy brief ,issue 5, 2012

²⁵⁴ The Constitution (18th Amendment) Act , 2010. Act no. X of 2010. April 19. 2010.

²⁵⁵ From RTI to FOI: some lessons and Insights" *Issue paper on RTI Legislation in Pakistan*. CRCP 13thAugust (2014). Available at <http://www.crcp.org.pk/index.php/pub>. Last accessed on 25 -04-2015.

been highlighted including the scope exemptions and exceptions review processes and so on. Private member bills were presented in the Assembly demanding the fresh comprehensive RTI laws and to address the shortcomings of existing regimes in 2004, 2008, 2010, and in 2011.²⁵⁶ Recognizing the recent international trends towards more open and transparent system of governments several attempts have been made in order to promote transparency and accountability in Pakistan, A brief account of these efforts is given as under in two pre and post 18th amendment article 19A stages. ²⁵⁷

6.2 Legislative developments on freedom of information in Pakistan.

The work on right to information in Pakistan dates back to 1990 when Professor Khurshid Ahmed, Naib Amir of Jamaat-i-Islami, introduced a Private Members Bill in the Senate in this regard. However, the Bill could not attract the attention of the House. Later in 1990s, the government of former Prime Minister Benazir Bhutto established an anti-corruption committee, headed by late Malik Qasim, to look into the causes of corruption and make recommendations. One of the key recommendations of the committee was enactment of a freedom of information act. Nevertheless, the caretaker government of Malik Miraj Khalid promulgated an ordinance on freedom of information in 1996-97. The Ordinance promulgated by the caretaker government of Malik Miraj Khalid lapsed, as the elected government of Nawaz Sharif (1997-1999) did not present it before the Parliament for enactment.²⁵⁸

²⁵⁶ ibid

²⁵⁷ <http://shehri.org/rti/history-of-freedom-of-information-legislation-in-pakistan.html>

²⁵⁸ Challenges of Right To Information in South Asia-4-5

The Freedom of Information (FOI) Ordinance, 2002, was the first legal instrument, which recognized the freedom of access to information as a statutory right. The FOI Ordinance was promulgated by President General Musharraf in October 2002 and is applicable to the Federal government only. Similar laws (replicas of the Freedom of Information Ordinance, 2002) were also promulgated/enacted in the provinces of Balochistan (2005) and Sindh (2006). Being limited in scope and application, complicated in procedural aspects and restricted in providing access to information, these laws were termed as ineffective by civil society groups. Therefore, when the work on Eighteenth Amendment of the Constitution started, the civil society campaigned for recognition of RTI as a constitutional right and Article 19A was added in the Constitution of Pakistan in 2010.²⁵⁹

The inclusion of Article 19A changed the paradigm and debate on access to information in the country. Previously, entire debate was revolving around the freedom of information. As a result of Article 19A, the discourse of information moved to „right to information”. The Article 19A requires further legislation to detail out the process of access to information and list down „exempted information”. Therefore, all provinces as well as federal government are supposed to enact right to information laws for their respective jurisdictions. In response to the requirement of this Article, KP and Punjab introduced progressive and robust right to information laws in 2013. The laws are known as the Khyber Pakhtunkhwa Right to Information Act 2013 and the Punjab Transparency and Right to Information Act 2013.

²⁵⁹ From RTI to FOI: some lessons and Insights” 2014.

The matter of fact is that most of the FOI laws were introduced reluctantly as not a political will rather a political compulsion and Pakistan is no exception. There has been consciousness within political parties regarding the impact of right to information legislation in restricting corruption but these parties have been more active and voiced about the need for RTI enactment while in opposition and less than willing to act out these laws while in power. In KPK the Pakistan Tehreek e Insaf was the only exception that not only showed political will rather enacted FOI legislation when came to power. In Context of Pakistani legislative history there are two sets or generations of RTI laws: the Freedom of Information Ordinance 2002 that replicated in Baluchistan and Sindh belong to the first-generation of RTI laws. These are mostly ineffective laws and were enacted as a part of demand attached with Asian Development Bank loan (to get installments of loan). These laws failed to provide the desired ends or standards of right to information and without any relevance or partaking the input from civil society groups working for transparency and right to information. On the other hand KPK Right ton Information Act 2013 and the Punjab Transparency and Right to Information Act 2013 are considered as the second-generation of RTI laws as highly effective laws based on significant input from civil society groups while enactment in 2013.²⁶⁰

Centre for Peace and Development Initiative (CPDI) has developed a score-sheet to gauge the weaknesses and strengths of right to information laws in Pakistan.³ According to this Score-Sheet, RTI laws of Punjab and Khyber Pakhtunkhwa (KP) have scored 140 and 125 respectively, out of total 145 marks. Federal, Sindh and Baluchistan FOI laws could get only 32/145 marks according to this Score-Sheet. Moreover, the

²⁶⁰ Right to Information legislation in Pakistan . The country briefing paper May 2016. Center for Peace and Development Initiative.(CPDI), 9

Punjab and KP laws are guided by the principle of maximum disclosure. These laws draw exceptions clearly and narrowly and provide easy and cost effective access to information. These laws provide dedicated and independent information commissions to deal with the complaints of information requesters. Furthermore, the laws provide penalty for non-compliance of orders of the information commissions. Under the law, all provincial public bodies as defined in the laws are duty bound to publish their annual reports. Similarly, these laws do not require description of specific interest when information is requested. These laws also provide for inspection of the documents. Having an overriding affect, these laws take precedence over all other laws contradicting their aim.²⁶¹

6.2.1 Brief Overview Of legislative journey of RTI/FOI in Pakistan

Since 1990 till 2009 and initially the efforts were made to introduce the law in the country on both provincial as well as on Federal levels.

1990

The first ever attempt was made on FOI was by Prof. Khursheed Ahmed, a Senator and Naib ameer of Jamaat-i-Islamai. The bill was introduced in Senate as a private member Bill and was forcefully resisted and failed to be enacted.

1994

²⁶¹ Muhammad Aftab Alam. "Right to Information and Media Laws in Pakistan". 6-7 www.cpdpakistan.org

The Public accounts Committee headed by Senator Malik Qasim moved the second bill on the subject. However the freedom of information bill could not be enacted as forcefully resisted by bureaucracy and early dismissal of government

1997

On the Initiative of Fukhruddin G. Ibarahim , the Federal minister of Law in the interim government of Malik Mairaj Khalid , the president of Pakistan ,another major development occurred in form of promulgation of Freedom of Information Ordinance on January 29th, 1997. However it lapsed after only 4 months²⁶² as successive government of Nawaz Sharif did not enact it into law.

2000

The government of General Pervez Musharaf , aiming of soliciting public view a draft FOI bill was made public. However the bill could not get the popular acceptance by public owing to the number of inherent deficiencies.

2001

Consumer Rights commission of Pakistan(a nonprofit organization) launched a campaign on freedom of information in Pakistan and also proposed a Model of freedom of Information Act to government based on consultation process involving the local, regional FOI/RTI experts , law practitioners and stakeholders both from private and public sectors.

²⁶² Article 89 , The Constitution of Pakistan 1973.s

2001

Sindh Local Government Ordinance 2001, Section 137: "Every citizen shall have the right to information about any office of the District Government, Taluka, Tehsil, Municipal Administration and Union Administration."²⁶³

2001-Local Government Ordinance 2001 adopted by all provinces contains certain provisions pertaining to right of access to information held by district public bodies.²⁶⁴

2002

In October the freedom of information ordinance was promulgated by president of Pakistan, Gen. Pervez Musharraf, which happened to be the first FOI law in the region at that time. It was published in Official Gazzette of Pakistan on 26-10-2002²⁶⁵. In 2004 the rules for FOI 2002 were passed.²⁶⁶

In the same year Sherry Rehman initiated FOI Bill aiming to repeal FOI ordinance ,2002 and introduced whistle blowers protection issue in the law. However the government did not consider the bill for enactment

2005

Freedom of information Act promulgated in Baluchistan by Baluchistan assembly.

2006

In May Pakistan Muslim League(N) and Peoples Party commit in Charter of

²⁶³ <http://shehri.org/rti/history-of-freedom-of-information-legislation-in-pakistan.html>

²⁶⁴ <http://www.cpdi-pakistan.org/timeline-of-right-to-information-legislation-in-pakistan>

²⁶⁵ Gazette of Pakistan (extraordinary)pages 1564-1571on 26-10- 2002(ordinance # XCVI of 2002)

²⁶⁶ SRO:514(1)2004, gazette on 18th June 2004

Democracy that “Access to Information” will become law after parliamentary debate and public scrutiny that remained an unfulfilled pledge.

Same year in August Governor Sindh enacted Sindh Freedom of Information Ordinance 2006, followed by Sindh Freedom of information Act 2006 in September by Sindh provincial Assembly.²⁶⁷ Though both were replica of Freedom of information Ordinance 2002 having same deficiencies as federal legislation.²⁶⁸

2007

Balochistan Freedom Of Information Rules 2007, SO(INF:) 2-31/2007/1424- 1524 published on 20th November 2007.

2008

In March newly elected Prime Minister Yousaf Raza Gillani pledged in his address to parliament that a new freedom of information law will be enacted to promote the press freedom. Same year in September in Joint session of parliament president stated that “we will soon be bringing other fundamental laws such as freedom of information bill....”

In November Sherry Rehman the then Federal Minister for Information and broadcast, promised that freedom of information bill would shortly be tabled in parliament after incorporation of views of provincial governments in it. Later the FOI

²⁶⁷<http://www.cpdi-pakistan.org/timeline-of-right-to-information-legislation-in-pakistan> last accessed on 25- 05- 2015. See also Time Line available at <http://www.cpdi-pakistan.org/timeline>. for latest version. Accessed on 10-06-2020

²⁶⁸From RTI to FOI: some lessons and Insights” Issue paper on RTI Legislation in Pakistan. CRCP 13th August 2014. Available at <http://www.crcp.org.pk/index.php/pub#> . Last accessed on 25 -04- 2015

Act 2008 was proposed which was an amended version of FOI Bill 2004, however the bill did not see the day light owing to many deficiencies.

2010

In April 2010 a new article 19 (A)²⁶⁹ is inserted in 37 years old Constitution of Pakistan 1973 acknowledging the citizen's fundamental right to information which was not given expressly previously.

In the same year a fresh attempt was made for FOI bill by Sherry Rehman by moving in the assembly. Yet again in 2011 Sherry Rehman as second attempt tried to introduce "Right to Information Bill" moved a bill in the Assembly, though failed again as both of these bills were more or less same in content and text.²⁷⁰

Post 18th amendment

2013 - 2015

In Pakistan in context of transparency and public accountability, this year is momentous as two major provincial legislation has been enacted. Khyber Pakhtunkhwa and Punjab assembly enacted two reasonably good legislations Khyber Pakhtunkhwa Right to information Act 2013 and Punjab transparency and Right to information Act 2013. Both composing 70 % of population of Pakistan.

²⁶⁹ Article 19-A states: "Every citizen shall have the right to have access to information in all matters of public importance subject to regulation and reasonable restrictions imposed by law."

²⁷⁰From RTI to FOI: some lessons and Insights" Issue paper on RTI Legislation in Pakistan. 3

In year 2013 some major and significant steps were not only taken by provincial governments but also the subcommittee of senate on information and broadcast also contributed their part positively. In June the subcommittee gave final touches to draft Right to information Act 2013, proposed amendments and required Ministry of Information and broadcast to finalize the same to be tabled in the parliament by first week of July 2013. Senate committee on information and Broadcast approved the draft in August. And later in October the Federal Minister for information Senator Pervaiz Rasheed informed that right to information bill was worked out and very speedily and assured all the stake holders would be taken on board in this regard. In July 2014 the Senate standing committee on information and broadcasting and National Heritage approved the Right to information bill 2013 with proposed amendments.²⁷¹ On Provincial sides the Sindh local Government Act 2013 enacted.²⁷²

Governor KP Shaukatullah Khan promulgated Khyber Pakhtunkhwa Right to Information Ordinance 2013 on 13th August. In October same year the KPK provincial Assembly passed the KPK right to information Act 2013²⁷³. On 19th December 2014, the information commission notified the fee Schedules for hard copies.

On the other side Punjab Governor promulgated Punjab Transparency and right to information Ordinance 2013.²⁷⁴ Punjab provincial assembly passed Punjab

²⁷¹ <http://www.cpdi-pakistan.org/timeline-of-right-to-information-legislation-in-pakistan>

²⁷² Sindh local Government Act 2013 (Act#XLII of 2013) gazette on 16-09-2013,section 150& 154.

Sindh Local Government Ordinance 2012, Section 151: "Every citizen shall have the right to information about any office of the Councils. Every office shall provide requisite information, if not restricted under any law for the time being in force, on the prescribed forms and on payment of such fee as may be prescribed."

²⁷³ Kp Gazette (Extraordinary) pages 367-380 on 05-11-2013(Act #XXVII of 2013).

²⁷⁴(Ord #IV of 2013),promulgated on 4-10-2013

transparency and Right to information, 2013 on 12th December.²⁷⁵ Punjab Government notified the Punjab Transparency and right to information Rules 2014 on January 4th 2015 and the information Commission notified Schedules of costs on 13th January 2015.

6.3 Freedom of information and lack of transparency in Pakistan

Pakistan is one of the top ten most populous countries in the world whereby political parties and parliamentary institutions remained weak because of a civil-military bureaucracy that governed Pakistan for most of the time since independence. Public apathy is the cause and result of an exclusive, non- participatory and non-transparent government system, where a culture of secrecy and uncontrolled corruption prevails. The underlying factors are a large number of restrictive laws, rules and government instructions. It is widely accepted among the policy makers in Pakistan that the unfortunate state of governance and common corruption in government activities is mostly owing to a lack of transparency and access to information when it comes to public affairs, which hamper the ability of citizens, civil society groups and public representatives to effectively scrutinize the performance of public institutions leading to arbitrary and non-participatory decision-making, inefficient project execution and unchecked financial corruption. It further contributes to the upholding of excessive bureaucratic controls and non-functioning democratic institutions. ²⁷⁶

Owing to the serious criticism of secrecy and corruption, in recent past the Government of Pakistan during military government enacted certain important laws

²⁷⁵ Punjab gazette.(Extraordinary) Pages 1801-08 on 16-12-2013(Act# XLII of 2013)

²⁷⁶ Mukhtar Ahmed Ali. Lack of Transparency and Freedom of information in Pakistan: An analysis of state practice and realistic Policy option for Reform. Open Society institute C P S International Policy Fellowship Program 2005-06.4-5

apparently aiming promotion of transparency and access to information including the Local Government Ordinance in 2001²⁷⁷, a significant step towards transparency and public participation in functioning of Unions, Tehsil and District levels. Further in 2002 Freedom of information Ordinance (though subject to large number of exclusions and exemptions weak to make citizens RTI a reality) was also enacted as first FOI law at national level in South Asia. Unfortunately, it proved very ineffective as it was not based on any scientific research into public department functioning, planned hurriedly and executed without much consideration and consultation. Further policy initiatives excluded civil society groups from the design process, and could not provide an effective framework wherein persons could engage with public departments and make use of the enabling provisions in the new laws. ²⁷⁸

6.4 Factors Obstructing transparency and Freedom of Information in Pakistan

The current state of public accountability laws and practice in Pakistan does not provide a clear picture as to their formal implementation having various restrictions. The political interference in this regard cannot be ignored as it is one of the most influencing factors for effective implementation of existing law. Furthermore the infrastructure and record keeping by different departments is another serious issue in this regard. Another significant issue is of the existing laws inconsistent with right to know and other factors impeding the free flow of information for the better governance through public accountability are briefly highlighted below.

²⁷⁷ Local Government Ordinance 2001.

²⁷⁸ Ibid 5-6

6.4.1 Laws Requiring Secrecy

Official reluctance to disclose information and records to citizen can be attributed to a large number of laws, rules and regulations requiring secrecy for official information may include:²⁷⁹

6.4.1.1 The Constitution Of Pakistan 1973

In the 1973 Constitution the rights of free expression and freedom of information are subject to exclusion on the grounds of "public order, security, and defense, glory of Islam and subject to restrictions imposed by law."²⁸⁰ The exclusions are so broad that they can easily be utilized to block information and defeat the intent of the right to information.

6.4.1.2 Official Secrets Act, 1923

Several laws on the statute books, dated back to the colonial times, protect and promote this culture of secrecy by prescribing criminal penalties for those who leak or obtain the so called classified information, but no elaborate criterion of classification exists at all. It does not provide any definition of official secrets, and hence, leaves it to the government officials to arbitrarily decide what is secret and what is open for public scrutiny.

²⁷⁹ Mukhtar Ahmed Ali. Lack of Transparency and Freedom of information in Pakistan.15-16

²⁸⁰ Art.8 Laws inconsistent with or in derogation of fundamental rights to be void.

(1) Any law, or any custom or usage having the force of law, in so far as it is inconsistent with the rights conferred by this Chapter, shall, to the extent of such inconsistency, be void. (2) The State shall not make any law which takes away or abridges the rights so conferred and any law made in contravention of this clause shall, to the extent of such contravention, be void. (3) The provisions of this Article shall not apply to: Any law relating to members of the Armed Forces, or of the police or of such other forces as are charged with the maintenance of public order, for the purpose of ensuring the proper discharge of their duties or the maintenance of discipline among them.

Art19 Freedom of speech, etc. Every citizen shall have the right to freedom of speech and expression, and there shall be freedom of the press, subject to any reasonable restrictions imposed by law in the interest of the glory of Islam or the integrity, security or defense of Pakistan or any part thereof, friendly relations with foreign States, public order, decency or morality, or in relation to contempt of court, [commission of] or incitement to an offence.

Art19-A Right to information: Every citizen shall have the right to have access to information in all matters of public importance subject to regulation and reasonable restrictions imposed by law.

Consequently, even the information of ordinary nature is kept secret on one pretext or the other. Under Article 5 of the Act, even an individual who is found in possession of official information can be prosecuted, which leaves a lot of room for abuse because the official secrets have not been clearly defined.²⁸¹

6.4.1.3 Qanoon-e-Shahadat Order (Law of Evidence), 1984

Various provisions of Qanoon-e-Shahadat Order (Law of Evidence) 1984 also control citizens' right to information. Article 6²⁸² and 7²⁸³ of the Order is used for restricting free flow of information. It may, however, be noted that in the case of Ms. Benazir Bhutto vs. Federation of Pakistan,²⁸⁴ the Supreme Court of Pakistan held that the privilege claimed under Article 6& 7 of the Order do not give absolute power to government officials to withhold or disclose records. Hence, as a principle, 'public interest' is to be finally determined by courts. However, that allows significant power at the disposal of public officials to block free flow of information and requires definitions and procedures to balance the requirements of public interest and flow of information.

²⁸⁵

²⁸¹Mukhtar Ahmed Ali. Lack of Transparency and Freedom of information in Pakistan. 16

²⁸² Evidence as to affairs of State: No one shall be permitted to give any evidence derived from unpublished official records relating to any affairs of State, except with the permission of the officer at the head of the department concerned, who shall give or withhold such permission as he thinks fit. Explanation: In this Article, "official records relating to the affairs of State" includes documents concerning industrial or commercial activities carried on directly or indirectly, by the Federal Government or a Provincial Government or any statutory body or corporation or company set up or controlled by such Government.

²⁸³ Official communications: No public officer shall be compelled to disclose communications made to him in official confidence, when he considers that the public interests would suffer by the disclosure. Explanations In this Article, a communications includes communications concerning industrial or commercial activities carried on, directly or indirectly, by the Federal Government or a Provincial Government or any statutory body or corporation or company set up or controlled by such Government.

²⁸⁴ PLD 1989 SC 66

²⁸⁵State of transparency and freedom of information in Pakistan. CPDI, Pakistan.11

6.4.1.4 The Security of Pakistan Act, 1952

Under section 11 of the Act the Federal Government can require an editor, publisher or printer to disclose the name of a confidential source and to forbid the publication, sale or distribution of a document and to forfeit the same if it is of the opinion that the document contains matter likely to negatively affect the defense, external affairs or security of Pakistan. To this end, any police officer may be authorized to take a search and seizure operation. Act further empowers the Federal and Provincial governments to impose a prior censorship regime regarding "any matter relating to a particular subject or class of subjects affecting the defense, the external affairs or the security of Pakistan". No matter disallowed by the censor can be published; the censor has up to 72 hours to give his or her judgment. Appeals may be made within seven days to the government, which must assign the case to a district judge. Breach of these provisions may lead to imprisonment.²⁸⁶

6.4.1.5 The Maintenance of Public Order Ordinance, 1960

This is perhaps the most draconian Pakistani law in relation to the media, giving the authorities all the extraordinary powers available under the Security Act and more. It empowers the government or a district magistrate, if "satisfied that such action is necessary for the purpose of preventing or combating any activity prejudicial to the maintenance of public order", to pass an order:

- prohibiting the publication of any material;

²⁸⁶ Global Trends on The Right to Information: A survey of South Asia, Article 19. Center for Policy Alternatives , Commonwealth Right Initiative, Human rights commission of Pakistan, July 2001@article 19 CHRI,CPA,HRCP98

- requiring a publisher to publish material supplied by government within the time and in a manner prescribed by it;
- imposing prior censorship;
- closing down a publication or a press for a specified period;
- requiring the disclosure of a confidential source; and/or
- Requiring delivery of relevant material.

Provincial governments are further empowered to prohibit the entry of newspapers into a province and to order a search for material. The Ordinance also empowers a district magistrate to order preventive detention of citizens, and journalists have been among those detained under this law.²⁸⁷

6.4.1.6 The Pakistan Penal Code

A number of provisions in the Penal Code unduly restrict freedom of expression and the free flow of information. Many are extremely broad in scope, while others include undefined, subjective, terms whose interpretation is effectively left to the authorities. Some do not require proof of intent, contrary to basic rules of criminal due process.

²⁸⁷ Ibid 99

Section 123-A²⁸⁸ criminalizes anything which is prejudicial to the safety or ideology of Pakistan, or which amounts to 'abuse' of Pakistan. It is so widely worded that it can be applied to anyone giving out information which presents the "ideology of Pakistan" (a concept which has never been satisfactorily defined) in a way which displeases the authorities. Similarly, the scope of the notion of 'abusing' Pakistan can only be guessed at. This section is clearly open to misuse and violates the right to freedom of expression. Section 124-A²⁸⁹ deals with sedition and is also extremely broad. It can be invoked for mere criticism of government and has been applied to journalists. Section 153-B²⁹⁰

²⁸⁸ 123A. Condemnation of the creation of the State, and advocacy of abolition of its sovereignty:

(1) Whoever, within or without Pakistan, with intent to influence, or knowing it to be likely that he will influence, any person or the whole or any section of the public, in a manner likely to be prejudicial to the safety [or ideology] of Pakistan or to endanger the sovereignty of Pakistan in respect of all or any of the territories lying within its borders, shall by words, spoken or written, or by signs or visible representation abuse Pakistan or, condemn the creation of Pakistan by virtue of the partition of India which was effected on the fifteenth day of August, 1947, or advocate the curtailment or abolition of the sovereignty of Pakistan in respect of all or any of the territories lying within its borders, whether by amalgamation with the territories of neighbouring States or otherwise, shall be punished with rigorous imprisonment which may extend to ten years and shall also be liable to fine.

(2) Notwithstanding anything contained in any other law for the time being in force, when any person is proceeded against under this section, it shall be lawful for any Court before which he may be produced in the course of the investigation or trial, to make such order as it may think fit in respect of his movements, of his association or communication with other persons, and of his activities in regard to dissemination of news, propagation of opinions, until such time as the case is finally decided.

3) Any Court which is a Court of appeal or of revision in relation to the Court mentioned in sub-section (2) may also make an order under that sub-section.

²⁸⁹ 124-A Sedition: Whoever by words, either spoken or written, or by signs, or by visible representation, or otherwise, brings or attempts to bring into hatred or contempt, or excites or attempts to excite disaffection towards, the Federal or Provincial Government established by law shall be punished with imprisonment for life to which fine may be added, or with imprisonment which may extend to three years, to which fine may be added, or with fine.

Explanation 1: The expression ".disaffection includes disloyalty and all feelings of enmity.

Explanation 2: Comments expressing disapprobation of the measures of the Government with a view to obtain their alteration by lawful means, without exciting or attempting to excite hatred, contempt or disaffection, do not constitute an offence under this section.

penalizes incitement of students or others to take part in political activity which disturbs, or is likely to disturb, public order.

Section 292²⁹¹, which prohibits the sale, public exhibition and even possession of obscene books, is extremely broad and vague. An explanation exempts material "used *bona fide* for religious purposes" but the exemption does not extend to artistic works. Since the law does not define obscenity, this term is, in practice, left to subjective interpretation by the authorities.²⁹²

Explanation 3: Comments expressing disapprobation of the administrative or other action of the Government without exciting or attempting to excite hatred, contempt or disaffection, do not constitute an offence under this section.

²⁹⁰ Inducing students, etc., take part in political activity: Whoever by words, either spoken or written, or by signs, or by visible representations, or otherwise, induce or attempts to induce any student, or any class of students, or any institution interested in or connected with students, to take part in any political activity which disturbs or undermines, or is likely disturb or undermine, the public order shall be punished with imprisonment which may extend to two years or –with fine or with both.

²⁹¹ Sale etc. of obscene books, etc "Whoever: (a) sells, lets to hire, distributes, publicly exhibits or in any manner puts into circulation, or for purposes of sale, hire, distribution, public exhibition or circulation, makes, produces or has in his possession any obscene book, pamphlet, paper, drawing, painting, representation or figure or any other obscene object whatsoever, or (b) imports, exports or conveys any obscene object for any of the purposes aforesaid, or knowing or having reason to believe that such object will be sold, let to hire, distributed or publicly exhibited or in any manner put into circulation, or (c) takes part in or receives profits from, any business in the course of which he knows or has reason to believe that any such obscene objects are, for any of -the purposes aforesaid, made, produced, purchased, kept, imported, exported, conveyed, publicly exhibited or in any manner put into circulation, or (d) advertises or makes known by any means whatsoever that any person he engaged or is ready to engage in any act which is an offence under this section, or that any such obscene object can be procured from or through any person, or (e) offers or attempts to do any act which is an offence under this section shall be punished with imprisonment of either description for a term which may extend to three months, or with fine or with both. Exception: This section does not extend to any book, pamphlet, writing, drawing or painting kept or used *bona fide* for religious purposes or any representation sculptured, engraved, painted or otherwise represented on or in any temple, or on any car used for the conveyance of idols, or kept or used for any religious purpose."

²⁹² Global Trends on The Right to Information: A survey of South Asia, Article 19. Center for Policy Alternatives, Commonwealth Right Initiative, Human Rights Commission of Pakistan, July 200. 99

6.4.1.7 Government Servants' (Conduct) Rules, 1964

Similarly certain legal provisions also restrict government servants in terms of disclosure of official information as for instance under rule 18²⁹³ of Government Servants (Conduct) rules.²⁹⁴

6.4.2 A Weak Legal and institutional framework for freedom of information

The legal and institutional framework for freedom of information is weak though gradually improving in last decade as discussed earlier but still cannot ensure prompt, proficient and effective realization of citizens' rights to information. Despite the fact that the right to information is a constitutional right, under Article 19A after 18th amendment and information is a pre-requisite of the effective exercising of freedom of speech and expression. Recently the Provincial government following KPK Freedom of information initiative has promulgated their law which is a step forward to brighter future but federal government has not taken any action in this regard yet.²⁹⁵

6.4.2.1 Existing mechanism for transparency and Access to information.

Secrecy is norm though but some existing laws and rules provide for certain mechanisms or procedures to be followed whereby some information can be officially shared with public although these mechanisms are not fully operational, for a variety of reasons in most of the cases. These include the following:

- i) Official publications and Annual Reports.

²⁹³ Rule 18 states as: No Government Servant shall, except in accordance with any special or general order of the Government, communicate directly or indirectly any official document or information to a Government Servant unauthorized to receive it, or to a non-official person, or to the press

²⁹⁴ Mukhtar Ahmed Ali. Lack of Transparency and Freedom of information in Pakistan.¹⁶

²⁹⁵Ibid 19-22

- ii) Gazette Notifications
- iii) Ministry Spokesperson
- iv) Parliamentary Questions
- v) The parliamentary committee proceedings
- vi) Court Proceedings
- vii) Websites(official)
- viii) Print and electronic Media²⁹⁶

6.4.3 Political Apathy and lack of Public accountability

Political apathy and indifference in Pakistan has become a cultural norm largely owing to the lack of easy access to information and official discouragement. To ensure transparency and appropriate use of public funds, citizens need to have information about various public departments, their activities and the way they spend public money meant for public welfare projects. The secretive culture prevalent in Pakistan largely explains people's mistrust in state institutions and lack of participation in formal economic activities.²⁹⁷

It is surprising that even the reports of various committees and commissions on reforms in areas such as policing, education and corruption are treated as confidential, and therefore, inaccessible by citizens. Effective freedom of information regime therefore would also require intervention through law to inculcate a culture of questioning and accountability amongst the citizenry.²⁹⁸

²⁹⁶ Mukhtar Ahmed Ali. Lack of Transparency and freedom of information in Pakistan.

²⁹⁷ Freedom of Information, Consumer Rights Commission of Pakistan P.O. Box 1379, Islamabad, Pakistan

²⁹⁸ ibid.

6.4.4 Poorly Regulated Media

Print and electronic media represent an effective tool in dissemination of information, however, at this stage Pakistan's media suffers on two fronts on one hand are laws and regulations which remain on the statute book which are colonial in nature and are exclusionary on grounds of "public interest" "defense" and "glory of Islam" while on the other hand the media regulation has not kept its pace with technological advances which is rendering the difference between information and propaganda difficult. Also laws need to be up-graded to safeguard the citizens from the excesses of media which can create immense pressure on working of state and justice system.

Journalists and media practitioners do not have any legal right to get information except through their informal connections with the bureaucracy and the ruling elite. In the absence of formal-legal arrangements for access to information, a lot of time, energy and resources of media, concerned citizens and civil society organizations is wasted in obtaining access to information through informal means and arrangements. Some argue that information illegally or informally acquired cannot be used for legal purposes. A freedom of information regime is therefore essential to overcome this short-coming.²⁹⁹

6.4.5 Non indexation and poor maintenance of public record

Poor preservation of public official records, which makes maintenance of data as well as its retrieval, a complicated job, if and when required.³⁰⁰ Further the lacking focus on computerization of records, indexation, networking and availability of computer systems and relevant resources and other concerns about relevant infrastructure to

²⁹⁹ Ibid

³⁰⁰ Mukhtar Ahmed Ali. Lack of Transparency and Freedom of information in Pakistan.18

make sure prompt or active data management and the handling of citizens' requests as regard access to information.³⁰¹

6.4.6 Official Attitude towards Requestor

The information requests are not generally taken seriously and the official responses vary person to persons. These hindering or obstructive attitudes can be for different reasons like the generally prevalent culture of secrecy, sometimes lack of clarity regarding rules, procedures and government policy can be an issue, or as regards the covering up of inefficiencies and wrong-doings and some time can even be official arrogance that lead to members of the public, especially the disadvantaged, being discouraged from asking questions. To a lesser but relevant point, officials' concern are about increasing their workload if they have to respond to questions and information requests from members of the public.³⁰²

Most recently a long awaited decision of parliament is finalized in October, Right of Access to Information Act 2017 (appendix 3) has been promulgated, a step in right direction towards a flourishing regime in Pakistan. Apparently a good piece of legislation but relevant issues of implementation as discussed in next part will remain a

³⁰¹An interesting event quoted by the writer while conducting research (Mukhtar Ahmad Ali . lack of transparency and freedom of information in Pakistan)

In the course of interviews for this study, an official in the Ministry of Health narrated an interesting case: one of the public bodies under the Ministry of Health wanted to increase the inspection fee from some Paisas to 1000 Rs. per inspection, because the fee had been fixed in the 1980s and had become very low for existing circumstances. The case was examined thoroughly by the Ministry, and rates for similar inspections in other countries of the world were looked at. In the end, the case was presented to the Finance Division, for concurrence – and the Ministry of Finance wanted to see the 1980s letter whereby the earlier approval had been granted. In spite of all efforts, however, Health Ministry officials were unable (and are still unable) to trace that letter, or file. As a result, the case of the fee increase remains pending. The loss to the Public Exchequer because of this (i.e. that there has still been no fee increase) can be estimated in the millions. And many more examples of a like nature can be referred to - sometimes bringing with them extremely serious concerns when it comes to public health and resource utilization efficiencies.

