

**RIGHT OF ACCESS TO INFORMATION:
INTERNATIONAL HUMAN RIGHTS LAW REGIME
AND SITUATION IN PAKISTAN**



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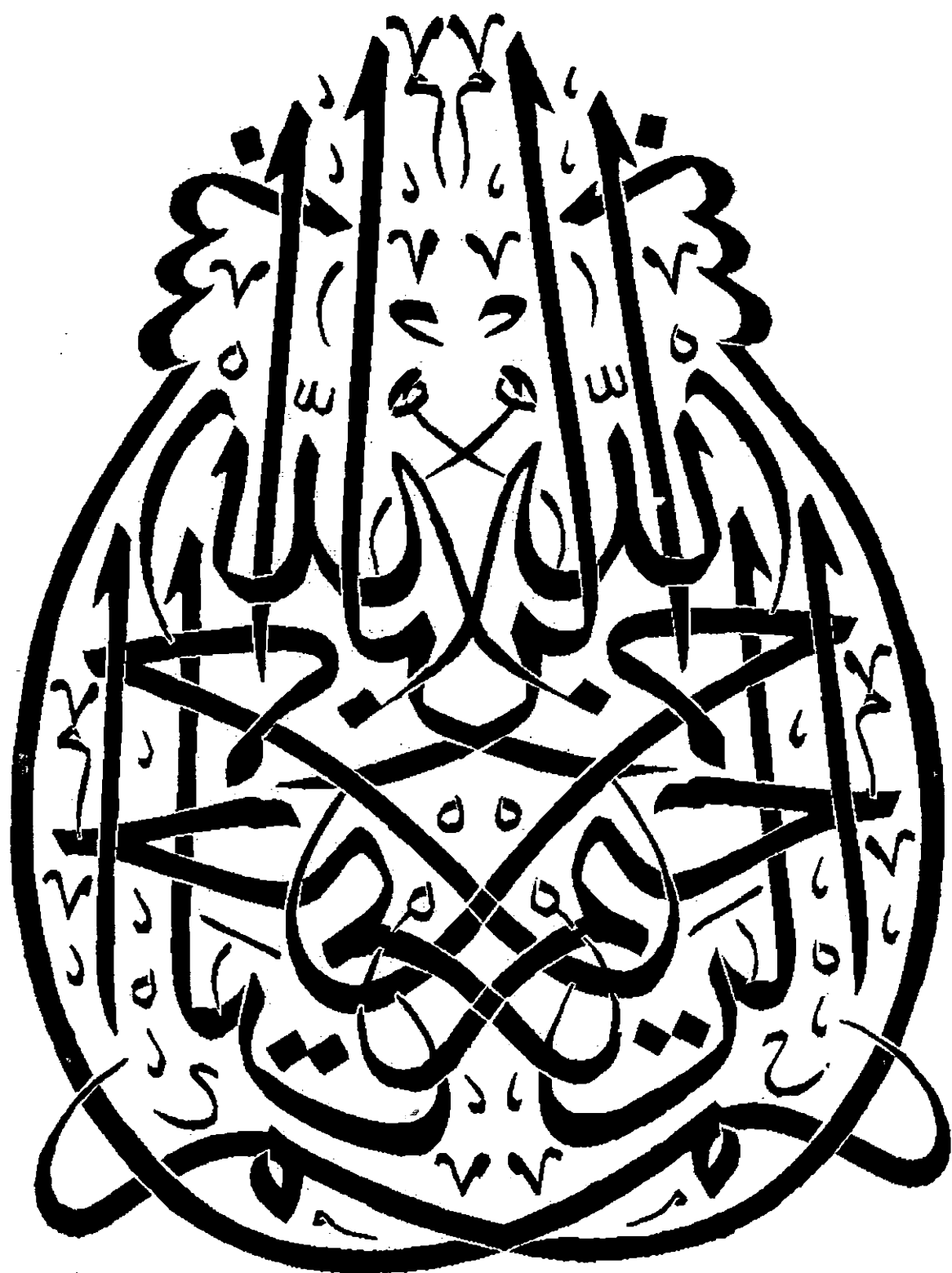
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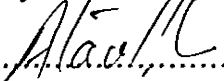
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Abstract

Right of Access to Information is a fundamental human right that is guaranteed by International Law of Human Rights. International as well as regional Human Rights documents recognize this right as a fundamental right. The United Nations has termed it the touchstone for all other rights attributed to human being. International document that guarantee this right are adopted by the governments after ratification. Universal Declaration on Human Rights (UDHR) and International Covenant on Civil and Political Right (ICCPR) put an obligation on the member states to give due importance to the peoples' right to access government held information in order to make them aware of the conduct of their government.

The world is turning toward the democratic system of government as the Monarchies, which had been existing from the ancient times, are abolishing. The people can play the best role in a democracy if they have better Access to Information regime. The effectiveness of the government policies can only be assessed by the people having the best access to information leading to the open system of government.

The culture of secrecy that is prevailing in a lot of countries is the biggest hurdle to guarantee this right. Bureaucracies are reluctant to implement this right as they think it usurpation of their powers. The economic growth rate is very low in societies with high rate of corruption. Transparency can only be reached in the departments of government if the official find themselves answerable to the people. The law that regulates the right to access information can help to bring transparency and accountability in the state affairs.

There are some exceptions to the right to access information. This right cannot be invoked to infringe the reputation of fellow human beings. The information that is considered fatal to national security and public health is not subject to access. To invoke this right the moral

values of a society cannot be ignored. All the documents that deal with this right address some exclusion that are to be taken in consideration.

Pakistan has adopted a national law to access information in 2002. The right to access information is also inserted in the Constitution of Pakistan, 1973 by 18th amendment. The people of Pakistan can demand the information from their government subject to any other law in force. Pakistan has inherited the culture of secrecy from the colonial government. Even after the 65 years of independence, the laws enacted by the colonial government to conceal the important information from the people of India are still in force. The Official Secret Act, 1923 is the biggest example of it, which was adopted by the government of Pakistan and is still on the statute books. Beside the Freedom of Information Ordinance, 2002 PEMRA Ordinance, 2002 is also in force that causes to conceal much information, in the name of prior restraints and content regulations, which can be played by electronic media. The Local Government Ordinance, 2001 also gives some provisions to Access Information but is not implemented properly because of the absence of the rules for the smooth implementation of the law.

Despite the fact that the Freedom of Information Ordinance contains a lot of exceptions from access but it was considered the achievement of a milestone because prior to this there was no such law that was aimed to bring the open culture and the accountability in affairs of state.

The government should have amended the laws that are meant to promote the culture of secrecy to make the law to access information operative properly.

Private member bills were presented to the National Assembly in 2004 and 2008 respectively aimed to bring the improvements to the Freedom of Information Ordinance, 2002. Now a day Freedom of Information Bill of 2011 is also under discussion but nothing can be assessed that either this bill will bring improvements or not. The people and the concerned officials should be educated to make the use this right.

Beside international guarantee and national laws the government can provide the access to information to their subjects by other ways. Some countries have adopted the practice to provide information to their subjects proactively. There are laws that give access to a particular type of information. Constitutions of the states guarantee the right to access information to the people of the state .beside all this, the law that is drafted particularly for the access to information gives the best access thereof. It is the duty of the state to take measures to make such law operate according to the wishes of drafters.

Dedication

I dedicate this research work, with great love and affection, to my Parents (May their souls rest in peace).

Faseeh ur Rehman

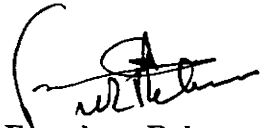
Declaration

INTERNATIONAL ISLAMIC UNIVERSITY, ISLAMABAD STATEMENT OF UNDERSTANDING

I, Faseeh ur Rehman, bearing the university registration number 110-FSL/LLMIL/F08, declare in the name of Allah that my thesis titled,

“Right of Access to Information: International Human Rights Law Regime and Situation in Pakistan”, submitted to the Department of Law, Faculty of Shari’ah and Law, is a genuine work of mine originally conceived and written down by me under the supervision of Mr. Ata Ullah Khan Mehmood, by Allah’s will and approbation.

I do, hereby, understand the consequences that may follow, if the above declaration be found contradicted and/or violated, both in this world and in the hereafter.



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February 2012

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The idea of working on this topic first came to my mind when my worthy teacher, Syed Amjad Mehmood, taught us International Law of Human rights. There was a discussion in the class on Right to Access Information as an internationally recognized Human Right. Inspired by this discussion is started to go through different documents that deal with this right., I came across different research articles on this topic. Some of these articles, which I have used as reference as well, pointed out the relationship between access to information and human rights. This led me to analyze the provisions of the Freedom of Information Ordinance, 2002 in the light of human rights norms. The idea got flourished further when I studied the access to information laws of some other States, such as Indian Freedom of Information Act, 2005, Freedom of Information Act of the United Kingdom, 2000 and others. I would like to express my gratitude to my learned supervisor, Professor Ata Ullah Khan Mehmood, as well. He has really been a source of guidance for me to complete my thesis with success. He went through my entire thesis and guided me on every step how to make it a valuable work.

Finally, I owe my sincere thanks to all those who have been helpful to me in any way in conducting this research.

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CHAPTER 1

1. Introduction

The Right to Access Information is a fundamental human right. International and regional human rights documents recognise the status of this right. Universal Declaration on Human Rights (1948) as well as International Covenant on Civil and Political Rights (1966) recognized this right as a basic human right. If people's right to access information is not denied, they can demand their political, social and economic rights more effectively from their government. The government is duty bound to recognise this right and laws should be enacted to protect this right. The present study is focussed at the necessity of access to information in current global scenario and its implementation by the governments of the world as well as of Pakistan. An analyst, while looking the state of access to information wrote as,

"It is evident that whenever an effort has been initiated towards right/access/freedom to information in Pakistan, it has faced considerable opposition from incumbent administrations. Public participation in the democratic process has been limited to elections, with no contribution in governance. In developed countries, this right has been extended not only to citizens, but in some cases even to non-citizens as far back as the eighteenth century. Pakistan, however, has been unable to realise the importance of the right to information even in the 21st century. Instead, an absence of will to implement the procedure and an insistence on preserving colonial regulations has exacerbated the situation. Although the democratic system provides people with the apparatus to hold public office holders accountable, it will take consistent public pressure from civil society and all other stakeholders to bring about proper implementation of the right to information."¹

A civil society organization launched a campaign for the access to information in Pakistan.

The report of the campaign wrote about the right that,

"Freedom of information is universally recognized as a fundamental human right and a pre-requisite for transparent and accountable governance. It is now referred to as 'oxygen' for democracy and a 'touchstone for all freedoms'. It is also widely recognized as an effective anti-corruption tool and, for this reason, the Transparency International (TI) has been working for its advancement around the world."²

In states, like Pakistan, access to information should be considered unhindered and transparent human right. Now a day media is playing an important role to ensure people's

¹ Gulmina Bilal Ahmad, "Empowering the People", *Daily Times*, December 09, 2011

² Centre for Peace and Developmental Initiative (2009), "Freedom of Information Ordinance, 2002 and its implementation", Islamabad. p. 3

www.cpdipakistan.org/index.php?option=com_content&view=article&id=52&Itemid=79#transparencyrtr
Accessed on 19 January, 2009.

right to access information. The state is duty bound to take in consideration the existing media regulations, which may cause any kind of hindrance to public awareness. If access to information is guaranteed, the process of accountability and elimination of corruption can be much easier.³ This right has many aspects but the present study is focussed at the Individual's right to access records and all respective information that is held by authorities. This access may be provided by the government publications of the important issues or at the request of the public for direct access.⁴ This may help the government to establish efficient record keeping procedure. There should be an affective legislation to guarantee this access.

By now, more than ninety countries of the world have enacted laws for the right to access information. Pakistan has also promulgated the Freedom of Information Ordinance, 2002 as well as Freedom of Information Rules, 2004 that specify the implementation procedure. The ordinance opens with preamble, as:

“... to provide for transparency and freedom of information to ensure that the citizens of Pakistan have improved access to public records and for the purpose to make the Federal Government more accountable in its citizens, and for matters connected therewith and incident thereto.”⁵

Freedom of expression is international guarantee that is considered the mother of the right to access information. Resolution 59(1) of the United Nations General Assembly testifies this right as “freedom of information is a fundamental human right and the touchstone of all the freedoms to which the UN is consecrated”.⁶

As for the matter of transparency in the state affairs is concerned, right to access information is a tool to ensure it. The need and the significance of the right to access information cannot be denied. Its denial will lead to inefficient and corrupt practices and effectiveness of freedom of information laws will be restricted.