³⁰² Ibid 18-19.

hurdle unless taken some prompt and serious steps in this regard. The conflicting laws with FOI need to be interpreted in such a way that FOI may be given preference so that uniformity and clarity can be achieved. Policy reforms are also required for better implementation of FOI to coup with the level of corruption and to target the transparency and improved governance.

Conclusions

A historical review of legislation in Pakistan presents that law making has not always been done in context of public interest; rather legislation remained the area of expediencies and number of other factors like democratic institutional failures, political compromises, lack of interest, lack of required knowledge or expertise on an issue and worse of all protection of vested interest. On the other side the external pressure of International Financial institutions like IMF and World Bank also an important contributor for the undesirable policies and legislation have been introduced or enacted resulting in poor governance and hindering transparency , of course effecting the FOI regime.

FOI 2002 though deficient from many aspects but definitely a significant positive development towards a cultural shift from secrecy to more open approach. Where once the minimum access to official record by citizen was official discretion, now citizens can demand information, and In case of denial, related departments have to justify the refusal on information requests. Of course such efforts changed the concept of freedom into a right to access the information from public bodies.

The 18th Constitutional Amendment to the Constitution of Pakistan, 1973 in 2010, insertion of the article 19-A, totally altered the landscape of FOI system in Pakistan. Significant accessibility has been observed at all fronts particularly among the political groups. Further this changed discourse also lead to bringing in change in the old and basic FOI legislations in the country and accelerated the efforts on putting in place better provincial RTI laws like Khyber Pakhtunkhwa and Punjab where no such laws were in existence.

RTI as referred earlier as oxygen for democracy, it is fundamental for the transparency, good governance, to enhance accountability and reduction in corruption in any democratic state. To enact comprehensive and effectual laws on RTI in Pakistan recent developments in KP and Punjab have set an example. Previously Freedom of Information Ordinance, 2002 remained applicable at federal level and same was replicated by Sind and Baluchistan.

These laws have failed to serve the citizens due to inherent deficiencies and vehemently ignored international standards such as: maximum disclosure of information, obligation to publish key information, promotion of open government, short list of exceptions, rapid and fair processes to facilitate requester, cost effective procedure, open meetings of public bodies and whistleblowers protection. In the situation there is a dire need to replace these outdated legislations with comprehensive and meaningful legislations at first stage leading to next essential steps like to improve implementation mechanisms which is a fundamental obstacle through regular engagement, trainings and capacity building of government officials that need serious attention to defeat the issues of implementation under the relevant laws.

The most important factor to be seriously focused on is the education and awareness of the citizens, along with collective effort from other stake holders like political activists and workers, CSOs, media persons and academia, about how to use the right to information, would in fact fortify the demand side of implementation mechanism, that is a common hurdle with almost all the legislations.

Most recently a Federal legislation on FOI has been enacted in month of October 2017 which is a ray of hope for better FOI regime in Pakistan. The prevalent situation when this Act has been enacted in political context of Pakistan history is significant as after the decision of Supreme Court of Pakistan in Panama case, the FOI and its implementation has gained further importance. The debates on different forums for the information on the issue have reached the general public interest to the disclosure of information though many aspects of situation are still controversial.

The success of the FOI system relies on a citizenry acutely aware of its right in the matter and insistent upon knowing what its government is doing. The objective of this legislation will only come to fruition when people of Pakistan will demand the information and are willing to take action upon its refusal. This demand will come around with the active assistance of the media and the civil society organizations who can keep the citizenry reminded of their right to know.

Chapter 7

Freedom of Information and Democracy

Democracy without accountability is nothing more than a myth and will remain a paper procedure unless those in power are not held accountable by the people for their actions, policies and decisions. Public accountability is basic ingredient of any modern democratic governance and transparency. Traditionally accountability was only fashioned in political context and ensured through the election. The public official and bureaucracy were mainly immune from such scrutiny. But public management reforms have introduced a new facet by making them directly and individually accountable for their acts and omissions and their role played regarding the policy formulation and implementation.

7.1 Introduction

The public management reforms are ensured by empowering the citizens with the legal rights to have access to the government information. Last few years many states not only enacted such laws but also provided for penal provisions in case of failure to provide the required information. By legalizing and institutionalizing the citizen's right to know has given a real meaning to the concept of public accountability. However, the freedom of information laws are potentially one of the most powerful and effective tool to date but some cases they remain a toothless paper construct and democratic show

case based on multiple reasons instead of being effective scrutinizing means that they were intend to be.³⁰³

7.2 FOI, Corruption, Transparency and Public Accountability

Within debate on good governance, there is an increasing emphasis on freedom of information as a tool to guarantee transparency, accountability and public participation. Since mid 1940s, the right to information is generally recognized as a fundamental human right which has been rightly characterized as “the oxygen for democracy”.³⁰⁴ In a democratic system, it is essential for citizens to make informed electoral preference. On the other side right to information is also crucial for exposing inefficiencies and corrupt practices, and ensuring transparency, effective public accountability and good governance. The need and significance of right to information cannot be denied unless by those who have a vested interest in protecting corruption or inefficiencies and would like to restrict the capacity and usefulness of freedom of information laws.³⁰⁵

Corruption, a cancer that Pakistan inherited since its birth has now penetrated to every part of its body and cure seems impossible if not disinfected with right treatment. Quaid e Azam Muhammad Ali Jinnah pointed corruption, bribery, nepotism, jobbery and black marketing as the curses, while addressing the first constituent assembly after independence.³⁰⁶

³⁰³ Ashref Meraj. How effective is the Right to information as a public accountability and transparency mechanism?

³⁰⁴ Dr Sania Nishter . Freedom of Information-oxygen for democracy . The News International, October 12th 2009. Available at http://www.heartfile.org/pdf/57_Freedom_of_Info.pdf. Last accessed on 10-06- 2019.

³⁰⁵ State of Transparency and Freedom of Information in Pakistan. CPDI. 4

³⁰⁶ On August 11, 1947 the Founder of our Country Quaid-e-Azam Muhammad Ali Jinnah had this to say while addressing the first constituent assembly: “The second thing that occurs to me is this. One of the biggest curses from which India is suffering — I do not say that other countries are free from it, but, I

To have a better picture of the issue, first we need to understand the meaning and relationship of these terms.

7.2.1 Governance.

The word “governance” derives from Latin “gubnare” which means to steer or direct.³⁰⁷ Traditionally Governance was associated with institution of state power only, however, modern understanding of the terms has acquired wider connotations and has included non-government sectors such as the Civil Society and the private sector and modern governance is interplay of traditional state power structures and the non state structures to achieve commonly agreed and cherished goals.³⁰⁸

The term governance, generally applies to all means of governing whether undertaken by a state administration like government authorities, business market or other networks or whether official or informal organizations or territory either through any set of laws, norms or customs.³⁰⁹

think, our condition is much worse – is bribery and corruption. (Hear, hear.) That really is a poison. We must put that down with an iron hand and I hope that you will take adequate measures as soon as it is possible for this Assembly to do so. Black-marketing is another curse. Well, I know that black-marketers are frequently caught and punished. According to our judicial notions sentences are passed, and sometimes fines only are imposed. Now you have to tackle this monster, which today is a colossal crime against society, in our distressed conditions, when we constantly face shortage of food and or the essential commodities of life. A citizen who does black marketing commits, I think, a greater crime than the biggest and most grievous of crimes. These black marketers are really knowing, intelligent and ordinarily responsible people, and when they indulge in black-marketing, I think they ought to be very severely punished, because they undermine the entire system of control and regulation of food-stuffs and essential commodities, and cause wholesale starvation and want and even death. The next thing that strikes me is this. Here again is a legacy, which has been passed on to us. Along with many other things good and bad, has arrived this great evil -the evil of nepotism and jobbery. This evil must be crushed relentlessly. I want to make it quite clear that I shall never tolerate any kind of jobbery, nepotism or any influence directly or indirectly brought to bear upon me. Wherever I find that such a practice is in vogue, or is continuing anywhere, low or high, I shall certainly not countenance it.”

³⁰⁷ What is governance? Available at <https://tamayaosbc.wordpress.com/2014/08/21/what-is-governance/>. Accessed on 15-09-20

³⁰⁸ Anne Mette Kjaer, “Governance,” (Cambridge: Polity Press, 2004), 3-4. Also available https://ceses.cuni.cz/CESES-136-version1-1D1_Governance_Intro_Kjaer_2004.pdf. last accessed on 15-09-20

³⁰⁹ Governance. Knowledge, Society, Policy Handbook. By UNESCO, IFAP, UNU-EGOV. 51.

The governance involve the process of interaction and the decision policy or strategy making by the all relevant factors involved in any particular collective issue of concern. For our purpose the public policies by the public sector governance need the responsiveness and accountability are needed for development of any democratic society³¹⁰

7.2.2 Public Accountability

The term accountability can be defined in many ways and is a multidimensional phenomenon. When specifying with public accountability, it pertains to compulsory responsibilities of the persons or entities that have been given the charge of or entrusted with the public resources to be accountable, for the managerial, fiscal and program responsibilities. The right to seek accountability belongs to those who conferred these responsibilities as how and where those resources are utilized including the allocation, use and result achieved. In other words accountability aims to ensure that public money or resources are utilized economically with minimum wastage or theft and ultimately the public is benefitted from public finances.³¹¹

‘Public accountability’ as a concept is rather indefinable as a hurrah-word, like ‘responsibility’, ‘learning’ or ‘solidarity’, therefore all are usually found to favor the concept and there is hardly against it. Today in modern democratic governance, public accountability is a basic feature or a hall mark. Any democracy will remain a paper procedure without public accountability for their actions and omissions, their policies,

³¹⁰ Ibid.

³¹¹ M. Adil Khan And Numayr Chowdhury, Public Accountability, Corruption Control And Service Delivery: Governance Challenges and Future Options, Available at <http://unpan1.un.org/intradoc/groups/public/documents/un/unpan028466.pdf>. Last Accessed on 5th, August,2016.

decisions and expenditures. Public accountability is complementary to public management.³¹²

7.2.2.1 Background

The term accountability is closely related to the accounting and its literary derived from bookkeeping. Historically the recent concept of accountability can be traced back to reign of William I , after the Norman conquest of England in 1085 when he required all property holders of his dominion to render a count of what they had in possession.

These belongings were listed and valued by the royal agents and books were made by name as doomsday books. The lists or the survey were not only for the tax payments issues but also formed the foundation of royal governance. Along with the listing of what was in the kingdom but the king also had all the landlords swear for allegiance on oath?

Later in the early twelfth century this practice developed into a highly centralized administrative system which was ruled through the centralized auditing and annual account giving. The idea of accountability has moved beyond bookkeeping into many shapes and sizes. More recently the idea of accountability does not refer to holding the subjects to account before the sovereign anymore but to the contrary it is the authorities or the sovereign themselves who are held accountable to or by their subjects or the citizens. Moreover it has become a principle character for good governance, both in private and public sector. ³¹³

³¹² Mark Bovens. PUBLIC ACCOUNTABILITY. Paper for the EGPA annual conference, Oeiras Portugal September 3-6, 2003 to be presented in workshop 8 (Ethics and integrity of governance),available at <https://www.law.kuleuven.be/integriteit/egpa/previous-egpa-conferences/lisbon-2003/bovens.pdf>. Last Accessed on 05-07-2016.

³¹³Ibid.

7.2.3 What is corruption?

“The abuse of entrusted powers for private gain” (by heritage, education, marriage, election, appointment or whatever else) is a generally definition given to the term of corruption. It not only includes politicians or public servant but also the any CEO / CFO of a company, a team leader at work place, the notary public , an administrator at schools or team coach or others. ³¹⁴

Corruption can take multiple forms like political, private or public, grand or petty depending on the amount of money lost and gained and the sector where it occurs. Political or grand corruption can be committed at high governmental level that distort policies or central functioning of state, facilitate leaders to benefit at the expense of public good. It involves the manipulation of policies, rules of procedure while allocating resources and institutions, who misuses their positions to sustain their powers wealth and status. On the other hand petty or minor corruption relates to daily abuse of trusted powers by mid or low level public officials while interacting with ordinary citizens who are accessing or dealing with the basic goods or services in places like schools, hospitals, traffic, markets or police departments or other agencies. ³¹⁵

Corruption affects societies in many ways and in worse cases the corruption can cause life. Short of this it may vary amongst the people's freedom money or health. Mainly corruption can be divided into four categories including political, economic, social and environmental.

³¹⁴ <http://www.corruption.org/en/corruption/what-is-corruption/>. Last Accessed on 5-8-2016.

³¹⁵<http://www.transparency.org/what-is-corruption/#define>

- The political corruption is a major barrier to democracy and the rule of law. Offices and institutions, in a democratic system, lose their legitimacy when they are misused for private gain as defined. This is harmful not only in established democracies, but worse in newly emerging ones. It is extremely challenging in a corrupt climate to have an accountable political headship.
- Another related area is the economical corruption that depletes nation's wealth. Policy maker or the political leader, corrupt politicians invest limited public resources in projects that will help their pockets instead benefit communities. And promote high-profile plan such as power plants, pipelines, dams, and refineries over less impressive but more urgent infrastructure projects such as schools, hospitals and roads. Further it distorts competition and hampers the development of fair market structures, which consequently deters investment.
- Amongst the negativities of corruption is it crumbles the social fabric of society. It weakens trust of people in its leadership, the political system, and ultimately the institutions. A distrustful or apathetic public then becomes yet another problem to challenging corruption.
- Another major international and national concern and an example is environmental degradation which is another consequence of corrupt systems. The insufficient , or non-enforcement of, environmental legislation and regulations means that precious natural resources are hastily exploited, and entire ecological systems are ruined. From mining, to carbon offset, to logging

companies across the world continue to pay bribes in return for unobstructed destruction.³¹⁶

7.2.4 What Is Transparency?

Transparency is knowing or being aware by all means of what, why, how and how much, it is about shedding light on plans rules, procedures and actions related to public affairs. Transparency keep checks and ensures that public official's manager civil servants, board members and business people must act evidently visible and understandably and ultimately report for their activities. Consequently the general public can hold them accountable. It is only and positivist way of guarding corruption which as result helps to gain public trust on institutions on which our future depends.³¹⁷

7.3 Transparency and accountability through Access to information

Among various ways to cure by deterring and detecting corruption and to safeguard the integrity of any government, freedom of information laws is one of the major tools for attaining the public participation in policy or decision making. A significant factor for dearth of popular participation is the lack of information. In last two decade many countries around the globe have adopted these responsive provisions /laws providing for all official records of public interest subject to exemption. It is also unique in the sense that individual can exercise directly without an intermediary like an elected representative or a lawyer to ask question for them rather it is a free standing right any

³¹⁶ <http://www.transparency.org/what-is-corruption/#define>

³¹⁷ <http://www.transparency.org/what-is-corruption/#define>

person can use in his/ her name. At the same time another significant aspect of this right is requestor is not required to justify his request or reveal any sort of need to know rather the burden of proof is on the authority to justify the withholding of information.

³¹⁸

It is also significant as it involves all the central and state governmental whether local or provincial or federal authorities on one side and on the other side it applies not only to executive but the judiciary and legislature as well. The term information encompasses or acts to cover right to inspect all relevant documents records and other work detail held by any such office and permits to get certified copies /sample for verification.³¹⁹

Keeping in view the general features of FOI laws, freedom of information involves a very complex legislation whose success is dependent on the number of factors regarding the details of the legislation like the charges, delays or enforcement mechanisms causing hurdles to achieve the goals. The drafting of precise exemption in legislation is of fundamental importance in case of serious corruption specially those protecting the commercial confidentiality. Another important exemption is for personal privacy again if drawn widely can undermine the efforts to safeguard against the malpractices.³²⁰ Public interest tests as discussed earlier here may play an important

³¹⁸The only prerequisite can be that of being citizen or a resident of any state, for instance in Canada's Access to Information Act 1982, section 4(1)but many states even removed this condition by allowing "any Person" including a foreigner as in cases of Australian, Irish, US and UK FOI laws, amongst others.

³¹⁹ Doctrine of public Accountability. Available at <https://www.lawteacher.net/free-law-essays/administrative-law/doctrine-of-public-accountability-administrative-law-essay.php>. last accessed on 10-10-2017.

³²⁰ For instance, by treating improper expenses claims by public officials as private matters, or protecting the fact that a convicted child abuser had been appointed to a post involving close contact with children.

role along with the authority dealing with the question of disclosure like the court or any other established legal authority.³²¹

7.4 Effective FOI laws to achieve transparency and Governance.

More than 75 countries around the globe have adopted FOI laws granting citizens the right to access information not only their personal record but various records of the governmental agencies regarding their own working. ³²²

The basic objective of FOI law is to improve transparency and governance thereby creating a trusted relationship between the citizens and their elected representative and other government institutions. Subjective facts suggest that such law improves the governmental accountability, transparency and increase the performance of Bureaucratic machinery.³²³ It has also been observed on the subject, which at cross national level adopting FOI laws increased corruption on account of greater reporting.³²⁴ Further findings also suggest that FOI laws are very effective at detecting corruption and transparency when combined with media and civil society or non-governmental organizations.³²⁵ Same findings also resulted that FOI can increase corruption if remained in isolation or in weak version. The effectiveness against

³²¹ Maurice Frankel. Freedom of information and corruption. Paper for global forum on fighting corruption and safeguarding integrity. May 2001. Available at <https://www.cfoi.org.uk/pdf/corruptionmf.pdf>. last accessed on 13.03.2017.

³²² Krishna Chaitanya Vadlamannati, Arusha Cooray. Do freedom of Laws improve bureaucratic efficiency? An empirical investigation.(Oxf Econ Pap (2016) 68 (4): 968-993, 05 April 2016) Oxford Economic Papers. Volume 68, issue 4, October 2014. availabale at <https://academic.oup.com/oep/article/68/4/968/2503353/Do-freedom-of-information-laws-improve>. last Accessed on 10-03-2016.

³²³ Michener, Greg. "FOI laws around the world." *Journal of Democracy* 22, no. 2 (2011): 145-159.

³²⁴ Krishna Chatania et'al. Do freedom of information Laws improve bureaucratic efficiency? An empirical investigation.

³²⁵ Ibid.

corruption depends on other social, economic and political arrangements and controls.³²⁶ In United states FOI is argued to be associated with increased conviction rate of official involved in corruption referring to the prevalent situation in state where FOI laws to be implemented. ³²⁷

Similarly, another aspect that nature of FOI also makes the goal achievable or otherwise that is a strong vis-a-vis a weak FOI regime to improve the efficiency of relevant authority. The positive effect of FOI laws are mainly emanating from countries adopting a stronger version of these laws. Further the FOI can be more effective when actualized by the citizens accessing and analyzing the performance along with various channels like the media freedom the active role of NGOs or civil society organizations and competitiveness in political participation.

To achieve the desired transparency, accountability and responsible governance the FOI depends on these forerunners in all the situations for all time. The Countries that have not yet implemented or implemented a weak FOI law must strive for stronger FOI laws and other complementary mechanisms like well trained public officers and institutions to promote implementations of these laws. The increased role of civil society activism a free press/media , better political competition, can make the decision making process and the performance of bureaucracy further open to inspection by increasing the right to access public information and disclosure procedures.³²⁸

³²⁶ Samia Costa Tavares, "Do freedom of information laws decrease corruption?." *Journal of Law, Economics, and Organization* 29, no. 6 (2013): 1317-1343.

³²⁷ Cordis, Adriana S., and Patrick L. Warren. "Sunshine as disinfectant: The effect of state Freedom of Information Act laws on public corruption." *Journal of Public Economics* 115 (2014): 18-36.

³²⁸ Vadlamannati, Cooray. Do freedom of information Laws improve bureaucratic efficiency? An empirical investigation.2016.

7.5 Users of RTI /FOI?

The very relevant question in this discussion is how and who is the user of these laws and what is the impact of this activity towards the elimination of corruption and better governance.

The potential users of FOI or right of access may vary from individuals in quest of information about their own dealings and NGOs or other social organizations working for local issues, such as for education, health, public transport, pollution, planning, safety, job creation, are being dealt. Journalists or other media related persons must be amongst the major users.³²⁹

Their areas are directly related to the FOI but that afford does not provide the direct and immediate ready access to the required information that reporters need. Rather it is attractive to those working with a continuing interest in areas of documentary making, special reporting or especially for investigative journalists in particular topics or issues. After obtaining information from the relevant file or extract and they can do the analysis of the raw material and assess the unpublished information for their opinion. The success or importance of access law is not dependent on the volume of requests made rather it is reflected in the flow of the narratives that are based on such an information obtained through the law.³³⁰

Similarly the politicians in different states are now using FOI laws to get the information which can be more effective than their internal procedures which can be dodged easily. In many states like Canada³³¹ Ireland³³² and some others, members of the parliament are utilizing FOI laws to get the information from government which

³²⁹ Right to information legislation in Pakistan. Country Briefing Paper. May 2016. Center for peace and development (CPDI). 25-31

³³⁰ Maurice Frankel. Freedom of information and corruption. 5-6.

³³¹ Information Commissioner of Canada, Annual Report for 1995-96

³³² Annual Report of the Information Commissioner for 1999, Government of Ireland, 44

reportedly have been found a speedier mechanism than usual parliamentary procedures. It has become a tool for even improving parliamentary democracy. Sometimes these laws even allow for the retrieval of information from overseas which can be more ideal in case both the donor and the recipient governments have FOI laws this is especially relevant in case of international aid. The concerned can get information on the effective utilization of those funds wherein huge corruption cases are involved regarding intended and actual use of such funds which are usually criticized.³³³

Further the companies can also be attracted either local or multinational to by the transparency situation of a particular state to invest and the success of their business. FOI can be used to obtain raw data regarding their products and can also check the regulators treatment of other competitors.³³⁴

The implementation and impact can also assess how successfully the right is used. The RTI aims to regulate the proactive disclosure of information and also the mechanisms by which people can exercise this right. These laws also define who can use along with the exceptions and power for refusal of required information.³³⁵

In enhancing the transparency and accountability, there is a consensus on the importance of RTI, thereby reducing corruption but the empirical evidence as to affectivity of RTI laws remains limited. The actual or practical impact depends on series of other aspects or factors. Generally RTI laws have positive impact and a helpful tool in specific cases but in order to have a sustainable change through RTI other factors like guarantees like freedom of press and association, efficient checks and balance system,

³³³ Ibid.

³³⁴ Ibid.

³³⁵ Right to information laws: impact and implementation. Maíra Martini, Transparency International, Reviewed by: Marie Chêne; Robin Hodess Ph.D, Transparency International Date: 9 May 2014 Number: 2014:10 available at <http://www.u4.no/publications/right-to-information-laws-impact-and-implementation/downloadasset/3578> last accessed on 10-03-16.

like prosecution and dismissal of relevant officials involved in corrupt practices and logical policy responses to the issue in question regarding service delivery. Further it requires a strong leadership having political will along with establishment of independent well equipped / resourced oversight mechanisms following a clear legal framework and appeal system. Training and awareness campaign for the public to inform citizen as use of their right through media and educational institutions.³³⁶

7.6 Pakistani Legislations on Accountability and Corruption

Laws against corruption are amongst those which were enacted by parliament after independence showing that it was an issue that we inherited since birth of Pakistan and is not newly emerged in recent times. In this part anti corruption regime has been looked into to assess the progress we have made so far by all government in their times.

7.6.1 Evolution of Legal and institutional mechanism to fight corruption in Pakistan

The fight against corruption in Pakistan started from the time of creation as the first law passed by the Assembly was Prevention of Corruption Act which has become a war from a fight. Since then different governments enacted, along with the then existing law, different laws to curb the problem. Some of them are briefly discussed here³³⁷

7.6.1.1 The prevention of Corruption Act, 1947 (POCA)

The Pakistan Penal Code as enacted by British in 1860 was one of the law which contain a whole chapter with almost 11 separate section defining and punishing related to illegal gratification, bribery and the like but to make it more effective this law was

³³⁶ Ibid.

³³⁷ Zaheer ud Din Quraishi. A review of Anti Corruption Laws in Pakistan. Available at <http://www.hamariweb.com/articles/article.aspx?id=31063> Accessed on 01-03-2107.

promulgated.³³⁸ The earliest laws enacted but did not create any special agency rather the police system inherited from colonial administration served as enforcement instrument under this law which was part of district police force without any power to take an independent action.

Later this special police was merged into newly created Federal Investigating Agency in 1975. Secondly the law was limited in its application to Public servants. Thirdly the law provided procedural lacuna as it needs for official permission of respective head of department before taking action against any public servant and fourthly it was lacking for any civil society or democratic check or action but it was just a corruption control mechanism for a public servant by a public servant. Fifthly the law did not make corruption a separate crime and same procedural laws (Pakistan Criminal Procedure Code) were followed for corruption cases. Lastly no provisions were enacted for prevention or education as it was seen as behavioral problem not systemic failure. No organizational or structural reforms were given thought about and law worked against petty officials rather than big fish. These issues highlighted above can be attributed as some of the causes of failure in this anti corruption effort.³³⁹

7.6.1.2 The Public Representative Disqualification Act 1949/Elected Bodies Disqualification Ordinance 1958

Both laws were promulgated during military regime of Gen. Ayub Khan (1958-69) are among the trend setter in history of Pakistani legal anti corruption efforts. Almost 7000 politicians were banned under this law from taking part in election for next 15 years and prosecution could be avoided by agreeing to it. These laws started another destructive

³³⁸ Anti Corruption Mechanism and Institutions to address the Problem of Corruption in Pakistan. Back ground Paper. PILDAT. 12 December 2015. Dubai, UAE.

³³⁹ Zaheer ud Din Quraishi. A review of Anti Corruption Laws in Pakistan.

trend by using the anti corruption mechanism to achieve the political goals by respective government and political victimization become the fashion for all successive anti corruption attempt as for them corruption was a problem of all political class and civil servants and need to be purged.

Consequently a training movement was started by establishing a system of basic democracies to serve as ground for politician. On the other hand it was made compulsory for new entrants to Civil Superior Services (CSS) to attend a training course with Pakistan Military .These attempts however failed to control corruption.³⁴⁰

7.6.1.3 Federal Investigation Agency Act 1974

The Federal government after adoption of 1973 constitution, proceeded to establish Federal Investigation Agency under the law to further strengthen the anti corruption efforts. After three years martial law regime started and some of the cases related to offences of illegal gratification and bribery were transferred to military courts. Simultaneously tribunals were established to disqualify and punish the politicians allegedly corrupt under the Holder of Representative Offices (Punishment for misconduct) Order 1977 and the Parliament and Provincial Assembly (Disqualification for Membership) Order 1977. Again attempts resulted in political victimization rather to achieve the goal. ³⁴¹

7.6.1.4 The Ehtasab Act, 1997

Another round to curb corruption from Pakistan started during the second government of Nawaz Shareef (1996-1998) an Ehtasab Commission was set up under this law in 1996 and enhanced later by Ehtasab Bureau in 1997. The Commission carried on with

³⁴⁰ Ibid.

³⁴¹Anti Corruption Mechanism and Institutions to address the Problem of Corruption in Pakistan.
PILDAT

the prosecution and bureau assumed the investigation functions. Prominent feature of this law was to bring highest public functionaries even President and Prime Minister with the domain of anti corruption laws though symbolically as was known that no such agent would dare to bring any such proceeding against such offices. Special benches were established headed by high court judges to hear and decide cases within 30 days. The overall impact of the law was not positive as commission became a tool to repress political rivalry and members of opposition and previous government became the main target and undermined the political legitimacy further.³⁴² Collectively this law further discredited anti corruption efforts and synonymies it as political victimization.³⁴³

Now it can be analyzed from previous three anti corruption efforts in Pakistan, the factors like political use of anti corruption laws, lack of resources and dependence only on police along with in comprehensive selective legislations are among the major cause of failure of such efforts specially in later cases absence of political will was a major contributor.

7.6.1.5 The National Accountability Ordinance, 1999

Most recently this law was promulgated during military regime of Gen. Pervaiz Musharaf by repealing the Ehtasaab Bureau Act 1996 and established a new agency named as National Accountability Bureau (NAB). Musharraf's government saw a number of important laws to tackle corruption besides this including the freedom of information Ordinance 2002, The Removal from Service (Special power) Ordinance

³⁴² The bureau headship was assigned to a government close associate and former Prime minister and close associate were specially targeted.

³⁴³ Zaheer ud Din Quraishi. A review of Anti Corruption Laws in Pakistan.

2000 enacted at both federal and provincial level for summary removal of (corrupt) government servants.³⁴⁴

The Ordinance not only extended the jurisdiction by including the private sector but also broadened the definition of Corruption to include *persons who maintain a living standard not commensurate with their known sources of income*.³⁴⁵ Further it addressed many lacunas by giving legal backing especially the typical doctrine of presumption of accused innocence was also amended to create an effective deterrence against corruption. Remand law under Criminal procedural laws was also changed from 14 days to 90 days in these cases.³⁴⁶

The most important aspect of the NAB is the change in mission or motto which makes it apparently and comparatively effective institution is that it has adopted a three staged strategy for elimination of corruption and that is "Awareness, Prevention and enforcement which generally and theoretically works for effective working and seemed a flexible and practical contemporary approach specially in case of Pakistan where the issue is as old as the state itself.

In theory the organization is totally independent in its working. The chairman after posting by President can only be removed by following the procedure as to remove the judges of the Supreme Court of Pakistan.³⁴⁷ The agency is powered with both investigation and prosecution with no budgetary constraints. Additionally NAB courts

³⁴⁴ Anti Corruption Mechanism and Institutions to address the Problem of Corruption in Pakistan. PILDAT

³⁴⁵ NATIONAL ACCOUNTABILITY ORDINANCE,2000 (XVIII of 1999) ,s9

³⁴⁶ Zaheer ud Din Quraishi. A review of Anti Corruption Laws in Pakistan.

³⁴⁷ Article 209, Supreme Judicial Council. The Constitution of Pakistan 1973.

were created under the same law for speedy trials. Only compulsion is to submit annual report to the president.³⁴⁸

Holder of Public Office (Accountability) bill was introduced believed that elected representative or the holder of public office (such as President, Prime Minister or Governors) do not technically fall within accountability domain of existing laws, was introduced to repeal NAO 1999.(The name of bill was later changed to National Accountability Commission Bill. NAC). Since then it has been lying pending with the National Assembly standing committee on law and justice. Proposed bill was also considered by some as a hidden attack on the existing NAO 1999 thereby rendering many of its effective provisions of the law defunct by replacing it. Thus multiplicity of laws (mostly outdated) is also an issue with a Pakistan's ineffective Anti corruption regime.³⁴⁹

Another episode of legitimacy crisis in context of anti corruption regime, Pakistan faced was after the promulgation of National Reconciliation Ordinance in 2007 and when Supreme Court in 2009 declared it unconstitutional causing serious political crisis in the country. Even later the efforts to promulgate new anti corruption failed because of divergence between government and opposition. ³⁵⁰

7.7 Challenges to combat corruption

Pakistan's ranking in Corruption Perception Index (CPI) at the end of Musharaf's tenure in 2008 was at 134/180 countries which has recently been improved slightly during year 2014-15 as 126/175 countries indicating the improvement though slow but a sign of

³⁴⁸ Zaheer ud Din Quraishi. A review of Anti Corruption Laws in Pakistan.

³⁴⁹ Affan Taj. Problem of Corruption. Dawn News. April 12th 2012.

³⁵⁰ Zaheer Ud Din Qurashi.A review of Anti Corruption Laws in Pakistan.

betterment. Keeping in view the legal evolution we can assume that laws are there from Pakistan Penal code to National accountability ordinance and even after given freedom of information as fundamental right.³⁵¹ On the other side institutional mechanism are in place such as the Office of Auditor General of Pakistan under the Constitution along with the Public Accounts Committee of the National Assembly. There are now long established regulatory authorities of all the government departments subject to procurement rules to be followed both at national and provincial level, and the offices of ombudsman to provide remedy for mal administration. The office of NAB, FIA with a special anti corruption wing and other anti corruption establishments. A serious question arises that, why the huge state apparatus has not succeed to root out this menace of corruption and inefficiency that remains acute despite the identification of the disease since its birth, the laws enacted and mechanisms put in place by both military and civilian governments?³⁵²

Some of the basic areas are highlighted below that are the reasons of failure of anti corruption regime in Pakistan and what improvements can be made:

1. One of the basic reasons Anti corruption legislation faced is the definition or even explanation of the term of corruption was missing as initially. POCA the first anti corruption law defined criminal misconduct rather corruption which targeted only the government servants and it is generally accepted that at corruption has various forms which if limited to simple definition will be a complex job. If our

³⁵¹ Anti Corruption Mechanism and Institutions to address the Problem of Corruption in Pakistan. PILDAT

³⁵² Affan Taj. Problem of Corruption. Dawn News . April 12th 2012.

legislatures do not take into account the different nomenclatures of corruption how could they detect corruption? The Ehtasab Ordinance which define the term 'corruption and corrupt practices' composed of six characteristics which was later superseded by NAO in 1999 by 12 Characteristics.³⁵³

The Supreme Court while adjudicating a case investigated by NAB in 2008 interpreted the term as.

...an act which is done with intent to give some advantage inconsistent with law and wrongful or unlawful use of official position to procure some benefit or personal gain. (The) expression corrupt practice(s) is a series of depraved/debased/morally degenerated acts.³⁵⁴

Until 1997 the legislature only perceived and focused was targeting public servant the persons employed by the government like police land or tax officials the bureaucracy and court of justice thereby excluded the elected representative and military officials from the general law. The wafaqi mohtasib's laws and provincial anti corruption laws are no different.³⁵⁵ The Ombudsman and provincial laws suffers same deficiency as only applicable to public / government servants but cannot hold executives accountable even after the tenure of their offices. Besides the deficiency the provincial establishments do not function properly.³⁵⁶

³⁵³ Ibid.

³⁵⁴ The State Vs M.Idrees Ghauri and others .SCMR 118, 2008.

³⁵⁵ The Sindh Prevention of Bribery and Corruption Act 1950, The Punjab Employees Efficiencies, Discipline and Accountability Act 2006.

³⁵⁶ For example, in 2010 the office of the ombudsman Punjab, according to its annual report, received 123 complaints pertaining to the officials of the anti-corruption establishment in Punjab alone

2. Federal Investigation Agency (FIA) has a separate anti corruption wing dealing with certain matters of corruption concerning the Federal government but FIA is vulnerable to political interference. The FIA, Ombudsmen and provincial establishments further suffer from inability to proceed against particular institutions like medical legal practitioners and the army that are regulated by dedicated laws.³⁵⁷ These institutions do not define corruption and usually Pakistan's institutions rarely or do not proceed against their own ranks resulting in minor or no conviction making the respective law ineffective.³⁵⁸
3. There are abundant anti corruption laws in Pakistan but are out dated and exclude certain classes of people and institutions from their purview thereby granting a kind of implied immunity from action. The NAB ordinance 1999(NAO) was a first law till now that brought the untouched class of people into sphere of accountability.³⁵⁹ Under this law the institutions has been conferred power to investigate and prosecute the cases of corruption and so far it is the only institution that has comparatively worked effectively than before but still it has its own limitations. The chairman is the appointee of the president in

³⁵⁷ Affan Taj. Problem of Corruption. Dawn News. April 12th 2012.

³⁵⁸ The Army Act 1952, for instance, does not define the word corruption or include the classification 'corruption or corrupt practices'. Rather, it defines 'illegal gratification' as an offence. Resultantly, none of our anti-corruption agencies or courts can investigate a serving army officer for alleged corruption. Meanwhile, the Army Act provides immunity to all serving members of the armed forces from investigation, arrest, detention or trial from all other courts or investigative agencies.

³⁵⁹ The Supreme Court observed in the Asfandyar Wali's case, "For the first time, members of a hitherto untouchable class of influential and powerful persons, not merely restricted to holders of public office, but also include bankers, businessmen, industrialists, bureaucrats, and other persons, who are involved in corruption and corrupt practices as defined in the NAB, fall within the purview of accountability in an effective and coherent manner."

consultation with the leaders of the house and opposition and as such legally powerless to bring the president, prime minister or provincial chief minister or even a leader of opposition into the domain of accountability even after the expiry of their services.³⁶⁰

4. Lack of public trust on watchdogs established to deal with corruption is also amongst the reasons of failure to effective handling of corruption.³⁶¹ Yet another aspect is that the generally corruption is not considered as major social issue comparing it with the energy crisis, unemployment, security issue poverty, education inflation, and drinking water.³⁶²
5. Keeping the history in mind we can asses that our legislatures have legislated tailor made laws for securing some of the institutions and of course self interests by not letting anti corruption institutions have autonomous powers. Consequently the state and its institutions remained under political influence and prevented free and fair investigation and prosecution which is criminal. ³⁶³
6. Moreover another neglected but very important aspect of anti corruption regime is protection or indemnity for whistle- blowers, exposing the instances of corruption. These laws would encourage

³⁶⁰Affan Taj. Problem of Corruption. Dawn News.

³⁶¹ A survey conducted by PILDAT in June 2015 showed that only 30 % of public trust(some or more) NAB though 39% expressed no opinion. Further public confidence on Police and Tax and public finance admistartion is much less than that.

³⁶² Anti Corruption Mechanism and Institutions to address the Problem of Corruption in Pakistan. PILDAT

³⁶³ Affan Taj. Problem of Corruption. Dawn News.

public servant or any person to expose corruption without being prosecuted for his or her action by the state itself.³⁶⁴

The issue is deep rooted as reported by Supreme Court in 1997³⁶⁵ and many subsequent cases ³⁶⁶suggested that Pakistan is faced by not only individual corruption but also the systemic corruption. If the institutions like those of police ,tax administration and even subordinate judiciary (can be extended to the superior judiciary executive and parliament) are corrupt then there can be no short term cure or treatment rather substantial and sustainable efforts over the time are required to rebuild or restore these intuitions and more importantly the public trust in them.³⁶⁷

Recent past in Pakistan both the social and electronic media have become active towards exposing the acts corruption, the nepotism or bribery and others social evil emerging at different section of private and government sectors. The Right to information laws has been enacted at provincial level and efforts are made for the federal level under the auspices of article 19A in the Constitution which surely help to uproot corruption and advance transparency and accountability with the help of all stakeholders. Patriotism need to be invoked however there is need to be realistic. ³⁶⁸

Faced with the level of corruption that has penetrated everywhere and enacting stiffer laws isn't sufficient rather it requires looking into the root cause to deal with it. Corruption can be conveniently diagnosed as symptom of governance failure. Amongst

³⁶⁴ Ibid.

³⁶⁵ Benazir Bhutto Vs President of Pakistan , SCMR 353,1997.

³⁶⁶ Right to Information Legislation in Pakistan. Briefing Paper CPDI. 47-48.

³⁶⁷ Anti Corruption Mechanism and Institutions to address the Problem of Corruption in Pakistan. PILDAT

³⁶⁸ Ibid.

other thing the Governance standards require procedure for easy access and accountability of any relevant officer to an average citizen, by bringing decision making regarding basic social issues like education health, clean water, sewerage, electricity, gas closer to citizens by empowering the local government system, simplifying and reducing the cost and procedure for performance of simple tasks like issuance or submission of bills license/ permits or likes.³⁶⁹

The 18th amendment of the Constitutions through article 140A ³⁷⁰ further mandates local government system in all provinces and demands devolution of political administrative and financial responsibility and authority to the local government. Actuality of article 140A has to be done and election to local government need to held even with more regularity than the general election. Though role of Provincial Governments cannot be removed altogether but to give meaningful public participation within local community's issues through their councilors, the Provincial governments control or influence must not be allowed to suppress the local initiatives.³⁷¹

The importance of Right to information in this regard has already been discussed earlier as many states have adopted these laws to improve transparency and accountability ³⁷²

³⁶⁹ Anti Corruption Mechanism and Institutions to address the Problem of Corruption in Pakistan. PILDAT

³⁷⁰ The Constitution of Pakistan .art.140 (A) Local Government.

Each province shall by law, establish a local government system and devolve political administrative and financial responsibility and authority to the elected representatives of the local governments.

³⁷¹ Ibid.

³⁷² International examples of efforts to disseminate information, to improve transparency and to promote accountability include Uganda's experiment with expenditure tracking surveys that publish data on government expenditures in delivering services, participatory budgeting in some cities of Brazil, Citizens Charter in some cities of the Philippines, report card on government services in Bangalore, India

Having analyzed the situation we can easily conclude that if anything is to blame the weak or helplessness against corruption , it is the insensitivity and to some extent the intentional indolence of all successive legislatures towards the issue and if we need to effectively uproot the corruption , the legislature and indirectly the people hold the golden key.³⁷³

7.7.1 The role of NAB

The leading watchdog organization in Pakistan is the National Accountability Bureau (NAB) established in 1999. The 1997 Ehtasaab Ordinance was promulgated in 1996 and was amended and reenacted in 1997 as Ehtasab Act proved to be controversial for transferring powers from chief Ehtasab Commisioner to an Ehtasab bureau headed by political appointee. Later the Ehtesab Act 1997, the Holders of Representative Offices (Punishment for Misconduct) Order 1997 and the Parliament and Provincial Assemblies (Disqualification for Membership) Order 1977 were repealed by National Accountability Ordinance 1997. The NAB ordinance applies to all person in Pakistan (including FATA). The holders of public offices against whom NAB can proceed include former Presidents and Governors and former and serving Prime Ministers, Chairman Senate, Speakers of the National and Provincial Assemblies, Chief Ministers, Federal and Provincial Ministers and Chairmen of Local Governments but does not include the Judges of superior courts and members (serving) of Armed forces.

and the Citizens Charter in Malaysia which empowers citizens to demand accountability of government servants if specified service standards are not met.

³⁷³. Affan Taj, Dawn News.

The Ordinance provides the list of large number of offences amount to corruption or corrupt practices.³⁷⁴ Under the ordinance the offences are non bail able but concession is obtained by large number of accused through the constitutional jurisdictions of superior courts.³⁷⁵ The reference can be made by the Chairman (or an officer authorized by him) for trial by accountability courts. NAB can initiates action if reference is received by appropriate government, or complaint by public or suo moto action involving three stages of complaint verification, inquiry, investigation and filling of reference after investigation, a plea bargain (one of the most criticized action) is possible only with the approval of competent court. Further in case of default (willful) of loans the permission of governor State Bank of Pakistan to initiate any inquiry or investigation by NAB or reference filed by the NAB.³⁷⁶

All banks and financial institutions are required to report to NAB doubtful monetary transactions, which have no clear authentic economic or lawful purpose. The failure to furnish such information is an offence punishable under the ordinance.³⁷⁷

Under section 33c³⁷⁸ NAB can take various actions for prevention of corruption. Even it is authorized to liaise with foreign state and seek cooperation to prevent and

³⁷⁴ Section 9. They include illegal gratification, bribery, dishonest or fraudulent misappropriation, holding assets disproportionate to known sources of income, misuse of authority, willful default of loans, cheating, criminal breach of trust and criminal conspiracy.

³⁷⁵ Article 184/185(3) and 199 . The constitution of Pakistan, 1973.

³⁷⁶ Anti Corruption Mechanism and Institutions to address the Problem of Corruption in Pakistan .PILDAT.

³⁷⁷ The NAB's annual report for 2014 reveals that out of 93 decided cases in that calendar year it secured convictions in 44. Pending cases in the accountability courts at the end of the year 2014 were 675. Further in report the NAB also highlights that it recovered as much as Rs.2.793 billion from 375 accused persons through voluntary returns and plea bargains. Number of suspicious transactions reported to the NAB by banks and financial institutions was 19 only. Requests for assistance to foreign countries numbered 25 to which there were 16 responses. Number of inquiries pending with NAB at the end of 2014 was 932, number of investigations 279. Evidently much work needs to be done to speed up the pace of inquiries and investigations and trials. (Anti Corruption Mechanism and Institutions to address the Problem of Corruption in Pakistan .PILDAT.)

detect corruption and such practices for tracing out the foreign assets of accused or convicted persons.³⁷⁹ Further it is important to note here that Pakistan has endorsed in 2001, the ADB-OECD Anti corruption plan and also ratified the UN Convention on Corruption in 2007. Further it is also signatory of Convention against Transnational Organized Crime.³⁸⁰

Under the Ordinance it is self evident that NAB has vast powers but the question can be raised that why it has not been able to show a sufficient impact to prevent and punish the corruption and such practices. The only reason being is that shortly after its establishment the NAB became politicized though headed by serving or retired 3star General. Major inquires were muted for political or other reasons. Many references filed in the Courts were not perused properly. However indications are there that trust of people in NAB will take time to reach to acceptable level like many other institutions.³⁸¹

The Military Government in 2002 introduced a National Anti corruption Strategy (NACS) but unfortunately no efforts taken for any furtherance or updating this strategy

³⁷⁸ 33C. The Chairman NAB, shall from time to time as he deems fit, constitute committees comprising officers of the NAB or other persons or organizations from the private or public sectors to—

(a) educate and advise public authorities, holders of public office and the community at large on measures to combat corruption and corrupt practices;

(b) develop, arrange, supervise, participate in or conduct educational programmes or media campaigns, and generally to disseminate information on the detrimental effects of corruption and corrupt practices and the importance of maintaining the integrity of public administration;

(c) examine the laws in force, and also rules and regulations relating to the practice and procedure of various ministries, departments of the Federal Government or Provincial Government, statutory or other public corporations or bodies, and the conduct of holders of public office and to recommend amendments in such laws, rules or regulations, as the case may be, in order to eliminate corruption and corrupt practices;

(d) instruct, advise and assist any statutory or other public corporation or bodies or upon request, any organization in the private and public sector on measures for the reduction and elimination of corruption and corrupt practices; and

(e) monitor the implementation of the instructions and advice as aforesaid and to assess and evaluate the success or otherwise of such instructions and advice on the reduction and elimination of corruption and corrupt practices.

³⁷⁹ Section 22.

³⁸⁰ Anti Corruption Mechanism and Institutions to address the Problem of Corruption in Pakistan. PILDAT.

³⁸¹ Ibid.

by any succeeding governments of PPP or PMLN. NACS tried to aim to block corruption through three fold supporting system based on prevention, monitoring and combating. The fundamentals of this strategy included the most important political will along with other element including transparency, accountability, Regularization of discretionary powers, standardization and automation, efficiency of service delivery and Public participation. The torch bearer was NAB for the implementation however it failed to achieve its target and apparently none of the ministries department or federal or provincial governments even taken any serious note or action on the issue. But it may also be worth mentioning here that the various elements of the NACS highlighted for better governance standards however without spelling out the ways and time frames for realizing such reforms. ³⁸²

Further noted here that in 2014 the KPK government enacted the Khyber Pakhtoonkhwa Ehtasaab Commission Act (KPECA). The provisions of act are mostly similar to those of NAB however there are many points of departure including to establish a Provincial Assembly Legislative Committee to confirm the nominations of 5 members of Ehtasaab Commision, members (approved by the legislative committee) of Search and Scrutiny Committee which can also review the Ehtasab Commission reports. This is how the law provides for legislative oversight of the accountability mechanism. The performance of this commission can be assessed with time but hopefully it will support and complement rather to get in conflict with the working of NAB.³⁸³

³⁸² Ibid.

³⁸³ Ibid.

Conclusion

The relationship of RTI with transparency, accountability and improved governance is indispensable. It can rightly be concluded that RTI is among the most important and powerful tools to combat corruption and to enhance transparency and accountability.

To achieve desirable goal or results RTI cannot work in isolation or we can say practically RTI alone can only give positive effect but cannot achieve a sustainable solution of the issue. The success depends on multiple factors or guarantees like freedom of press and association, efficient checks and balance system, like prosecution and dismissal of relevant officials involved in corrupt practices and logical policy responses to the issue in question regarding service delivery. Further it requires a strong leadership having political will along with establishment of independent well equipped / resourced oversight mechanisms following a clear legal framework and appeal system. Training and awareness campaign for the public to update citizens as how to use of their right through media and educational institutions. The role of civil societies towards these ends is also very crucial.

Keeping in view the history of Pakistan it is clear that corruption has haunted the state since its birth. Mostly governments have been extricated on account of such contentions and can even be easily concluded that no institution from any aspect is free from it. It is a multi dimensional phenomenon involving horizontal and vertical directions.

Democracy in Pakistan to acquire firm roots need unwavering determination from citizens by not tolerating any violation of constitution and affirmation that rule of law shall prevail within the framework of the constitution. Strict implementation of the

anti corruption laws for strengthening the accountability mechanisms already in existence is imperative followed by change in public attitude towards state and its officials.

The task of government does not end by creating laws, institutions and other mechanism for public accountability; they have to guarantee their effectiveness otherwise targets cannot be achieved as we have experienced in many cases including Pakistan. It has been understood that corruption can only be kept in control or checked when all stakeholders from government, business and civil societies work together to develop standards and procedures all of them can support. Similarly it is also a clear fact that corruption cannot be up rooted in one sweep. It needs a partnership building, ensuing a step by step and a non-confrontational approach to bring all the parties around the table.

On the other side fighting corruption is not a straight-line task it needs much more efforts from different angles or fronts like political system reforms including election or party financing or economic reforms in market and financial sector budget reporting controls, free access of information.

Further institutional reforms by strengthening the parliament and judicial system and maintenance of law and order, local councils and administration on one hand and media in its all forms. Another aspect which is also relevant as an important factor in context of fighting corruption is the role of civil societies and most importantly the protection of whistle blowers. It is clear that corruption will not disappear from society but can be restricted by improved approach can cause a greater impact. A small

corruption control that may not cost much or less damaging but it helps to thrive major corruption at later stages.

Regarding the policy reform it can be concluded that status quo is not an option in Pakistan scenario and gradual and decentralization policy reforms has been done in last few years at federal and provincial levels a gradual shift from status quo has already been experienced in this way.

Freedom of information laws have now been enacted in provinces as well as at federal level. A quick and thorough shift from secrecy to openness as suggested by Mr Mukhtar Ahmad Ali is necessary based on a uniform national policy. This will be difficult to implement but for better governance, public service delivery and improved the public confidence of government is needed. This may include following steps:

- i) Significant amendments or repeal of existing laws and rules restricting the right of information of the citizens on one side and comprehensive freedom of information law on other side. Provisions can be given to give prevalence of RTI over the secrecy provisions or to minimal of such restriction for disclosure, a stronger version of RTI
- ii) Application of RTI on all ministries, departments or institutions including all the judiciary and legislatures either federal or provincial and their subsidiaries.
- iii) Special priority must be given to e-governance system through computerization networking, record indexation in order to improve access to information more feasible in efficient manner including the cost effective procedures. Further priority may also require the staff training by providing

the detailed guidelines (including the required changes in existing rules procedure) and allocation of resources and sensitizing both the government officials as well as the citizens regarding the use of this right.

This policy reform supposes of a suitable socio political conditions which are lacking though but not impossible. This shift in focus will only happen with a strong political will, and support of the bureaucracy, which is numerous and strong enough to support not only policy shift but also the effective implementation. On the other side pro reform groups in government along with the civil society groups can play a significant role to sideline the status quo of the system, through a strong proactive demand of information regime to achieve transparency, accountability and anticorruption in Pakistan.

Chapter 8

Freedom of Expression, Information and Media

Freedom of expression without information and media is now a unimaginable. Media is now used as expression as well as information source by all in every society in different context or capacity. Pakistan in last decade has witnessed a significant social, cultural and political change because of change of media. Media has played a vital role in providing information and expression but at the same time the negativity of its impact created a chaos in the society. Media can be more powerful than a nuclear device should also be a subject for regulation and accountability which need special attention by the authorities otherwise results can be far-reaching.

8.1 Introduction

An established principle of the freedom of expression is the fact that expression includes a right to receive ideas and information without which an expression no matter how vocal and loud and vociferous remains defective.³⁸⁴

Active participation in a society requires ability to communicate both vertically and horizontally and this unfettered communication further leads to individual and group empowerment allowing individuals and groups to formalize positions and make demands. The whole process therefore is entirely dependent on an unfettered access to true, fair and unbiased information, representing a plurality of opinions, and the means

³⁸⁴ UDHR, Article,19. "Everyone has a right to freedom of opinion ad expression ;this right includes freedom to hold opinion without interference and to seek , receive and impart information and ideas through any media and regardless of the frontiers "

to actively communicate horizontally and vertically. Access and exchange of ideas requires medium and ever since democratic society has found roots the medium for this exchange has been speech whether spoken or written, direct or indirect, in other words, reports news, books or from a pulpit. In modern world this exchange has also been transformed by technology and bulk of the exchange of ideas now depends on the electronic media, The freedom of media and access to information provide for the wider development objective of empowering people in any society .³⁸⁵

8.2 What does Media mean?

Media is a late Latin term which has developed over the years to signify numerous forms of communication and speech. It includes every broadcasting and narrow casting medium (singular of media) like news papers, magazines ,TV radio, telephone, fax ,billboards and internet, further more in data storage data material (depending on recording methods) diskettes ,tapes , disks , microfiche ,CDs and DVDs.³⁸⁶

It is not a monolithic entity rather an open term encompassing a variety of content provided to the public, over a variety of platforms. There is no closed list of content provided by the media: news, politics, current affairs, business, entertainment, celebrity, fashions, food, motoring, gardening, religion, home decor and lifestyle and others are the topics covered by the media. Traditionally, the thought of the media was linked only with thought of newspapers, magazines, radio and television. But the 'new media' is another world that covers a range of platform, including web-based platforms, such as internet sites, but also mobile platforms such as mobile television or the facility

³⁸⁵ Press Freedom Day, <http://www.un.org/en/events/pressfreedomday/background.shtml>. Last Accessed 5-07-2016.

³⁸⁶ Media Definition, <http://www.businessdictionary.com/definition/media.html>. Last Accessed 5-07- 2016.

to listen to news headlines on your mobile phone. Internet-based media can be simply electronic versions of the print media. For example, a newspaper's website will carry an electronic version of the newspaper for that day, even at times such media can carry unique content not available in its printed version. The so called new media has made the very crucial social changes all over the globe and media related sites such as Twitter and Face book, for example, have played a significant role by social networking as sources of news and information in even third world countries. The most significant example is the recent disturbance in the Arab world.³⁸⁷

8.3 Role of Media

Just as there is no monolithic 'media' unit, so is the case with the role that it plays. Indeed, the role of a particular part of the media is very much determined by a series of factors relating to the nature of the media itself, in particular the substance of the media (news or current affairs versus light entertainment) and the means used (print, broadcasting or internet based). Thus the media plays a number of different roles in society, including being informative, educational or entertaining. Media can be focused from minor public interest like fishing magazine or art to the area of specialization like trade or any political analysis in any state. It can also call to a mass audience by being a full service television station or a daily newspaper covering a variety of news and current affairs, whether International, national or local.³⁸⁸

It is common to conflate the terms 'the media' with 'the press'. This is not necessarily a problem; however, when thinking about media and press freedom

³⁸⁷ The role of Media and Press freedoms in society. Media law handbook for southern Africa, 1 (2012) 11-12, Available at <http://www.kas.de/wf/doc/4212-1442-2-30.pdf>. Last Accessed 05-07,2016

³⁸⁸ Ibid.

concerns it is helpful to see the term 'the press' as a sub-set of 'the media'. The press has a connotation that is clearly associated with the news media, whether provided in print or electronically. Within the term 'the press' (meaning the news media) there are various kinds of press outlets – state media, public media, commercial media, and even certain forms of community media can be included in 'the press'. It is important to bear these distinctions in mind when considering the role of the press in particular and of the media more generally.³⁸⁹

8.3.1 Social aspect and impact of media in Pakistan.

Freedom of information as one of the foundation of any civilized society is now considered as important as right to life. With the development of technology the medium or sources for information have also increased. Once a daily news paper or few TV channels were available to get yourself updates on the prevailing news but advent of IT and satellite world has become smaller or as the saying goes "one click away an ordinary person can have access to other side of the globe.

The combination of auditory and visual sensory observation by modern electronic media can succeed in motivating deep emotions and sensations for masses. The TV news is the most effective tool of information today especially in Pakistan. The literacy rate is very low in Pakistan and print and electronic media help people to understand the situation often by criticizing the governments activities of violating the rules or the Constitution or of being unaccountable to public for their policies causing poverty , unemployment, law and order situation and role of opposition. ³⁹⁰

³⁸⁹ The role of Media and Press freedom in society, A Handbook for Southern Africa.

³⁹⁰ Amir Jahangir, Maria Gulraize Khan and Qurut-ul-Ain Hussain, " Situational Analysis Of Right to Information in the communication & Information Sector in Pakistan",10. Available at

Mass Media in Pakistan in an area, which showed the speediest progress in the last one and half decade. The world has become a global village and we are living in age of information explosion. The role of mass media is very crucial as representing the thinking mode of any society, which includes the Print media, the Electronic media and the Interactive media.³⁹¹

The Advent of private media was also a challenge to state media. Private media that provided more open and realistic stories helped state media to reform itself and compete with the private media. It also paved way for the regional and community based radio channels like FM and other services. Today's age mass media is the major and most convenient source of updating society as what is going on around the world and who is doing what. Electronic media enjoy better scope over Print media as it has larger audience easily accessible and even understood by a layman. By providing different entrainment or news programs touching all age groups and languages. The talk show widened and revolutionized the vision of an ordinary man by highlighting the erstwhile taboo or untouched issue discussion thereby increasing the public awareness level, acting as "watch dog" on state actions. Media discussions / cross discussions and identifying the reasons and angles and stances of different interest groups or people are brought out and helped people to make an opinion on issues with or without Pakistan through discussions and documentaries. It also assisted in projecting development efforts of state like "perha likha Punjab" or earthquake relief coverage. It has also been

used by state, organizations or society to advance the educational activities as done by Allamah Iqbal Open University and many other forums.³⁹²

The economic or the commercial aspect attached to media has also contributed towards its development, advertisement / commercials brought big money to media market. Furthermore the abundance of media provided employment opportunities. Also the infrastructure, modern state of art studios, equipments, and communication facilities³⁹³ have revolutionized the public alerts. Strengthening democracy can also be attributed as an outcome of media, for instance, the live coverage of parliament proceeding or activities of politicians.

Besides the positive above one can also highlight negative social and cultural impacts of the media. The most important of them is moral vacuum and westernization in our family systems. The Indian and western cultures invaded our media and seeping into our society. Our dramas and commercials are depicting purely alien values and causing a huge loss to our religious and national identity. They glamorized everything they depict causing a moral vacuum. Our young or so called modern generation is going away from the reality of our social and religious values. Unethical material, scenes or photographs are shown spreading obscenity and vulgarity leading to national misidentification. Unnecessary open discussion on every/ anything is causing great loss to our young generation. Projecting in its most rated programs like morning shows, family planning, and love story dramas, hi-fi living style are very negatively exaggerated and unrealistically approached which is not based on ground realities. The ability or the power it can use to educate nation has been greatly ignored. People of

³⁹² Ibid.

³⁹³ Video conference, fax, electronic data transfer chat mobiles etc.

Pakistan are, not educated enough yet to understand the negative manipulation or twisting facts of media. A famous quote that “a lie spoken 100 times becomes greater than a truth” is summary of our media’s approach. ³⁹⁴

Pakistani media is also blamed for not developing or projecting our national image rather humiliating it, our national language losing its originality and becoming similar Indian language. Even at times we are promoting Indian language and stars in our ads and specially the cartoon corrupting our children mind with Indian cultures and values which is against the preservation of our national or regional languages. Our media policies lack such an ability to promote national image which should be strongly countered rather it is blamed for negative overwhelming negative exaggeration. The breaking news and headlines, the race among all the channels sensationalize the issue / accidents/incidents (at times unauthentic or without confirmation and inaccuracy) which not only create confusion by too much of information but demoralize and induce discouragement among our nation.³⁹⁵ These media practices seem to following the famous quote of Jospeh Geobbels on his idea of propaganda that “this is the secret of propaganda: those who are to be persuaded by it should be completely immersed in the idea of propaganda, without ever noticing that they are being immersed in it”.

Another factor that needs close attention is a general lack of transparency within media houses, there has been allegations that some of the media houses have been accepting direct foreign funding to promote foreign agendas. These allegations need to be looked into and some law based audits need to be put in place. Evidence also suggests

³⁹⁴ Ibid.

³⁹⁵ Amir Jahangir, etal’ “ Situational Analysis Of Right to Information in the communication & Information Sector in Pakistan”.

that media is already exerting considerable influence on the decision makers and the decision making process in issues like foreign relations and internal security options.³⁹⁶ Both the allegations and the evidence on the working of media highlight a general lack of ethics in a cut throat business environment.

In this age of information and artificial intelligence, independence of media is indispensable. A press freedom expression and information or independence of media, signifies an open society based on the democratic traditions but like all freedoms it should not be used as license to kill rather subject to some limitations pro to the integrity of the state national unity, upholds the national laws of the land and positively contribute towards social welfare subject to moral and religious values which is strongly lacking in our case.³⁹⁷

A lot of work needs to be done in media regulation and policies and their strict implementations. It is the strongest and fastest way to create the social political, economical or cultural changes in any society. The regulation of media can easily regulate the society. The significance of media not only as source of information but also a platform of interconnectivity of our human and national affairs cannot be ignored especially in this age of globalization. It can be used as force to bring agreement on vital issues prevalent in our country like security, education and health.

“Media is a double edged sword. It has its benefit and vices.”³⁹⁸

³⁹⁶ Lawrence Pintak , syed Javed Nazir.Media , policy in Pakistan, Columbia Journalism Review available at https://archives.cjr.org/behind_the_news/media_policy_and_conflict_in_p.php ;last accessed on 10-06-17

³⁹⁷ Ibid.

³⁹⁸ Abbas Chaudhary, Role of Media.

8.4 History of Media in Pakistan

Pakistan after independence inherited 5 radio channels but International developments played a very significant role in the development of the Mass Media in Pakistan. Initially for few decades of Pakistan's media history remained dominated by PTV. Freedom of media in Pakistan was a result of many compelling forces like Indian air way liberalization led to rapid growth of TV channels. The most important part is growth of the literacy rate in Pakistan which participated towards media developments. The Kargil war also contributed towards the free media as India advertised its viewpoint very effectively to the world and Pakistan was painted as a culprit having a dummy state owned channel. The Economic or commercial aspect of media was discovered which also led to freedom of media. The gap in the graph of revenue generation by media from 2002 to 2007 and later became a crucial factor in this respect. Arrival of cable operator and most importantly the policies of Musharraf's Government gave a blast to the media in Pakistan, as rightly said by Javed Jabbar , "*Media is more Powerful than nuclear devices*"³⁹⁹

The free electronic media in Pakistan was surprisingly emerged by a dictator though to achieve his own agenda to be presented as a democrat president. Allowing media freedom was never a choice of Pakistan's establishment rather it was compulsion. The Kargil War played a decisive role as PTV commanded a limited audience and viewer as people preferred Zee news and other Indian channels to get the story from their side. These bitter lessons lead to decide that Pakistan needed its own independent electronic media. And Local government system in 2001-2 also contributed towards the urgency to

³⁹⁹ Ibid.

provide information through electronic media at the grass root level. People started watching their interest rather traditional drama and fixed news .Post 9/11 the scenario changed and Pakistani people and Muslim world got the attention and voice through talk shows and open media coverage.⁴⁰⁰

8.4.1 An overview of media landscape in Pakistan

The development in area of media in Pakistan in last decade has made significant social and political changes at a vast level. A brief description is given in its different aspects.

8.4.1.1 Print Media

Since Print media is ancient amongst the different types of media and with reference to Pakistan currently there are more than 950 news papers and periodicals in different languages.⁴⁰¹ Major news paper groups are Jang, Nawa e Waqat, Dawn, Express, Daily Times and Khaberain. Currently cross- media ownership is common phenomena in Pakistan as each of these groups owns their television channels as well.

Pakistan in last one and half decade faced quite substantial social and political changes with the liberalization of media during Musharraf's government. The first TV channel PTV (Pakistan Television) was launched 1964 from Lahore which remained the only channel available till 1990⁴⁰². The first private channel NTM Network Television Marketing started in 1990 under an initial 3 years agreement with Shalimar Recording

⁴⁰⁰"Media in Pakistan", CSS Forum,<http://www.cssforum.com.pk/css-compulsory-subjects/essay/essays/32892-media-pakistan.html>. Last accessed 2nd December 2015

⁴⁰¹ According to Federal Bureau of statistics, Government of Pakistan 2011. More than 760 in Urdu, 84 in English, 2 Punjabi, 17 in Pashto, 26 in Sindhi and 13 In Baluchi.

⁴⁰² Amir Jahangir,etal'." Situational Analysis Of Right to Information in the communication & Information Sector in Pakistan", 5-6.

and broadcasting company (STN) . However with the invasion of private channels after 2002 Pakistan Television Network now consist of six state owned TV channels having maximum reach as available on satellite and terrestrials. Among major network there are PTV network Geo, ATV, Express media Group, ARY , AAJ Indus networks .According to the report of Gallup Pakistan 2009 approximately 86 Million people watch TV out of which around 38 million have access to cable and rest have terrestrial broad caste in their areas.⁴⁰³

Pakistan Electronic Media Regulatory Authority (PEMRA) is significantly contributing as catalyst of socio political change in the society. In its report in 2010-11 provided that around 85 license for satellite TV in different categories which not only contributed towards the media spread but also opened up for investment and employment in broad cast arena (an estimated US\$2.5 billion investment and directly employed 200,000 people and about 7.00 million have been accommodated through indirect employment.) ⁴⁰⁴

8.4.1.2 Radio

Radio in Pakistan, like television, was under state monopoly until the PEMRA Act of 2002. Till 2010 PEMRA issued license to around 138 channels out of which 115 are working. Pakistan Broadcasting Corporation (PBC) Radio Pakistan and FM has the major hold having 31 channels reaching 96.5% of population , 80 % of territory and around 95.5 million listeners. Many illegal frequencies are also found operating in

⁴⁰³ ibid

⁴⁰⁴ <http://pakobserver.net/detailnews.asp?id=110074>

different parts of country particularly KPK which have been shut down by the Government actions.