³ Article 19 Global campaign for freedom of expression, “Submission on the Federal Government of Pakistan's Ordinance to provide for transparency and freedom of information”, p.3
www.article19.org/pdfs/analysis/pakistan.foi.00.pdf Accessed on 19 January, 2009.

⁴ The National Anti-Corruption Strategy (2002) www.nab.gov.pk Accessed on 19 January, 2009

⁵ Preamble to The Freedom of Information Ordinance, 2002

⁶ Resolution 59(1), The United Nations General Assembly

It is a fact that the countries with Access to Information Laws have started towards transparency. According to the Transparency International's annual Perception index of 2002, ten countries that were scoring best, the eight of them had effective Access to Information laws and the countries with the worst situation with regard to transparency, no one was equipped with Access to Information law.⁷

National stability is promoted by the culture of openness and access to information regime as it opens a dialogue between the common citizen and the government. Instability and conflict plays havoc to the development of the societies. A system that recognize the peoples' right to access government records personally, generates the feeling of confidence that results in the faith of public in their government and the democracy is stabilized.

To draft a law to access information is essential, as the present research is focussed on, but in absence of a political will it will be impossible to transform the culture of secrecy. It may result in the delay of an access to information law to become operational as it needs formulation of rules to become operational. Bureaucracy is also an obstacle to the law to access information in underdeveloped countries like in Pakistan. The culture of secrecy is deep rooted in bureaucracy and it is difficult to uproot it. In 1995 Australian Federal Access law was reviewed the report revealed an interesting fact that, even after 13 thirteen years of the law to be in power the bureaucracy still reluctant to accept it "as an integral part of democracy."⁸

In *Leander v. Sweden* the European Court of Human Rights held that the Right to access information is not isolated right as It emerges from all the civil and political right as a basic

⁷ Transparency International (1998) "Press Release: Eight out of ten clean countries have effective freedom of information", www.transparency.org/pressrelaese_archive/1998/1998.12.03_ford.html Accessed on 19 January, 2009.

⁸ Open Government: A Review of the Federal Freedom of Information Act 1982, (1995) ALRC 77, Report of Australian Law Commission and Administrative Review Council. www.austlii.edu.au/au/other/alrc/publications/reports/77/ALRC77.html Accessed on 19 January, 2009

component as well as the component of the internationally guaranteed right of freedom of expression.⁹

1.1 Benefits of Right to Access Information

Transparency is the goal that is supposed to be achieved by better legislation in terms of access to information. However much work is done for ensuring this right but still the culture of secrecy is very strong in many countries of the world. There is need to curtail the old practices and to bring active and effective changes in this field to coup the tradition of mal-management and wrong doings of authorities. Access to information legislation may bring positive changes in this regard by giving the public better opportunity to know people governing them as well as the policies made by them. Access to information law can help the society in many ways; some of them are listed below.

1.1.1 Active Public Participation in Democratic Process

Democracy is based on the rule of equality. If the people have better access to information they can contribute to strengthen democratic process. People give their consent to participate in the process of election to choose a government for them. If people have the information about the policies and activities of governing bodies they can contribute to the democratic process more effectively. Only the people with accurate information can assess the effectiveness of policies made by the government and can propose alternate solutions. Access to information is the key that can lead to an open system of government.¹⁰

Indian Supreme Court gave a verdict in 2002 that it is the right of the voter to know about the conduct of the candidate before election. Such information includes the details of moveable and immoveable property as well as details of all criminal cases, disposed or pending, that are

⁹ European Court of Human Rights, *Leander v. Sweden*, Judgment of 26 March 1987, Series A. no. 116, para. 74.

¹⁰ Common Wealth Human Rights Initiative(2003), "*Looking for the Right to Information in the common wealth*", New Dehli, p 16

http://www.humanrightsinitiative.org/publications/chogm/chogm_2003/chogm%202003%20report.pdf

Accessed on 6 June, 2011

against him. Now it is an established practice that all candidates have to submit these details before getting registered for the election.¹¹

Corruption destabilizes democracy. An effective law for the access to information is practical anti-corruption tool. Corruption destroys the rule of law and the people responsible for it need the culture of secrecy to hide their deeds. Lack of accountability in government affairs takes the economic lifeblood of many societies. The societies with corrupt governments have low development rate. The poor are the biggest victims of corruption because they cannot afford to pay the extra amounts that are associated with the bribery and fraud of their democratic representatives. The culture of secrecy is avoided by effective legislation for access to information so that the people equipped with information can demand their rights.

1.1.2 Transparency in Affairs of State

Lack of transparency in the affairs of state is the biggest hurdle for economic growth. Transparency is inevitable to reduce the graph of poverty.¹² Government officials usurp public funds that should be used for the welfare of the people. United Nations Convention against Corruption, which was undertaken in October 2003, puts an obligation on the governments to curb the culture of corruption. This convention stresses on the free flow of information to the common public so that they become aware of the misdeeds of authorities. A society equipped with information can stand against abuse of power and corruption by authorities.

There is a big relationship between the transparency and the laws ensuring access to information. If the laws of access to information are active, the graph of corruption will be at lower level.

¹¹ Election Commission of India <http://www.eci.gov.in/2007> Accessed on 6 June, 2011

¹² Privacy International, *Freedom of Information Around the World*, A Global Survey of Access to Government Information Laws. <http://www.privacyinternational.org/foi/survey2006.pdf> Accessed on 7 June, 2011

1.1.3 Protection of Other Rights

Many political and economic rights can be enforced in terms of access to information. In India ration depot holders usurped the subsidized food that was supposed to be provided to the poor population. The poor demanded the access to the stock registers of TPDS which was granted under Freedom of Information Act, 2005. The Government of Dehli ordered to bring reforms to the TPDS system and the flow of subsidized food was ensured to the poor population.¹³

The UN Committee of Economic, Social and Cultural Rights (CESCR), while speaking about the right to health stated that access to information should be ensured. Such right will include the right to seek, receive and impart information that is related to health issues.¹⁴

1.2 Common Exception to the Right to Access Information

There is no doubt that right to access information is an exclusive right but there are some exception to this right. There are some laws that include many exception on the other hand some countries have adopted very comprehensive laws with minimum exceptions. The exception that are most common in national laws to access information as well as included in the international human rights documents are listed below:

- 1) To protect the rights and the reputation of other human beings;
- 2) Information is excluded if it is expected to cause harm to national security and public order in the state;
- 3) Information that may cause harm to the public health or morality.

The European Convention provides, In addition, exceptions to prevent the access to information received in confidence and for maintaining the authority and impartiality of the judiciary”.¹⁵

¹³ <http://www.ar.dehligovt.nic.in/right.html> Accessed on 7 June, 2010.

¹⁴ The UN Committee of Economic, Social and Cultural Rights, General Comment No. 14 UN E/C.12/2000/4, para. 3 & 11.

1.3. International Law of Human Rights and Access to Information

International Law of Human Rights was made to protect the people from the infringement of their fundamental rights, which are attributed to them for being human being, by their governments or someone else. There are International Human Rights Conventions, to which the governments show their consent to abide by the rules laid by such document after ratification, for the protection of the fundamental rights of their subjects. The ratification makes a government feel that they have to make policies in accordance with rules laid down by the convention. Many states take the responsibility to be answerable before the observer organizations for not being able to fulfil the requirement of the convention. Such organizations and committees can debate the annual reports provided by the member states and even investigate for the serious kind of abuse of the Human Rights.

Some governments of the world have failed in terms of awareness of the people according to the international standards of human rights. There are cases when the governments denied the people's right to access information or paid hurdles to the possible extent. If so ever the people become aware of their rights by some channel, they feel so helpless that they cannot demand the right that is purely attributed to them. As discussed above the right to access information strengthen the individual to demand his rights from the authorities. The individual may be in better position to see his *locus standee* and he can play his role in the nucleus of the political activities.¹⁶

The right to access information and democracy are closely related. Both emerge from the idea that all human beings are equal so have equal rights to contribute to the administration of their country. They are equally protected under the law that state has enacted to govern their conduct. However it is important to take some precautions, by the states, to avoid the

¹⁵ Article 10, the European Convention for the Protection of Human Rights and Fundamental Freedoms

¹⁶ Common Wealth Human Rights Initiative, "Our Rights Our Information", 2008 CHRI, New Delhi, India. p.

14 www.humanrightsinitiative.org/.../rti/our_rights_our_information.pdf Accessed on 7 June. 2010.

enactment of such laws and policies that are aimed to deter the people from looking into the working of the governments. The government is the representative of the people so they are required to make the people aware of issues of their interest. It is evident that the information which are declare secret by the government, as exception from the access to information law, deals with the issues that are mostly against the public interest. For this reason laws that address the right to access information are always in demand.

International Convention on Civil and Political Rights recognise this rule under article 19 as do other international laws. The countries of the world recognise the rules derived from these conventions after ratification. In Canada, for example, the courts have acknowledged the right to access information as a fundamental human right. In 1986 a woman was raped in Canada.¹⁷ She filed a case against the Canadian police that they concealed the character of the offender to the people of the area to catch him red handed. The court held that, by doing so the police have infringed the section 7 and 15 of the Canadian Charter of Rights and Freedom and that the authorities are duty bound to inform the people about the risks of the serious nature.¹⁸

Right to access information has been recognized by almost all international human rights documents. There is uprising urge in the international community to encourage the right to access information to promote culture of transparency and accountability.

1.4 Situation of Right to Access Information in India and Pakistan

Pakistan and India have inherited the same governing system that exclude the participation of the common public in the affairs of the state. The systems as well as the inherited laws are the same as those were under the colonial rule. These laws were enacted by the colonial government, taking in consideration their personal interests. Attempts for transparency and

¹⁷ Jane Deo vs. Metropolitan Toronto (Municipality) Commissioner of Police (1998) Court files 87.CQ. 21670(Canada) http://www.sgmlaw.com/page_251.aspx Accessed on 7 June, 2010.

¹⁸ Toronto Audit Services (1999) Toronto police review of the investigation of sexual assault. p.103-105 http://www.walnet.org/jane_deo/graffiths-991025.pdf Accessed on 7 June, 2010.

access to information are resisted from the very first day. The bureaucracies of these countries have, at many instances, failed badly to effectively implement the Judicial and policy decisions in this regard.

While we discuss the situation of access to information in India and Pakistan, we see that both states inherited some Laws that restricted some information held by governments. One such example is the Official Secret Act, 1923 which is silent about the definition of the Official secret. This is up to the government official to decide that what the official secret is. As a result the information that must not be denied is kept secret under the cover of the act. Although it is long since it was promulgated and the world scenario is completely changed, even then it is on the statute books without necessary amendments. The mere recipient of information from the official record is an offender under Article 5 of the act.

In Pakistan the reports by various official committees as well as commissions on corruption and misdoings of the state officials is treated as restricted. These reports are kept in the government offices to gather dust.¹⁹ Other than the said Act there are other laws that restrict the access to information include the Security of Pakistan Act, the Maintenance of Public Order Ordinance , 1960 and some sections of the Pakistan Penal Code and the Code of Criminal Procedure. On the other hand the rule 18 of the Government Servants (Conduct) Rules, 1964 authorizes the government servant not to communicate any official document or information to press, an individual and even the government official that is not authorized for the same.²⁰ This rule is also supported by Qanoon-i- Shahadat Order, 1984 in Article 6 and 7. Article 6 says that, "No one is permitted to disclose official record relating to the affairs of the state unless authorised by the head of the department concerned, who shall give or withhold such information as he thinks fit".²¹ While article 7 says that no public officer can be compelled to disclose a communication "when he considers that the public interest would

¹⁹ Roedad Khan, *Pakistan: Dream Gone Sour*: (Karachi: Oxford University Press, 1997).p.153.

²⁰ Government Servants (Conduct) Rules, 1964, Islamabad, Pakistan.

²¹ Article 6 & 7, Qanoon-i- Shahadat Order, 1984.

suffer by disclosure".²² The Supreme Court of Pakistan in *Benazir Bhutto vs. Federation of Pakistan*²³ held that the privileges under the article 6 & 7 do not authorise the public officials to retain the evidence or any other document, which is demanded for the public scrutiny, at their own will. This shows that the courts are there to determine public interest.

In India the Official Secret Act, 1923 is strengthened by the Central Civil Service Rules, 1964 as it authorise the government servants to deny any document to any person other than authorized thereof. Section 123 of the Indian Evidence Act, 1872 excludes the unpublished official record from evidence if it is not authorised by the head of the concerned department. Section 124 of the act authorise the public official not to disclose communication made in the official work.²⁴ India has enacted a comprehensive law for Freedom of Information in 2005, which allows a broader field of action i.e. the noting on the files and minutes of the meetings, but some may be declared exempted, if so required for the sake of collective security. But this is considered more comprehensive law than there is in Pakistan.