8.4.1.3 Internet

Towards use of Internet, this is on rise with a very high speed ratio than any other source. According to some reports that that intern user number have crossed 24 million⁴⁰⁵ with the increase on regular basis but on the other hand the Internet Service Provider Association of Pakistan (ISPAK) estimated far low number of internet user that is of 10 million . Whatever is truth the use and user is ever increasing not only in the major cities or urban areas but even in some remote rural areas in Pakistan⁴⁰⁶. Cellular mobile phone users According to PTA are more than1 billion subscribers and that make 65.4% of total population ⁴⁰⁷

8.5 Media Laws in Pakistan

The article 19 of the Constitution of Pakistan 1973 ⁴⁰⁸ provides for fundamental right of freedom of Expression however the phrasing the list of limitation can easily be used to hinder the object of the law. ⁴⁰⁹

Past few years' Pakistani media landscape has witnessed exceptional growth particularly after the promulgation of PEMRA ordinance 2002.beside that Press Council

⁴⁰⁵ Pakistan at par with China and Saudi Arabia on "internet freedom", www.dawn.com ,05-12-2014

⁴⁰⁶ Situational Analysis of Right to Information in the communication & Information Sector in Pakistan .5-6.

⁴⁰⁷ Pakistan Telecommunication Authority, 2011, www.pta.gov.pk/

⁴⁰⁸"Every citizen shall have the right to freedom of speech and expression, and there shall be freedom of the press, subject to any reasonable restrictions imposed by law in the interest of the glory of Islam or the integrity, security or defense of Pakistan or any part thereof, friendly relations with foreign States, public order, decency or morality, or in relation to contempt of court or commission of or incitement to an offence."

⁴⁰⁹ National security , available at <http://www.right2info.org/exceptions-to-access/national-security>

Ordinance 2002, The Defamation Ordinance 2002, PNNABRO 2002 are some of the important media related laws. However this was not a first time but historically elected governments or dictator regimes enacted laws related to media and journalists like West Pakistan Press and Publication Ordinance 1963, The Newspaper Employees (condition of service) Act 1973 are among the important legal instrument in context of media laws Though, except the later, none of such laws were debated in the parliament.

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The list of the directly or indirectly operational media and information laws in Pakistan is given below.⁴¹¹ Most of these are enacted after 2002 as a result of liberalization of media and satellite channels boom in Pakistan.

1. Baluchistan Freedom of Information Act 2005

2. Code of Criminal Procedure 1898.

- 99A power to declare certain publication to forfeited and issue search warrants for the same
- 99B Application to High court to set aside order for forfeit

3. Contempt of Court Ordinance of 2003

4. Defamation Ordinance of 2002

5. Freedom of Information Ordinance of 2002

⁴¹⁰ Muhammad Aftab Alam . Right to Information and Media Laws in Pakistan. CPDI ,8". Center for Peace and Development Initiative (CPDI). Available at www.cpdi-pakistan.org. Last Accessed 2nd December 2015.

⁴¹¹ Imran Ahsan Khan Nyazee, "Media Laws in Pakistan", (Islamabad: Federal Law House ALSI Law outlines,2009) , 56-59.

6. Intellectual Property Organization of Pakistan Ordinance 2005
7. Motion Picture Ordinance of 1979, motion Picture (amendment) Ordinance
8. Broadcasting Cooperation Act 1973
9. Pakistan Electronic Media Regulatory Authority (PEMRA) of 2002 and Pakistan Electronic Media regulatory Authority (amendment) Act 2006/7
9. Pakistan Telecommunication (RE-Organization) Act 1996
10. Printing Presses and Publications Ordinance 1988
11. Press, Newspapers, News Agencies and Books Registration Ordinance 2003 and PNNABRO (Amendment) 2007
12. Press Council Ordinance 2002
13. Press and Publications Ordinance (PPO) 1988
14. Sindh Access to Information Ordinance of 2006.

8.5.1 Rules and Regulations

1. Censorship of Films Rules 1980.
2. Code of Conduct for Media Broadcasters/Cable TV operators.
3. Copyright Rules 1967.
4. Freedom of Information Rules, 2004
5. PEMRA Cable Television (Operations) Regulations of 2002.
6. Pakistan Electronic Media Regulatory Authority Rules (PEMRA), 2009/2

7. Pakistan Electronic Media Regulatory Authority (Media Ownership and Control) Regulation of 2002.

8. Pakistan Electronic Media Regulatory Authority (Council of Complaints Organisation and Functions) Regulations of 2002.

9. PEMRA (TV/Radio Broadcast Operations) Regulations of 2002.

The Press council of Pakistan was formed in 2011 though ordinance was enacted in 2002. Its first session was held in November 2nd 2011, entrusted with responsibility to ensure ethical reporting and that truth is not stifled. Its effectiveness is still a matter of debate.

The Press, Newspaper, News Agencies and Books registration Ordinance (PNNABRO) 2002 deals with procedures of registration of publications and criteria for media ownership. It requires the newspaper to through the editor to abide by the Ethical Code of Practice required by the Press Council of Pakistan.

The Pakistan Electronic Media Authority (PEMRA) , an independent body established by the Government in 2002 with the aim to monitor and to end the state monopoly , licensing of the private Television and Radio stations and oversight the programs and advertisement produced.⁴¹² The PEMRA is regulated by PEMRA Ordinance 2002, PEMRA amendment Act 2007, PEMRA Rules 2009 and PEMRA Regulations. Violation of the Ordinance, Rules and Regulation can lead to shut down / suspension of channels or cable operator⁴¹³ . The independence of PEMRA is in question

⁴¹² Code of Conduct and PEMRA Rules 2009.

⁴¹³ PAKISTAN ELECTRONIC MEDIA REGULATORY

in many ways as the Federal Government is authorized to issue policy directive to PEMRA.⁴¹⁴

With the exception of PNNBR Ordinance specifically dealing with registration of press newspaper books and new agencies, and PEMRA Ordinance for the regulation of private electronic/broadcast media including TV, cable and radio, most of these laws are applicable to all kind of media.⁴¹⁵

Besides the direct Media and information laws several other legal instruments are introduced to put restriction on press or media over time. In addition to the laws listed above, many others are listed below used to deter the freedom of information or against the journalists or editors and publications.⁴¹⁶

1. The Officials Secret Act of 1926, (a colonial law used to detain and prosecute editors and journalists)
2. The Security of Pakistan Act of 1952 (used to close down press, impose prior censorship, and stop publication.)
3. Maintenance of Public Order Ordinance 1960 (prohibits publication, prior censorship, and close press down, force disclosure of sources).

AUTHORITY ORDINANCE 2002 PEMRA (AMENDMENT) ACT, 2007 (ACT NO.II OF 2007)
S.27. The Code of Conduct (Schedule A) defines the parameters for programming contents.

⁴¹⁴ PEMRA Ordinance 2002, S 4.

⁴¹⁵ Muhammad Aftab Alam CPDI ,8.

⁴¹⁶ Rehman , “Press Laws and Freedom of Expression”, *Sapana, South Asian Studies*, 12(Mediand Peace in South Asia, 2006. Lahore free media Foundation): 266-277

4. Pakistan Penal Code¹⁸⁶⁰ (listed below, sections that may directly or indirectly relevant)⁴¹⁷

- Section 123-(A) of Pakistan Penal Code (PPC) allows prosecution of anything prejudicial to safety or ideology of Pakistan
- Section 124-(A) of PPC applies to sedition.
- Section 153-(A) promoting enmity between different groups, etc.
- Section 153(B). Penalizes incitement of students disturbing public order and can be used against the press or political activities.
- Section 171. (G) False statement in connection with connection with an election.
- Section 171 (J). Inducing any person not to participate in election or referendum.
- Section 292 of PPC prohibits sale, publication or exhibition of obscene books.
- Section 293. Sale etc. of obscene objects to young person.
- Section 294. Obscene acts ad songs.
- Section 295 (A) deliberate and malicious acts intended to outrage religious feeling of any class by insulting its religious belief and or religion.
- Section 295(B) Defiling ,etc. of Holy Quran.
- Section 295(C) Use of derogatory remarks ,etc in respect of Holy Prophet (SAW).
- Section.296. Disturbing religious assembly.
- 298. Uttering words etc, with deliberate intent to wound the religious feelings.
- 298(A) Use of derogatory remarks in respect of holy personages.
- 298(B)(i) misuse of epithets , description and titles , etc reserved for certain holy personage or places (applies to Lahori and Qadianis group)

⁴¹⁷ Imran Ahsan Khan Nyazee. Media Law in Pakistan, 58.

- 298(C) Person of Quadiani group calling himself a Muslim or preaching or propagating his faith. (Qadiani and Lahore group)
- Section 469 Forgery for the purpose of harming reputation.
- 499 Defamation
- 500. Punishment for the Defamation.
- 501. Printing or engraving matter known to be defamatory
- 502. Sale of printed or engraved substance containing defamatory matter.
- 503. Criminal intimidation (including defamation of reputation).
- 504. Intentional insult with intent to provoke breach of the peace.
- 505. Statement conducing to public mischief.
- 506. Punishment for criminal intimidation.
- 507. Criminal intimidation by an anonymous communication.

5. Section 295-C of PPC known as the infamous blasphemy law has been applied to journalists.

6. Section 99 A of the Criminal Procedure Code gives executive powers to prescribe publications

7. The Defamation Ordinance 2002

8. The Anti-Terrorism Act

9. Contemp of Court Ordinance 2003

The above mentioned list of media specific and general laws is not conclusive but sufficient to conclude that the successive governments tried to curtails the freedom of expression. The obsession with national security, long periods of authoritarian military

regimes, the growing the concretization of society, suppression of dissent, corrupt and secretive regimes have always opposed the transparency and freedom of expression and laws are used for such purpose.⁴¹⁸ Among recent example is when President Musharraf imposed an emergency and suspended the constitution. Hence suspended fundamental rights, PEMRA and PNNABRO were enforced.⁴¹⁹

Article 19⁴²⁰ while drafting the principles on freedom information in 2000 declared that “the law should provide for a number of mechanisms to address the problem of a culture of secrecy within government.”⁴²¹ Along with that free media also plays a vital role informing and enabling them to make opinion. Consequently an enabling legal framework to protect and uphold people’s right to information, ensure independent and diverse media and restrict secretive practice of the government is crucial.

During last one and a half decade in Pakistan information and media environment have completely changed. Previous to 2002 neither any law provided for freedom of information directly nor there was independent electronic media except the state controlled. The promulgation of and Freedom of Information Act (FOIA) in 2002 and Pakistan Electronic Media Regulation (PEMRA) Ordinance besides others regulations during the Musharaf’s government permitted private sector to own media outlets like Satellite TV and FM radio stations. Presently more than 80 TV channels and

⁴¹⁸ Amir Jahangir, et al', "Situational Analysis Of Right to Information in the communication & Information Sector in Pakistan", 13.

⁴¹⁹ Code of Conduct of media was issued, private channel news transmission was suspended, particularly prolonged suspension of GEO government advertisement was withheld, media outlets and outspoken journalists were victimized and intimidated.

⁴²⁰ A UK based organization working on freedom of expression – and endorsed by the UN Special Rapporteur on Freedom of Opinion and Expression.

⁴²¹ <http://www.article19.org/data/files/pdfs/standards/righttoknow.pdf>. Last accessed on 02-12-2015.

more than 140 private Radio stations are operating in Pakistan. The significant 18th amendment of the Constitution provided people's Right to Information as fundamental right lead to enactment of amongst the world best FOI law by KP government⁴²² and then Punjab government⁴²³ in 2013. ⁴²⁴

Nevertheless, in spite of all this, freedom of expression and media's freedom is still a serious issue in this country. A crucial paradigm shift has taken place in two of the provinces after FOI laws from secrecy to transparency and accountability but media related laws are still not very favorable to this change and either are silent or have very slight reference to Right to Information. For instance PEMRA laws specifically targeting to "improve the standards of information, education and entertainment" and "ensure accountability, transparency and good governance by optimizing the free flow of information", does not provide for a single direct provision for RTI and on the other hand the Official Secrets Act 1923 still operational.⁴²⁵

Eighteenth Amendment of the Constitution in 2010 is a beginning of an new era in the history of Pakistan with the insertion of article 19A providing the Freedom of Information as fundamental right expected to be a setback to prevailing system of working of the government and other institutions with the idea of secrecy and a door towards openness and transparency. The laws as listed and discussed above mostly predate the inclusion of Article 19A. Many of them were on the statute books before the enactment of FOI Ordinance 2002. A vigilant analysis of those laws reveals that they were intended mainly to regulate, control and manage media and freedom of expression

⁴²² Khyber Pakhtunkhaw Right To Information Act 2013.

⁴²³ Punjab Transparency and Right to Information Act 2013.

⁴²⁴ Muhammad Aftab Alam "Right to information and media laws in Pakistan.

⁴²⁵ Ibid. 3-4.

from the perspective of then the governments. Right to Information of the citizens was not targeted by these laws.⁴²⁶

Some of the major media laws in context of Freedom of information laws are discussed here in respective category.

8.5.2 Electronic media Laws

The governing laws are briefly discussed below:

8.5.2.1 The Pakistan Electronic Media Regulatory Authority Ordinance, 2002

The special law dealing with regulations of the airwaves of the country, PEMRA Ordinance 2002, provides for the establishment of 12 members panel, and the chairman⁴²⁷, of the Authority “responsible for regulating the establishment and operation of all broadcast media and distribution services in Pakistan.”⁴²⁸ It aims to “improve standards of information, education and entertainment” and “ensure accountability, transparency and good governance by optimizing the free flow of information.”⁴²⁹ The authority is further mandated⁴³⁰ to “regulate distribution of foreign and local TV and radio channels in Pakistan.”

The PEMRA Ordinance composed of 40 sections provide details/ dealing with multiple issues of procedures, process and qualification for the grants of licenses for broadcasts and distributions. It explains the terms and conditions and restrictions on

⁴²⁶ Ibid.8.

⁴²⁷ PEMRA Ordinance,2002,S, 6.

⁴²⁸PEMRA Ordinance,2002,S 4(1)

⁴²⁹ Preamble of the Ordinance, PEMRA Ordinance,2002.

⁴³⁰ PEMRA Ordinance,2002,S ,(2).

broadcast and distributions service license.⁴³¹ Furthermore the ordinance provide for the establishment of “Council of Complaints” and the procedure for complaints against the licensee.⁴³² Although dealing with all major aspects of the relevant field however, beyond the preamble, no relevance or provision for the citizen’s Right to Information. The Ordinance ignored what that was aiming at, to ensure accountability, good governance and transparency.⁴³³

8.5.3 Print Media Laws

The Print media as discussed earlier is amongst the initial mode or source used for public information especially in Pakistan’s media history. Some of prevalent laws are specifically dealing with print media that is why this section is termed as print media laws to exclude the other laws like electronic media. Unlike electronic media some very old laws are still operational in the country such as;

8.5.3.1 The Newspaper Employee (Conditions of Services) Act 1973

The law deals mainly with the working conditions of newspaper employees which also include the Journalists, therefore no direct bearing on the issue of freedom of information in the Act. However this can be argued that the term working condition can be referred to the performance of the workers. Better working conditions can help or improve the performance of the journalist and other workers towards the required passion and satisfaction. Their job is to keep public informed and better working environment and conditions is must for proper performance of their duty.

⁴³¹ PEMRA Ordinance,2002,S, 20,25

⁴³² PEMRA Ordinance,2002,S, 26

⁴³³ Right of Information and Media Laws in Pakistan CPDI. 11

8.5.3.2 The Press Council Ordinance, 2002

The Pakistan Press Council was established under the Ordinance for the purpose of “To implement the Ethical Code of Practice, as set out in the Schedule to the Ordinance”. The council is further mandate to “maintain highest professional and ethical standards of newspapers and news agencies with a view to making them more responsive to the issues and concerns of the society in Pakistan.”⁴³⁴ The Preamble,⁴³⁵ referring to the public awareness and free flow of information and expression but conditionally, as subject to the non infringement of the “national Interest”. The ordinance also provided for its function besides others, to “*act as shield to the freedom of the press*”⁴³⁶ and “*to keep under review any development likely to restrict the dissemination of news of public interest and importance*”⁴³⁷.

The ordinance further requires from the council to prepare its annual report summarizing its activities of the year, statements of accounts audited and explanation of standards of news papers and news agencies and factors affecting them. The report must be published, publically available and forward it to the Federal government.⁴³⁸ However no direct or specific provision related to Freedom of or access to information but may be used indirectly.

⁴³⁴ Section 8(1) (i) Press council Ordinance 2002.

⁴³⁵ The Preamble of the ordinance states , “AND WHEREAS Freedom of the press and public awareness is the foundation of democracy and the function of democracy and the principles of accountability depend inter alia upon free flow of information and freedom of expression without infringing on national interest;”

⁴³⁶ Section 8 (2). The Council shall also act as a shield to freedom of the press. It may receive a complaint by a newspaper, a journalist or any institution or individual concerned with a newspaper against Federal Government, Provincial Government or any organization including political parties for interference in the free functioning of the press.

⁴³⁷ Section 8(1)(iii) to keep under review any development likely to restrict the dissemination of news of public interest and importance;

⁴³⁸ Section 20

8.5.3.3 The Press, Newspaper, News Agencies and Books Registration Ordinance, 2002

The Ordinance mainly focused at,” to amend and consolidate the law relating to news agencies, publications and printing presses”⁴³⁹ in the country. It provides in detail the procedures and process for authentications of newspaper declaration, registration of printing presses , news agencies and books subject to restriction under section 5⁴⁴⁰ of the ordinance. The ordinance, however, is silent on issue of the freedom of or access to information even in the preamble.

8.5.3.4 The Defamation Ordinance 2002.

Defamation ordinance is one of the major media law promulgated during General Musharraf's government in 2002. Previously defamation was a criminal offence under Pakistan Penal Code 1860 ⁴⁴¹ subject to the jurisdiction of session courts as an offence. However the ordinance extended the civil courts jurisdiction and one can file a suit in civil courts for damages as well.⁴⁴²The Ordinance defines the tort of defamation consist of two sub torts, that is, Slander and Libel Torts protects person interest in his reputation, Slander deals with spoken words and libel is for the written or recorded form as provided in the section 3 and 4⁴⁴³ of the ordinance the defamation. The

⁴³⁹ Preamble of the Ordinance

⁴⁴⁰ Section 5. Publication of newspapers. – No newspaper shall be published except in conformity with the provisions of this Ordinance and without prejudice to the provisions of section 3; every copy of every such newspaper shall contain the name of the owner and editor thereof printed clearly on such copy and also the date of its publication. Similarly, no news agency shall disseminate or defuse news except in conformity with the provisions of this Ordinance unless there subsists a declaration authenticated by the District Co-ordination office

⁴⁴¹ Section 499-502

⁴⁴² Aftab .Right to information and Media laws In Pakistan , CPDI ,p 10

⁴⁴³ 3. Defamation. – (1) Any wrongful act or publication or circulation of a false statement or representation made orally or in written or visual form which injures the reputation of a person, tends to lower him in the estimation of others or tends to reduce him to ridicule, unjust criticism, dislike, contempt or hatred shall be actionable as defamation.

(2) Defamation is of two forms, namely:-

(i) Slander; and
(ii) Libel.

ordinance further provide for the defense or privileges under the same heading of defenses in any defamation proceedings under section 5⁴⁴⁴.section 6 and 7 define the terms absolute privilege as

Any publication of statement made in the Federal or Provincial Legislatures, reports, papers, notes and proceedings ordered to be published by either House of the Parliament or by the Provincial Assemblies, or relating to judicial proceedings ordered to be published by the court or any report, note or matter written or published by or under the authority of Government, shall have the protection of absolute privilege". And qualified privilege as "Any fair and accurate publication of parliamentary proceedings, or judicial proceedings which the public may attend and statements made to the proper authorities in order to procure the redress of public grievances shall have the protection of qualified privilege.

(3) Any false oral statement or representation that amounts to defamation shall be actionable as slander.

(4) Any false written, documentary or visual statement or representation made either by ordinary form or expression or by electronic or other modern means of devices that amounts to defamation shall be actionable as libel.

4. Defamation Actionable.— The publication of defamatory matter is an actionable wrong without proof of special damage to the person defamed and where defamation is proved, damage shall be presumed.

444 5. Defenses.— In defamation proceedings a person has a defence if he shows that—

(a) he was not the author, editor, publisher or printer of the statement complained of;
(b) the matter commented on is fair and in the public interest and is an expression of opinion and not an assertion of fact and was published in good faith;

(c) it is based on truth and was made for the public good;
(d) assent was given for the publication by the plaintiff;
(e) offer to tender a proper apology and publish the same was made by the defendant but was refused by the plaintiff;

(f) an offer to print or publish a contradiction or denial in the same manner and with the same prominence was made but was refused by the plaintiff;

(g) the matter complained of was privileged communication such as between lawyer and client or between persons having fiduciary relations; and

(h) The matter is converted by absolute or qualified privilege.

In all such cases the burden of proof lies on the defense.⁴⁴⁵ This can be a reference to be used as if the matter lies within any of the privileges, it is legal to use that to information to publicize or such information can be accessed.

8.5.4 Other Laws on Media and Information.

Besides media specific laws some others laws also have provision dealing with curbs and restriction on media and information. Some of the provisions are discussed here.

8.5.4.1. Pakistan Penal Code, 1860

The general criminal law provides for the offences and their punishments thereof. However some of the provisions can be taken as confusing, conflicting or indirectly affecting the free flow of information and media . For instance, section 292 ⁴⁴⁶ puts ban on the sale of hiring or distribution of obscene books, pamphlets, papers, drawings, paintings, representation or figures or any other obscene objects with defining the term

⁴⁴⁵ Imran Ahsan Khan Nyazee, *Media laws in Pakistan*, (Islamabad:Federal Law House,2017) , 15.

⁴⁴⁶ Pakistan Penal Code, 1860(Act XLV of 1860) ,S292. Sale, etc., of obscene books, etc.:

Whoever:- (a) sells, lets to hire, distributes, publicly exhibits or in any manner puts into circulation, or for purposes of sale, hire, distribution, public exhibition or circulation, makes, produces or has in his possession any obscene book, pamphlet, paper, drawing, painting, representation or figure or any other obscene object whatsoever, or

(b) imports, exports or conveys any obscene object for any of the purposes aforesaid, or knowing or having reason to believe that such object will be sold, let to hire, distributed or publicly exhibited or in any manner put into circulation, or

(c) takes part in or receives profits from, any business in the course of which he knows or has reason to believe that any such obscene objects are, for any of -the purposes aforesaid, made, produced, purchased, kept, imported, exported, conveyed, publicly exhibited or in any manner put into circulation, or

(d) advertises or makes known by any means whatsoever that any person he engaged or is ready to engage in any act which is an offence under this section, or that any such obscene object can be procured from or through any person, or

(e) offers or attempts to do any act which is an offence under this section, shall be punished with imprisonment of either description for a term which may extend to three months, or with fine or with both. Exception: This section does not extend to any book, pamphlet, writing, drawing or painting kept or used bona fide for religious purposes or any representation sculptured, engraved, painted or otherwise represented on or in any temple, or on any car used for the conveyance of idols, or kept or used for any religious purpose.

“obscene”. Section 501 , 502⁴⁴⁷ can be relevant here referring to the criminal defamation and bans sales of such allegedly defamatory issues.

8.5.4.2 The Telegraph Act, 1885

It is one of the inherited legislations after independence and oldest in the area of communication and broadcast information aimed to establish maintain and operate telegraph in the country. The term telegraph is defined in the Act as means “any apparatus, equipment or plant used for transmitting, emitting, making or receiving signs, signals, writing, speech, sound or intelligence of any nature by wire, radio or visual or electro-magnetic system.” Further the Act defines the term message as “any communication, whether in written, printed , pictorial or spoken form, transmitted, emitted, made, received or delivered by telegraph or given to a telegraph officer to be transmitted or emitted, and includes all contents thereof;”.⁴⁴⁸

The Act provides for the penalties, section 20 and 21⁴⁴⁹ penalize the actions in case of establishing, maintaining, working and using a telegraph in Pakistan in

⁴⁴⁷ Pakistan Penal Code, 1860 ,S501. Printing or engraving matter known to be defamatory: Whoever prints or engraves any matter, knowing or having good reason to believe that such matter is defamatory of any person, shall be punished with simple imprisonment for a term which may extend to two years, or with fine, or with both.

Section 502. Sale of printed or engraved substance containing defamatory matter: Whoever sells or offers for sale any printed or engraved substance containing defamatory matter knowing that it contains such matter, shall be punished with simple imprisonment for a term which may extend to two years, or with fine, or with both.

⁴⁴⁸ Pakistan Penal Code, 1860) ,S 3 , Definitions.

⁴⁴⁹Pakistan Penal Code, 1860) ,S 20. Establishing, maintaining or working unauthorized telegraph.-

(1) If any person establishes, maintains or works a telegraph within Pakistan in contravention of the provisions of section 4 or otherwise than as permitted by rules made under that section, he shall be punished, if the telegraph is a wireless telegraph, with imprisonment which may extend to three years, or with fine, or with both, and in any other case, with a fine which may extend to one thousand rupees.

(2) Notwithstanding anything contained in the Code of Criminal Procedure, 1898, offences under this section in respect of a wireless telegraph shall, for the purposes of the said Code, be bailable and non-cognizable.

(3) When any person is convicted of an offence punishable under this section, the Court before which he is convicted may direct that the telegraph in respect of which the offence has been committed, or any part of such telegraph, be forfeited to Government.

contravention of the provisions of this ordinance and made punishable with fine and imprisonment. Further section 24⁴⁵⁰ made offence and penalize in case of unauthorized learning of the content of message. Similarly section 29 punishes in case of transmission of false and fabricated or an indecent or obscene message, without defining in the Act the terms indecent and obscene.

8.5.4.3 The Post Office Act, 1898.

The Act mainly aimed to amend and consolidate the laws related to the Pakistan post offices. It restricts the transmission of any indecent or obscene materials including photograph, painting or printing book or card or any other postal article having words marks or designs of obscene or indecent threatening or grossly offensive character.⁴⁵¹ The Act also prohibits transmission of newspapers by post in Pakistan, printed and published not in accordance with the rules provided in the Press and Registration of Books Act, 1867. A designated officer is authorized under the Act to detain any such article if found suspected or any document containing such material publication if which prohibited under section 123A and 124 A of Pakistan Penal Code

Section 21. Using unauthorized telegraphs.- If any person, knowing or having reason to believe that a telegraph has been established or is maintained or worked in contravention of this Act, transmits or receives any message by such telegraph, or performs any service incidental thereto, or delivers any message for transmission by such telegraph or accepts delivery of any message sent thereby, he shall be punished with fine which may extend to fifty rupees.

⁴⁵⁰ Pakistan Penal Code, 1860) ,S 24 . Unlawfully attempting to learn contents of messages.- If any person does any of the acts mentioned in section 23 with the intention of unlawfully learning the contents of any message, or of committing any offence punishable under this Act, he may (in addition to the fine with which he is punishable under section 23) be punished with imprisonment for a term which may extend to one year.

⁴⁵¹ Pakistan Penal Code, 1860) ,S 20. Transmission by post of anything indecent, etc, prohibited . no person shall send by post

(a) any indecent or obscene printing, painting, photograph, lithograph, engraving, book or card, or any other indecent or obscene article, or

(b) any postal article having thereon, or on the cover thereof, any words, marks or designs of an indecent, obscene, seditious, scurrilous, threatening or grossly offensive character.

1860 during the course of transmission.⁴⁵² Section 21 authorizes Federal Government to make or amend such rules.

8.5.4.4 The Pakistan Telecommunication (Re Organization) Act 1996

The Act is amongst the recent enactments commonly known as Telecom Act, targeted to re organize the telecom sector in Pakistan. Various telecom institutions are established under the Act including the Pakistan Telecommunication Authority (PTA), National Telecommunication Cooperation (NTC) and Frequency Allocation Board (FAB). The Act also regulates the transfer of the services to the private sector and telecommunication industry. PTA was authorized to issue licenses to the cable operators before the establishment of PEMRA in the country. The ACT has defined in detail the all the major relevant technical terms including Telecommunication system⁴⁵³, Telecommunication service⁴⁵⁴ and others.

The Telecom Act empowers Federal Government to issue directives to PTA⁴⁵⁵ besides others, on the issues related to “national security” and state relationships with other governments and territories outside the Pakistan without clearly defining the terms. Therefore the said clause can be used to hinder or restrict the right to information while interpreting those clauses. The term national security can justify anything done by federal government like using telecommunication services or system

⁴⁵²Pakistan Penal Code, 1860) ,S 27A & B

⁴⁵³ “telecommunication system” means any electrical, electro-magnetic, electronic, optical or optio-electronic system for the emission, conveyance, switching or reception of any intelligence within, or into, or from, Pakistan, whether or not that intelligence is subjected to rearrangement, computation or any other process in the course of operation of the system, and includes a cable transmission system, a cable television transmission system and terminal equipment;

⁴⁵⁴ “telecommunication service” means a service consisting in the emission, conveyance, switching or reception of any intelligence within, or into, or from, Pakistan by any electrical, electro-magnetic, electronic, optical or optio-electronic system, whether or not the intelligence is subjected to rearrangement, computation or any other process in the course of the service;

⁴⁵⁵The Pakistan Telecommunication (Re Organization) Act 1996(Act No.XVII of 1996), S 8.

to intercept calls and messages⁴⁵⁶ The Authority is required to submit the report to the Federal Government on the account of its affairs along with the audit report on the same to the National assembly.⁴⁵⁷ Under section 33e PTA is further required to maintenance and audit of universal service fund and submission of audit report to Auditor general of Pakistan. The Federal Government is under legal requirement to publish annual report on: the state of universal service, research and development.

There is abundance of conflicting laws protecting on one side and restricting on the other side, freedom of expression and information within their own context but no formula to foresee the outcome can be determine. Unless the a general principle to favor RTI in case of conflict and also strict implementation of legal principle that later in time will prevail can be taken as fundamental rule to avoid these confusions of course subject to restriction of right of privacy in specific cases. Judiciary can be given task to weigh and balance in specific cases.

At the same time misuse of power by media also need some specific policy as there is general policy governing these media houses and their accountability mechanism should also be set in form of tribunals specifically dealing with media sector.

8.6 Media Ethics, responsibility and quality journalism

In the history of Pakistan media always tried to strengthen and revival of the democracy in the state even when media was not free under martial law and civil government says Dr Mehdi Hassan⁴⁵⁸. They have made sacrifices that a very few third world countries

⁴⁵⁶ The Telecom Act,S 54.

⁴⁵⁷ The Telecom Act,S 18.

⁴⁵⁸ Prof. Dr .Mehdi Hasan is a Pakistani left-wing journalist, media historian and professor of the Journalism and the Mass communication at the Beacon house National University. He is the current vice-

have such histories where press have contributed so much for instance the Zia's regime over 150 journalists were either tortured, or arrested, PFUJ⁴⁵⁹ is a living example.⁴⁶⁰

The term ethics has come lately to mean learning to make rational choices between good and bad, what is morally permissible action and what is not. Further it means distinguishing among choices, all may be morally justifiable, but some more than others. The key word is Rationality. The ability to explain ethical choices is an important one for journalists for our purpose as if laws and ethics for everyone than journalists and media is no exception. According to the Johannesburg principles on National Security, freedom of expression and access to information declaration,⁴⁶¹ media organizations must treat information not as commodity but as fundamental right of the citizens. The media should exploit neither the quality nor the substance of news or opinion for purpose of boosting readership or audience figures in order to increase advertising revenue. The codes of ethics may vary from society to society or country to country but all the codes have some common articles and clauses to great extent.⁴⁶²

If laws and ethics are for everyone, then, than journalists and media is no exception. Ethics are moral rules or guidelines or about how professional communicators should act in circumstances where their action may have negative

chairperson of the (Punjab) of the Human Rights Commission, Punjab Branch, and the Dean of School of Media and Communication at Beacon house National University. He is one of Pakistan's more prominent communication experts with a specialization in political analysis.