The right to access information was justified, by the courts, in South Asian states by the interpretation of different constitutional provisions. For example the Indian Supreme Court interpreted that constitutional right to life; liberty and freedom of speech ensure the right to access information.²⁵ As discussed above that the supreme court of the Pakistan, in *Nawaz Shareef v. president of Pakistan*²⁶, ruled that the right to access information is the pre-requisite for the freedom of expression and speech.²⁷ We cannot claim that such judicial decisions led to legislative measures.

²² Ibid. Article 7.

²³ NLR 992 SCJ, p.606.

²⁴ Section 124 of the Indian Evidence Act, 1872 states that "No public official shall be compelled to disclose communication made to him in official confidence, when he considers that public interest would suffer by disclosure".

²⁵ S.P. Gupta vs. Union of India AIR 1982 SC 149

²⁶ PLD 1993 SC 473

²⁷ Article 19, the Constitution of the Islamic Republic of Pakistan, 1973

1.5 Access to Information Regime in Pakistan

The President of Pakistan Promulgated the Freedom of Information Ordinance, 2002 to archive the goal of right to access information for the people of Pakistan as is guaranteed by International Human Rights Law standards.

Prior to the 18th amendment the Right to access information was not directly mentioned in the constitution of the Islamic Republic of Pakistan, 1973 but Article 19 deals with freedom of speech and expression. While interpreting this Article the Supreme Court of Pakistan held that right to information is integral to freedom of speech and expression as is there in Article 19 of the constitution.²⁸ Later on, by the 18th amendment to the constitution Article 19-A was inserted to the constitution which clearly addressed the right to information. Now the right to information is a constitutional right of the people of Pakistan, still awaiting the sub-ordinate legislation at the provincial level for the better access of the people to the information held by government bodies. At provincial level Sindh and Baluchistan promulgated the Freedom of Information Act, which are the copies of the FOI Ordinance, 2002. The Punjab government also presented a draft law, in 2010, on right to access information, but is still reluctant to enact it into law.

After discussing the history above, as per the requirement of this study, the laws and ideas that restrict the access to information in Pakistan will be taken in consideration. The Code of Criminal Procedure section 99-A gives the authorities "Power to declare certain publications forfeited and to issue search warrants for the same". This gives the power to the government authorities to stop any document from being published or to restrict its circulation after publication. In the present scenario the restriction or blocking of some websites and the censorship of films is the common example that is done under the cover of "The Motion

²⁸ Supra note 26. p 473 and 746.

Pictures Ordinance, 1979". PEMRA Ordinance, 2002 discusses further provisions about prior restraints and content regulation.

In Pakistan people have limited access to the sources of information such as print media and electronic media. The information acquired by these channels is authentic or not is determined by taking in consideration the general situation of access to information regulation in relation to government activities. As discussed above, such information is filtered at various levels depending on the situation and it is impossible to say that the information conveyed after intense censorship is authentic and reliable.

In Pakistan the government departments and ministries are required, as per rules, to publish annual reports for the sake of transparency in the state affairs. It is seen in many cases either these reports are not published or the publication is so small that it is impossible for the most of the people to access them. The deceptive contents and lack of precise data is also very common in these publications. Most of the reports remain locked in the store rooms for many years as their circulation is restricted by the respective departments. These reports are prepared to meet the requirement of the department rules instead of promoting transparency about the respective department.

As far as private sector is concerned the more information as well as transparency is needed because this sector is fast growing in the country. International Financial Institutions have also stressed the member states to enact laws that ensure the people's right to access information. IFIs have themselves adopted, not only, the policies to disclose information but have included the enactment of the laws that ensure the right to access information in their conditions for granting loans. The Local Government Ordinance, 2001, having section about freedom of information, was the result of the pressure of International donors, Like the Asian Development Bank, to legislate in terms of awareness of the public and transparency in state

affairs. Section 137 of the Local Government Ordinance, 2001 was not fully implemented as the rules for the smooth operation was not notified by the provincial governments.

1.5.1 Efforts for Access to Information legislation in Pakistan

In Pakistan, there were very few laws having provisions for the right to access information. In the last one and a half decade several efforts are done in Pakistan to introduce the legislation that assures the right to access information the main aim which was to bring transparency and accountability in the state departments. Professor Khurshid Ahmad a senator from Jamat-i-Islami Pakistan was the first man who presented a private Freedom of Information Bill to the senate in 1990. Another Freedom of Information Bill was drafted four years later, in 1994, by the Public Accounts Committee that was headed by Senator Malik Qasim. The drafts of both the bills were rejected because of the resistance paved by the bureaucracy as they thought it interference in their powers. The development in the context of Freedom of Information legislation was started in the interim government of Maik Miraj Khalid at the initiative of Federal Law Minister Fakharuddin G. Ibrahim, on January 29, 1997, the president promulgated the Freedom of Information Ordinance. However this Ordinance was allowed to lapse as it was not enacted into law by the succeeding government of Mian Muhammad Nawaz Shareef. The demand for the Freedom of Information law was continued by the people of Pakistan and civil society organizations.

In the military government of Gen. Pervaiz Musharaf a draft bill was made public in August 2000. This draft was silent in terms of some necessary details and implementation procedures. By influencing the inadequacy of the government bill a civil society organization Consumer Right Commission of Pakistan (CRCP) drafted a Model Freedom of Information Act, 2000 and presented it to the government for consideration. In October 2002 Freedom of Information Ordinance was promulgated by the president of Pakistan. This Ordinance lacked parliamentary ownership because it came in before the meeting of National Assembly (15th

November) and after the general elections of 10th June 2002. The section 55 of the Rule of Business, 1973 was also amended to take it into the realm of FOI Ordinance. In 2004 the freedom of information rules were introduced for the smooth implementation of the Ordinance. Now, since the promulgation of the ordinance a number of important steps have been taken as the initiative for awareness, capacity building, and improvement in terms of legislation.²⁹ Two provinces of Pakistan have taken initiative towards the freedom of information legislation i.e. Baluchistan Freedom of Information Act, 2005 and Sindh Freedom of Information Act, 2006. Departmental freedom of informational policies for the purpose of better access to information is also reviewed.³⁰

In 2004 Ms. Sherry Rehman of the Pakistan People's Party proposed a Freedom of Information Bill as parallel initiative. The motive of the bill was to repeal the FOI Ordinance, 2002 and to enact a national law with lot of improvements with special emphasis on the protection of the whistle blowers. But as is the common practice, this private member bill was not debated in the parliament. In 2008 Ms. Sherry Rehman then Federal Minister for Information, Propose Freedom of Information Bill, 2008. This Bill contains number of improvement as compare to the existing law on FOI. Till now this bill is not tabled for open discussion.

There are serious flaws and inadequacies in these laws. A large number of government records are exempted from the jurisdiction of these laws. Private sector is also not the subject to these laws. The implementation procedure is not according to the standards. Most of the times the implementation of these laws is restricted by other state laws, Official Secret Act, 1923 is the example thereof. This law do not override the Official Secret Act, as far as Pakistan is concerned. The Official Secret Act, 1923 should be amended or repealed by active legislations to allow greater access to information. In previous times even the limited access

²⁹ Consumer Right Commission of Pakistan (2008), *Freedom of information Bill, 2008, Analysis and Recommendation*: CRCP, Islamabad. p. 1

³⁰ The process of formulation of these policies is in process under Access to Justice Program

to the official information was the sole discretion of concerned department. Now a day the situation is better than the past as, at least, legislation is available to empower the people to demand access to information, while the concerned department have to justify the reason for denial if they reject request made in this respect.

1.6 Significance of the Study

The right to access information is not an absolute right. It may be necessary to keep some information secret in the course of public administration. The information, if disclose is against the general interest of public should remain classified as the right in *rem* is prior to right in *personum*. The reason for such secrecy may be national security, maintenance of general public order or to protect the privacy of an individual that is not prejudicial to public interest. A good freedom of information law should not be silent in terms of these exceptions and the scope of these exceptions should be limited to the minimum extent.

The present research is aimed to study the situation of the right to access information in Pakistan in comparison with the standards laid down by International Law of the Human Rights. The focus will be to find out some better solution to coup the lack of transparency in the state departments as well as corruption. If the culture of secrecy in the state affairs is not curtailed the situation may become bad to worse because of the corruption and maladministration of the authorities. In the last two decades as the markets are open for the foreign investor across the region, coincidently, the corruption is also increasing tremendously. The state of uncertainty and inequality has also kindled the corruption. Civil Society and the governments across the globe are required to make policies to actively curb this problem. There is need for the institutional reforms and to strengthen the anti corruption departments to meet this challenge. An active and perfect implementation procedure should come to force for freedom of information laws.

CHAPTER 2

2. Government's Recognition to the Right to Access Information

If the right to access information is not recognized by the government of a state the practical value of the international conventions and declarations is very low. Besides the international standards, domestic recognition and some practical measures are also necessary to make the community able to access the information that is held by their government.

The people have a common mentality that until or unless a law is not enacted to access information, the government will not let them access the information. There are many ways that a government may adopt to ensure the people right to access information in the absence of the enactment made in this regard. This chapter is specially focussed at the situation, where there is no legislation for the right to access information, the measures the government to take for providing the information to the people. These measures are discussed one by one in detail.

2.1 Providing Information Proactively

In the absence of the right to access information law the government can adopt a policy to provide information to the people by publishing information proactively, even in the absence of the request for the information. Here the example of Solomon Island's³¹ can be quoted where the government has exposed an improved promise to clear governance by providing information to the people on its performance and policies.³² This will leave the people informed even in the absence of the formal request for the information by them and waiting

³¹ A. Chand, et al. (2005), "*Impact of ICT on Rural Development n Solomon Islands the PF Net. Case*", The Communication Initiative. www.communit.com/ict/ictcaseStudies/ictcaseStudies-18.html Accessed on 21 March, 2010

³² PFNet(Peoples First Network) was established by Rural Development Volunteer Association(RDVA), an NGO, in association with the Solomon Island's Ministry of Rural Development, aimed to build the confidence of the people of the Solomon Island in their government. The project is focussed at the improved practices to the people's right to access information for the reduction of poverty level and peace building. The outcome of the net work is positive. People are kept informed are the possibility of the false reporting and rumours is at minimum level. After the accredited success of the network the government of Solomon Islands has launched its website in 2006 to promote transparent government practices. Press release, policies and draft bill and other important documents are kept on the website for the public scrutiny.

for the long interval of time for the response of the government concerning their request. It is very easy for the people to obtain the information which is needed by them. This practice may include the practical measures and the physical tools for the people to be benefitted, as for example, the government may keep the information about the policies that are adopted in the public confidence, on the official website for the people's access.

The important reports, that may attract public attention, should be published in periodicals. Solomon Islands have established a remarkable practice in this regard, leaving the governments of the world to think and act accordingly.

Some countries have made policies that what are the information that are to be provided proactively to the citizens. It is important to discuss countries and regions that have made lists of information that can be provided proactively.

2.1.1 Europe

In European countries following categories of information are required to be provided proactively by the government.³³

- 1) Information on the organizational structure of the public bodies including the information relating the officials.
- 2) Budget information and expenditure details of the state on official activities. Financial information is available on the official websites of the European states.
- 3) Information relating to the activities and policy decisions in public interest.
- 4) The decision making procedure and the mechanisms for the public participation in decision making process.
- 5) Detailed mechanism for access to information as well as the contact details of the officer designated to provide information.

³³ Open Society Justice Initiative (2004), *"Results of the Open Society Justice Initiative Access to Information Monitoring Tool"*, New York . <http://right2info.org/scope-of-covered-information/administrative-information-and-proactive> Access on 13 July, 2011

- 6) Complete index and classes of the information held by the public bodies.
- 7) Procedure of public procurement and all related information before and after the issuance of a contract.

The categories of the information as listed above are in the policies of the most of the European countries under right to access information laws.³⁴

2.1.2 United States of America

The US government publishes considerable information for the access of the common people on various websites. The Federal Funding Accountability and Transparency Act, 2006 requires the government to take positive steps toward creating the state of accountability and transparency in state affairs.³⁵

2.1.3 Mexico

The access to information law of Mexico requires the information held by the public institutions to be available in the websites.³⁶ The categories of the information that should be provided proactively are listed as follows.³⁷

- 1) Organizational structure of the public bodies.
- 2) Complete detail of the duties conferred on each unit of public body as well as their administrative activities.
- 3) Monthly income of public officials under each department and their directory contain contact details.
- 4) Street address of the office that can be contacted for the access to information.
- 5) Complete information on budget allocation and detailed list of expenditures.

³⁴ Ibid.

³⁵ There are many websites on which the information, which is held by the government, is kept for the public scrutiny. One of such important website is www.USAspending.gov that is established under the provisions of the Federal Funding Accountability and Transparency Act of 2006, which requires the establishment of a single website that is reachable by the public for accessing information.

³⁶ Article 7, Transparency and Access to Public Governmental Information Federal Act, Mexico.

³⁷ <http://right2info.org/scope-of-covered-information/administrative-information-and-proactive> Access on 13 July, 2011

6) The reports of different administrative units that are to be made according to the law.

7) Mechanism of citizen participation in the state affairs.

These are the information important of which are listed above that are to be provided proactively.

2.1.4 Pakistan

Section 5 of the Freedom of Information Ordinance, 2002 puts an obligation on the authorities to publish "acts and sub-ordinate legislation that may include rules and regulations, notification, notifications by laws, manuals, and orders having the force of law in Pakistan."³⁸

The scope of section 5 of the ordinance is narrow in the sense it only covers the publication legislations and orders. It is silent about the giving information proactively to the public. It only gives instructions to declare certain record to be public record.³⁹ There is no provision that how such declaration be made. Now a day the Freedom of Information Bill, 2011 is tabled in the parliament. The bill is aimed to bring improvements to the existing law on access to information.⁴⁰

2.2 Laws Giving Access to Particular Information

There are some laws, though not regarding access to information, but they give access to certain kinds of information to the people. For example, the laws that govern the Environment Protection demand the government to publish reports for environment impact assessment and the information that may relate to. In Canada the corporations that release large amount of chemicals are bound to publish the reports that are regarding the details of the discarding of their waste.⁴¹ This requirement is going to be extended by the city of

³⁸ Section 5, The Freedom of Information Ordinance, 2002.

³⁹ Ibid. Section 7.

⁴⁰ Zahid Abdullah, A Matter of Implementation, *The Dawn*, 25 October, 2011

⁴¹ The Canadian Environment Protection Act, 1999 Available at www.laws.justice.gc.ca/en/C-15.31/text.html
Access on 13 July, 2011

Toronto by the enactment of a bylaw requiring small industries to publish reports regarding the use and wastage to the environment of the harmful chemicals by them.⁴² Such laws may oblige the common man, giving out information on a particular issue that is in the interest of the people.

Several countries of the world have laws to regulate the conduct of private corporations by demanding to publish periodic reports, giving details of accounts and expenditures. Consumer Protection legislations demand their subjects to publish the quality of their product and the safety standards as well as the measures taken to preserve the product. In some countries the laws to maintain the property title records demand the respective department to allow the common man to inspect such records.⁴³

2.3 Constitutional Guarantee of Access to Information

Several countries have the protection of the right to freedom of speech and expression under their constitutions.⁴⁴ Courts of the different states of the world have been interpreting them to defend right to access information. Indian Supreme Court, more than 25 years before the enactment of the access to information law, held that the right to access information was an integral part of the right to speech and expression guaranteed by the constitution as fundamental human right.⁴⁵ The Indian Supreme Court also held that the right to information was an integral part of the right to live⁴⁶ of every individual that is guaranteed by the constitution as a fundamental human right.⁴⁷

⁴² S. O'Neill, (2007), "Health Board Seeks Right-to-Know Bylaw on Toxic Chemical Use Inside Toronto", (New York) www.insidetoronto.ca/news/city_hall/article29188 Accessed on, 13 July, 2011

⁴³ UK Land Registration Act, 2002 www.opsi.gov.uk/acts/acts2002.html Accessed on 13 July, 2011

⁴⁴ Prior to the 18th amendment, the Constitution of Pakistan, 1973 contained article 19 that was granting freedom of speech and expression as fundamental human right. The courts of Pakistan have been interpreting this for the right to access information, now included in article 19-A that is inserted in the constitution by the 18th constitutional amendment

⁴⁵ State of Uttar Pradesh vs. Raj Narain, AIR 1975 ,SC 865

⁴⁶ Article 21 of The Constitution of India

⁴⁷ S.P.Gupta vs. Union of India, AIR 1982 SC 149

Some other countries of the world have included the right to access information in their constitutions. For example the Constitution of Hungary guarantees an individual to "the right to freely express his opinion, and furthermore to access and distribute information of public interest."⁴⁸ The Constitutional Court of Hungary held that "not only does this Article mean that freedom of information is a fundamental right, but it also strike down secrecy laws which infringe on the right to information."⁴⁹

There are some constitutions that require from the government to legislate for guaranteeing an effective access to information law. Such law should lay down practical mechanisms for the access to information by individual. Article 32 of the Constitution of South Africa provides the right to access information to every citizen. Further the clause 2 of Article 32 demands that "national legislation must be enacted to give effect to this right..."⁵⁰ the Access to Information Act was passed by the legislature in 2000 in the pursuance of provision contained in the constitution. The constitutions of some other states such as Uganda, New Guinea and Papua also contain such provisions that demand the access to information legislation by the government. Uganda has legislated for the right to access information in 2005⁵¹ while New Guinea and Papua are still lying on the constitutional guarantee of the access to information.

There is an issue that the right that is derived from constitutional provision can be enforcing by it on or not. There are different rulings on this issue. The Supreme Court of Philippines ruled in 1987 that the right that is derived from a constitutional provision has its own effect without the need of additional act.⁵² On the other hand in Bulgaria the Constitutional Court in 1996 ruled that the right guaranteed by the constitution can only be regulated by a law

⁴⁸ Article 61 of The Constitution of Hungary

⁴⁹ Privacy International (2006), "*Freedom of Information Around the World: A Global Survey of Access to Government Information Laws*", p 37 www.privacyinternational.org/foi/foisurvey2006.pdf Accessed on 21 March, 2010

⁵⁰ Article 32 Constitution of the Republic of South Africa, 1996

⁵¹ Access to Information Act, 2005

⁵² Legaspi vs. Civil Service Commission, 150 SCRA 530, 29 May 1987.

legislated for the same. The New Zealand Court of appeal was of the view that "the permeating importance of the (Official Information) Act is such that it is entitled to be ranked as a constitutional measure."⁵³

2.4 Laws for Right to Access Information

The legislation for the right to access information is prevailing from more than two centuries.⁵⁴ The considerable development took place in last fifteen years. More than 80 countries of the world have enacted laws for the right to access information. These laws empower the common man to give access to the information held by the government. A better enactment in this regard gives the people the awareness that what are the information that they can demand from their government, and what information is excluded from the access of the common public.

If particular information is denied to the public, they can demand the reason for so doing.

These laws also provide the remedies available to the common public for the denial of the government from giving access to the information. In practical viewpoint this is the best practice available for the right of the common man to access information from the public bodies. In the absence of such law, where the culture of secrecy prevails, the people should go to courts to demand the right to access information because the courts can interpret the existing law to find out the right to whom the right to access information is an integral part to.

But by this way the common man cannot access the information easily as this is a difficult way and the chances of delay as well as denial are maximum.

⁵³ Commissioner of Police vs. Ombudsman (1988) 1 NZLR 385.

⁵⁴ Sweden had adopted the law to access information in 1766, the only state at that time with such legislation. Columbia followed the practice in 1888 by adopting Code of Political and Municipal Organization, which allowed to individual to demand the document held by the government.

2.5 Law Gives the Best Access to Information

If a state has legislated for the people's right to access information makes sure that there is clear and legally enforceable machinery that equips the people to demand the information from their government. This means that the state respects the rights of its subjects is have the will that the people should participate in the decision make process of the government, that they can do only if they have the knowledge of the activities of their government. Such knowledge is only possible if the state has an effective law for the right to access information. The laws that govern the right to access information make public bodies responsible towards their duties and activities as they feel themselves answerable. This kind of practice minimizes the corruption from the affairs of the state. This kind of practices brings accountability protecting the other rights. A study conducted by pen Society Justice Initiative state it in following words,

"Requests for information made as part of the study yielded information more often in countries with freedom of information laws than in countries without, indicating that freedom of information laws have had a significant, positive impact in the countries studied. Specifically, the study shows that in the countries with dedicated freedom of information laws, requests for information made to government entities yielded responses nearly three times as often."⁵⁵

This study clears that the legislation with regard to access to information brooders the scope of the right to be ensured. If a state does not have the law that is addressing the access to information, the request for the information may not be entertained as it was to be entertained in the state with a law in this regard.

2.6 Standards of Law Regarding Access to Information

The standards of law regarding right to access information are discussed in chapter 2 in details. Access to information is the right that is a continuous topic of debate in international community as well as institutions. Everyday becomes with a new dimension of the right. The consensus on the elements of the right to access information is developing day by day. There

⁵⁵ Open Society Justice Initiative (2006), "*Transparency & Silence: A Survey of Access to Information Laws and Practices in 14 Countries*", New York, p.11 www.justiceinitiative.org/db/resource2/fs/?file_id=17488 accessed on 13 November 2010.

are some elements that, according to the consensus of international community, should be taken in consideration while legislating for the right to access information.

2.6.1 Governments under Obligation to Disclose Information

The law should provide, in binding terms, that every member of the society has right to access information as fundamental human right and corresponding government is under responsibility, as provided by the international law of human rights, to take all possible measures to ensure the free flow of information, that may be demanded by the respective government or under some special cases without the request thereof. The public bodies should make promises to disclose the information to the public in clear word and the possibilities of ambiguities should be lessened by the using clear language in this regard. This should be drafted with the presumptions to favour the right to access information from the public bodies. In government the information is gathered, kept, and utilized using the money of the taxpayers. The government's decisions and policies are to be used to protect the public interest, so have the corresponding duty to tell the public that is done by the government to protect their interest. People have the right to know that what is done by the government at their name.

The right to access information should extend to the international community, not only the citizens of the state, for which law is drafted. The law should not limit the information only to the documents and record rather a variety of information should be guaranteed. The legislation should include the information from the private bodies that carry out public functions, under the supervision of public bodies or independently, and are paid from the money of the taxpayers and state has monopolized them to carry out commercial activities. The bodies which are purely private i.e. that are not carrying out public functions, should be under obligation to provide information that is necessary to exercise any human right. However there should be a balance between different rights i.e. the law should protect the

right of privacy of an individual. The private bodies should also be given protection for their legitimate business-related interests.

Another dimension of this interest is that the information held by the government should not only be provided on request, but the government should provide information proactively, by publishing or broadcasting the key information that is held in the public interest. This may include the information regarding the norms of the government, the finances held by the government and the policies of the government that are in the public interest.

2.6.2 Minimum Scope of Exclusion

The circumstances in which the government is not under an obligation to disclose information is provided in every law that addresses the public's right to access information. It is required that the exclusions or exceptions should be drawn to minimum possible extent. Information is disclosed, when doing so is in the public interest, so when drafting the exception, this should be kept in mind. The law should not permit scope for preservation of information on the basis of shielding the government from humiliation, revealing wrongdoing or for the reason that the government thinks that the community will not be able to understand the information.

One thing should be kept in mind that "public interest override". All the exceptions should be subject to this rule. When a request for information is under any exclusion, it should further pass through scrutiny to decide whether it is appropriate to disclose it in public interest or its exclusion is justified.

The major difficulty is the relation of the laws that regulate access to information as a fundamental right of human being with those of secrecy laws. Practically appropriate balance is not provided by the secrecy laws. The reason is that such laws were drafted before the recognition of right to access information regime. In some countries, like in India and South Africa, the access to information law has overriding force. Indian law provides that it will

take precedence from the Official Secret Act, 1923. There is no such provision in the Pakistan' law to access information. The practice of historical disclosure is recognized by different laws. These laws provide the release of documents or information protected on public ground after a reasonable time. This reasonable time limit is provided by the laws that recognise such disclosure.⁵⁶

2.6.3 Simple Procedure

The key test of a law to access information is the procedure it provides to demand information. The process to seek information should be easy and affordable so that people with the request are easily entertained with the availability of the right. If the information is inaccessible to the community because of the available procedure then the law is of no use. This is to say that the law should establish a smooth procedure to take quick response from the bodies carrying the information. Application forms should be simple and in the native language of the state, so that the people who are familiar with the international languages, should also take benefit of the law. The fees should not be charged for the requested information. In the states where fee is charge that should be reasonable taking in consideration the level of the earning of a domestic worker in that state, for the purpose to disseminate the right at equal level, not excluding the poor from the benefit of the law. The fee should be equal to the actual reproduction of the information from the record, at any cost it should not exceed from the actual cost that is levied in normal circumstances.

2.6.4. Appeal Mechanism

A law needs proper mechanism for the implementation of its provisions to make it sure that the authorities are working in accordance with the law. To maintain a strong right to access information regime, an impartial body is needed to look into the refusals to the information

⁵⁶The Azerbaijan law provides for release of information protected on public grounds after five years, in Uganda documents protected under the internal deliberations exception are released after ten years and the defence and international relations exceptions come to an end after 20 years.

requests. The body should be granted powers to compel the public body if it thinks that the refusal was not justified.