⁴⁵⁹ Pakistan Federal Union of Journalists.

⁴⁶⁰ Amir Jahangir, et al, "Situational Analysis Of Right to Information in the communication & Information Sector in Pakistan .15.

⁴⁶¹ These Principles were adopted on 1 October 1995 by a group of experts in international law, national security, and human rights convened by ARTICLE 19, the International Centre Against Censorship, in collaboration with the Centre for Applied Legal Studies of the University of the Witwatersrand, in Johannesburg.

⁴⁶² Muhammad Riaz Raza et al, "Code of Ethics and Laws for Media in Pakistan". *Asian Journal of social science & Humanities*,2(1) (February 2013) :306-10. Available at [http://www.ajssh.leena-luna.co.jp/AJSSHPDFs/Vol.2\(1\)/AJSSH2013\(2.1-33\).pdf](http://www.ajssh.leena-luna.co.jp/AJSSHPDFs/Vol.2(1)/AJSSH2013(2.1-33).pdf). Last Accessed 4th August,2016.

effects over others and laws do not dictate behavior. These guidelines can either be codes of ethical conduct explicitly created by professional organizations or represent broad system of ethics prevailing in the particular society. To many commentators, media ethics actually refers to journalistic ethics, the moral conduct and behavior of journalists doing their work as news gatherers, editors, and disseminators of information to the masses.

A press freedom or independence of media signifies an open society based on the democratic traditions rather than dictates of one person. The primary purpose of gathering and distributing news and opinions is to serve the general welfare by informing the people and enabling them to make judgments on the issues of the time. The press can only perform its duty if it is free and independent in its functions like reporting its news and views. But like all freedoms it should not be used as license to kill rather subject to some limitations pro to the integrity of the state national unity, upholds the national laws of the land and positively contribute towards social welfare. Media should respect the right of people involved in the news, follow the common standards of decency and put accountable to the public for the justice and accuracy of their news reports.⁴⁶³ It is further opined that unless there is clear and imperative need to maintain confidences, sources of information should be identified.⁴⁶⁴

A responsible media helps to enhance public awareness about issues and help them to opt for better option at the ballot boxes and hold government answerable for its

⁴⁶³ Ibid.

⁴⁶⁴ Christopher,C, *Dynamics of Journalism 2* (New Dehli :Anmol Publications Pvt Ltd) ,82-83

action to the people.⁴⁶⁵ But the other side of the picture presents a different view of the situation which gives you an idea about that media is presently undermining the democracy in the country. The sensationalizing of situations in creating chaos has become a major issue, that every update news or statement, as a Breaking News often without any follow up or analysis of the report, just the running commentary. With the boom in electronic media, generally staff came from print media like journalist, reporters, visual editors etc, without specific and sufficiently trained. Professionalism and ethical reporting is missing. Major area of concern is lack of trained journalists who are not really aware of ethics and contents of news productions and even if they do, they don't follow it.⁴⁶⁶

The media or press is emerged as a business or industry but with a difference, as such the burden of responsibility is more than any other field. Besides legal political or professional the social aspect has paramount importance, as rightly said "journalism is the mirror of the society" and whatever image the mirror reflect goes to the surroundings. The society expects journalism to serve the interest of the people. Therefore a truthful comprehensive and intelligent version of the events is the key of the responsibility. It must serve as a platform of forum for the exchange of views and ideas.⁴⁶⁷

The journalists at first are gate keeper and editor /editorial policy is second. They should know they are not to interfere into the private affairs of people or have no right

⁴⁶⁵ Amir Jahangir, et al., "Situational Analysis Of Right to Information in the communication & Information Sector in Pakistan. 15.

⁴⁶⁶ Sometimes these untrained reporters make payments to TV channels to get their media card with which they can get many privileges.

⁴⁶⁷ Muhammad Riaz Raza et al., "Code of Ethics and Laws for Media in Pakistan", *Asian Journal of social science & Humanities* , 2 (1) (February 2013): 306-10.

to include his/ her opinion in a news story published with a staff reporter or others.⁴⁶⁸ For free flow of information of any kind professional education especially in the world of media is preconditioning where the influence it holds more than everything else in any society. Education and training is mandatory at every level not only the journalists but all the owners, stakeholder, and executive level decision maker.⁴⁶⁹

Legally a journalist is bound to be well aware of the press related laws. The first area in which a journalist operates the freedom of expression based on idea that “people have right to know” and that people have right to say what they like. These are guarantees are protected by other guarantees either constitutionally or by other laws. The enjoyment of any right particularly freedom is limited by the rights of others. This area deals with civil wrongs (torts). The same law protects the reputation and privacy of a citizen. The law does not allow anyone to cross such limit by such protection.⁴⁷⁰ Therefore publications should avoid the baseless and manipulated material not only to safeguard oneself but the organization from legal clutches.

8.6.1 Code of Ethics and Media Laws in Pakistan

During the authoritarian administration of Field Marshal Ayub Khan promulgated the restrictive Press and Publication Ordinance 1963. Later a mild regulatory law, the Registration of Press and Publication Ordinance of 1988 replaced it, as a consequence of Federal Shariat Court judgment on a petition, which demanded examination of the already existing ordinance of 1963.

⁴⁶⁸ If he/she wants to give personal opinion they should write separate news articles or columns.

⁴⁶⁹ UNESCO 16

⁴⁷⁰ Imran Ahsan Khan Nyazee, “Media laws in Pakistan”, 15.

Article 19 and now article 19A⁴⁷¹ of the constitution of Islamic Republic of Pakistan besides guaranteeing to the citizens freedom of the speech and expression and access to information, also protects freedom of the press subject to reasonable restrictions imposed by law in the interest of glory of Islam, of the integrity, security and defense of Pakistan or any part thereof, friendly relations with foreign states, public order decency or morality or in relation to contempt of court defamation or incitement of any offence.

On May 22, 1993, the Newspaper Editors Council of Pakistan was formed with object to safeguarding the freedom of the press and working freely for growth of journalism in the state. The Council believes that duty of editors/journalists is to serve the truth and that the agencies of mass communication are carriers of public discussions and information.

In 2002 ,The Press Council of Pakistan Ordinance was issued by the then President Pervez Musharraf, provided with mandate to implement 17 points “ethical code of practice” for the press by the establishment of 19 members council. Most of these points relate to the moral and ethical values of journalistic profession. Until mid 2002, the country’s electronic media was controlled mainly by the state. The PEMRA Ordinance 2002 promulgated by the Military government of Pervez Musharaf with objective to open up broadcast sector for private ownership. It was promulgated for regulating the establishment and operation of all the broadcasters and cable television stations in Pakistan established for the purpose.⁴⁷²

⁴⁷¹ Pak. Const. amend. XVIII, 2010. Art.19 A.

⁴⁷² Muhammad Riaz Raza et al., “Code of Ethics and Laws for Media in Pakistan”, 306-10.

Another important step was, the freedom of information ordinance introduced in 2002 acknowledging citizen's right to know. However the time frame for the release of information as 21 days and inclusion of courts and tribunals, with those requirements of disclosing information spoils its true spirit. Further the exemptions granted , largely undermining the public's right to know., the ordinance provides a, restrictive list of public records subject to disclosure rather applying to all records held by public bodies.

There have been rising demands by the members of the press to amend the ordinance and pass a legislation that obliges the government to give access to all forms of information, excluding those which are purposely restricted. There have been some developments in respecting the right to freedom opinion and expression in South Asia but the progress is restricted by laws giving the state the right to protect information and discourage open discussion on religious issues. Furthermore the laws based on security need reviewed in context where information can be received through electronic media or internet. To make the right to information effective it is necessary to draw some minimum guide lines. According to PEMRA Ordinance 2002, it has mandated amongst other to make possible the devolution of responsibility and power to the grassroots by improving the access of the people to mass media at the local and community level, and to ensure accountability transparency and good governance by optimizing the free flow of information.

The law demands strict and subjective pre-requisitions to be eligible for the a license, a broadcaster or Cable TV operator under this ordinance must, along with others, under take the following:

- a) Respect the sovereignty, security and integrity of Pakistan,

b) Respect the national, cultural social and religious values and the principles of public policy as enshrined in the constitution, and

c) Ensure that programs and advertisements do not encourage violence, terrorism racial ethnic or religious discrimination, sectarianism extremism militancy or hatred or contains pornography or other material offensive to commonly accepted standards of decency.

The Ordinance is also blamed as arbitrary and not in line with the international standard for a free flows of information and maintain the infamous system of licensing without defining eligibility in clear-cut terms. Furthermore the ordinance is also silent on the old and constant public demand for liberation of Pakistan broadcasting corporation and Pakistan Television Corporation from governmental control. The obligation imposed on private television channels to broadcast programs mandated by the authority appear to be a mechanism to arrange them for official propaganda and shows little respect or concern for views, requirements and taste of Pakistan's pluralist society.⁴⁷³

8.7 How Media Can Use RTI

Media persons require correct and up-to-date information to execute their task of reporting on issues of public interest and the performance of the legislature, judiciary and executive. Modern RTI legislation grants both electronic and print media an extraordinary level of access into the internal workings of government that allows the media to produce up-to-date fact-based reports on issues that were earlier either off-

⁴⁷³Ibid. 312

limits or about which confirmable information is not willingly available. The given examples point up many ways in which RTI can help the media to achieve their targets.

8.7.1 Investigative Journalism

RTI is a controlling device in the hands of investigative journalists. Traditionally journalists to get information to produce the investigative report on inner working of government relied on their 'sources', thus the information they gain may often vary greatly in terms of value and accuracy depending on the source. This dependence on 'sources' is problem particularly for fresh competitors in the field of journalism who have not had the time to develop well placed sources unlike their senior contemporaries. Under the RTI Journalists are empowered to produce fact-based reports on government performance and issues of public interest. The example of, Mr. Naeem Sadiq⁴⁷⁴ a citizen journalist and activist, is important in this regard as he was a wildlife and conservation activist investigated about the annual hunting trips of Saudi princes to Sindh in pursuit of Houbara Bustards, an endangered species for which hunting licenses are in other cases strictly not granted. Under the Sindh Freedom of Information Ordinance 2006 and Article 19A of the Constitution, he filed an RTI request which was denied at first but later filed an appeal in the High Court on January 23, 2014, which then upheld his request, and ordered release of the required information. ⁴⁷⁵ Mr. Sadiq proceeded to file RTI requests on different issues like, the nationality status of Members of the Parliament. Issue of illegal gun licenses in Sindh, and ghost schools in Sindh, on which he not only investigated but produced impactful and well-publicized reports.

⁴⁷⁴Mr Naeem Sadiq is a management consultant and freelance writer on social issues.

⁴⁷⁵ This revealed the gross misconduct on part of forestry department by first granting a permit that should otherwise have been denied, and then allowing its limit of 100 birds in ten days to be blatantly violated by over 2000 birds in the same time period.

With RTI journalists, instead of exclusively relying on their sources, are provided with an alternative for obtaining and verifying information. A mean to produce accurate fact based report on various issues of public interest and gauge the impact of their reports. Recently an investigative reporter using FOI ordinance 2002 to investigate the case of income tax returns of parliamentarian to the Federal Board of Revenue (FBR) and Election Commission of Pakistan (ECP). Under Freedom of Information Ordinance request was submitted but received no response. Consequently the report was produced on the basis of informal sources but denial by the governmental bodies implies the malafide intention on government's side.⁴⁷⁶

Most recently the PILDAT ⁴⁷⁷successfully used RTI legislations for obtaining attendance records of parliamentarians. Initial request was submitted in March 2013 to the National Assembly Secretariat, which was denied and an appeal was filed to Federal Ombudsman. The Ombudsman upheld PILDAT's request in October 2013 and ordered release of MNA attendance records. Responding to the order, an appeal was filed by the National Assembly Secretariat against this decision to the President of Pakistan, against this decision the issue remained pending until July 2015, when President Mamnoon Hussain ruled in PILDAT's favor and ordered the release of the records requested. Consequently, MNA attendance records have started to be published online the National Assembly of Pakistan website since June 05, 2015. Subsequent suit the Senate of Pakistan, has also initiated to share attendance records of Senators both in the plenary and in committees. Reporting on Irregularities and Issues of Public Interest In May

⁴⁷⁶ Right to Information (RTI) and the News Media, PILDAT Media Brief. Available at www.PILDAT.ORG. Last Accessed 04-08- 2016.

⁴⁷⁷ Pakistan Institute of Legislative Development and Transparency. An independent, non partisan and not for profit indigenous research and training institute.

2008, even more experienced journalists like Mr. Ansar Abbasi,⁴⁷⁸ have benefitted from RTI legislations in his reporting while acquire details about the lawyers appointed and fees paid to each lawyer within the Supreme Court in defense of President Pervez Musharraf's Presidential candidacy. It was later revealed that the fees were paid by the Ministry of Law and Justice from the national exchequer, even though the Federal Government was not a party to the case. Mr. Abbasi published reports in English and Urdu based on his findings on July 14, 2008. Both reports attained countrywide coverage.⁴⁷⁹

Referring to the murder of journalist between the years 2002-2013, the Pakistan Press Foundation in March 2014 submitted a total of 60 RTI requests at the Federal and all the provincial levels regarding the status of police investigations into the issue. This request was submitted after many years of widespread attacks on journalists. While it is significant mentioning that the requests on status of investigations into journalists' murders did not yield the required information, the submission of these requests formed the basis for advocacy on the issue and subsequent reporting that can lead to better outcomes.⁴⁸⁰

8.8 How can Media contribute to the RTI Movement

The media at present is one of the major contributor towards educating people on their rights and responsibilities as a citizen of a democratic state and is considered as fourth pillar of state. By highlighting issues of public interest and performance of government enables citizens to make informed political choices and thus strengthen the democracy.

⁴⁷⁸ A nationally-renowned reporter for "The News" and "Daily Jang".

⁴⁷⁹ Right to Information (RTI) and the News Media, PILDAT Media

⁴⁸⁰ Ibid.

However a strong media needs substantial freedoms for accessing and to pass on information from control, a right that is guaranteed within a functioning democracy. Knowing that RTI is so critical to the effectual execution of democracy, the media has to take a more active part in the continuing RTI reforms movement in Pakistan. One of the grounds RTI legislation in Pakistan is so under-utilized is a need of public awareness and interest of media in the matter.

Taking example of India where media has been contributing a lot more in the country's RTI movement by participating with RTI activists and civil society, staff training on RTI and setting up RTI cells at bureau offices looking after for submitting and tracking RTI requests. This example can be followed by Pakistani media and contribute to the RTI movement in multiple ways. RTI movements and reporting on them in India has now escalated for which initially media was reluctant but eventually after consolidation of mass support for RTI movements under the National Campaign for Peoples' Right to Information in 1996, the media took up the issue of RTI in a more consequential way, causing the pressure necessary for the India's significant Right to Information Act 2005. Media advocacy on RTI related issues has significantly contributed towards the public awareness on the issue and resulted in extraordinary growth of RTI requests in India every year.

Coming to Pakistan, besides others media coverage paved way to one of the modern Pakistan RTI law by the KPK government which also gave confidence to the Punjab Government to advance its own RTI law. The KPK Assembly passed on 23rd June 2015 passed some disputed amendments to RTI ACT 2013 which was at time one of the progressive RTI legislation in Pakistan. The amendment excluded the KP Assembly

from the RTI Act jurisdiction and reduced the powers of RTI Commission. The amendment was heavily condemned within the media and other civil society institutes like PILDAT that on 10th September 2015, another amendment was passed bringing the KPK assembly within the jurisdiction of RTI Act once again though the powers of RTI commission still yet to be reversed. Media advocacy has been a helpful tool in rolling back one part of the controversial amendment in KPK but for the rest it is pertinent to argue the issue of the restoration of the status of the information commission as without independent RTI commission the proper implementation will suffer and anticipated ends can't be achieved in KPK. ⁴⁸¹

Conclusion

Media is a Late Latin term which has developed over the years to signify numerous forms of communication and speech. It includes every broadcasting and narrow casting medium (singular of media) like news papers, magazines, TV radio, telephone, fax, billboards and internet, further more in data storage data material (depending on recording methods) diskettes, tapes, disks, microfiche, CDs and DVDs.

Media is now used as expression as well as information source by all in every society in different context or capacity. Pakistan in the last decade has witnessed a significant social, cultural and political change because of change of media policies. Media has played a vital role in providing information and expression but at the same time the negativity of its impact created a chaos in the society.

An established principle of the freedom of expression is the fact that expression includes a right to receive ideas and information without which an expression no matter

⁴⁸¹ PILDAT Media Brief Right to Information (RTI) and the News Media.13-14

how vocal and loud and vociferous remains defective. Active participation in a society requires ability to communicate both vertically and horizontally and this unfettered communication further leads to individual and group empowerment allowing individuals and groups to formalize positions and make demands. The whole process therefore is entirely dependent on an unfettered access to true, fair and unbiased information, representing a plurality of opinions, and the means to actively communicate horizontally and vertically. Media as source of information must disseminate information with extreme cautions and responsibility which is lacking in prevalent in our media culture and a lot of work needs to be done on media regulation and policies and their strict implementations. The abundance of conflicting laws is creating ambiguity in context of implementation of the existing laws as well as the FOI affectivity. It is the strongest and fastest way to create the social political, economical or cultural changes in any society. The regulation of media can easily regulate the society. The significance of media not only as source of information but also a platform of interconnectivity of our human and national affairs cannot be ignored especially in this age of globalization. It can be used as force to bring agreement on vital issues prevalent in our country like security, education health.

The independence of media signifies an open society based on the democratic traditions rather than dictates of one person. The primary purpose of gathering and distributing news and opinions is to serve the general welfare by informing the people and enabling them to make judgments on the issues of the time. The press can only perform its duty if it is free and independent in its functions like reporting its news and views. But like all freedoms it should not be used as license to kill rather subject to some

limitations pro to the integrity of the state national unity, upholds the national laws of the land and positively contribute towards social welfare. Media should respect the right of people involved in the news, follow the common standards of decency and put accountable to the public for the justice and accuracy of their news reports. As rightly quoted that "Media is a double edged sword. it has its benefits, it has its vices. For the society to acquire benefit from the role of media it is of utmost importance that media must be regulated through a well thought out legal regime which should shy off clear censorship yet putting a confine on behavior of media entities through code of ethics, good business practices and improvement in the law of Torts, specifically damages.

The media at present is one of the major contributors towards educating people on their rights and responsibilities as a citizen of a democratic state and is considered as fourth pillar of state. By highlighting issues of public interest and performance of government enables citizens to make informed political choices and thus strengthen the democracy. However a strong media needs substantial freedoms for accessing and to pass on information from control, a right that is guaranteed within a functioning democracy. Knowing that RTI is so critical to the effectual execution of democracy, the media has to take a more active part in the continuing RTI reforms movement in Pakistan. One of the grounds RTI legislation in Pakistan is so under-utilized is a need of public awareness and interest of media in the matter.

Media persons require correct and up-to-date information to execute their task of reporting on issues of public interest and the performance of the legislature, judiciary and executive. Modern RTI legislation grants both electronic and print media an extraordinary level of access into the internal workings of government that allows the

media to produce up-to-date fact-based reports on issues that were earlier either off-limits or about which confirmable information is not willingly available. With RTI journalists, instead of exclusively relying on their sources, are provided with an alternative for obtaining and verifying information. A mean to produce accurate fact based report on various issues of public interest and gauge the impact of their reports.

CHAPTER 9

RIGHT TO INFORMATION AND RIGHT TO PRIVACY

The right to information and the right to privacy, both are fundamental rights in the modern era of technological developments where world have become a global village. In the process of accountability and governance both rights complement each other but at the same time there exist a potential conflict between them. Where two rights overlap, a state needs a mechanism to identify the conflicts to minimize the conflict and for balancing of the rights.

9.1 Introduction

Apparently both rights are irreconcilable as Right to information (RTI) provides for fundamental right for any person to access information held by government bodies. Simultaneously the right to privacy provides for the control over such access, collection and use of one's personal information held by government and private bodies. RTI and privacy are often described as, "two sides of the same coin" complementing each other to promote individual's right and government accountability. As equal fundamental human rights, neither can be given priority over the other, thus it is necessary to implement both rights and laws in such a manner that respects and balances both rights.⁴⁸²

Privacy is increasingly being challenged by technological advancements which have increased the availability and sharing of sensitive personal information/ data used

⁴⁸² David Banisar. The Right to Information and Privacy: Balancing Rights and Managing Conflicts. World Bank institute Governance Working Paper Series.2

routinely. Public records are even released over internet. To deal with these circumstances more than 60 states have adopted legislation giving individual some control over the collection and use of these data by public and private bodies. Major international conventions are already in place in Europe and are rapidly emerging in Asia and Africa.(discussed in the next part of chapter) On the other side RTI laws have already been widely accepted as almost 90 states have adopted RTI laws⁴⁸³. Information is being facilitated through new information and communication technologies and searchable government data or record is available on respective websites.⁴⁸⁴

The term privacy is in itself a very complicated rather knotty phenomenon involving multiple issues and their connected aspects. Privacy may involve or start from ones personal privacy related to personal data related to his or her civil, social, economical, cultural life held by private or government body. The protection of his privacy is a crucial question when dealing with right to information, that is what to disclose and to what purpose and extend disclosure can be permitted based on general policy as to protection of privacy ⁴⁸⁵

9.2 The Right to Privacy

According to Black's Law dictionary, the right of privacy is "the right of a person to go his own way and live his own life that is free from interferences and annoyances."⁴⁸⁶

⁴⁸³ An International map of countries with RTI legislation is available at <http://www.privacyinternational.org/foi/foi-laws.jpg>. Last Accessed 02-04-2016.

⁴⁸⁴ Banisar. The right to Information and Privacy: Balancing right and managing conflicts.

⁴⁸⁵ Solveig Singleton. "The Freedom of Information and versus the right to privacy. A pro Market Framework for Arizona."Arizona Issue Analysis,171. Goldwater institute, May 24, 2002. Available at <https://cei.org/studies-issue-analysis/freedom-information-vs-right-privacy>. last accessed on 12.03 2016.

⁴⁸⁶ The Law Dictionary Black's Law Dictionary Free Online Legal Dictionary 2ndEd.available at <https://thelawdictionary.org/right-of-privacy/>

Duhaime's law dictionary define right of Privacy as "A person's right to control access to his or her personal information".⁴⁸⁷ The definition is a simple statement beneath which a whole world of issues is buried. Another definition by Farlex dictionary provides as;

In the Constitutional law the right of people to make personal decisions regarding intimate matters; under the common law the right of people to lead their lives in a manner that is reasonably secluded from public scrutiny, whether such scrutiny comes from a neighbor's prying eyes, an investigator's eaves dropping ears, or a news photographer's intrusive camera; and in statutory law, the right of people to be free from unwarranted drug testing and Electronic surveillance."⁴⁸⁸

The starting point of this as legal right can be traced back to 19th century when a famous jurist Louis D Brandeis and D Warren published a significant article on "The Right to Privacy (1890) that hypothesized a common right law as right of privacy. Later the courts have relied on it in many cases presenting a wide range of privacy issues.⁴⁸⁹ The Supreme Court judge and the jurist Brandeis described privacy as a general constitutional right "to be let alone", and comprehensive right which can be offered to civilize people.⁴⁹⁰ The right to privacy gradually evolved and today every jurisdiction around the globe recognizes this right either in form of constitutional statutory or common law right. Brandies noted French Law providing relief for invasion

⁴⁸⁷Right of privacy, Duhaime's Dictionary, <http://www.duhaime.org/LegalDictionary/P/Privacy.aspx>. Last accessed 06-04-2016.

⁴⁸⁸Right of Privacy, Farlex Dictionary, <http://legal-dictionary.thefreedictionary.com/right+of+privacy>. Last Accessed 06-04-2016 .

⁴⁸⁹Ibid.

⁴⁹⁰Olmstead V. United States, 277 U.S.438, 48, Ct %^\$72 L.ED 944(1928).

of private life which he urged to be provided by common law countries. It was recognized in US in 1902 for the first time in state of Georgia.⁴⁹¹

The right to privacy is now a very well established right nearly in every national constitution and in most of the international instruments like Universal Declaration Of Human Rights.⁴⁹² Privacy is itself a very complex or multi dimensional concept based on individuals autonomy and its relationship with society including other individuals, governments and companies. Further it encompasses protection of a wide range of rights including invasion of home or family life. Health, financial and other communication secrecy .Furthermore, it acts as a core right that supports human dignity and other freedoms like those of speech, expression, and association.⁴⁹³

The notion of privacy varies in every society and culture and there is no universal definition of the term that can be applied to all. It is commonly pointed out as the one that underpins the human freedom, dignity and other values like speech and association, at the same time as a fundamental right it is considered vital in protecting personal relationships and one's ability to develop ideas. The advent of technology and globalization greatly shifted the perception from traditional privacy ideas or opinion to globalized ones, disturbing the overall power structures. Simultaneously affecting the trends of protection of personal information globally.⁴⁹⁴

⁴⁹¹ Marc Rotenberg, "Preserving privacy in the information Society". Available at www.unesco.org/webworld/infoethics_2/eng/papers/paper_10.htm. Last Accessed 10-03-2016.

⁴⁹² UDHR Article, 12 Available at <http://www.un.org/en/universal-declaration-human-rights/> Last Accessed on 10-03-2016 .

⁴⁹³ David Banisar. The right to Information and Privacy . Balancing rights and managing conflicts. 6

⁴⁹⁴ David Banisar, "Linking ICTs, The right to Privacy, Freedom of Expression and Access to Information". *East African Journal of peace and Human Rights*, 16(2010):125.

9.2.1. Areas of Privacy

The term privacy can be divided in following related categories ;

- i) Information privacy that includes individual's personal information like financial or medical information held by other parties and rule governing for the collection and handling the same, also known as "data protection".
- ii) Bodily privacy deals with physical selves of people against the insidious procedures like drug testing, cavity search or genetic tests.
- iii) Communication privacy using the postal mail, email, telephones and other technologies, and is one of the most common and controversial area of concern.
- iv) Territorial privacy includes the limitation on the invasions into domestic or other environments like workplaces or publics places including searches , videos , surveillance or ID check⁴⁹⁵

Privacy has been described by jurists and philosophers as necessary characteristic for all personal freedoms associated with autonomy, dignity spirituality, trust and liberty of a person. The threat to privacy right is of multiple folds which can be divided into technological threats, threats from private and Governmental action and other commercial services.⁴⁹⁶

Availability, legislation and judicial decision have led to debates on the issue of rules governing access to personal data held by public or private bodies as how to

See also Solveig Singleton. "The Freedom of Information and Versus the right to privacy. A pro Market Framework for Arizona."

⁴⁹⁵ Ibid., 126.

⁴⁹⁶ Rotenberg, "Preserving privacy in the information Society".

achieve a balanced approach, though there is no easy way to do it. The right privacy is recognized in almost every constitution globally and international human rights instruments like The Universal Declaration of Human Rights⁴⁹⁷, International Covenant on Civil and Political Rights,⁴⁹⁸ The European Convention on Human Rights,⁴⁹⁹ The American Declaration on the Rights and Duties of Man⁵⁰⁰ and the American Convention on Human Rights.⁵⁰¹

9.3 Fair Information Practices (FIPS)

The collection of personal information including obligations like tax, medical , employment, criminal and citizen record, identification technologies like identity card , fingerprints or DNA mapping by governmental or private bodies through latest technologies into databases of unprecedented breadth and depth. New communication technologies create and collect substantial record in the process of providing communications including emails, list of website visited and mobile location. Besides the information sharing on social networking sites. All these and others related issue lead to concerns about abuses or misuse of information for unlawful purposes and identity theft.⁵⁰²

9.3.1 Historical development

Since 1960s principles on collecting and handling information (known as “Fair Information Practices” herein after FIPs) have been developed to deal with related

⁴⁹⁷ UDHR , Article 12.

⁴⁹⁸ ICCPR, Article 17 available at <http://www.un.org/en/universal-declaration-human-rights/>.
Last Accessed on 01-02-2017.

⁴⁹⁹ Art 12.

⁵⁰⁰ Art 5, 9, 10.

⁵⁰¹ Art 11

⁵⁰² David Banisar, The right to information : Balancing rights and Managing conflicts.6-7

issues. These principles are a set of principles and practices that explain how an information-based system may deal with information handling, storage, management, and flows with a scrutiny toward maintaining fairness, privacy, and security in a fast developing global technology environment.⁵⁰³ FIPs are a set of internationally accepted practices to deal with the privacy of information about individuals. Information privacy is a subset of privacy. FIPs are important because they provide the basic policy for many national laws addressing privacy and data protection issues.

Later in 1970s European nations started to enact privacy laws for public and private sectors, starting with Sweden (1973), Germany (1977) and France (1978). Laws which were predicated FIPs like Hesse (Germany 1970) law and 1970 American Fair Credit Reporting Act were consistent with FIPs. With the spread of privacy laws to other countries in Europe, the international institution like council of Europe came up with focus on privacy laws and regulations. Council of Europe adopted a Convention for the Protection of Individual with Regard to automatic processing of Personal Data in 1980 which was the first legally binding International treaty on data protection.⁵⁰⁴ The quality of data, special categories of data and data security were the areas addressed by the Council of Europe. Recently in 2013 the Council maintains a data protection webpage which includes, besides other things, information on new signatories to the convention

⁵⁰³ Pam Dixon. "A brief Introduction to Fair Information practices". available at <https://www.worldprivacyforum.org/2008/01/report-a-brief-introduction-to-fair-information-practices/>. Last accessed on 26-04-16

⁵⁰⁴ It stated, "It is desirable to extend the safeguards for everyone's rights and fundamental freedoms, and in particular the right to the respect for privacy, taking account of the increasing flow across frontiers of personal data undergoing automatic processing."

and reports on modernization of the Conventions. the ad hoc committee on data protection in December 2014 approved the modernization proposal.⁵⁰⁵

In July 1973 initial steps were taken when a Elliot Richardson, then Secretary of US government's Department of Health Education and Welfare(hereinafter HEW) established advisory committee proposed a set of information practices to deal with the issue of lack of protection under the law then in record keeping system as response to growing use of automated data system containing information about individuals by public or private organizations. The Secretary's advisory committee headed by Willis H. Ware from Rand Corporation on Automated Data Systems in California issued the report, Records, Computers, and the Right of Citizens.⁵⁰⁶ Setting forth the key foundational ideas for protection of privacy and reported "Safeguards for personal privacy based on our concept of mutuality in record keeping would require adherence by record- keeping organizations to certain fundamental principles of fair information practices." The central role of the Advisory Committee was the development of a code of fair information practices for automated personal data systems which was inspired by the Code of Fair Labor Practices.⁵⁰⁷

Later in 1980s, the Organization of Economic Cooperation and Development (Hereinafter OECD) used those basic HEW fair information principles and codified a set of eight FIPs in the OECD Guidelines on the *Protection of Privacy and Trans border Flows of personal Data*. Historically OECD created internationally agreed upon codes,

⁵⁰⁵Robert Gellman."Fair information Practices , A basic history." privacy and Information Policy Consultant, Washington, DC; former Chief Counsel and Staff Director, Subcommittee on Government Information, Committee on Government Operations, U.S. House of Representatives; J.D. 1973, Yale Law School.Available at <http://bobgellman.com/rq-docs/rq-FIPShistory.pdf>. last accessed on 26- 04- 16

⁵⁰⁶Ibid., 6.

⁵⁰⁷ Pam Dixon. "A brief Introduction to Fair Information Practices".

practices and policy instruments, by member states including US through rectification process .The OECD Guidelines provides basis for modern International and national Privacy legal instruments like US government accountability Office are referred as key principle for privacy protection.⁵⁰⁸

The Organization for Economic Cooperation and Development (OECD) proposed similar privacy guidelines around the same time as the Council of Europe's original 1980 effort. A group of government experts under the chairmanship of The Hon. Mr. Justice M.D. Kirby, Chairman of the Australian Law Reform Commission, developed the OECD Guidelines on the Protection of Privacy and Trans border Flows of Personal Data. The OECD adopted the recommendation, which became applicable on 23 September 1980.⁵⁰⁹ These principles are now adopted by many governmental and international bodies⁵¹⁰.

The eight principles set out by the OECD are:

9.3.1.1 Collection Limitation Principle

There should be limits to the collection of personal data and any such data should be obtained by lawful and fair means and, where appropriate, with the knowledge or consent of the data subject.

⁵⁰⁸ Ibid.

⁵⁰⁹ Robert Gellman, "Fair information Practices, A basic history."