To comply with it the authorities are needed to provide the reason for the denial in written to the requester so that he may appeal before the body that is established to see such matters. The process for the appeal should also be provided with such refusal and the mechanism of appeal should be simple and non judicial in order to save time. If necessary the law should permit a final recourse to the court of law.⁵⁷ In such cases the burden of proof shall be on the public body to give solid reason for exclusion.

The body that is established for this purpose should be empowered to impose penalties of the officials who deny the information without a just cause. If such refusal causes suffer to the requester the body should provide them compensation for such loss. If the law provides penalties for the culpable officers and indemnifies the victim such law is regarded as strong as it addresses sanctions for proper implementation. This will deter the public servants for breaching the right to access information of the public. The issue of denial was looked by an analyst he suggested the bodies to whom appeal is made to take the action as,

“They should have the powers to award fines, penalties and jail terms to officials who delay or refuse to provide information. A pro-active web-based display of information should be made mandatory for all government departments. A dedicated FOI website managed by the FOI commission should display complete requests, responses, time taken, results and decisions on all cases initiated under the FOI law.”⁵⁸

These are some simple rules that may lead to an improved and effective access to information regime.

2.6.5 Training and Public Education

There are many impartial bodies and organizations in different countries of the world which act monitor the implementation of the right to access information. Some time such bodies are

⁵⁷ Common Wealth Human Rights Initiative, (2008), “*Our Rights Our Information*”, CHRI, New Dehli, India. p. 49

⁵⁸ Zahid Abdullah, “Information: A Right Denied”, *The Dawn*, 27 May, 2010

empowered by the law of land for such doing.⁵⁹ National Human Rights Commission or Information Commissions are monitoring and working for promotion of law relating to access information. These organizations conduct seminars and develop codes of practice for the smooth implementation of laws.

Such bodies take responsibility to monitor the steps taken by the government for the promotion of law and to urge the government to conduct programmes and to publish brochures to make the public aware of their rights. The official responsible for entertaining the information requests should be trained and educated about the duty they have to perform.

2.6.6 Monitoring

Most of the right to access information laws passed in last two decades contain clear provision for the monitoring the implementation of the law. The law should address the body or the minister specially empowered in this regard to report the parliament of the steps taken and the policies adopted for the implementation of the law. This process will help to analyse the effectiveness of the law and to avoid the abuse of the law. Some governments have made special units to monitor the implementation of the law.⁶⁰ Such unit are responsible to monitor as well as to report the obstacles to access information. The major tasks of these units include the giving guidelines and to train the public official as well as to lead campaigns for the public awareness to the right.

2.6.6.1 Importance of Monitoring

If a law is made taking in consideration the principles discussed above the active role of community is of much importance to demand the proper implementation by government. As is the scope of the law of access to information, it shifts some of the responsibilities on the community. If the community is not aware of the right or it does not demand the right that is

⁵⁹ Ibid. p. 50

⁶⁰ Jamaica, Trinidad and Tobago, have also created special units to monitor compliance with the law of Access to Information.

attributed to him by the law, its strength decrease and implementation is slowed down. If the community continues to demand the openness and accountability the government is more conscious about its implementation.

The participation of the community has been very important for the success of the law. The open Society Justice Initiative conducted a study that derived some findings about the importance of smooth implementation of the law. it was found that,

“The countries that produced the highest response rates to requests for information during the study were those where civil society movements have been active in promoting the adoption and subsequent implementation of national freedom of information laws. These include Armenia, Bulgaria, Mexico, Peru, and Romania. In these countries, NGOs have submitted numerous requests for information from the government undertaken strategic litigation in response to refusals by the government to release requested information, and engaged in media advocacy on access to information cases involving corruption and governance issues.”⁶¹

Effective implementation is only possible when the government shows commitment to it that is only possible when the demand the right.

2.7 Factors for Adopting Access to Information Laws

The governments are always under internal and external pressure to adopt access to information laws. Civil society organizations play a vital role in this regard.⁶² Sometimes it is under the pressure of intergovernmental or international organizations that a government precedes to the promulgation of the access to information law.⁶³ The third major factor is the trend of modernization that leads to transparency and accountability regime resulting in the promulgation of access to information law, without which the task is impossible to achieve.

These factors can be discussed as follows.

⁶¹ Open Society Justice Initiative (2006) “*Transparency & Silence: A Survey of Access to Information Laws and Practices in 14 Countries*”, New York, p.11: www.justiceinitiative.org/db/resource2/fs/?file_id=17488 access on 21 December, 2010

⁶² After the promulgation of Freedom of Information Ordinance, 2002 the government of Pakistan was reluctant to draft the rules to implement it. A civil society organization Consumer Rights Commission of Pakistan (CRCP) demanded the rules to be drafted. In pursuance of the pressure imposed by CRCP the cabinet division drafted the rules for the implementation of the law in 2004

⁶³ Pakistan adopted the law for the Access to Information at the demand of IMF and the World Bank.

2.7.1. Corruption

Corruption is prevailing in almost all the communities of the world. Access to information laws are needed to eliminate the corrupt practices. The campaigns for the elimination of corruption have helped very much to change this culture. In democracies the biggest reason to adopt a national access to information law was the campaigns against the corruption of the public and the culture of lack of transparency. Japan, Ireland and the United Kingdom adopted the national laws for access to information under the pressure of such campaigns.

2.7.2 International Pressure

The influence of international community cannot be denied for the adoption of access to information law. International organization such as the United Nations, Commonwealth and the European Union has drafted legislation for the access to information. In 2003 the Council of Europe decided to develop international treaty on access to information. International financial institutions has also stressed upon the states to do active legislations to promote access to information regime and to bring accountability in the financial system of the state to strengthen the economy.⁶⁴ Another example of such obligation is the Aarhus Convention which demands the states to legislate to promote the environmental information.

2.7.3. Modernization

Today the people have modern communication tools such as internet, private news channels and variety of news magazines and papers. Media is also gaining power to expose everything under the realm of independent media. These factors call for the maximum information for the public.

⁶⁴ Ibid.

CHAPTER 3

3. Right to Access Information in International Law of Human Rights

Right to access information is given due importance under International Law of Human Rights as is discussed in previous chapter. This chapter will deal how International Law of Human Rights deals with this right.

International institutions have included right to access information in their charters as well as by the resolutions. In 1946 the United Nations adopted a resolution for the right to access information.⁶⁵ It was admitted that if the right to access information is denied no one can make progress in the way of life. This right is the fundamental right as it makes the person aware of his rights and duties. There are some international standards that bind the governments to legislate for this right under prescribed rules.

3.1 Standards for the Right to Access Information

Standards are laid down in the international document to ensure effective legislation for the right to access information. We shall see the rules adopted by the international institutions in their charters and resolutions for the right to access information under this head.

3.2 The United Nations

Right to access information has been strengthened by the United Nations Organization declaring it "the touch stone for all the freedoms".⁶⁶ It is stated in article 19 of the Universal Declaration of Human rights as, "Everyone has the right to freedom of opinion and

⁶⁵ The United Nations General Assembly adopted Resolution No. 59(1) on 14 December 1946 that speaks about right to access information. The document is available at www.un.org/documents/ga/res/1/ares1.html Accessed on 19 October, 2011

⁶⁶ Ibid.

expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.”⁶⁷

In 1993 UN commission for Human Rights appointed a mission for the freedom of opinion and expression. The commission gave a declaration that the article 19 of ICCPR binds the governments of the member states not to deny the requests for access to information.⁶⁸ In 2004 UN Special Rapporteur along with the regional organizations of Europe and American states gave a joint declarations stating that the access to information is the fundamental human right and the governments are under obligation for the free flow of information to their citizen with fair and effective legislations. This was regarded as the simplest and fundamental rule for individual’s right to access information. This report also states that access to information is oxygen for democracy; it ensures accountability in the government and better participation of the citizen in the state affairs. In this way a state can make progress as a pure welfare state.

The Organs of UN like World Bank have changed their policies to ensure the better access to information.⁶⁹ Freedom of expression was interpreted in international law by the UN Human Right Committee as right to access government held information.

3.2.1 Standards of Right to Access Information by United Nations

In 2000 the United Nations has adopted some standards of right to access information. These standards are derived, taking in consideration, the international and regional standards of law. These standards are milestone while legislating in this field.⁷⁰ These principles should be kept in mind, while making enactments, to avoid the denial of the right to access information. In

⁶⁷ Article 19, Universal Declaration of Human Rights (UDHR) 1948.

⁶⁸ United Nations Economic and Social Council Report of the Special Rapporteur. 1997/26 UN Doc. E/CN.4/1998/40, Para. 14, www.unhcr.ch/huridocda/huridoca.nsf/fb00da?openDocument.html Accessed on 19 October, 2011

⁶⁹ Hetty Kovach, Carloline Neligan & Simon Burall, “Power without Accountability”. Global Accountability Report 2003. <http://www.oneworldtrust.org/documents/GAP20031.pdf>. Accessed on 19 October, 2011.

⁷⁰ <http://www.article19.org/pdfs/standards/righttoknow.pdf> Accessed on 19 October, 2011

2002 the Committee of Ministers of the Council of Europe (COE) gave recommendations to provide a list of legitimate intends to justify exceptions to the right of access to information.⁷¹ The situation of the right to information is different in different countries but there are many similarities in law making process. Article 19, an Organization working in the area of right to information, has published a set of principles.⁷² These principles set out best standards for legislation on right to know. These principles are as follows.

3.2.1.1 Maximum Disclosure

It is the obligation of the public bodies to disclose information as well as it is the right of the every member of the public to receive information on demand. The record held by the public body is not excluded from this right either it is stored in files or includes computerized record. This principle helps to bring transparency in the state affairs. The public bodies will perform more effectively if they are strongly convinced that they are answerable for every bit of the work done. On the other hand if the disclosure is excluded from the public access for no special reasons, it may lead to corruption and mismanagement. The rule of maximum disclosure further broads the scope of right to access information. The United Nations standards say: "Public bodies have an obligation to disclose information and every member of public have a corresponding right to receive information."⁷³

In most of the countries public bodies are not obliged to create information held by them at the time of request. The public bodies are required to extract information from the records by using electronic technologies and searching through different records to evaluate the request for information. Now a question arises whether a requester should demand a particular document or simply the information required. In this situation most of the individuals cannot identify the original document so the right should extend to information. However in some

⁷¹ Council of Europe, Recommendations R (2002), *"The Committee of Ministers to Member States on Access to Official Documents"*, 21 February 2002.

⁷² <http://www.article19.org/pdfs/standards/righttoknow.pdf> Accessed on 5 May, 2011.

⁷³ www.access-info.org/.../Access.../Access_Info_Europe_Briefing_Pap.html Accessed on 5 May, 2011.

cases request was refused because of no distinction between a right to access particular information and to access a document.⁷⁴

3.2.1.2 Obligation to Publish

Documents having significant public interest should be published by the public bodies. The effective system of access to information demands the publication of key categories of information even if they are not requested. A number of international standards put this obligation on authorities. The United Nations standard states it in these words:

"Freedom of information implies that public bodies publish and disseminate widely documents of significant public interest, for example operational information about how the public body functions and the content of any decision or policy affecting the public. . ."⁷⁵

The Council of Europe Recommendations also put an obligation on the public authorities to publish important information at their own initiative, even in the absence of a request. This may include the way of functioning as well as the decisions and policies that directly affect the public. In this way the functioning of the public bodies may improve. All the respective information is reached to each and every person and no one suffers for the lack of information. This practice also helps the government institution to know the emotions of the public for each and every policy that is made in the public interest.

Limitation of resource may affect the scope of this obligation, but now a day new techniques and technologies are progressing and the process of publication is becoming easier day by day so the amount of information covered in this way should increase with the passage of time.

3.2.1.3 Promotion of Open Government

Most of the countries of the world suffer from deep rooted culture of secrecy in the state affairs. For better right to access information regime this culture should be curtailed with progressive legislations. There is need to convince the public official that openness is an

⁷⁴ A protest letter by ARTICLE 19, available at <http://www.article19.org/pdfs/press/undp-disclosure-policy.pdf>. Accessed on 5-5-2011

⁷⁵ UN special Rapporteur, "*Promotion and Protection of Right to Freedom of Opinion and Expression*", UN Doc. E/EC.4/2000/63, 18 January 2000, para 44.

obligation as well as a fundamental right of the people from where other right generate. Public education is necessary in this regard. People should be made aware of their right to information through active campaigns and trainings. Here, the role of an active and independent media cannot be denied. The publication of a simple guide on the process to lodge request for information is also needed in areas with low literacy rate. Penalties should be provided for those who obstruct access to information either by verbal denial or destruction of records. Some countries provide criminal penalties, although prosecutions are rare but it helps to make public official aware that wilful denial to information will not be tolerated.