⁵¹⁰ Different organizations and countries have their own terms for these FIPs - the UK terms it "Data Protection", the European Union calls it "Personal Data Privacy," and the OECD has written *Guidelines on the Protection of Privacy and Transborder Flows of Personal Data* available at <http://whatis.techtarget.com/definition/Fair-Information-Practices-FIP>. Last Accessed on 26-4-16.

9.3.1.2 Data Quality Principle

Personal data should be relevant to the purposes for which they are to be used and, to the extent necessary for those purposes, should be accurate, complete, and kept up-to-date.

9.3.1.3 Purpose Specification Principle

The purposes for which personal data are collected should be specified not later than at the time of data collection and the subsequent use limited to the fulfillment of those purposes or such others as are not incompatible with those purposes and as are specified on each occasion of change of purpose.

9.3.2.4 Use Limitation Principle

Personal data should not be disclosed, made available or otherwise used for purposes other than those specified in accordance with [the Purpose Specification Principle] except: a) with the consent of the data subject; or b) by the authority of law.

9.3.2.5 Security Safeguards Principle

Personal data should be protected by reasonable security safeguards against such risks as loss or unauthorized access, destruction, use, modification or disclosure of data.

9.3.2.6 Openness Principle

There should be a general policy of openness about developments, practices and policies with respect to personal data. Means should be readily available of establishing the

existence and nature of personal data, and the main purposes of their use, as well as the identity and usual residence of the data controller.

9.3.2.7 Individual Participation Principle

An individual should have the right:

- a) To obtain from a data controller, or otherwise, confirmation of whether or not the data controller has data relating to him;
- b) To have communicated to him, data relating to him within a reasonable time; at a charge, if any, that is not excessive; in a reasonable manner; and in a form that is readily intelligible to him;
- c) To be given reasons if a request made under subparagraphs (a) and (b) is denied, and to be able to challenge such denial; and
- d) To challenge data relating to him and, if the challenge is successful to have the data erased, rectified, completed or amended.

9.3.2.8 Accountability Principle

A data controller should be accountable for complying with measures, which give effect to the principles stated above.⁵¹¹

These principles have now been incorporated into many other international instruments on data protections. The UN general assembly adopted in 1990⁵¹² and Common Wealth secretariat in 2002, Asia Pacific Economic Cooperation (APEC)⁵¹³ and most influential is the European Data Protection Directives as adopted by 27 EU member states and by numerous other countries of Africa, Europe and Latin America that trade with EU⁵¹⁴.

On the other hand, national constitutions are also evolving to recognize the protections of personal data as right.⁵¹⁵ Latin American states introduced a right of Habeas data⁵¹⁶ to control and access to personal data. The Kenyan state's Constitution also stated that, "Every person has a right to privacy which includes the right not to have...information related to their families or private affairs unnecessarily required or revealed."⁵¹⁷

⁵¹¹ Banisar, The right to information and privacy, Balancing rights and managing conflicts.7-8

⁵¹²Privacy Commission, <https://www.privacycommission.be/en/united-nations>. See also https://www.privacycommission.be/sites/privacycommission/files/documents/guidelines_computerized_personal_data_files.pdf Last Accessed 02-03-2016.

⁵¹³Electronic Frontier Foundation, <https://www.eff.org/issues/international-privacy-standards>. Last Accessed 07-03-2016.

⁵¹⁴ Banisar , The right to Information and privacy : balancing Rights and Managing conflicts, 8

⁵¹⁵ For example, see the constitutions of Albania (1998, sec. 35). Cape Verde (1999, sec. 42), the Former Yugoslav Republic of Macedonia (1992, sec.18), Mozambique (1990, sec. 71), and Thailand (2007, sec. 35).

⁵¹⁶ A constitutional right that permits individual to demand access to their own information and to control its use.

⁵¹⁷ Article 31(c).

The Governments of more than 60 countries around the globe have adopted comprehensive data protection acts based on FOIs that apply to personal information held by public and private authorities in some of the countries like United States, Thailand ⁵¹⁸and Georgia⁵¹⁹, the legislation only protects data that is held by government bodies and in Malaysia's law, protection is only provided for data held by companies but has not provided the protection to the data held by Government.⁵²⁰

Even in countries where no specific data protection laws has yet been adopted some general legal provision in the civil and criminal codes provides for such protection to use of personal information.⁵²¹

9.4 The role of RTI and Privacy

The democracy is incomplete without these two ingredients if applied practically as both play central role in any such system. Both targeted on ensuring the accountability of powerful institutions to individual in information age. The RTI and privacy often play complementary roles the recommendation of Council of Europe 1986 stated that roles are “not mutually distinct but form part of the overall information policy in society”. Similarly data protection registrar UK noted, “Data protection and freedom of information can be seen as complementary rights, with the potential to be mutually supportive in practice.” ⁵²²

⁵¹⁸ Official Information Act, B.E. 2540 1997.

⁵¹⁹ General Administrative Code. Section 27.

⁵²⁰ Malaysian Personal Data Protection Act, 2010.

⁵²¹ Banisar. The right to information and Privacy: balancing Rights and Managing conflicts,8

⁵²² Ibid.9

9.4.1 RTI to support Privacy

The two right in many cases overlap in complementary way. The rights provide access to one's personal information from government bodies and privacy laws provide access to personal data held by private bodies. Simultaneously, both mutually enhance each other as privacy laws are used to get policy information in the absence of RTI laws and RTI laws are used to enhance privacy by disclosing abuses.⁵²³ Below complementary aspect of both laws is discussed first;

9.4.1.1 Information from Government Bodies through RTI.

The basic function of both the laws is to give right to a person to acquire information about his/herself held by government bodies. It is an important safeguard to make sure the information held is accurate and the person is being treated by the government. Generally, where countries have both laws, individual requests for personal information are dealt under data protection acts but for the information about the data of other parties is requested, the request follows the RTI laws. The practice to deal with such request varies in different countries.⁵²⁴ whereas in Countries like South Africa⁵²⁵ and India where there is no general privacy law applicable, RTI laws are the means to gain personal record from the government bodies.⁵²⁶

9.4.1.2 Information from Private Sector through Privacy Laws.

⁵²³ Ibid., 10.

⁵²⁴ For instance in Bulgaria and Ireland application for personal information can be made under both the laws. As such different outcome may occur depending on the over sighting bodies and exemptions. In Australia RTI law is given preference. All requests even under the Privacy Act are filter through the FOI Act for personal information by a party. In Ireland both laws allow for individual access , the FOIA is still most people(70% approx) use for their own information.

⁵²⁵ South African, Promotion of Access to Information Act (Section 88) provides , in absence of other legislations, public and private bodies must take reasonable steps to establish internal means to correct personal information held by the concerned bodies.

⁵²⁶ Banisar. The Right to Information and Privacy, Balancing Rights and Managing conflicts.10

Generally, RTI laws are not applicable on private sectors unless concerned body is involved in government functions. Some of the countries⁵²⁷ like South Africa have extended the jurisdiction of RTI laws to non-government bodies for their non-government functions. Data protection laws complement to RTI provisions to broaden one's right to access information from private bodies. More than 60 countries around the world have adopted data protection laws that are applicable on private as well as government sectors. These laws not only provide access to personal data from private sector but also expose abuses by such operations or other private organizations like malfeasance by information and communication technology companies, banks and employers.

9.4.1.3 Policy Information using Privacy Laws.

Privacy or data protection laws can be used to obtain important policy information where RTI laws are unavailable. As mentioned earlier *habeas data* can be used to demand information and accountability. Article 8 of European Convention on Human Rights⁵²⁸ also provide the remedy in the similar manner guaranteeing the disclosure of non personal information in some cases. European Court of Human Rights in 1998 ruled⁵²⁹ that individual may demand from government bodies in cases where lack of

⁵²⁷ South Africa, Antigua and Barbuda have adopted laws that apply to private bodies “in the protection of any right.”

⁵²⁸ Right to respect for private and family life

1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic wellbeing of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

⁵²⁹ Guerra and Others v. Italy, 116/1996/735/932, February 19, 1998.

information could cause danger to their health.⁵³⁰ Prior to FOIA, Data Protection Act was used to obtain information from government authorities in United Kingdom.⁵³¹

In United States and many other countries, NGOs and other groups like American Civil Liberties Union Electronic Frontier Foundation and Electronic Privacy Information Center used U.S FOI laws and state laws to obtain government records on government programs like communication surveillance groups spying, body scanners and used those information to campaign against such proposals and programs.⁵³² FOIA are also used by organization in UK to oversee the Government activities.⁵³³

9.4.2 Conflict between Privacy and RTI

The complementing nature of the RTI and privacy laws provides for a strong based relationship of two rights but at the same time there exist another side which causes a serious conflict between these two.

The collection of personal information by government is in huge amounts and demands for the access to information vary on the basis of reasons for demands. An individual demanding to know why any particular decision or policy made in particular

⁵³⁰ "The Court reiterates that severe environmental pollution may affect individuals' well-being and prevent them from enjoying their homes in such a way as to affect their private and family life adversely....In the instant case the applicants waited, right up until the production of fertilisers ceased in 1994, for essential information that would have enabled them to assess the risks they and their families might run if they continued to live at Manfredonia, a town particularly exposed to danger in the event of an accident at the factory"

⁵³¹ Banisar, Right to Information and Privacy : balancing Rights and Managing conflicts,¹¹.

⁵³² See EPIC v. DHS (Suspension of Body Scanner Program), available at <https://epic.org/privacy/litigation/apa/tsa/bodyscanner/>. Last accessed on 10-04-2016

See also public FOIA documents on spying in Washington, released by the American Civil Liberties Union, available at <http://www.aclu-wa.org/public-documents>. last accessed on 10-04-2016

⁵³³ The Tax Payers' Alliance is Britain's independent grassroots campaign for lower taxes. Available at <http://www.taxpayersalliance.com>. See also <http://www.taxpayersalliance.com/taxpayers> alliance join call to protect the freedom of information act .Last accessed on 10-04-2016.

way, civil society groups or NGOs fighting for accountability for specific actions ,or a journalist investigating the stories , companies may demand for market practices or policies, or one as historian or academician may for their research of a an event. At the same time the exemption provided by RTI laws for personal information or data vary greatly. Countries have adopted separate laws for both of them acting together while determining the release of any information.⁵³⁴

These issues have gained importance as such information is now being increasingly available or disclosed on internet sites and he personal information(even available publicly) raise the important question about relevance of data protection laws for reuse of personal information. The EU data protection law provides that access to information does not lead to assumption that it can be used for any purpose. In countries like United states , Canada and UK , the privacy exemption is one of the most used in often denials of information in such cases.⁵³⁵

The relationship of these rights is a complex one. Usually the conflict arises when misunderstanding the content as what exactly is intended to be protected. The dealing official has to do with numerous issues like the official names and other information be considered private? Criminal or court records are private or public? or information in public documents or registers is available for any use? In such situations, it is vital that clear provision of law, policy and practice can help to limit the conflict. Below some of the conflicting situation will be assessed.⁵³⁶

⁵³⁴ Bannigar , The Right to information and privacy : balancing rights and managing conflicts. 12

⁵³⁵ Ibid.

⁵³⁶ Ibid.

9.4.2.1 Public Official Information

Public records contain the detailed information about any action of an office whereby the information about the officers who undertook different tasks in such case. At the same time it also provides for the other information like contact information emails or phone logs, official expenditures which can be useful to categories it as done within their official competence. Furthermore, the official records also hold information about official including salary and employment record, photographs, home address and even the biographical data, financial assets and medical record. There is no universal consensus as to what is or is not personal information. The right of privacy is multifaceted and defined by each culture.⁵³⁷

Majority of countries follow the practice that information related to “official capacity” is subject of disclosure, not considering it personal information. Generally, it is not sensitive being not related to his or her personal or family life unless it might relate to a specific identifiable person. In majority cases such document cannot be held just because official’s name is given to the author or addressee of a document.⁵³⁸ Whereas regards to the information related to the performance of an official in his job (performance review and salary) practices vary as such information is withheld by many jurisdictions and is also available in the rest.⁵³⁹ The information related to employees’ personal life, other than his or her public actions, is not permitted to be released, among

⁵³⁷ Banisar ,The Right to Information and Privacy , Balancing right and managing conflicts.¹³

⁵³⁸ The European Ombudsman (EO) in 2007 found that for non disclosure or refusal of European Parliament the expenses of the members of their travel and subsistence allowance as maladministration. The UK and Irish information commissions also ordered to release the expense information of members of the parliament. U.S congressional expenditure is published biannually.

⁵³⁹ Chang Vs Dept. of Navy. No.CIV.A 00-0783 . U.S district Court , District of Columbia April 22, 2004.

other things medical records even of non elected members are generally considered as sensitive. The criminal records not related to official's positions are often withheld.

The practice may vary depending on the position of an official. Generally the disclosure of high ranked or the elected members' information (even their salaries or personal life information) received recognition as compared to junior officials. The requirement of asset disclosure is imposed in many countries. Even the medical record in some cases of high ranked official (even the president) may be publicly released ⁵⁴⁰. Indian Supreme court ruled that citizens have right to know about public functionaries and candidates for office, including their assets and criminal and educational back grounds.⁵⁴¹ ECHR also said that public has right to be informed, in circumstances it can be extended to private life of public figures, particularly where politicians are concerned.⁵⁴²

9.4.2.2 Private individual Information held by Governments.

The notion of privacy mainly developed and continued in the context of information of private individuals. The great amount of sensitive information like health or medical

⁵⁴⁰ Recently in case from India ruled that medical information could be released if there was a sufficient public interest: "personal information including tax returns, medical records etc. cannot be disclosed in view of Section 8(1)(j) of the Act. If, however, the applicant can show sufficient public interest in disclosure, the bar (preventing disclosure) is lifted and after duly notifying the third party (i.e. the individual concerned with the information or whose records are sought) and after considering his views, the authority can disclose it"

(Secretary General, Supreme Court of India v. Subhash Chandra Agarwal, High Court of Delhi, January 12, 2010) available at <https://indiankanoon.org/doc/1342199/>. Last accessed on 26-02-2016.

The ECHR ruled in 2004 that there was a public interest in a doctor revealing information that French President François Mitterand was seriously ill while in office and had hid that from the public. The court ruled that a temporary injunction was appropriate, but that a permanent one violated Article 10 of the European Convention on Human Rights (Editions Plon v. France [Application No. 58148/00], May 18, 2004).

⁵⁴¹ Union of India v. Association of Democratic Reforms. 2002 AIR 2112; 2002(3) SCR 294

⁵⁴² Von Hnnover V Germany ECHR (3rd section) application no. 59320/00 24-06-2004. available at <http://merlin.obs.coe.int/iris/2004/8/article2.en.html>. last accessed on 10-05-2016

records, taxations⁵⁴³ or dealing with government bodies and others, in most of the jurisdiction is considered as private and confidential.

i) Court Records

As far as court records are concerned, no consensus exists on access. In Europe any court records naming individuals are taken sensitive but in United States such records are considered public. Since the increase in availability of individual records on different networks increased the sensitivity especially of financial information being used for fraudulent purposes. To deal with such concerns many courts now edit some of information before making it publically available electronically in US. Many European states also required that identities be removed from cases prior to public availability.⁵⁴⁴

ii) Social support Program

Similarly, the information related to social support programs, mostly developed countries keeping the sensitivity of issue (about people receiving social support) in mind kept such information held by governmental bodies is not publically available generally.⁵⁴⁵ But some of developing countries like India are now using it to combat corruption by using it as social audit, made it public⁵⁴⁶. Such information is made publically available on internet.⁵⁴⁷

⁵⁴³ Tax records in some jurisdictions are publically available.

⁵⁴⁴ Banisar, The right to information Balancing Rights and Managing Conflicts .14

⁵⁴⁵ Rural Housing Alliance Vs United States Dept.of Agricultural et al.Appellants, 498F.2d73(D.C.Cir.1974)

⁵⁴⁶ For example Mazdoor Kisan Shakti Sangathan (MKSS), the campaign using RTI as tool to fight corruption. Available at. http://siteresources.worldbank.org/INTEMPowerment/Resources/14653_MKSS-web.pdf . last accessed on 12 -6-2016.

⁵⁴⁷ Banisar, The right to information Balancing Rights and Managing Conflicts .14

iii) Records in Public Registers.

Another controversial area is access to the public registers where birth, death, marriage, divorce, land records and other records are collected. Previously these were given public access in most of the countries but with the digitalization of such records the concerns over use of such information for commercial purpose, for stalking and many other reasons have also increased.

Countries vary as to make public registers available and permitting third parties to get information from such documents. The UK provides for limited version from electoral roll that can be used for commercial purpose where people can opt to remove their names from it but it prohibits use of full roll for such use. The US Supreme court upheld the law restricting the access to a computerized list of recently arrested individual for commercial marketing.⁵⁴⁸

Discussed above are some of the areas where FOI and data protection may get in conflict that are dealt on individual or case to case basis. Determinations are not specifically governed by standard principles on the relevant issues and practice. In this context the contents of legislations and oversight mechanisms are very important as how flexible they are to accommodate both aspects of the issue.

9.5 Legislation and oversight mechanisms

In last many years, the privacy and information laws have been seen and tried in details to achieve a balanced approach between them on both policy and legislation level.

⁵⁴⁸ Los Angeles Police department Vs United Reporting Publishing Corp., 528U.S32(1999). Available at <https://supreme.justia.com/cases/federal/us/528/32/case.html>. Last accessed on 12-06-2016.

Different approaches or practices have been followed by different states. In case of data protection laws mostly follow the structure of Council of Europe Convention for the Protection of Individuals with Regard to Automatic Processing of Personal Data and the European Union (EU) Data Protection Directive but in the RTI laws more divergence can be seen as compared to privacy laws. The fundamental common principles in both the areas have resulted from either influence of many international treaties and agreements or advancement through modern communication technology covering a global civil society. Similarly there has been unanimity or convergence towards the policy developments on the effective and compatible relationship between privacy and information laws while interacting. However there has not yet been any consensus on any particular good practices but here some common policy choices and oversight mechanisms adopted by different governments along with their weakness and strengths are briefly highlighted.⁵⁴⁹

9.5.1 A Single Privacy and RTI Law. (Model 1)

The states which have recently or not adopted these laws yet but planning to adopt in a single law or act, allows them to have common definitions as to limit conflict and ascertain balance from the start along with the internal consistency throughout the law. Some of examples of these states are given below:

- The Official Information Act⁵⁵⁰ in Thailand provides for both in the same Act as it gives citizens' rights to access to information held by Government bodies at the same times controls how the governmental bodies control the persona data. On

⁵⁴⁹ Banisar. The right information and privacy: Balancing Rights and managing conflicts,17.

⁵⁵⁰ The Official Information Act (RTI Act) was approved in July 1997 and went into effect in December 1997.

the other side, both are overseen by Official Information Council. To protect the records held by private sector are still under consideration to be legislated.

- In 1982, the bill C43⁵⁵¹ was adopted by Canada includes both Access to information and Privacy Act. The two sections became separate laws with two separate commissions to enforce them based on common definitions and relationship. The relationship of these laws as described by Supreme Court “seamless code with complementary provisions that can and should be interpreted harmoniously”.⁵⁵² Many of provincial laws follow the same as having single law for both rights simultaneously.
- The Hungarian 1992 Act on the Protection of Personal Data and Public Access to Data of Public Interest⁵⁵³ is a general law working for both ends as RTI and data protection law with a single oversight body having jurisdiction over both. The Parliamentary Commissioner for Freedom of Information and Data Protection supervises or oversee them.
- The Mexican Federal law on Transparency and Access to Public Information includes both RTI and the Privacy laws for records held by federal governmental authorities primarily which is overseen by Federal institute for Access to information (commonly known IFAI, the Spanish acronym). Lately the

⁵⁵¹Parliament of Canada.

Available at <http://www.parl.gc.ca/HousePublications/Publication.aspx?DocId=6836481>. Last accessed 05-12-2016.

⁵⁵²Canada (Information Commissioner) v. Canada (Commissioner of RCMP), 2003 SCC 8, October 29, 2003. Available at <https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/2038/index.do>. last accessed 26-05-2016.

⁵⁵³Act LXIII of 1992 on the Protection of Personal Data and Public Access to Data of Public Interest. Available at <http://dzlp.mk/sites/default/files/Dokumenti/EU%20zakoni%20zzlp/HUNGARY.pdf>

legislation to extend the jurisdiction to include data held by private sector has been adopted.⁵⁵⁴

There are some disadvantages of adopting a single act for addressing both the right along with the advantages. It may cause confusions regarding the intent of laws and can lead to bias by some parties who would support one act or another. Practically another issue is also relevant here is of complexity of legislation which take longer to be reviewed because they lack time as in case of Tanzania in 2006 a draft bill to address the access to information, privacy and media rights was of more than 85 pages in length, a fact that could not be considered. A single Act dealing with both the areas comprehensively will need to be as detailed as two separate acts as except the definition and over sighting body there is slight overlapping in the two.⁵⁵⁵

9.5.2 Separate RTI and Privacy Laws (Model 2)

The other parts of globe practice differently either a data protection or RTI laws have been adopted and in force, or decided to introduce the laws as separate piece of legislation. Thus, either the new law or laws must be adopted in way that guarantees the maximum balance, accord and harmony between the functions and operation of these two laws. If that is ignored at initial stage the conflicts will arise and further legislative efforts will be needed late.

While adopting separate legislation some important issues that must be considered by the legislators for effective or balanced laws include the followings:

⁵⁵⁴ Banisar ,The right to information and Privacy: balancing Rights and Managing Conflicts.18

⁵⁵⁵ Ibid.

9.5.2.1 “Personal Information” definition and primacy of law

Preferably a common definition can be used for both laws but data protection Acts usually take an expansive view of what is personal information. Since both laws and right are equally fundamental rights, neither law may randomly or subjectively trump the other. This issue has to be balanced while formulating laws separately. In case of separate definitions both laws will be considered every time when access to personal information is sought.⁵⁵⁶

EU Directive⁵⁵⁷ defines personal information as that identifies an individual. Such broad approach can be conflict with RTI as basic principle of data protection laws provides that information obtained for one purpose cannot be used for other purpose without consent of individual which apparently covers everything that refers to a person. Different ways are adopted by different countries to address this issue .Irish FOIA and data protection use different definitions but require the FOIA definition be used when considering the exemption whereas in contrast the Canadian practice use single definition in Privacy Act that sets out the detailed boundaries of personal and public information. Some states have given details of the information to be protected leaving lesser space for oversight bodies and courts to decide. Even some recent laws like Indian RTIA and Indonesian Act on Public Information Disclosure⁵⁵⁸ do not provide for any specific definition rather they rely on common language definition while interpreting.⁵⁵⁹

⁵⁵⁶ Banisar, The right to information and Privacy: balancing Rights and Managing Conflicts.19.

⁵⁵⁷ EU Directive 95/46/EC, Section 2(a).

⁵⁵⁸ Indonesian Act on Public Information Disclosure No. 14 (2008).

⁵⁵⁹ Ibid.

9.5.2.2 Privacy Exemption and RTI laws

Personal Information is generally protected in all the national laws but there are variations or the differences as to the scope of these exemptions ranging from a presumption of openness with limited exceptions for sensitive information to the presumption that all information is private and should be withheld. In many countries like Croatia, Romania and United Kingdom the privacy exemption require that all personal identifiable information must be withheld and RTI laws specifically reschedule to the data protection laws for the definition of personal information and the rule governing its release. An initial inquiry will determine if the consent has been given and can be used to justify the release of information. If no such consent is forthcoming data protection principle can be reviewed to determine if release can be justified based on fairness principle.⁵⁶⁰

Many RTI laws also provide for public interest test while determining whether the personal information can be released. Subject to this test even after it is determined that information is personal and release could cause harm it may be disclosed if the public interest in release is more beneficial than the privacy interest. Many countries like Ireland , New Zealand Slovenia and United states use this test to evaluate the privacy interests. It allows for independent authority like the courts, commissions and

⁵⁶⁰ Fairness typically depends on the circumstances under which the information was collected and expectation at that time that information to be used in certain ways. The U.K. Ministry of Justice recommends that the following factors be used in determining if disclosure under the U.K.

FOIA would be considered fair:

- How the information was obtained.
- The data subject's likely expectations regarding the disclosure of the information. For example, would the party expect that his or her information might be disclosed to others? Or had the person been led to believe that his or her information would be kept secret?
- The effect that disclosure would have on the data subject. For example, would the disclosure cause unnecessary or unjustified distress or damage to the data subject?
- Whether the party expressly refused or consented to disclosure of the information.
- The content of the information. • The public interest in disclosure of the information.(Ministry of Justice UK 2008)

ombudsmen to evaluate the different angles and values and decide case by case as when information can be released. ⁵⁶¹

9.5.2.3 Subject Access request.

Some jurisdictions allow for subjects or individual to request their own information under either act but better choice would be to choose one act which gives greater access and focus through that law to avoid multiplicity of these request and confusions. In mostly European states it is the data protection or Privacy act.

9.5.2.4 Appeals and Over sight Bodies.

Another important related issue is that what sort of body will rule upon the balancing the interest or rights. That must be a specialized body which works to settle the clear standards on the subject. This area again has the relevant issue as those or having the single act or two separate Acts on the issue which are briefly discussed in next part.⁵⁶²

From discussion above it can be concluded that both Privacy and RTI laws must deal with the issue of personal information in very clear terms as how the issue is to be considered. An effective legislation can be where this is set out logically and specifically provide for the limits on kind of information to be protected and create a balance between both harm and public interest.⁵⁶³

9.6 Appeals and Oversight

All Right to Information laws provide for some structure of external appeal mechanism such as commission or ombudsman have been empowered to reactive appeal and give decision on the release of information. They have significant role to play for balancing

⁵⁶¹ Banisar, The right to information and Privacy: balancing Rights and Managing Conflicts.20.

⁵⁶² Ibid., 18.

⁵⁶³ Ibid., 21.

public interest with the release personal information. There is a strong trend to establish a commission to decide appeals and provide oversight and guidance between those that have single body to handle both and that have separate bodies to handle data protection and RTI. Both models have their own pros and cons.⁵⁶⁴

9.6.1 Separate Privacy and RTI Commissions- Two Bodies

Some of the countries have formed split bodies for enforcing the RTI and the protection of privacy. The bodies have single function to perform and sometimes have other duties assigned to them. Others countries like Belgium Canada, Portugal have independent RTI commission as a single Function body. Mostly states have enforced RTI law through already established ombudsman's office. Scandinavian countries, New Zealand, Peru follow this approach. A few jurisdictions like Ireland established RTI commission that also serves as ombudsman, with special powers. Almost in all states data protection commission is an independent body partly as required by EU laws.⁵⁶⁵

Besides the conflicts, to have separate commissions has its own benefits as an independent body they can become supporter and defender of such rights unfettered of the need to balance potentially competing interests.⁵⁶⁶ Particularly in jurisdictions

⁵⁶⁴ Banisar, The right to information and Privacy: balancing Rights and Managing Conflicts.23

⁵⁶⁵ Under Article 28(1) of European Union Directive 95/46/ EC, data protection commissions "shall act with complete independence in exercising the functions entrusted to them." The European Court of Justice recently ruled, "[t]he guarantee of the independence of national supervisory authorities is intended to ensure the effectiveness and reliability of the supervision of compliance with the provisions on protection of individuals with regard to the processing of personal data and must be interpreted in the light of that aim. It was established not to grant a special status to those authorities themselves as well as their agents, but in order to strengthen the protection of individuals and bodies affected by their decisions. It follows that, when carrying out their duties, the supervisory authorities must act objectively and impartially. For that purpose, they must remain free from any external influence, including the direct or indirect influence of the State or the Länder, and not of the influence only of the supervised bodies" (Case C-518/07, OJ May 1, 2010).

⁵⁶⁶ Canadian Information Commissioner John Grace stated :The values of openness and privacy each has a clearly identifiable and unambiguous advocate. While both commissioners are required by law to reasonably balance access rights and privacy rights, each has a clear mandate to be a lightening [sic]

where any of them is a new right, not established in public mind yet and other has long been practiced and championed by a body.⁵⁶⁷

Major concern in case of two bodies is usually the conflict which can become a serious matter at times. There have been public fights between these two bodies for either political or policy reasons. On the other hand public will be given different advices from both in case of their disagreement. Consequently, there will be a need of a third body or such mechanism to resolve the disagreement between them beyond any doubt reasonably.⁵⁶⁸

Another aspect is of economic concern that it can be difficult specially in small jurisdictions to justify two commissions where costs and infrastructures can be difficult to be provided. States like New Zealand both ombudsman and privacy commission are required to formally consult the views of privacy commission before release of any such information. Whereas in Ireland the Data Protection Law require both bodies to cooperate. ⁵⁶⁹

9.6.2 A Single Privacy and RTI Commission- One Body

Many countries have been creating single body to deal with both access to information and data protection like Malta, Mexico, Thailand, Hungary and United Kingdom at national levels and Canadian provinces, Mexican states, German lenders and Swiss cantons at sub national level. Mostly an existing body or commission with the adoption of legislation is given additional charge or authority. Data protection Commission in UK evolved into the Information Commission and same development occurred in

rod for, and champion of, one of the two values.” Access to Information Commissioner, Annual Report of 1991–92, 1.

⁵⁶⁷ Banisar, The right to information and Privacy: balancing Rights and Managing Conflicts.24.

⁵⁶⁸ Ibid.

⁵⁶⁹ Ibid.

Switzerland, Malta and Germany. In Slovenia both bodies were merged into single commission with previous information commissioner as its head.⁵⁷⁰

The significance of having single body is reduction of conflict and shared expertise as very strong interrelated issues exist between the two rights. Besides the areas of conflict both share some commonalities too. Having single body can reduce institutional conflicts significantly. Practically many requests under RTI specifically for personal information can be scrutinize by having dual expertise can allow for better balancing.⁵⁷¹

From point of public convenience, it is easier to have one point of contact with public authorities for effective and better exercise of their rights. Slovenian experience shows that merger into one body resulted into better awareness of public and government bodies regarding both rights and also the unification of entire legal practice of the field. Another positive aspect of having single body is that it reduces the chances of misuse of data protection by the public bodies knowing that their decision can be reviewed by an independent oversight body having experts in both areas of laws.⁵⁷²

⁵⁷⁰ Banisar, The right to information and Privacy: balancing Rights and Managing Conflicts.25

⁵⁷¹ As remarked by Elizabeth France, the U.K. data protection registrar, while legislative process June 1999: "The possibility of institutional conflict which would exist were there to be separate Commissioners for freedom of information and data protection matters is avoided. Working within one institution should allow more focused and effective consideration than working across institutional boundaries. Any tension will be contained within the institution. Making the actual decision about where the balance should lie between data protection and freedom of information in a particular case will not be less difficult because there is one commissioner. However, with experience and understanding of both issues in-house, the decision process itself should be eased."

⁵⁷² As László Majtényi, the first Hungarian information commissioner, stated in his first report, "[i]t goes without saying that nobody can lawfully obstruct the freedom of information and the press in the name of data protection" (Government of Hungary 1998a, p. 73).

From economic aspect important argument in favor of single body can be that it reduces the administrative costs like human resources, administrative support and technical infrastructure which have to be duplicated otherwise.⁵⁷³

The major drawback of having single over sight body is the danger of keeping the balance between these two interests as one may be taken as stronger over other or perceived as more powerful and the bodies may not equally protect or balance both rights. Any such conflicts are likely to be decided internally or secretively rather than publically that is without debate and public reviewing. Situation can be worse when one of the laws has been enforced for longer period of time than other or has greater constitutional protection.⁵⁷⁴ Another related concern can be one body may get overburdened with lesser or inadequate resources for performing the dual functions or duty that are considerably different in some ways,⁵⁷⁵ especially in the developing jurisdictions.

There is no specific or clear answer as to what is better than other regarding the adoption of a single or separate legislation and oversight bodies in context of RTI and privacy protection implementation with sufficiently balanced manner. Countries may adopt a new institution to ensure that profile of each right is evidently supported without being weakened by other functions. In some cases, an existing body like that of

⁵⁷³ When the Canadian information and privacy commissioners, who shared common corporate services, split apart in 2002, the costs for both bodies increased by an estimated can\$1 million each.

⁵⁷⁴ In the United Kingdom, this concern led to the creation of two distinctly separate workforces for the different rights inside the information commission (which had previously been enforcing only data protection rights). Only after five years are the two workforces being merged.

⁵⁷⁵ In Australia, the Tasmania ombudsman (who is also the information commissioner and the integrity commissioner, and who holds several other posts) recently expressed concern that new functions added to his mandate have resulted in additional work without enough resources being provided (ABC News 2009).

ombudsman may be suitable to achieve the end. Above all political and economic concerns of any state hold the dictator's rights to prefer one model over other.⁵⁷⁶

9.7 Privacy Regime in Pakistan

Among many challenges Pakistan is facing in the context of freedom of information, freedom and protection of privacy is a crucial aspect. Privacy, as other side of FOI, cannot be separated from main agenda but requires a balanced approached to provide for protection of both the rights.

Presently in Pakistan there is no direct data protection legislation, though a Personal Data Protection Bill 2018 is still pending in the Parliament.⁵⁷⁷ Privacy, is not listed in the constitution as a separate fundamental right. However, it finds a passing mention in Article 14(1) of the Constitution of Pakistan as; "[t]he dignity of man and, subject to law, the privacy of home, shall be inviolable." But like other fundamental right Privacy is also subjected to many restriction⁵⁷⁸. There is no specific agency or authority for the data protection. Pakistan has extensive citizen registration system which is managed by National Data & Registration Authority (NADRA).⁵⁷⁹ From international perspective Pakistan is also signatory to many instruments with privacy protection

⁵⁷⁶ Banisar , The right to information and Privacy: balancing Rights and Managing Conflicts.²⁶

⁵⁷⁷ Available at <https://moitt.gov.pk/userfiles1/file/PERSONAL-DATA-PROTECTION-BILL-July-18-Draft.pdf>

⁵⁷⁸ Under the Constitution restricts the protection of privacy of an individual in cases related to the "proper discharge" of the duties of the Armed Forces or the police.

⁵⁷⁹ State of privacy in Pakistan Privacy International and Bytes for All, 2018 available at <https://bytesforall.pk/sites/default/files/State-of-Privacy%20Pakistan.pdf>. Last accessed on 12-06-19.

including ICCPR⁵⁸⁰ the Cairo declaration on Human Rights in Islam CDHRI⁵⁸¹ and CRC⁵⁸².

Though there is a lack of direct general legislation for data or privacy protection, right of privacy is indirectly regulated through various other legislations. Some are briefly provided here, including

1) The Electronic Transactions Ordinance (2002)

The Ordinance does not deal with the right of privacy directly but criminalizes any violation amounting to unauthorized access to any personal information.⁵⁸³ The ordinance requires for the establishment of an authorized body to certify electronic documents and also grants the same body powers⁵⁸⁴ to make regulations for the privacy of its users. But no such steps are taken as yet

2) Prevention of Electronic Crimes Act (2016)

The Act (PECA) also included multiple sections on data privacy, though it allows governmental authorities and law enforcement bodies to access the information on private data of a citizen with certain conditions ensuring care in maintaining the secrecy

⁵⁸⁰ Art. 17 of the ICCPR states that "no one shall be subject to arbitrary or unlawful interference with his privacy, family or correspondence." Signed in April 2008 and rectified in June 2010.

⁵⁸¹ Art. 18 provides "a) Everyone shall have the right to live in security for himself, his religion, his dependents, his honor and his property. (b) Everyone shall have the right to privacy in the conduct of his private affairs, in his home, among his family, with regard to his property and his relationships. It is not permitted to spy on him, to place him under surveillance or to besmirch his good name. The State shall protect him from arbitrary interference. (c) A private residence is inviolable in all cases. It will not be entered without permission from its inhabitants or in any unlawful manner, nor shall it be demolished or confiscated and its dwellers evicted." Signed in August 1990

⁵⁸² Art. 16 of the CRC states that "1) No child shall be subjected to arbitrary or unlawful interference with his or her privacy, family, home or correspondence, nor to unlawful attacks on his or her honor and reputation. 2) The child has the right to the protection of the law against such interference or attacks." Rectified in 1990

⁵⁸³ Section 36 ETO

⁵⁸⁴ Section 43(2) (e)

of the collected data or its unauthorized disclosure⁵⁸⁵ and in some cases it can share it foreign government and international agencies⁵⁸⁶. On the other hand it restricts citizen to access to government data.⁵⁸⁷

3) National Database and Registration Authority Ordinance, 2000

The NADRA is established under the ordinance, and provided in section 4(j) of the ordinance that authority shall be responsible for be responsible for "ensuring of due security, secrecy and necessary safeguards for protection and confidentiality of data and information contained in or dealt with by the National Data warehouse at individual as well as collective level."

4) Freedom of Information Ordinance 2002/ Right of Access to Information Act 2017

Under the 2002 Ordinance privacy was protected through an exemption "Privacy and personal information", certain forms of "information is exempt if its disclosure under this ordinance would involve the invasion of the privacy of an identifiable, individual (including individuals) other than the requester."⁵⁸⁸ Recently enacted Right of Access to Information Act also provides for privacy right through its section 16(c).⁵⁸⁹ In Pakistan there is no specific legislation through which an individual is allowed to request information for personal data (Habeas data), however, that can be done through right to information laws.

⁵⁸⁵ Section 31,32,35, 38, 39

⁵⁸⁶ Section 42

⁵⁸⁷ Section 3-8

⁵⁸⁸ Section 17 FIO

⁵⁸⁹ Information is exempt if its disclosure under this Act would involve invasion of privacy of an identifiable individual, including a deceased individual, other than the applicant....

Similarly consumer protection laws are enacted in all provinces and federal capital which are within limited context also dealing with privacy of individuals.

Use of modern technologies to invade the right of privacy has become a very serious issue. Recently many instances of data breaches have been reported. In 2010 computers and other equipments from office of NADRA⁵⁹⁰ were stolen by breaking in. In 2012 data from NADRA servers and FIA was claimed to be accessed by Turkish hackers by spawning backdoors. Similarly some stances of data breach were referred to NADRA while using private companies' databases and verification systems. In 2017, a bug causing leak of personal information of citizens from Punjab Information Technology Board was reported. Recently another practice of illegally selling of databases online is also identified specially for mobile marketing but what action is taken in this context is not clear.⁵⁹¹ Online banking transaction recently in Pakistan is serious concern when fake individual identities are used for money laundering.

The proposed bill on data protection and privacy⁵⁹² is step in right direction and makes some very important provisioning, for instance in chapter II it makes companies responsible for breach of security or data privacy while processing data. Chapter III also provides for data subject or user to access his personal data including ability to seek correction or removal of any information, thus giving a measure of control on one's personal data.⁵⁹³ Without such a law the people had their privacy rights infringed and could be misused without their consent by individuals, companies and even by the state. In this age

⁵⁹⁰ Shah Faisal branch in Karachi

⁵⁹¹ State of privacy in Pakistan, 10

⁵⁹² Personal Data protection bill 2018, available at

<https://moitt.gov.pk/userfiles1/file/PERSONAL-DATA-PROTECTION-BILL-July-18-Draft.pdf> last accessed on 20-06-19

⁵⁹³ Usama Khilji, Data Protection Law . January 07, 2019. Available at <https://www.dawn.com/news/1455963>

of information and communication where use of technology has become part of basic survival a strong legal protection is a must guaranteeing personal information from abuse and misuse.

Another aspect that needs special attention is the conflicting provisions within other laws that can cause uncertainty and friction while dealing with privacy protection. For instance the data retention clause (section 9) in proposed legislation requiring to delete the data till completion of relevant task, is in conflict with section 32 of PECA that requires from services provider retention of data for at least one year⁵⁹⁴

In absence of a formal legislation for the protection of privacy the role of courts has become crucial and in the perspective of Pakistan some cases can show the practice adopted to deal with constitutional guarantees and set as precedents. In Ghulam Hussain's case⁵⁹⁵ court held privacy of home cannot be violated unless there exist exceptional circumstances. When petitioner's house was raided by the police, on the basis of secret information, without any inquiry by a magistrate. In another case⁵⁹⁶ the court favored the complainant and held for reconstruction of park and wall in such a way that privacy of the petitioner can be secured, affirming that right to life under article 9 of the constitution can be extended for protection of right to privacy. The Lahore High Court in another case⁵⁹⁷ held that collection of information held by the bank of account holders and providing the same to tax authorities is violation of right to privacy in absence of any contention of illegality or wrongdoing the State Bank directive was thrown out and the Court held "taking of private information without any allegation of

⁵⁹⁴ Ibid.

⁵⁹⁵ Ghulam Hussain vs Addition Sessions Judge, Dera Allah Yar (PLD 2010 Quetta 21),

⁵⁹⁶ Taufiq Bajwa vs CDGK (2010 YLR 2165)

⁵⁹⁷ M.D.Tahir v. State Bank (2004 CLC 1680),

wrongdoing of ordinary people are an extraordinary invasion of this fundamental right of privacy."

It is of extreme importance that in this age of technological advancement and major reliance is on information and communication technologies, there be a strong law that protects the privacy of citizens who trust commercial concerns and the state with their personal data for ease in services, and have the guarantee under law that such personal information will not be misused. Accountability of violators and oversight bodies for protection of privacy are needed to be established.

Conclusion

Right to privacy, is a very technical but a fundamental side of RTI regime which cannot be ignored. The importance and significance of both the rights require a balanced approach. After the evaluation of both the rights it can be concluded that both rights are not always conflicting rights but are two sides of the same coin which cannot be separated. The fundamental issue is how to balance them.

The legislation and the implementation along with oversight bodies are the tools which can achieve this goal. Both rights are internationally recognized rights with their separate functions and long histories. No fundamental right can be given priority or greater weight over other under any human right legal regime.⁵⁹⁸ The decision must vary on case to case bases on the relative importance of the various interests.

⁵⁹⁸ Volker und Markus Schecke GbR and Hartmut Eifert vs Land Hessen (Joined cases C 92/09 and C 93/09 November 9, 2010. No 85.)

The legislative authorities while drafting laws must anticipate achieving a balanced and flexible approach otherwise both areas will be affected negatively. It can either be done through separate set of laws for both the rights or both can be incorporated in one but with very clear provisions as not to cause any confusion towards implementation. Privacy in itself is a multidimensional concept comprising of social economic, political aspects. For our purposes we are more focused on privacy being a human right and its protection, while giving right to information a status of fundamental right at the same time to ensure improved governance. This need to allow citizens both the rights, however this confluence of two separate rights makes it inevitable that the limits be defined on case to case basis on the back of legislation(s) that are flexible in matters of implementation.

Pakistan is amongst the states where both areas are in their infancy, as no federal law has been enacted to fully establish and implement both the rights simultaneously, except the Constitution and provincial laws of course with their respective limited scope. As already highlighted the need exists for federal legislation for protection of Right to Information along with the protection of one's privacy side by side. Any federal FOI legislation must incorporate the provisions that provide limitation to the extent of applicability.

At the moment the focus in Pakistan is with FoI which has been promulgated in some basic form, however, the right of Privacy is still not subject to laws. Working on legislation on protection of Privacy has already been started but the issues of breaches of privacy are taking serious turn which requires legal protection without delay. With enactment of formal freedom of information legislation privacy protection laws are

equally necessary to make FOI properly effective. Keeping in view the importance and significance of right of privacy, time has come to recognize it as separate fundamental right and along with it a formal legislation for its protection. Without a proper Privacy regime even FOI can be used arbitrarily.

Till adoption of separate privacy legislation a flexible approach may be adopted and the existing FOI legal regime may be amended to cater for privacy protection the same administering bodies can be assigned the task to balance both the rights. This approach is likely to allow enough time for the development of the expertise and resources in both the area leading to gradual separation of the FOI and privacy regime.

Chapter 10

10. 1 Conclusions

Human Right is a complex legal phenomenon. All classes of human rights, like civil political, economic, social and cultural rights in their own framework are important and equal, inalienable and inherent for the entire humanity, yet each individual right is dependent on other rights for its realization thus creating a web which often needs balancing acts. Major human rights instruments like Universal Declaration of Human Rights along with International Covenant on Civil and Political Rights and International Covenant on Economic , Social and Cultural Rights have enshrined the list of those rights that international community is required to protect in their particular system of governance. Yet there is no concept of absolute freedom in any way. With the exception of few, all the rights are limited or restricted in their practical applications.

The term democracy and human rights are interrelated and it is understood that human rights cannot succeed without democracy neither can a democracy without respecting human rights. Freedom of expression is one of those essential rights without which the concept of modern democracy is incomplete. Freedom of expression technically includes the right to seek, receive and impart information and ideas. The right to information is generally considered as an integral part of freedom of expression. The right to information can be interpreted in the context of legal framework that support FOI while applying to relevant public body but in broader perspective it takes in both access and the circulation of the information held by other actors, where it becomes inherently linked to the freedom of expression. Freedom of expression cannot be effectively used without having access to relevant information which is vital for

complete enjoyment of Freedom of Expression. The right to information (RTI) has gained importance and has become in itself a separate fundamental right in any modern democratic system. The FOI primarily ensures the accountability, transparency and public participation. Also referred to as Public's right to know, FOI is a multi dimensional social and political practice that leads to empowerment of people.

Freedom of Information (FOI) is an offshoot of freedom of Expression can have multiple meaning and implications, but most commonly is to include individual's right to access the information and records of relevant public authority either from governmental publication of information or through access request. Any action of state authorities to prevent them from knowing would amount to violate their right. Access to public information is essential but so are the means through which information is made available whether it is the sharing of documentation or ICTs (Information and Communication Technology) or any other source of information.

The Right to information has been recognized by various international and regional instruments and gained the status of universality over the time. As discussed earlier the international bill of human rights (UDHR, ICCPR, and ICESCR) have incorporated the right of information as one of the basic human right. On the other side the regional instruments like the European Convention on Human rights (ECHR), the African Charter on Human and Peoples Rights also recognized it amongst the basic rights.

The movements of RTI were stimulation for the transition from authoritarian and secrecy to openness in the context not only to fight corruption but also the human rights abuses in last few decades. The western side of globe where the developed countries like

USA and UK are also following the RTI regime at different stages. The setback and the advancement in RTI in Americas show the importance that RTI as a tool to be used by the citizens to oversee the governmental activities towards accountability. RTI laws in America are focused on both improving existing laws and promoting the better implementation of them on one hand and on the other RTI activists are strongly working for the countries that do not have a law yet and to ensure these countries and progress the enactment and implementation of these laws in accordance with the standard set by Model American Law on Access to information. Strong regional networks and relationship are playing a key role towards better RTI regime in the region. CSOs are exploring for new opportunities to work together to facilitate local authorities to create greater positive impact on RTI.

The most developed legal systems such as those of the US and UK, still needs a constant reviews of their respective regimes to ensure incorporation of latest developments and lessons learnt. It is an evolving phenomenon which needs some adjustments in accordance with every new social and legal change. A change in Government is also a change in policies which needs a compatible relation of these two.

UK is also struggling in the same scenario of FOI evolution during the last decade. The access to information laws in UK is comparatively a recent development which has changed the earlier governing system of secrecy. The culture of secrecy was prevalent but after adoption of FOIA in 2006, a breakthrough took place towards openness of the government. Having a vibrant media and freedom of expression on one side and a long history of colonial system of secrecy presented a conflicting picture. Amongst the developed western world UK is no exception which had to face resistance

in respect of development of FOI regime. Governments are reluctant to enforce such legislations that can hold them accountable for their policies and activities. The analysis of first decade presents a mixed picture of success and at times deficiencies in the law. The required institutions are in places and have started working in their areas. The users of FOI are increasing with time and it can be hoped that in next few years situation will improve further.

On the other side of the globe, developing states Pakistan and India are two major south Asian countries with RTI regimes and victims of highest level of corruption since birth. Though Pakistan was first to introduce FOIA in region but political instability lead to weakening of the RTI regime. But India as a strong democratic state remained consistent and progressed. The first stage of having the law is achieved but the implementation side needs a lot more attention from all stakeholder including the government, people, media and civil societies organization. Historical evidence from other nations proved that FOI legislation cannot work in isolation it requires support through the wider legal system. Without efforts from all direction the goal of an efficient FOI regime cannot be achieved.

Different surveys or researches have been conducted to analyze the success of FOI regimes in different countries around the world. Starting from Sweden till date, Right to access to information have been adopted in different time periods by different systems and is still evolving. Developed states like America which is amongst those states who had been using these right for a very long period gives a picture of a very well established FOI system and UK which has passed recently the first decade have seen different stages of evolution. Developing states, like India and Pakistan, have their own

design of FOI regime within respective governing systems. There are some those have not adopted any such laws yet. Some basic features are common to all system based on general principles of FOI (including the law, procedures and exceptions) but outcomes are different based on the social and administrative structures of states.

The general context of FOI regime is very relevant in order to rank any system as successful in terms of transparency and openness. The context of law may vary from very legal framework with or without referring to implementation quality, economic freedom index, Corruption Perception Index (CPI), or role of Civil society actors, measuring the public sector level of corruption, sometime the use of ICTs or digital media freedom can be of decisive character to determine the success or impact of FOI in any particular state. It can be rightly concluded that though RTI are becoming more widespread but their effectively depends on the system that support them otherwise it will remain ineffective.

The significance of Right to information cannot be undermined now as it changes ones approach to see the world around him or her, our status or position in it and helps us to organize in order to achieve the benefit at maximum from the available resources. Fact based decision making can modify significantly our political, economical and social perception. In this background the sources of information most importantly in the modern era is the open and pluralistic media that can play a fundamental role by simply providing the true picture of society to see itself, and helping in making it to understand the relationship of people and the state.

The role of media in all its forms is very noteworthy in any social change not in a particular state but around the globe. The world has become a so called global village

especially in social and cultural milieu. The impact that media has in today's world is not a background story, whether positive or negative, it has changed the shape of worlds patterns or paradigm, rightly illustrated as double edged sword. Technological advancements have changed the way of life that existed since two decades ago. Coming to the relationship of media and information, it is in each other's pocket. Today one can think of information without using any form of media whether print or electronic. It has become one of basic necessity of life.

Referring to the impact of free media, as more than nuclear blast, is of major concern. Media in any way is now a basic source of any kind of information from any part of the world but it must not be arbitrarily used. A balanced or regulated media (with freedom, immunity along with restrictions either internal or external) is essential in order to benefit otherwise it can be a disaster. Even media cannot claim immunity from accountability and misuse of its influence. Media regulations are in itself a multi dimensional area though. Right of expression even through media can be restricted for collective good and by that keep in view social aspect of any society. The FOI through media is an important ingredient in any such system as each and everything cannot be considered information rather "the right to swing my fist ends where the other man's nose begins" should be the rule. Freedom of information and freedom of privacy are two sides and media lies in between. Media regulations must incorporate the training based on media ethics of relevant staff is crucial. Independent media in Pakistan has gained major status in past few years. The influence requires a greater need to act responsibly.

Another aspect which cannot be ignored when RTI is matter of concern is right of Privacy. Described as two side of one coin, they exist in parallels. To have a complete picture both characteristics have to be looked side by side and there is need for achieving a balanced approach. Different states have different practices depending on the sources available to them. Legislative authorities have to incorporate the restrictive approach to secure the right of privacy and in practice the relevant official must keep that in mind while disseminating information.

The generally acknowledged objectives of FOI to promote transparency and accountability, has a direct consequence on fighting corruption, which has substantial impact on development of any society. And it sanctions two basic ways of information dissemination, that is, proactive distribution and then reactive disclosure of information. And this jousting between public and authorities results into achieving transparency and creates a strong accountability tool to curb corrupt practices.

Recent history shows the persistent efforts for recognizing people's right to know as fundamental right in South Asian countries and many countries have successfully promulgated these laws though a hard won entitlement. Through RTI public can understand how decision making is done, what is the expenditure incurred on tax collection, implementation of public schemes, and above all how government can be held accountable of its action and policies. RTI has now been regarded as best tool to control corruption, mismanagements and control of ultra vires of power and advancing the agenda of transparency and good governance. However, it has also been proven beyond doubt that mere promulgation of a law making the information available leads to little traction in combating corruption. Eradication of corruption requires a strong

sense of the right to information with system of public criticism and censure of public bodies and tiers of government and free and fair elections.

The FOI has become a right that is considered to be tool for improve the level of transparency and public participation by providing need information to improve the decision making in any particular state. A novel client of RTI in recent years should not start from reinventing the proverbial wheel but lessons from earlier practitioners should spur the development of late entrants in the field and can base the new laws on those experiences enmeshed with its internal system in context of existing administrative structure and laws.

10.2 Recommendations

In view of the study conducted above it is recommended that following steps need to be taken for developing efficiency in Pakistan's FoI regime:

i) **Review of the Laws to remove conflict with RTI**

The legal framework prevalent in Pakistan presents a conflicting picture. Freedom of information legislation is an area where general political reluctance can be seen from history on one side and conflicting legal provision on the other side. Secrecy remained a norm for most of the history. Laws like officials Secrets Acts and many others as discussed above are hampering the purpose of recent efforts to attain transparency and accountability in the system. Legislative authorities must revisit these laws and either repeal these outdated laws or makes amendments where possible. A radical shift is necessary to meet the need of modern technological advancements. Preference for FOI provision should be given in any conflicting case.

ii) **Balancing Privacy and the Right to Information.**

The Right to Privacy and its protection against right information is also a major concern. Since Pakistan a developing country with limited resources and a weak democracy the need to balance the fundamental rights can prove to be an uphill task. Privacy laws are not very clear and implementation is weak and open to abuse by influential. Disclosure should be given but right of privacy cannot be compromised as they both share a similar status within the Constitution. Further legislation is required in ensuring the balance between the right of privacy and RTI.

iii) **Establishment of strong Local Governments and general uniformity of the system.**

In order to use RTI by public at large access need to be easy and exclude travelling to major cities to get any issue resolved. Allocation or set up of local government at localities can help to improve the public participation in public matters. Since all major government offices are located in main cities and an ordinary semi illiterate citizen can not have effective access to public records and decisions. On the other side uniformity of system can also help people to understand the nature of work for our purpose. A public relation office may be established at all local government center which can help people to access the records.

iv) **Role of Media**

Media is a most important source of connection all around the world and promoter of human rights. The role of media as watch dog on the government and other social issues and as a connection of society to the world is very important. The regulation of media is

very vital to keep a balance in the society. Freedom of information, right to privacy and media is triangle that cannot be separated. There is dire need to revisit the media laws and their implementation in Pakistan. Freedom of media is no doubt is important but a misuse of freedom is not permissible as in case of media in Pakistan. Media company owners must follow the basic ethics and steps ought to be taken for the training of the relevant staffers. Government policies regarding the controlled media need amendments. The use of media in different form can do magic if properly used for RTI promotion.

(v) Role of Civil Society organizations.

The role of NGOs and other organization national and international is also a crucial in context of human rights development. Different organizations are working in all aspects of social life. Their participation for the purpose of public awareness and their access to all sects of society can also contribute for FOI success. Governments are major authority but limited or deficient resources (financial or expertise) can work along with organization to attain transparency in the system but at the same time these organization need to be regulated. Transparency in their system must also be checked.

v) Protection of Whistle Blowers.

Any person who raise voice against any violation of any human right or disclose any corrupt practice on part of any private or public authority is considered as whistle blower whether a journalist, human right activists, or an ordinary citizen. Their protection is unavoidable rather a mandatory condition of any RTI regime. To

encourage people to know and demand their right this area should be an integral part of such legislations.

vi) **Public Awareness / User of RTI**

The countries with low literacy rate where majority people are not even aware of their rights can not avail the benefit of FOI. The prevalent situation in Pakistan firmly places her among those countries. Improvement in the level of public awareness needs special attention. To improve the ways and means to exercise this right special campaigns can be initiated through media programs ,proactive approach regarding policies for public related projects need to be adopted to involve people in decision making process and avail their input or participation. One important implication of these findings is that reforms focusing on increasing transparency should be accompanied by measures for strengthening citizens' capacity to act upon the available information if we are to see positive effects on corruption.

vii) **Capacity Building of Public Officials**

Serious efforts are in demand for the training of public official and their dealing with the information requestor. Capacity building is necessary for the proper implementation of FOI. Record keeping and digitalization of system and proper archiving is essential in major public institutions.

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<http://www.un.org/en/universal-declaration-human-rights/>

<http://www.businessdictionary.com/definition/media.html>

<http://www.corruption.org/en/.corruption/what-is-corruption/>

<http://www.transparency.org/what-is-corruption/#defi>

Appendix 1

Literature review

Article 19A has recently been inserted in the Constitution of Pakistan 1973 and right to information has been provided as fundamental right subject to reasonable restrictions imposed by law. This area of law will affect every government and private sector in all levels of hierarchy if viewed as fundamental right because of the nature of the right. For the purpose of this research most of the resources will be of foreign authors as no significant literature is available in this area. This research will contribute towards exploring the issues and possible solutions in effective implementation of this article.

Constitutional Right to Information⁵⁹⁹

The article highlighted the importance of right to information as constitutional guaranty based on the political nature and its unique role in protecting the democracy. Almost 90 states in last 20 years have recognized this right of individual to obtain information held by public agencies but despite the general recognition specific aspects related to its exact scope and way of its implementation remain controversial and continue to be debated in national and international organizations as well as academically.

This Article thoroughly delved into the proper route for anchoring the right to information in constitutional law, through theoretical, analytical, and comparative aspects of the issue. The final section provided the more appropriate drafting of

⁵⁹⁹ Roy Peled and Yoram Rabin, *Constitutional right to information*, Columbia Human rights Law Review, Vol. 42, No. 2, 2011

constitutional articles securing the right to information which would be very significant for our research keeping in view the recent developments in this area in Pakistan.

Lack of Transparency and freedom of information in Pakistan; An Analysis of State Practice and Realistic Policy Options for Reform ⁶⁰⁰

The article states the prevalent situation of the freedom of information regime in Pakistan. There is growing recognition among top policy makers in Pakistan that transparency and the citizens' right to information are critical for effectively combating corruption and providing good governance. Political parties and parliamentary institutes, however, remain weak after years of rule by a civil-military bureaucracy. The cause and result of this is an exclusive, non- participatory and non-transparent government system where a culture of secrecy and rampant corruption prevails. The underlying factors are a large number of restrictive laws, rules and government instructions. A weak legal and institutional framework for freedom of information exacerbates the problem. Despite many new laws being enacted, many are flawed, restrictive and ineffective. There is still no coherent policy via which to ensure transparency. At present the government appears satisfied to uphold the current status quo, but even if this brings improvements they will be largely down to external pressure rather than a commitment to transparency and good governance. A gradual and decentralized policy may be the easiest type of reform to implement, but the risks

⁶⁰⁰ Mukhtar Ahmad Ali, Lack of Transparency and Freedom of Information in Pakistan: An Analysis of State Practice and Realistic Policy Options for Reform, CPS International Policy Fellowship program, 2005-06

outweigh the benefits. A radical shift from secrecy to freedom of information is necessary. It would be the hardest policy to implement, but would hold the greatest promise of promoting good governance, improving public service delivery and building up public confidence in the government.

Freedom of Information Acts and Public Sector Corruption⁶⁰¹

The Article explores Freedom of information laws around the globe and their relative effectiveness in combating corruption. Various countries who have implemented Freedom of Information acts believing that greater transparency can reduce public sector corruption. To test this, the instant article analyzes annual data on 128 countries between 1984 and 2003 using a variety of propensity score matching techniques and overall finds no significant relationship between the two, with one exception.

The article argues that in the developing world, FOI acts are significantly associated with rising levels of corruption. Further investigation suggests this may be due to the fact that the effectiveness of FOI acts is conditioned by a country's institutional arrangements. For the purpose of our research the comparative aspect of the issue in the area of reduction of corruption through free flow of information and effective implementation through institutional arrangements can be of main concern.

Legislating for the Citizens' Right to Information in Pakistan⁶⁰²

⁶⁰¹ Escaleras, Monica et al, *Freedom of Information Acts and Public Sector Corruption*, Public Choice Volume 145, Numbers 3-4, December 2010 , 435-460(26) Publisher: Springer

⁶⁰²Venkatesh Nayak *Legislating for the Citizens' Right to Information in Pakistan; A Note on Legislative Competence*, Prepared by, Commonwealth Human Rights Initiative.

The Note provides an over-view of the post 18th amendment legal scenario with reference to the FoI law and argues that one of the major issue concerning 18th amendment and freedom of information regime in Pakistan after granting provincial autonomy is of competence as to legislation in this regard.

The note explores the matter with regard constitutional provisions highlighting the situation after abolition of concurrent legislative list and tried to answer the questions;

- 1) Whether Parliament or the Provincial Assemblies have the competence to make laws to give effect to the right to information?
- 2) Whether Parliament has the competence to enact a single law guaranteeing access to Information binding all public bodies under both Federal and Provincial Governments?

It argues that both routes could not make an ideal situation in the context of Pakistan but a compromise. Firstly the political parties will play a crucial role in any law making which is totally lacking in Pakistan particularly for freedom of information. Interpretation of article 143, 144 cannot provide a comprehensive solution to achieve the intended object that is transparency, and good governance.

Even the comparison of Indian FOI regime is not a good model for Pakistan but may operate as guideline for legislation as relations between the governments in India and Pakistan are not same

A centralized or federal legislation is inevitable as international obligations cannot be met without federal legislation. After abolition of concurrent legislative list Right to Information is not clear as the domain for federal or provincial government

Freedom of Information in Pakistan. ⁶⁰³

The author in his legal survey tried to highlight the relation and importance of democracy and the growth in demand of freedom of information. The generally accepted principles of freedom of Information regime are also discussed including maximum discloser, protection to whistle blowers, promotion of open government and limited exception.

Mendel argues that the trends have been changed as even terminology has been transformed from freedom to right of information, and taken it as “oxygen for democracy” at every level. Democratic societies have a wide range of participatory mechanisms, ranging from regular elections to citizen oversight bodies for example of public education and health services, to mechanisms for commenting on draft policies, laws or development programmes. Effective participation at all of these levels depends, in fairly obvious ways, on access to information, including information held by public bodies.

Democracy also involves accountability and good governance. The public have a right to scrutinize the actions of their leaders and to engage in full and open debate about those actions. They must be able to assess the performance of the government and this depends on access to information about the state of the economy, social systems and other matters of public concern. One of the most effective ways of addressing poor governance, particularly over time, is through open, informed debate. The right to information is also a key tool in combating corruption and wrongdoing in government. Investigative journalists and watchdog NGOs can use the right to access information to

⁶⁰³Toby Mendel, *Freedom of Information*; A Comparative Legal Survey. Second Edition, Revised and Updated UNESCO: Paris, 2008

expose wrongdoing and help root it out. As U.S. Supreme Court Justice Louis Brandeis famously noted: "A little sunlight is the best disinfectant."

While keeping in view the prevailing state of democracy and historical perspective of legislative progress of Pakistan, it can be concluded that idea of democratic state is practically missing, may be theoretically, but without accountability and good governance. Recent legal developments can be an initiative towards achieving the presumed ends but still a very long way.

Right to Information: Pre and Post 18th amendment situation in Pakistan⁶⁰⁴

The author has discussed the pre and post scenario of 18th amendment of the constitution of Pakistan particularly with reference to the role of Civil Society organization.

Article 19-A of the constitution has huge potential in terms of bringing about major changes in the way of governmental departments, function in relation to the people. However it is not likely to happen automatically. Civil society organizations and pro reform constituencies will have to capitalize on the constitutional developments to promote the cause of people's right of information transparency and public accountability.

Further one possibility is that large number of existing laws, rules and procedures and by laws are challenged being conflicting with the said article in Higher courts. If such situation arises many of the provisions of exiting laws and rules may be declared as void and of no consequence. Ideally one would expect the government and the

⁶⁰⁴Mukhtar Ahmed, *Right to Information: Pre and Post 18th amendment situation in Pakistan*. From the Liberal Spectacle; Pakistan after 18th amendment, Freedom Gate Pakistan org, PO box 1733. Islamabad, Pakistan.

parliament to be responsible and review at least important piece of legislations to make them consistent with article 19A. However given their past track and constraints it is unlikely to happen. To bring about such a change civil society will have to play a significant role in terms of approaching higher courts highlighting the contradiction in existing laws.

It further emphasizes that in line with article 19A the federal and provincial governments must take timely and effective steps to change the culture of secrecy which it inherited from colonial administration and should adopt a comprehensive policy based on basic principles of freedom of information regime.

The Right to Information and Privacy: Balancing Rights and Managing Conflicts.⁶⁰⁵

The right to privacy and the right to information are both essential human rights in the modern information society. For the most part, these two rights complement each other in holding governments accountable to individuals. But there is a potential conflict between these rights when there is a demand for access to personal information held by government bodies. Where the two rights overlap, states need to develop mechanisms for identifying core issues to limit conflicts and for balancing the rights. This paper examines legislative and structural means to better define and balance the rights to privacy and information.