Providing incentives for good performers and by exposing poor performance can be helpful to eliminate the culture of secrecy. Law should address by clear provision the culture of secrecy within the government. The public should be made aware by the decisions made by the government. Government is the representative of the public in a state. Public is the subject to the policies and the government. In this way the culture of the open government should me promoted.

In some countries the major obstacle to access information is the poor state of record rooms. The state of record keeping is so poor that even the officials are not aware of the information that is possessed by them or if they know, are unable to locate that record. The right to access information can only be ensured by good management of official records.

3.2.1.4 Limited Scope of Exception

It is very complicated to assess the scope of exception in terms of access to information. Sometimes very effective legislation on right to access information is undermined by powerful regime of exceptions. International standards address the importance and complication of this issue. The UN standard states as:

“A refusal to disclose information may not be based on the aim to protect governments from embarrassment or the exposure of wrong doing; a complete list of legitimate aims which may

justify non-disclosure should be provided in the law and exceptions should be narrowly drawn so as to avoid including material which does not harm the legitimate interest.”⁷⁶

The exception so laid down should not be contrary to the standards of international law to restrict freedom of expression. The Inter-American court of Human Rights recognizes the right to access information as part of right to freedom of expression.⁷⁷ Article 19⁷⁸ Principles lay down a three-part test to justify exceptions, which is as follows:

- “1. The information must relate to a legitimate aim listed in the law;
2. Disclosure must threaten to cause substantial harm to that aim;
3. The harm to the aim must be greater than the public interest in having the information.”⁷⁹

Exceptions should always be in public interest and subject to strict harm. These exceptions may differ from case to case depending on the situation. If harm is anticipated by the disclosure, this harm should be clearly and narrowly defined. This is only in the public interest and to avoid harm in the public interest. There should be some clear rules to avoid the abuse of this exception.

3.2.1.5 Process to Facilitate Access

The process to acquire information should be quick and reasonable. If the request for information is refused, it should be reviewed fairly and the reason to refuse the request should be stated in written expressing reason(s) clearly. The requester should have the right, guaranteed by law, to appeal the refusal. The review body should be fair and independent. The authorities should make sure that there should be no external pressure on the person responsible for the disclosure of information.

The process to acquire information is complex in many countries having legislations on access to information. The UN standard put an obligation on the states to “to establish open,

⁷⁶ Ibid

⁷⁷ Claude Reyes and Others v. Chile, 19 September 2006, Series C No. 151, paras. 88-92

⁷⁸ Article 19 is a non-governmental organization that is working for the promotion of the right of expression and access to information.

⁷⁹ <http://www.article19.org/pdfs/standrds/three-part-test/pdf> accessed on 6 May, 2011.

accessible internal system for ensuring the public's right to receive information."⁸⁰ It also refers to follow strictly the time period that should be limited to process the request.

3.2.1.6 Costs

The cost to get a copy of desired information should be equal to the reasonable market price of the copy of the same document. Public bodies should not fix excessive cost to deter the public to make requests for information. There must be a system of monitoring, for the departments of the respective public offices, to control the chances of corruption in this regard. The persons and the bodies that are found indulged in receiving high costs, more than that are fixed by the government for the same, be punished according to the procedure.

On the other hand charging fee to provide requested information is complicated issue. International standards on right to information discuss this issue in detail. The UN standards states as: "the cost of access should not be so high as to deter potential applicants and negate the intent of the law itself."⁸¹ Principle VII of the Council of Europe Recommendations puts an obligation on the authorities that the consultation for the information required should be free of cost and the fee for the copies of the information should be equal to the normal market price for the same. Article 4[8] of the Aarhus Convention states the rule to charge fee as follows:

"Each party may allow its public authorities to make a charge for supplying information, but such charge shall not exceed a reasonable amount. Public authorities intending to make such a charge for applying information shall make available to applicants a schedule of charge which may be levied, indicating the circumstances in which they may be levied or waived and when the supply of information is conditional on the advance payment of such charge."⁸²

The question of fees varies in different systems of law. It is the duty of legislature to take this question in consideration while legislating for the public's access to information.

⁸⁰ Supra note 72.

⁸¹ Ibid.

⁸² Article 4(8) Aarhus Convention

3.2.1.7 Open Meetings

Public bodies should organise open meetings. Government should make sure to establish meeting, or measures should be taken to make public aware of the contents of the meeting.

The meetings that are in the public interest, their contents should be published or broadcasted.

There should be no secret points in these meetings. There should be a procedure available for the people and civil society organizations, to demand the details of meetings, which are interested to know the contents of the meetings that may include the minutes of meeting.

The idea of open meeting is included in the ARTICLE 19 principles. The UN Standard states in this regard as, "The law should establish a presumption that all meetings of governing bodies are open to public."⁸³ Some countries of the world have separate legislation on this issue.

3.2.1.8 Disclosure Takes Precedence

The countries are duty bound to address the issue of exception to the right to access information as international law does not states that how the countries implement its rules in terms of this right as well as of other human rights. Besides this many states have laws for secrecy in state affaires which are not according to the standards laid down by international statements so a practical mechanism to address this problem is strictly needed.

However this problem can be solved by establishing a law that wherever there is a conflict between access to information laws and secrecy laws, the access to information law should take precedence and where the conflict is of serious nature, the access to information law should override the secrecy law.

If there is a law that restricts the public's right of maximum disclosure, such law should be repealed or amended. The law should be interpreted in the manner that is consistent with laws ensuring access to information. Such laws that restrict the disclosure of certain information

⁸³ Supra note 73.

should be reviewed fairly and be amended to facilitate the people to acquire their right to access information.

3.2.1.9 Protection of Whistle Blowers

As whistle blowers are the people who make the common public aware of the misdeeds and wrong doings of their government and other autonomous bodies, so they may be at risk of retaliatory acts. There should be active and effective legislation for their protection. Such legislations should have effective implementation process. If their rights are infringed or they are seduced for retaliatory acts, remedies should be available to them.

Many countries provide protection to individuals who release information. By providing protection we can protect the flow of information about the wrong doings of the authorities.

The UN standard states that, "an individual will be protected from any legal, administrative or employment related sanctions for releasing information on wrong doings."⁸⁴ Here wrong doing is defined as "commission of criminal offence and dishonesty, failure to comply with a legal obligation, a miscarriage of justice and serious failure in the administration of a public body."⁸⁵

3.2.2 United Nations Convention against Corruption

In October 2003 General Assembly approved Convention against Corruption and adopted it in December 2005 when 30 member states ratified it.⁸⁶ Article 10 of the convention states that to fight the corruption, best practices towards the access to information laws are to be adopted. This article addresses to the state parties to take steps "as may be necessary to enhance transparency in its public administration, with regard to its organization, functioning and decision-making processes."⁸⁷ It states to allow the members of the general public to

⁸⁴ Supra note 71.

⁸⁵ Ibid.

⁸⁶ UN Convention against Corruption. http://www.unodc.org/unodc/en/crime_convention_corruption.html

Accessed on 07 August, 2009.

⁸⁷ Ibid. Article 10.

access information on decision making and functioning of the public administration. The competent decision making authorities are advised to adopt appropriate and simple administrative procedures to facilitate the public access to the decision making authorities. The information including periodic reports should be publishing to avoid the possible risk of corrupt practices on part of officials.⁸⁸

Active participation of the public is much important to curb the corruption in state affairs. By active participation the public have a chance to access the information that is meant to the general interest of the public. Article 13 of the convention states it in the following word,

“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.”⁸⁹

This convention is signed by more than 140 states and ratified by more than 60⁹⁰ states and many of them have adopted national law for the Access to Information.

3.2.3 Rio Declaration/UNECE Convention on Access to Environmental Information

The Rio Declaration on Environment and Development gathered the states on the question of access to information. It was aimed to improve the public participation and best practices with regard to access to information. Principle 10 of the declaration states as,

“Environmental issues are best handled with the participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided.”⁹¹

United Nations Economic Commission on Europe started working on the promotion of access to environmental information and participation in 1991. The UNECE Convention

⁸⁸ Ibid.

⁸⁹ Ibid. Article 13

⁹⁰ www.unodc.org/unodc/en/crime_signatures_corruption.html Access on 10 November 2009

⁹¹ Rio Declaration on Environment and Development, Rio de Janeiro, 3-14 June 1992.

www.un.org/documents/ga/conf151/aconf15126-1annex1.htm Access on 10 November 2009

on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters was approved by the General Assembly in June 1998 and came to force in October 2001. Article 4 of the convention addresses the nations to adopt the laws that allow the people to demand information. Such information may include any kind of documents regarding the environment. The information on the environment may include such information that is regarding the effects of environment on human health. A detailed procedure and measures are included in the convention to guide the nations to legislate in this regard. The information demanded should be accessed by the public without showing any legal interest in the information so demanded.

3.2.4 International Covenant on Civil and Political Rights, 1966

This covenant is a treaty of United Nations having provisions from UDHR. Article 19(2) deals with right to information. It reads as;

“Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and the 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 choice.”⁹²

This covenant borders the scope of right to access information but it also put some restriction or exceptions. The information for the prejudicial purposes, either to defame someone or to infringe the popularity of someone is not in the scope of this article. The information whose release is fatal for the public order or against public security i.e. security installations, is also exempted from the scope of this article.⁹³

This covenant recognizes the rights as derived from the inherent dignity of the human being so all the member state come under the obligation not to infringe these rights. The denial of information held by the government is highly condemned under the umbrella of this article.

⁹² Article 19(2), International Covenant on Civil and Political Rights (ICCPR) 1966,

⁹³ Ibid Article 19(3).

3.2.5 The Aarhus Convention

This convention is the treaty of United Nations Economic Commission for Europe, adopted in 1998 in Aarhus a city of Denmark due to which it is named Aarhus Convention. By now it is ratified by the United Kingdom and the European Union. It puts stress on the access to information about the environment and the decisions about it. It puts an obligation on the public bodies to reveal the information about the environment to make the common man aware of its surroundings. It also says the states to adopt a simple and transparent procedure in this regard.

Article 4 and 5 of the convention deal with the access to information in both aspects i.e. the obligation of the public bodies to reveal information and to give positive response to the requests for information as well as the collection of environmental information and its dissemination to the common public by the public bodies. Article 4 speaks about the reactive aspect i.e. the response to the request lodged to access information. If the information is not falling in the list that is excluded, the public authorities are under an obligation to provide the information that is demanded by an individual. Everyone can request the access to information without giving the reason for the access under this convention.

The convention also put an obligation to the public bodies to provide requested information as soon as possible. The maximum time period to provide information is one month after the submission of request for the information. The duration may extend to the next month if there is justified reason for the same. The public bodies are required to notify such delay to the requester.

This convention has broadened the scope of the environmental information by the inclusion of written, visual, aural and electronic information in the definition of the information. The public bodies are required to provide the information in the format demanded by the

requester. The cost can be charged that should not exceed the reasonable cost levied for the same.

The information is withheld on the basis of public interest, where it may harm the international relations and public security. The public authorities are addressed to justify the cause for the exemptions to save the provisions from misuse as well as misinterpretation. If the requester demands the refusal and the reason for such doing should be given in written form.

Article 5 puts an obligation on the public bodies to possess up to dated information relevant to their functions and duties. It also says to adopt simple procedure to keep the information in order to make it accessible. Further this convention obligates to provide the information proactively by internet and other ways that the people can access more easily.

3.3. The African Union

Right to seek and receive information is contained in the article 9(1) of the African Charter on Human and People's Rights. It states that "Everyone shall have the right to receive information."⁹⁴ The African Commission on Human and People's Rights viewed about the information held by the public bodies in 2002 that "public bodies hold information not for themselves but as custodian of the public good and everyone has a right to access this information."⁹⁵

The information held by the public bodies as well as by the private bodies is subject to access by the people under the provisions of Declaration of Principles on Freedom of Expression in Africa, provided that, this information is necessary to ensure a human right.

In South Africa private bodies are also under obligation to disclose information that is needed to protect any right. Principle IV (2) of African Declaration states: "Everyone has the right to

⁹⁴ Article 9(1), African Union (1981), Charter on Human and People's Right.

⁹⁵ African Commission on Human and People's Rights, (2001) *Resolution on the Adoption of the Principles on Freedom of Expression in Africa*, Resolution 54(XXIX).
www.achpr.org/english/declarations/declaration_freedom_exp_en.html accessed on 10 November 2009

access information held by private bodies which is necessary for the exercise or protection of any right".⁹⁶ States are bound to legislate for the human rights obligations. The judiciary is duty bound to interpret the enactments in terms of the protection of human rights. Though this declaration is not binding but being the representative of the will African population it contains persuasive force.

Article 9 of The African Union's Convention on Preventing and Combating Corruption requires that "legislative and other measures to give effect to right of access to any information that is required to assist in the fight against corruption and related offences."⁹⁷ If the information is concealed from public the culture of secrecy is promoted that give rise to corruption in the affairs of the state. The article is focused that the access to information can play a better role to promote political, social and cultural stability.

African Declaration also supports the international standard that puts the obligation to publish important information. Principle IV (2) states that, "public bodies shall be required, even in the absence of a request, actively to publish important information of significant public interest."⁹⁸ this principle states further that, "secrecy laws shall be amended as necessary to comply with freedom of information principles."⁹⁹

The Declaration does not stop here, it also protects the whistleblowers; African Declaration states it in these words.

"No one shall be subject to any sanction for releasing in good faith information on wrong doing, or that which will disclose a serious threat to health, safety or the environment save where the imposition of sanctions serves a legitimate interest and is necessary in democratic society."¹⁰⁰

⁹⁶ Principle IV (2), Declaration of Principles on Freedom of Expression in Africa
http://www.achpr.org/english/declarations/declaration_freedom_exp_en.html accessed on 10 November 2009

⁹⁷ Article 9, African Union (2003) *Convention on Preventing and Combating Corruption*. www.africa-union.org/official_documents/treaties_%20conventions_%20protocols/conventions/combating_corruption.pdf
Accessed on 10 November 2009

⁹⁸ Ibid.

⁹⁹ Ibid.

¹⁰⁰ Ibid.

3.4 The Organization of American States

The Organization of American States has recognized the right to access information on various occasions. The General Assembly passed a resolution stressing the member states to adopt laws to ensure the right to access information.¹⁰¹ Article 13(1) of the Inter-American Convention on Human Rights recognizes the “freedom to seek receive and impart information and ideas” derived from the freedom of thought and expression.¹⁰² The article reads as follows,

“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.”¹⁰³

The Inter American Court of Human Rights on an advisory opinion on “Compulsory Membership in an Association Prescribed by Law for the practice of Journalism”¹⁰⁴ stated that “a society that is not well informed is not a society that is truly free.”¹⁰⁵ This advisory opinion made the court the first international tribunal that recognized the right to access information as fundamental human right. The court was of the opinion that Article 13 of the American Convention on Human Rights was violated by Chile, and Chile was ordered to adopt an effective legal mechanism to ensure the free flow of the information that is held by the government bodies and the requests made in this regard should not be denied.¹⁰⁶

Inter-American commission on Human Rights has recognized the right to access information as fundamental human right. In 1999 annual report of the commission stated as follows.

“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

¹⁰¹ The Organization of American States, Resolution AG/RES.2057(XXXIV-O/04)

¹⁰² Article 13(1), Inter-American Convention on Human Rights.

¹⁰³ Ibid.

¹⁰⁴ *Claude Reyes vs. Chile* (2006) Case No. 12.108 p.6 www.article19.org/pdf/cases/claude-v-chile-commission-pdf accessed on 10 November 2009

¹⁰⁵ Inter-American Court of Human Rights, Advisory Opinion OC-5/85, Inter-Am. Ct. H.R. (Ser. A) No. 5 (1985) para. 70.

¹⁰⁶ Ibid.

his or her representatives that belongs the right to information that the State uses and produces with taxpayer money.”¹⁰⁷

The Declaration of Principles on Freedom of Expression was adopted by the American Commission of Human Rights in 2000. The declaration includes right to access information in principle 4 as follows,

“Access to information held by the state is a fundamental right of every individual. States have the obligation to guarantee the full exercise of this right. This principle allows only exceptional limitations that must be previously established by law in case of a real and imminent danger that threatens national security in democratic societies.”¹⁰⁸

Under this principle state is under obligation to provide the access to information to everyone as a fundamental human right.

Since 2003 the OAS General Assembly has been annually adopting resolution for access to public information. These resolutions take the member states under obligation to respect the peoples’ right to access information.

The Declaration of Nueva Leon was adopted in 2004 by OAS that states the heads of states as follows.

“Access to information held by the State, subject to constitutional and legal norms, including those on privacy and confidentiality is an indispensable condition for citizen participation and promotes effective respect for human rights. We are committed to providing the legal and regulatory framework and the structures and conditions required to guarantee the right of access to information to our citizens.”¹⁰⁹

3.4.1 Chapultepec Declaration

Inter American Press association that is a regional NGO working for freedom of expression conducted a conference on freedom of speech named Hemisphere Conference. This declaration was a set of principles that was adopted at the conference.¹¹⁰ This declaration recognizes the access to information as a fundamental human right that compels the authorities to adopt the mechanisms that are meant to ensure the right to access information

¹⁰⁷ Annual Report of the Inter-American Commission on Human Rights 1998, Volume III, Report of the Office of the Special Rapporteur for Freedom of Expression, 16 April 1999.

¹⁰⁸ Principle 4, Declaration of Principles on Freedom of Expression
<http://www.cidh.oas.org/Basicos/principles.htm> access on 10 November 2009

¹⁰⁹ Declaration of Nueva Leon, 13 January 2004
www.iica.int/cumbers/cumbresdíasamericas/declaracionleon_eng.pdf access on 10 November 2009

¹¹⁰ Chapultepec Declaration, 1994. www.declaraciondechapultepec.org/english/declaration_chapultepec.htm accessed on 10 November 2009

to the common public. This declaration creates no legal obligation but Dr. Santiago Canton¹¹¹ noted that “it is receiving growing recognition among all social sectors of our hemisphere and is becoming a major point of reference in the area of freedom of expression.”¹¹² This declaration is signed by more than 30 countries as well as many prominent persons have also signed the Declaration.¹¹³

3.4.2 Inter-American Court of Human Rights

In 1985 Inter-American Court while giving an advisory opinion interpreted Article 13 of the Inter-American Convention on Human Rights. The court was of the opinion that the right has dual nature under this Article. It protects the right to impart as well as to receive information held by the public bodies. It was of the view that,

“Article 13 establishes that those to whom the Convention applies not only have the right and freedom to express their own thoughts but also the right and freedom to seek, receive and impart information and ideas of all kinds.... [Freedom of expression] requires, on the one hand, that no one be arbitrarily limited or impeded in expressing his own thoughts. In that sense, it is a right that belongs to each individual. Its second aspect, on the other hand, implies a collective right to receive any information whatsoever and to have access to the thoughts expressed by others.”¹¹⁴

Proceeding further on the issue the court delivered 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, a society that is not well-informed is not a society that is truly free.”¹¹⁵ This statement gives a solid ground for recognizing the right to access information held by the public bodies as a right enforceable by law.

On 19 September 2006 the court held that the general guarantee rendered by Article 13 of the convention for freedom of expression protects the right to access information that is held by the government. The court stated as,

“Convention, in guaranteeing expressly the rights to “seek” and “receive” “information”, protects the right of every person to request access to the information under the control of the

¹¹¹ Dr. Santiago Canton is the OAS Special Rapporteur for Freedom of Expression.

¹¹² Supra note 102.

¹¹³ www.declarationdeci.org/eng/presidential_sign.html accessed on 10 November 2009

¹¹⁴ Inter-American Court of Human Rights, advisory opinion, “*Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism*”, Advisory Opinion OC-5/85, 13 November 1985, para. 30.

¹¹⁵ Ibid. para. 32

State, with the exceptions recognised under the regime of restrictions in the Convention. Consequently, the said article encompasses the right of individuals to receive the said information and the positive obligation of the State to provide it, in such form that the person can have access in order to know the information or receive a motivated answer when for a reason recognised by the Convention, the State may limit the access to it in the particular case. The information should be provided without the need to prove direct interest or personal involvement in order to obtain it, except in cases in which a legitimate restriction is applied."¹¹⁶

The quotation above clarifies that the right to access information arises, even if no reason for the same. The court is very clear about the restrictions on the access to information stating that these should be justified by law and the reason for such doing. It is aimed to protect the interest of a common man and for the promotion of democratic culture.¹¹⁷

The court held that the state that has denied the access to information request guaranteed by Article 13 of the convention is duty bound to provide the information demanded to compensate the breach of the right as well as to adopt the necessary measures to guarantee the right to access information by national legislation and the officers who are to accommodate this right should be trained in this respect.¹¹⁸

3.5 Council of Europe

Council of Europe is a treaty based inter-governmental organization. It is composed of 47 member states that have the aim to promote human rights as well as access to information as it has recommended to its member states to ensure the right of the people to access information. One of the important documents of the council to ensure human right includes the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR).¹¹⁹ This convention guarantees the right to access information and freedom of expression as fundamental human right. The political bodies have taken further steps to strengthen the right to access information. In 1981, recommendation No. R (81)19 on Access to Information was adopted by the Committee of ministers of the Council of Europe, that is

¹¹⁶ Claude Reyes and Others vs. Chile, 19 September 2006, Series C No. 151, para. 77
www.corteidh.or.cr/docs/casos/articulos/seriec_151_ing.doc accessed on 22 November 2010

¹¹⁷ Ibid. para. 88

¹¹⁸ Ibid. para. 174

¹¹⁹ ECHR was adopted on 4 November 1950 and came into force on 3 September 1953.

composed of the ministers of the foreign affairs of the member states, which stated as “Everyone within the jurisdiction of a member state shall have the right to obtain, on request, information held by the public authorities other than legislative bodies and judicial authorities.”¹²⁰ In 1993 convention on environmental protection was proposed by the committee that also demanded the access to environmental information.¹²¹

4th European Ministerial Conference on Mass Media Policy was held in 1994. This was recommended to the committee of the ministers to “preparing a binding legal instrument or other measures embodying basic principles on the right of access of the public to the information held by public authorities.”¹²² Recommendation for the member states to facilitate the right to access information was approved by the Council of Ministers in 2002.¹²³ This recommendation lays down the complete mechanism to adopt national law to respect people right to access information; it also lays down that these right amounts to access the official documents that are in the custody of the authorities. These recommendations are clearer about the procedure to request for the information as well as the possible exclusion.

The European court of Human Rights refused to guarantee general right to access information under Article 10 of ECHR¹²⁴ that speaks of the right to access information, rather it guaranteed the right to access information under Article 8 of the convention, which speaks of personal privacy. The court argued that the “right to access information emerges when personal privacy affects the general well-being.”¹²⁵ This persona privacy amounts to the information about a particular person held by the government or by the intelligent agencies.

¹²⁰ Recommendation No. R (81)19 on Access to Information 25 November 1981, p.2.

¹²¹ Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment, 21 June 1993.

¹²² Declaration on Media in a Democratic Society, DH-MM (95) 4, 7-8 December 1994, para. 16.

¹²³ Recommendation Rec. (2002)2 of the Committee of Ministers to member states on access to official documents.

¹²⁴ *Sîrbu and Others v Moldova ; Leander v. Sweden* judgment of 26 March 1987, Series A no. 116

¹²⁵ *Guerra and others v. Italy*, 116/1996/735/932.

The request to access information can be denied in public interest as is recognized by Council of Europe Recommendations. Principle IV (2) states:

"Access to document may be refused if the disclosure of the information contained in the document would or would be likely to harm any of the interests mentioned in paragraph 1 unless there is an overriding public interest in disclosure."¹²⁶

3.6 The European Union

The European Union has not put a general obligation on the member states to adopt the access to information legislation. But the European Union has adopted directives to adopt the access to information practice in different areas. A directive is considered by the European Parliament to provide the required data to the public free of cost.¹²⁷ The directive on access to environmental information that was directed in 1990 urged the member states to adopt national access to information legislation, till now nearly all member state has legislated to guarantee this right.

The European Union treaties demands the member state to abide by the right to access information that may include any information or document held by the government. It further recommends the rules for the protection of data that facilitate the public demand of the access to information. Article 255 of the Treaty of European Union states this as follows.

"1. Any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, shall have a right of access to European Parliament, Council and Commission documents, subject to the principles and the conditions to be defined in accordance with paragraphs 2 and 3.

2. General principles and limits on grounds of public or private interest governing this right of access to documents shall be determined by the Council, acting in accordance with the procedure referred to in Article 251 within two years of the entry into force of the Treaty of Amsterdam.

3. Each institution referred to above shall elaborate in its own rules of procedure specific provisions regarding access to its documents."¹²⁸

The Charter of Fundamental Rights of the European Union¹²⁹ guarantees the right to access information in Article 42 that empowers a citizen to demand information that is held by the institutions of the European Union. The Article states that "any citizen of the Union, and any

¹²⁶ Principle IV(2), Council of Europe

¹²⁷ Infrastructure for Spatial Information in Europe www.inspire.jrc.it Access on December 2011

¹²⁸ Article 255 of the Treaty of the European Union.