Access to information and protection of privacy are both rights intended to help the individual in making government accountable. Most of the time, the two rights go

⁶⁰⁵ David Banisar, *The Right to Information and Privacy: Balancing Rights and Managing Conflicts*' March 10, 2011 World Bank Institute Governance Working Paper.

together. However, there are conflicts as for example; privacy laws often are inappropriately invoked by governments. And there are cases where the conflicts are legitimate. There is no simple solution to balancing the two rights, but most issues can be mitigated through the enactment of clear definitions in legislation, guidelines, techniques, and oversight systems. Of key importance is that governments take care when writing the laws to ensure that the access to information and data protection laws have compatible definitions of personal information. They should adopt appropriate public interest tests that allow for careful balancing of the two rights. Finally, they should create appropriate institutional structures that can balance these rights and ensure that data protection and right to information officials work together, even if they represent different bodies.

Access to Information as a Human Right ⁶⁰⁶

Human rights have been characterized as rights to those resources and circumstances necessary for living a minimally good life (Nickel 2007). Information rights include rights to create and communicate information (e.g., freedom of expression, freedom of association), to control others' access to information (e.g., privacy and intellectual property), and rights to access information (e.g., freedom of thought, the right to read). Some information rights have been recognized as human rights in international instruments (e.g., Universal Declaration of Human Rights, Declaration on the Rights of the Child, Declaration on the Rights of Indigenous People).

⁶⁰⁶ Kay Mathiesen, *Access to Information as a Human Right* School of Information Resources and Library Science, University of Arizona, 2008.

Given the pivotal role of access to information in the exercise of all other human rights, the right to information should be understood as a welfare right that places on governments (and perhaps others) the duty to provide people with information.

Freedom of information around the world, 2006; A global survey of Access to Government Information Laws, privacy international.⁶⁰⁷

The growing concern in international community among those who have adopted freedom of information laws has been striking in the last ten years. FOI laws are now becoming a universal issue across the world. The laws are also evolving and states are adopting measures such as Information Commissions to improve their performance. It is expected that many new nations will adopt laws due to international agreements such as the UN Convention against Corruption and international and domestic demands for better accountability and public participation THE

There is much work still need to be done. There are continuing problems in many countries in developing a culture of openness. Weak laws, implementation and oversight hinder many countries efforts, causing access mostly unfulfilled. In other countries such as the US, high level opposition to access has reduced long standing rights of access. Record keeping is often poor in the new countries. There are also ongoing problems with state secrets and the misuse of privacy exemptions.

The author conducted the survey of many countries including Pakistan, in which the laws of freedom of information have so far been enacted and gave an overview. The general conclusion even was reported earlier than the enactment of 18th amendment was

⁶⁰⁷ David Banisar, Freedom of information around the world, 2006; A global survey of Access to Government Information Laws, privacy international

very much similar to the situation still prevailing in Pakistan; the author has also highlighting the political, legal and procedural issues involved.

Freedom of information, PILDAT⁶⁰⁸

In this report the freedom of information laws in Pakistan have been briefly discussed particularly the role of Parliament, press and public reflecting the responsibilities upon them in this context. The freedom of information Ordinance 2002 has also been taken into consideration by the author highlighting the insufficiencies or drawbacks but a positive step towards the improvement. Some very useful recommendations are also given to achieve the ends aimed by the freedom of information such as good governance and public accountability.

Analyzing the Right to Information Act in India⁶⁰⁹

This Briefing paper analyses the highlights the FOI regime and the status of implementation of the RTI Act in India and also looks at similar laws in other countries. and briefly pointed out the areas which are common to all jurisdiction as well as the differences of the same.

One of the important aspect of issue which is protection of whistle blowers is also very comprehensively highlighted in the paper which a matter of concern in our research. Many cases are cited showing the negative side of the use of such rights by which is an important issue to be discussed in this research for the protection of the

⁶⁰⁸Freedom of Information ; briefing paper no 14. Pakistan institute of Legislative Development and Transparency. June 2004

⁶⁰⁹ Simi T.B et al, *Analyzing the Right to Information Act in India*, CUTS International 2010. CUTS International, D- 217, Bhaskar Marg, Bani Park, Jaipur 302016, India.

whistle blowers. Public accountability without such protection cannot be achieved as such this will an important part of our research.

FREEDOM OF INFORMATION: HISTORY, EXPERIENCE AND RECORDS AND INFORMATION MANAGEMENT IMPLICATIONS IN THE USA, CANADA AND THE UNITED KINGDOM⁶¹⁰

The document has given the basic details of practice of FOI laws in the respective states in a comprehensive manner where the legislation taken place at three different periods of FOI evolution. As FOI becoming more common than ever in the recent history worldwide. How it works in real however is often different from ideal conception. The law is considered by supporter as window in to the government. the paper is mainly consist of four different but related aspects of the issue that combine give a comprehensive view of the practice in each country including governance and management of the law, elements kept from coverage and protected by legislation, procedures and statistics and practical concerns for the authorities.

The analysis of the issue showed that in practice FOI works differently than expected vision or ideal as involving number of factors that are specific in any particular system. The experiences of the state practices can be compared for establishing a FOI based system in Pakistan where there may exist some common circumstance ad feasibilities for ado

⁶¹⁰ Mark Glover Sarah Holsen Craig MacDonald Mehrangez Rahman Duncan Simpson. The Constitution Unit Department of Political Science/School of Public Policy University College London UK October 2006. Project Underwritten by: The Houston Chapter of ARMA International and the ARMA International Educational Foundation Endowment Fund

Appendix 2

Comparison of USA and UK FOI working system.⁶¹¹

ISSUE	USA	UK
Legislation	Freedom of Information Act 1966, amended in 1974, 1986, 1996, 2002 and an Executive Order about logistical changes in 2005. ⁴	Freedom of Information Act 2000, fully implemented in 2005.
Right of access	Gives any person the right to request access to federal agency records or information. Agencies are required to disclose in response to any written request unless the information is protected by exemptions or exclusions. No public interest test as the exemptions are designed to take account of public interest.	Gives any person the right to request information of any public authority, to be told whether the authority holds the information and to obtain the information unless it is protected by an exemption. Most exemptions are subject to a public interest test.
Breadth of coverage	Does not cover state or local government agencies, which are covered by legislation at the state level. Does not cover private sector organizations. No obligation to do research, to analyze data, answer written questions, or create records in response to a request.	Covers all public authorities i.e. government bodies and agencies plus local government and regional bodies as listed in schedule 1 to the Act and many smaller public bodies e.g. parish councils, schools, doctors' surgeries – about 100,000 bodies in all
Enforcement	Right of access is enforceable in court	The Information Commissioner has the power to serve decision, information and enforcement notices. These are backed by court action but maybe overridden by the government in exceptional cases
Systems/ processes for handling requests	Individual agencies must publish regulations about how they handle requests. Requests must 'reasonably describe' the records requested and be in accordance with the agency's published regulations.	The Act includes two statutory Codes of Practice giving guidance on authorities' functions and on records management. (section 45 & 46). Compliance with the Codes is non-mandatory. ⁷ The Department for Constitutional Affairs is responsible for coordinating and giving guidance to central government departments, and more widely in producing the Codes of Practice. The information commissioner has a duty to promote good practice and the power to make recommendations on good practice to any authority.

⁶¹¹Mark Glover Sarah Holsen Craig MacDonald Mehrangez Rahman Duncan Simpson. *Freedom of Information: History, Experience and Records And Information Management implications in the USA, Canada And United Kingdom.*

The Constitution Unit Department of Political Science/School of Public Policy University College London UK

October 2006

Project Underwritten by: The Houston Chapter of ARMA International and the ARMA International Educational Foundation Endowment Fund © 2006 ARMA International Educational Foundation 1609 Terrie Drive Pittsburgh PA 15241 USA www.armaedfoundation.org

Related legislation, e.g. privacy	Privacy Act 1974 (US Privacy Act 1974 http://www.usdoj.gov/foia/privstat.htm)	Data Protection Act 1998, revised 1998 Environmental Information Regulations 2004 (UK Data Protection Act 1998 http://www.opsi.gov.uk/ACTS/acts1998/19980029.htm UK Environmental Information Regulations 2004 www.opsi.gov.uk/si/si2004/20043391.htm
Fees and costs	No fee to file a request; three categories of charging for processing and photocopying—highest for commercial requesters; lowest for educational/media; in between for the rest. Obligation on each agency to publish a schedule of fees, which must be 'reasonable standard charges'. Fees are not required in advance of disclosure, and maybe waived. Court action has to be funded by requester, though costs may be awarded if successful.	Making a request is free, a capped fee may be charged for search, reproduction or copying. If the estimated cost exceeds the cap requester must be informed and may agree to pay the full charge.
Right of appeal or arbitration	1. Administrative appeal should be offered if requester is dissatisfied with initial response; decision reviewed internally within 20 business days to determine. 2. Judicial review: right to challenge in federal court. The court can order disclosure, with powers of enforcement against the responsible official. Costs can be awarded against the agency. Agency employees can be subject to disciplinary action for acting 'arbitrarily or capriciously'.	The Code of Practice (non mandatory) requires authorities to have an internal complaints procedure centered on fair review of decisions, and notification of this to requesters. There is then a right of appeal to the Information Commissioner covering both refusals and failure to deal properly with a request. Any refusal of a request must inform the requester of the right to appeal to the IC. An independent Information Tribunal hears appeals from requesters or authorities dissatisfied with an IC's decision notice. Tribunal decisions can be appealed on points of law only to the High Court.
Ombudsman/Commissioner	None as such. Senior official—nonpolitical—is the Director of the Office of Information and Privacy in the Dept. of Justice with government-wide responsibility for coordinating and implementing policy development and compliance for FOIA, but has no overarching regulatory or appeal function. Otherwise regulation rests with the agency concerned, subject to appeal only to the courts.	An independent Information Commissioner who reports directly to Parliament. Appointed for five years, renewable twice. With powers to issue a range of notices (see above), though government ministers can override in certain cases. Also powers to see records, enter premises, etc
Reporting	Agencies required to publish annual reports made to the Attorney General, including: number of refusals of requests with reasons; number of appeals submitted, with results and reasons if access denied; specified information on any court decisions to withhold information; number of requests for records pending; number of requests received and processed; average time taken to	Commissioner to report to Parliament annually and on other occasions as he/she thinks fit. No statutory requirement for collection or publication by public authorities of data relating to implementation or compliance. Code of Practice requirement (non-mandatory) to keep a record of any partial or complete

	process requests; fees collected; number of staff and amount expended on processing requests. Attorney General to produce a report each year with specified content on operation of the FOIA regime at federal level	refusal, for monitoring purposes.
Offences	None (violating the Privacy Act willfully, by contrast, is a criminal offence)	It is an offence punishable by fine to alter, hide or destroy any record with the intention of preventing disclosure where a request has been made and the requester would have been entitled to see the information.
Powers to override access Requirements	The 2002 amendments and other post-2001 legislation – e.g. the Intelligence Authorization Act 2003 and the Critical Infrastructure Information Act 2002 – introduced significant new exceptions to the USAFOIA. (US Intelligence Authorization Act for Fiscal Year 2004 for Fiscal Year 2004 http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=108_cong_bills&docid=f:s1025rs.txt.pdf)	Provisions for a government department and specified other bodies to issue a certificate which overrides compliance with a decision notice from the I
Miscellaneous issues		FOI Act overrides the previous provisions for access to historical records, housed at the National Archives, bringing them instead within the FOI access regime.

Appendix 3
Right of Access to Information Act 2017.

REGISTERED No. M – 302/L.-7646

The Gazette of Pakistan
EXTRAORDINARY PUBLISHED BY AUTHORITY

ISLAMABAD, MONDAY, OCTOBER 16, 2017

PART 1

Acts, Ordinances, President's Orders and Regulations

NATIONAL ASSEMBLY SECRETARIAT

Islamabad, the 13th October, 2017

No. F. 22 (30)12017-Legis.--The following Act of *Majlis-e-Shoora*

(Parliament) received the assent of the President on the 12th October, 2017 is hereby published for general information:—

ACT No. XXXIV Of 2017

An Act to provide for the right of access to information in transparent and effective manner, subject only to reasonable restrictions imposed by law

WHEREAS Government believes in transparency and the right to have access to information to ensure that the people of the Islamic Republic of Pakistan have improved access to records held by public authorities and promote the purposes of making the Government more accountable to its people, of improving participation by the people in public affairs, of reducing corruption and inefficiency in Government, of promoting sound economic growth, of promoting good governance and respect for human rights;

AND WHEREAS it is expedient to provide for a law which gives effect to the fundamental right of access to information, as guaranteed under Article I 9A of the Constitution of the Islamic Republic of Pakistan and international law, whereby everyone shall have the right to have access to all information held by public bodies subject only to reasonable restrictions imposed by law and for matters connected therewith or incidental thereto;

It is hereby enacted as follows:—

I. Short title, application and commencement—

- (1) This Act may be called the Right of Access to Information Act, 2017.
- (2) It shall apply to all public bodies of the Federal Government.
- (3) It shall come into force at once.

2. Definitions.—In this Act, unless there is anything repugnant in the subject or context,—

- i. "Appeal" means any grievance lodged in writing by an applicant with the Information Commission in accordance with section 17;
- ii. "applicant" means a citizen of Pakistan, as defined in law, who lodges a request or any person who is acting for or on behalf of such a person;
- iii. "Designated official" means an official of a public body designated as such in accordance with section 9;
- iv. "Information Commission" means the Pakistan Commission on Access to Information established in accordance with section 18;
- v. "information" means information based on record;
- vi. "national security" means the matters pertaining to the integrity, security or defense of Pakistan or any part thereof;
- vii. "prescribed" means prescribed by rules or regulations made under this Act;
- viii. "principal officer" means—
 - (a) in case of the Federal Government's Ministries and Divisions, the Secretary thereof; and
 - (b) in all other cases, the head or chief executive of the public body by whatever designation identified;

(ix)"public body" means—

- a. any Ministry, Division, attached department or subordinate office, including autonomous bodies of the Federal Government;
- b. any Federal and any municipal or local authority set up or established by or under any Federal law;
- c. the National Assembly and the Senate including their secretariats, committees and members;
- d. any statutory corporation or other body corporate or institution set up or established or owned or controlled or funded by the Federal Government;
- e. any court, tribunal, commission or board under the Federal law;
- f. any incorporated or unincorporated body of the Federal Government functioning under the control or authority of another public body or wherein one or more public bodies own or have controlling interest or provide substantial funding;
- g. any other organization which undertakes a public function, to the extent of that function; and
- h. a non-governmental organization which directly or indirectly receives or has received public funds, subsidy, tax exemption, piece of land or any other benefit involving public funds and any other non-governmental organization or body registered under any law for the time being in force;

(x) "record" means a public record as defined in section 6;

(xi) "request" means a request for access to information and includes a request for access to a specific record; and

(xii)"right of access to information" means the right of access to information accessible under this Act which is held by or under the control of any public body and includes the right of access to information, documents or record in digital or printed form, as the case may be.

3. Right to have access to information not to be denied.—(1)

Subject to the provisions of this Act, no applicant shall be denied access to information or record held by a public body.

(2) This Act shall be interpreted so as to advance its purposes as set out in the preamble and to—

- i. Promote the right of access to information; and
- ii. Facilitate and encourage promptly the disclosure of the information at the lowest and reasonable cost.

4. Maintenance and indexing of record.--(1) Subject to the provisions of this Act and rules made thereunder, the principal officer of each public body shall ensure that the record held by that body is properly maintained, so as to enable it to comply With its obligations under this Act.

(2)Each public body shall bring its record management practices in

Line with the Secretariat Instructions, 2004 or any other instructions of the Federal Government.

5. Publication and availability of record.— The principal officer of each public body shall, within six months of the commencement of this Act, ensure that the following categories of information and record are duly published including uploading over the Internet in a manner which best ensures that these are accessible subject to reasonable restrictions based on limited resources:-

- a) description of the public body's organization and functions, duties, powers and any services it provides to the public, including a directory of its officers and employees, indicating their duties and functions and their respective remunerations, perks and privileges;
- b) statutes, statutory rules, regulations, bye-laws, orders and notifications, etc. applicable to the public body disclosing the date of their respective commencement or effect;
- c) substantive or procedural rules and regulations of general application evolved or adopted by the public body, including any manuals or policies used by its employees;
- d) relevant facts and background information relating to important policies and decisions which have been adopted, along with a statement of the policies adopted by the public body and the criteria information, documents or record in digital or printed form, as the case may be standards or guidelines upon which discretionary powers are exercised by it.
- e) the conditions upon which members of the public can acquire any license, permit, consent, approval, grant, allotment or other benefits of whatsoever nature from any public body or upon which transactions, agreements and contracts, including contracts of employment which can be entered into with the public body. along with particulars about the recipients of any concession, permit, license or authorization granted by the public body;
- f) a description of its decision making processes as defined in the Federal Government's Secretariat Instructions, 2004 and any instructions for the time being in force for public to provide input into or be consulted about decisions;
- g) detailed budget of the public body, including proposed and actual expenditures, original or revised revenue targets, actual revenue

receipts, revisions in the approved budget and the supplementary budget;

- h) the methods whereby information in the possession or control of the public body may be obtained and the prescribed fee required along with the name, title and contact details of the designated officials;
- i) reports including performance reports, audit reports, evaluation reports, inquiry or investigation reports and other reports that have been finalized;
- j) Such other matters which the principal officer of the public body deems fit to be. Published in the public interest;
- k) such other information as may be prescribed; and
- l) camera footages at public places, wherever available, which have a bearing on a crime:

Provided that if the information or record pertains to a period earlier than the year 2008, the same shall be published within reasonable time.

6. **Declaration of public record.**—Subject to the provisions of section 7, the following record of all public bodies is hereby declared to be titled public record, namely:—

- a) policies and guidelines;
- b) transactions involving acquisition and disposal of property and expenditure undertaken by a public body in the performance of its duties and functions;
- c) Information regarding grant of licenses, allotments and other benefits, privileges, contracts and agreements made by a public body;
- d) final orders and decisions, including decisions relating to members of public; and
- e) Any record which may be notified by the Minister-in-charge of the Federal Government ²⁷. Public record for the purposes of this Act.

7. **Exclusion of certain record.**—Nothing contained in section 6 shall apply to the following record of all public bodies, namely:—

- a) noting on the files, subject to a final decision by the public body;
- b) minutes of meetings, subject to a final decision by the public body;
- c) any intermediary opinion or recommendation, subject to a final decision by the public body;
- d) record of the banking companies and financial institutions relating to the accounts of their customers;

- e) record relating to defense forces, defense installations or connected therewith and ancillary to defense and national security excluding all commercial and welfare activities;
- f) record declared as classified by the Minister-in-charge of the Federal Government:

Provided that the Minister-in-charge of the Federal Government shall have to record reasons as to why the harm from disclosure of information outweighs public interest and further that information pertaining to allegation of corruption and violation of human rights shall not be excluded;

- g) record relating to the personal privacy of any individual; and
- h) Record of private documents furnished to a public body either on an express or implied condition that information contained in any such documents shall not be disclosed to a third party.

8. Computerization and voluntary disclosure of record.—each public body shall endeavor to ensure within the time prescribed in section 5 and that all record accessible under this Act is computerized and is available online so that authorized access to such public records is facilitated.

9. Designated official—each public body shall, within thirty days of the commencement of this Act, notify one or more designated officials, not below the rank of an officer in BPS-I9 or equivalent:

Provided that where no designated official has been notified or he is absent or not available, principal officer of the public body shall be the designated official:

Provided further that in case of non-governmental organization, it may designate a senior officer as per its organizational structure.

10. Functions of designated official.—(1) Subject to the provisions of this Act and the rules made thereunder, the designated official shall be responsible for ensuring that requests are dealt with promoting full compliance by the public body of its obligations under this Act.

(2) A designated official shall, as may be prescribed, assist applicant who is having problems due to any disability in describing the information sought in sufficient detail to enable the public body to locate that information.

11. Requests.—

- i. Subject to the provisions of this Act and the rules made thereunder, a citizen of the Islamic Republic of Pakistan may make a request to a public body through the designated official.

- ii. A request under sub-section (1) shall be in writing and made in any manner in which the public body has the facilities to receive it, including in person, by mail, fax, online or e-mail.
- iii. Any written request which identifies the information or record sought in sufficient detail, to enable the public body to locate it and which includes a complete address and contact details for delivery of the information or record, shall be treated as a request.
- iv. Subject to sub-section (3), a public body may provide a prescribed form for making requests.
- v. In no case shall an applicant be required to provide reasons for his request.

12. Where information requested for is not held.—where a public body does not hold information or record, the applicant shall be informed accordingly within ten working days of the receipt of the request.

13. Procedure for acceptance and refusal of requests.—(1) the designated official shall provide a written acknowledgement in response to a request.

(2) The designated official shall process the request and by notice in writing inform the applicant that—

- a. The request has been acknowledged and the applicant is entitled to receive the information or record, subject to the payment of prescribed fee. On payment of the fee the designated official shall provide the requested record; or
- b. the request has been rejected-
 - i. on the basis that it does not comply with the provisions of this Act and the rules made thereunder but only after requisite assistance has been offered to the applicant as mentioned in sub-section (2) of section 10;
 - ii. on the basis that the information is already available in a generally accessible form in which case the notice shall indicate to the applicant the place from where the information may be found;
 - iii. on the basis that it is incorrect, because it relates to information which is substantially the same information that has already been provided to the same applicant during last six months; or
 - iv. In whole or in part, on the basis that the information is exempt subject to section 7 or section 16, in which case the notice shall specify the exact exception relied upon and specifying details regarding the right of the applicant to appeal against this decision.

(3) Where information or a record is provided in accordance with clause (a) of sub-section (2), it shall be accompanied by a certificate which may be affixed to the information or record at the foot thereof, or as appropriate, to the effect that the information is correct or, as the case may be, the copy is a true copy of the original record and such certificate shall be dated and signed by the designated official.

(4) Where the designated official refuses a request, he shall, before informing the applicant of such refusal, obtain written approval of the principal officer of the public body.

14. Time-limit for responding.—(1) Subject to the provisions of this - Act, a public body shall be required to respond to a request as soon as possible and in any case within ten working days of receipt of the request.

(2) The period stipulated in sub-section (1) may be extended by maximum of further ten working days where it is necessary when the request requires a search through a large number of records or records located in different offices or consultation is required with third parties or other public bodies.

(3) Information needed to protect the life and liberty of any individual shall be provided within three working days.

15. Fee for requests.—prescribed fee may be charged for the cost of reproducing information and sending it to the applicant.

16. Information exempt from disclosure.— (1) Subject to the provisions of this Act,—

(a) a public body shall not be required to disclose exempt information,—

- i. provided that where only part of a record or the information falls within the scope of the exceptions provided for in this Act, that part shall be severed and the residual record or information shall be provided to the applicant; and
- ii. If its disclosure is likely to cause damage to the interests of the Islamic Republic of Pakistan in the conduct of international relations.

Explanation--In this section, "international relations" means relations between Islamic Republic of Pakistan and—

- a. the government of any other foreign State; and
- b. Organization of which only States are members.

(b) in Conflation may be exempt if its disclosure is likely to-

- i. result in the commission of an offence;
- ii. harm the detection, prevention, investigation or inquiry in a particular case;
- iii. reveal the identity of a confidential source of information;
- iv. facilitate an escape from legal custody; or
- v. harm the security of any property or system, including a building, a vehicle, a computer system or a communication system;

(c) Information is exempt if its disclosure under this Act would involve invasion of privacy of an identifiable individual, including a deceased individual, other than the applicant. This exception shall not apply where—

- i. the third party has consented to the disclosure of the information;
- ii. the person making the request is the guardian of the third party or the next of kin or the executor of the will of a deceased third party, or
- iii. the third party is or was an official of a public body and the information relates to his functions as a public official;

(d) information is exempt if and so long as its disclosure is likely to cause—

- i. Damage to the economy as a result of premature disclosure of a proposed introduction, abolition or variation of any tax, duty, interest rate, exchange rate or any other instrument of economic management;
- ii. Damage to the financial interests of the public body by giving an unreasonable advantage to any person in relation to a contract which that person is seeking to enter into with the public body for acquisition or disposal of property or supply of goods or services; or
- iii. Damage to lawful commercial activities of the public body;

(e) information may be exempt if its disclosure is likely to cause serious prejudice to the—

- i. defense or security of Pakistan; or
- ii. the capability, effectiveness of armed forces of Pakistan or other law enforcement agencies;

(f) information may be exempt if its disclosure is likely to endanger life, liberty, health or safety of any individual;

(g) information may be exempt if—

- i. the information was obtained from a third party and on its communication it would constitute an actionable breach of confidence; or
- ii. the information was obtained in confidence from a third party and it contains a trade secret or if communicated it may prejudice the commercial or financial interests of that third party;

(h) information may be exempt if it is privileged from production in legal proceedings, unless the person entitled to the privilege has waived it;

- (i) information may be exempt if its disclosure is likely to-
 - i. cause prejudice to the effective formulation or development of government policy;
 - ii. frustrate the success of a policy, by premature disclosure of that policy;
 - iii. undermine the deliberative process in a public body by inhibiting the free and frank provision of advice or exchange of views;
 - iv. undermines the effectiveness of a testing or auditing procedure used by a public body;
 - v. prejudice the proceedings in a court or a tribunal; and
 - vi. disclose privileged information shared between counsel and the client;
- (j) information in respect of a crime may not be exempt, except the information relating to-
 - i. the prevention or detection of crime;
 - ii. the apprehension or prosecution of offenders;
 - iii. the administration of justice;
 - iv. the operation of the immigration controls excluding exit control list (ECL);
 - v. the maintenance of security and good order in prisons or in other institutions where persons are lawfully detained; and
 - vi. any civil proceedings which are brought by or on behalf of a public body or arise out of an investigation conducted; and
- (k) The exemptions set out in section 16 shall cease to apply after every twenty years and that record of public bodies shall be made public.

17. Appeal.—

1. An applicant who is not satisfied by decision of the designated official or where no decision has been communicated to him within the time fixed for such decision, he may, within a period not exceeding thirty days after either receiving a decision or after the time-limit for such a decision has passed, prefer an appeal to the Information Commission.
2. An appeal under sub-section (1) shall be free of charge
3. The Information Commission established under section 18 shall decide an appeal under sub-section (1) within a period of sixty days.
4. The public body shall, in an appeal under sub-section (1), bear the burden of proof of showing that it acted in accordance with the provisions of this Act

18. **Information Commission.**—(1) within six months of the commencement of this Act, the Prime Minister shall establish Pakistan Commission on Access to Information to be known as the Information Commission.

5. The Information Commission shall enjoy operational and administrative autonomy, except as specifically provided for by this Act.

6. The Information Commission shall comprise three Commissioners to be appointed by the Prime Minister, with the following composition; namely :-

(a) One member shall be from amongst the persons qualified to be a Judge of a High Court;

(b) one member who has been in the service of Pakistan in BS-22 or equivalent; and

(c) one member shall be from civil society having a degree based on sixteen years of education from a recognized institution and experience of not less than fifteen years in the field of social sciences;

7. No person shall be considered for appointment as Commissioner under sub-section (3) unless he is less than sixty-five years of age at the time of such appointment.

8. The Information Commission shall be headed by the Chief Information Commissioner, who shall be appointed by the Prime Minister from amongst the Commissioners.

9. The Chief Information Commissioner and the Commissioners shall hold office for a term of four years from the date on which they assume charge ^oI their office and shall not be eligible for such reappointment.

10. The Chief Information Commissioner and the Commissioners shall not hold any other public office or be connected with any political party at the time of or during their appointment in the Information Commission and, once appointed, they shall work on M1 time basis and may not run any business or pursue any profession during their tenure as the Chief Information Commissioner and Commissioners.

11. The Chief Information Commissioner and Commissioners shall be removed if there are serious complaints of mental and physical incapacity and misconduct against them, which are materially inconsistent with the status of being Chief Information Commissioner or, as the case may be, a Commissioner. The complaint shall be lodged before a five-member Parliamentary Committee comprising two Senators nominated by the Chairman Senate and three Members of National Assembly nominated by the Speaker National Assembly. The Speaker National Assembly shall nominate one of the five members as the Chairperson of the said Parliamentary Committee:

Provided that where the National Assembly stands dissolved the Parliamentary Committee shall comprise five Senators and the Chairman Senate shall nominate one of the five Senators as Chairperson of the Parliamentary Committee.

12. The Parliamentary Committee shall consider the complaint record reasons and present its recommendations to the Prime Minister who shall implement the recommendations within thirty days from the date of receipt of such recommendations.

19. **Functions of the Information Commission.**—(1) The Information Commission shall have the primary responsibility to receive and decide on appeals under section 17.

(2) The Information Commission shall, in addition to its functions

under sub-section (1), perform the following functions, 'namely:—

- a) compile a user-friendly handbook in Urdu and English describing in easily comprehensible form the rights established by and how to make a request under this Act;
- b) have an accredited accountant to conduct an audit of its accounts on an annual basis;
- c) Compile a comprehensive bi-annual report both describing its own activities, including an overview of its audited accounts and providing an overview of the activities undertaken by all public bodies to implement this Act. This report shall be laid before the Parliament;
- d) ensure that all the information under section 5 is made public; and
- e) Ensure implementation of this Act and the record to be made public under this Act.

20. **Powers of the Information Commission.**—(1) The Information Commission shall have all the powers, direct or incidental, as are necessary to perform its functions as provided for in this Act and the power to acquire, hold and dispose of property including the power to—

- (a) monitor and report on the compliance by public bodies with their obligations under this Act;
- (b) co-operate with or undertake training activities for public officials on the right of access to information and the effective implementation of this Act;
- (c) publicize the requirements of this Act and the rights of individuals thereunder;
- (d) conduct inquiries in relation to an appeal and for this purpose shall have the powers of a civil court in respect of the following matters:—

1. summoning and enforcing the attendance of witnesses and compelling them to give oral or written evidence on oath; and
2. requiring public bodies to produce records as defined in section 6 pertaining to the appeal;

(e) order a public body to disclose information to an applicant or to take such other reasonable measures as it may deem necessary to remedy any failure to implement the provisions of this Act;

(f) impose on the official a fine equivalent to his salary for one day, for a maximum of one hundred days, who has acted willfully to obstruct any activity which is required to be undertaken by this Act, including preventing or delaying the disclosure of information to an applicant;

(g) appoint its employees in prescribed manner; and

(h) The Information Commission after determination of willful destruction of record shall refer such matters to the relevant agencies.

(2) Non-compliance of a decision of the Information Commission under clauses (e) and (f) of sub-section (1) may, if it has not been appealed against within thirty days, be dealt with in the same way as contempt of court.

21. Funding for the Information Commission.—the Federal Government shall make annual budgetary allocation to the Information Commission to discharge its functions under this Act.

22. Offences.—(1) any person who acts willfully to obstruct the implementation of this Act including- by-

- i. obstructing access to any information or record with a view to preventing the exercise of a right provided for in this Act;
- ii. obstructing the performance by a public body of a duty under this Act;
- iii. interfering with the work of the Information Commission; or
- iv. destroying a record without lawful authority,

Shall be punishable with a fine not exceeding fifty thousand Rupees.

(2) In addition to any other action that may be taken under any other law for the time being in force, any person who willfully destroys a record which at the time it was destroyed was the subject of an application for access to

information or appeal or otherwise obstructs access to information which is the subject of an application or appeal, with the intention of preventing its disclosure under this Act, commits an offence punishable with imprisonment for a term which may extend to two years or with fine which shall not be less than one hundred thousand Rupees or with both.

23. Indemnity.—No suit, prosecution or legal proceedings shall lie against the principal officer, designated official or any other person of a public body in respect of anything which in good faith is done or purported to have been done under this Act and the rules made there under.

24. Recruitment in Information Commission.—Excluding the Chief Information Commissioner and Commissioners, appointment of officers and staff in Information Commission from 85-16 and above shall be made through Federal Public Service Commission in line with the Federal Public Service Commission Ordinance, 1977 (XLV of 1977).

25. Act to override other laws.—The provisions of this Act shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force.

26. Power to make rules.—The Federal Government may, by notification in the official Gazette and within one hundred and twenty days from commencement of this Act, make rules for carrying out the purposes of this Act.

27. Power to make regulations.—The Information Commission may make regulations, not inconsistent with the provisions of the rules made under section 26, regarding its internal procedures and, without limiting the generality of the foregoing, it may make regulations regarding—

- i. record management standards; and
- ii. fee that may be charged for requests; and
- iii. Procedure for processing of appeals.

28. Power to remove difficulty.—If any difficulty arises in giving effect to any of the provisions of this Act, the Federal Government may make such order, not inconsistent with the provisions of this Act, as deemed necessary for the purpose of removing the difficulty:

Provided that no such order shall be made after expiry of one year from the commencement of this Act.

29. Repeal—The Freedom of Information Ordinance, 2002 (XCVI of 2002) is hereby repealed.

QAMAR SOHAIL LODHI,

Acting Secretary

APPENDIX 4

National Right to Information Laws, Regulations and Initiatives 2013