¹²⁹ Adopted on 7 December 2000.

www.consilium.europa.eu/uedocs/cms_data/docs/2004/4/29/Charter%20of%20fundamental%20rights%20of%20the%20European%20Union.pdf. Access on December 2011

natural or legal person residing or having its registered office in a Member State, has a right of access to European Parliament, Council and Commission documents.”¹³⁰ This shows that the European Union is Committed toward the right to access information and is implementing the mechanism and regulation to provide the access thereof.

The Council of Europe’s Steering Committee on Human Rights (CDDH) adopted the Convention on Access to Official Document at Strasbourg in March 2008. The convention is criticised as it does not match the international standards and the standards lay down by the Inter-American Court of Human Rights.¹³¹

3.6.1 The European Court of Human Rights

The issue of right to access information was looked by the European Court of Human Rights in many cases. The cases which claimed the right to access information were based on Article 10 of the European Convention on Human Rights (ECHR). But the court held that Article 10 that guarantees the freedom of expression, not always guarantees the right to access information. In *Leander vs. Sweden*¹³² the Court stated the issue as,

“The right of freedom to receive information basically prohibits a Government from restricting a person from receiving information that others wish or may be willing to impart to him. Article 10 does not, in circumstances such as those of the present case, confer on the individual a right of access nor does it embody an obligation on the Government to impart information to the individual.”¹³³

It does not mean that the right to access information is always denied under Article rather it depends on the circumstance of the case as is obvious from the statement above. The same thing was adopted by the court in *Roche vs. United Kingdom*¹³⁴ saying “It sees no reason not to apply this established jurisprudence.”¹³⁵ The court held that the denial of the right to access

¹³⁰ Article 42, The Charter of Fundamental Rights of the European Union.

¹³¹ Freedominfo.org (2008), “*Council of Europe ducks open government advocates' calls for reform; adopts weak convention on access to information that falls short of international standards*”, 4 April 2009 www.freedominfo.org/news/20080402.html accessed on 12 May 2009

¹³² *Leander vs. Sweden*, the European Court of Human Rights, 26 March 1987. (Case no. 10/1985/96/144)

¹³³ *Ibid.* para. 74.

¹³⁴ *Roche v. United Kingdom*, the European Court of Human Rights, 19 October, 2005 (Application no.32555/96)

¹³⁵ *Ibid.* para. 172

information was the denial to the private or family life that is guaranteed by the Article 8.¹³⁶

The court was of the opinion that "the storage and use of the information, coupled with a refusal to allow the applicant an opportunity to refute it, was an interference with his right to respect for private life. The interference was, however, justified as necessary to protect Sweden's national security."¹³⁷

In *Gaskin vs. the United Kingdom* the Court held that,

"The applicant had a right to receive information necessary to know and understand his childhood and early development, although that had to be balanced against the confidentiality interests of the third parties who had contributed the information. Significantly, this placed a positive obligation on the government to establish an independent authority to decide whether access should be granted if a third party contributor was not available or withheld consent for the disclosure. Since the government had not done so, the applicant's rights had been breached."¹³⁸

So it was stated that the government was duty bound to decide grant the access to information in particular circumstance as well as where it was the need of the time.

In *Guerra and Ors. vs. Italy* the applicant lived near a chemical factory. He claimed that the local authorities of Italy have not provided them the information about the risk to the environment as well as to the human life and health from the wastes discharged by the factory. The court was of the opinion that,

"Severe environmental problems may affect individuals' well-being and prevent them from enjoying their homes, thereby interfering with their right to private and family life. As a result, the Italian authorities had a positive obligation to provide the applicants with the information necessary to assess the risks of living in a town near a high risk chemical factory. The failure to provide the applicants with that essential information was a breach of their Article 8 rights."¹³⁹

The decision was significant in nature i.e. it addressed the states to collect the information for the dissemination of such information to the common public in general interest of the public.

¹³⁶ *Sirbu and others v. Moldova*, the European Court of Human Rights, 15 June, 2004 (Application Nos. 73562/01, 73565/01, 73712/01, 73744/01, 73972/01 and 73973/01)

¹³⁷ *Ibid.* para. 48.

¹³⁸ *Gaskin vs. The United Kingdom*, the European Court of Human Rights, 7 July, 1989 (Application no. 10454/83)

¹³⁹ *Guerra and Ors. Vs. Italy*, the European Court of Human Rights.

The decisions of the European Court of Human Rights recognise the right to access information but there is a problem that the court has ruled that its decisions are restricted to the facts of the case so they cannot be used to establish principles.¹⁴⁰

3.7 Asia and the Pacific

Asia and Pacific have not made the regional bodies to set and monitor human rights in the regions but there are other forums to recognize the right to access information. The Asia and Pacific has recognized the right to access information in different agreements rather than recognizing it in treaties related to human rights...

3.7.1 Arab Charter on Human Rights

Arab Charter on Human Rights was adopted in Tunisia at the occasion on summit meeting of Heads of States of League of Arab. Previously a charter was adopted by Arab states in 1994 but it did not come into force because it was not ratified by any member state.

This charter is hailed by United Nations Human Rights Commission and other observers as considerable development over 1994 charter. Article 32 of the Charter, which speaks of right to information, states,

“(a) The present Charter guarantees the right to information and to freedom of opinion and expression, as well as the right to seek, receive and impart information and ideas through any media, regardless of frontiers.

(b) Such rights and freedoms shall be exercised in conformity with the fundamental values of society and shall be subject only to such limitations as are required to ensure respect for the rights or reputation of others or the protection of national security, public order and public health or morals.”¹⁴¹

The charter has not received seven required ratifications to come into force but it is signed by several states.

3.7.2 The Association of South East Asian Nations

The Bangkok Declaration states about the aims and purposes of the Association that it adheres to the principles laid down by the United Nations Charter as well as the article 19 of UDHR that speaks of the access to information.

¹⁴⁰ Supra note 131, para. 37

¹⁴¹ Article 32, The Arab Charter on Human Rights, 1994.

3.7.3 The Asian Development Bank

Organization of the Economic Cooperation and Development say the member states to be committed toward the public's right to access information. The Anti Corruption Initiative's Action Plan states it as,

"To ensure that the general public and the media have freedom to receive and impart public information and in particular information on corruption matters in accordance with domestic law and in a manner that would not compromise the operational effectiveness of the administration or, in any other way, be detrimental to the interest of governmental agencies and individuals..."¹⁴²

3.8 The Pacific

The leaders of 16 Pacific Island nations approved the Pacific Plan to establish good governance for their people. This plan requires the state to develop a mechanism for the access to information.¹⁴³ The Pacific Island Forum Secretariat is on the way to develop a policy for the disclosure of information held by the government. This shows that the importance of the right to access information is recognized by the Pacific.

3.9 The Commonwealth

The Commonwealth is an association of 53 countries. These countries were previously the part of British Empire. In 1980 Commonwealth adopted a resolution for the right access information. It encouraged its member state to enforce this right for the well being of their citizens. It was held that it is important for the democratic process to equip the people with the information held by the government.

In 1999 at the meeting of law ministers of the Commonwealth it was recommended that it was the obligation of the member states to adopt laws for access to information. A number of principles were drawn at this occasion stating, "Freedom of information should be guaranteed as a legal and enforceable right permitting every individual to obtain records and information

¹⁴² Asian Development Bank Organization for Economic Cooperation and Development Anti Corruption Initiative, *"The Initiative's Member Countries and Economies"*, www.oecd.org/document/23/0,3343,en_34982156_35315367_35030743_1_1_1_1.00.html accessed on 18 December 2009

¹⁴³ Point 12.3, The Pacific Plan, (2005): www.pacificplan.org/tiki-page.php?page=homepage accessed on 18 December 2009.

held by the executive, the legislative and the judicial arms of the state, as well as any government owned corporation and any other body carrying out public functions.”¹⁴⁴ These laws should focus at the principle of maximum disclosure, promotion of the open culture, limiting the scope of exemptions, management and maintenance of records and the right of review.¹⁴⁵ This report valued the right to access information as it contained strong principles and guidelines. The report states as,

“Freedom of information has many benefits. It facilitates public participation in public affairs by providing access to relevant information to the people who are then empowered to make informed choices and better exercise their democratic rights. It enhances the accountability of government, improves decision making, provides better information to elected representatives, enhances government credibility with its citizens, and provides a powerful aid in the fight against corruption. It is also a key livelihood and development issue, especially in situations of poverty and powerlessness.”¹⁴⁶

The Commonwealth principles were adopted taking in consideration this report. These principles are not comprehensive as compared to the international standards laid down by the United Nations.

3.9.1 Reluctance of Commonwealth States for Access to Information

The governments and bureaucracies of the Commonwealth states are reluctant to adopt the culture of openness in the affairs of the state. Working on the traditional system the tribal leaders and high officials of bureaucracy are often considered immune from accountability.

Commonwealth Human Rights Initiative, an NGO, conducted a study that stated as,

“A culture of secrecy permeated government, and systems to keep information from the public became embedded. Today, except in a handful of countries, governments enthusiastically retain and indeed embrace these symbols of supremacy as if there has been no intervening change from colonial to constitutional governance. Official secrets acts, preventive detention and anti-terrorist legislation, criminal defamation laws, overly indulgent contempt and privilege laws, media and privacy regulations and restrictive

¹⁴⁴ Promoting Open Government, “*Commonwealth Principles and Guidelines on the Right to Know*”, background paper for the Commonwealth Expert Group Meeting on the Right to Know and the Promotion of Democracy and Development (London: 30-31 March 1999).
www.humanrightsinitiative.org/programs/ai/rti/international/cw_standards/commonwealth_expert_grp_rti_99-03-00.pdf Accessed on 18 December 2009.

¹⁴⁵ Communiqué issued by the Meeting of Commonwealth Law Ministers at the Port of Spain, Trinidad and Tobago, May 1999.

¹⁴⁶ Promoting Open Government: “*Commonwealth Principles and Guidelines on the Right to Know*”, (1999) Commonwealth Expert Group Meeting on Right to Know and the Promotion of Democracy and Development. 30-31 March
www.humanrightsinitiative.org/programs/ai/rti/international/cw_standards/commonwealth_expert_grp_rti_99-03-00.pdf Accessed on 18 December 2009

civil service rules all remain very much intact. In truth, so many laws that protect and enshrine secrecy have been accumulated that bureaucrats now often just play it safe and simply keep every piece of paper confidential. In Kenya, for example, a file full of nothing more than newspaper cuttings was observed as marked "very confidential" and access to it denied without the permission of the permanent secretary."¹⁴⁷

The study proves that the secrecy is based on nothing but the will of bureaucracy that plays in accordance with its wishes and often to conceal its misdoings.

¹⁴⁷ www.humanrightsinitiative.org/publications/chogm/.../default.htm Accessed on 18 December 2009

CHAPTER 4

4. Right to Access Information in Pakistan

The history of access to information legislation in Pakistan has been discussed in chapter 1. In this chapter the laws that restrict the free flow of information or aimed to provide access to information in Pakistan will be reviewed. As it is discussed earlier that right to access information was not guaranteed in the constitution of Pakistan earlier rather it was inserted by 18th amendment in the constitution under article 19-A, which deals with freedom of information. Previously Supreme Court of Pakistan has granted this right to the citizens of Pakistan by the interpretation of article 19 that deals with the freedom of expression.¹⁴⁸

Pakistan has inherited a large number of statutes from the colonial government which were enacted by the colonial government, for the protection of their own interests, ignoring the wishes of Indian people. Unfortunately such laws are implemented by the government of Pakistan without necessary amendments, that were to be done before their implementation, taking in consideration the interests and benefits of Pakistani community. As discussed above these statutes were silent about many important issues that were to be taken in consideration at the time of implementation. Now those statutes will be discussed which deal with the access to information in one way or the other and at the end of this chapter The Freedom of Information Ordinance, 2002 will be reviewed and the state of access to information under this Ordinance will be taken in consideration.

4.1 Code of Criminal Procedure, 1898

Section 99-A of the Code declares certain publications forfeited and authorizes the court to issue a search warrant for such document. This section is wide in scope as “prejudicial to national integrity” is to be determined by the court and is under the discretion of the Judge to decide whether a certain document is prejudicial to national integrity or not.

¹⁴⁸ Nawaz Sharif v. Federation of Pakistan, PLD 1993 SC 473

There are possibilities that certain information about the acts of the government is restricted under this head to deprive the people's right to access information. So it is specifically stated that the information regarding the acts of governments and about the personal conduct of governing people are not prejudicial to the national integrity.

While discussing the ground for the forfeiture of such documents the Sindh High Court gave a verdict as,

"The order itself under section 99-A must contain the ground of forfeiture and not the affidavit filed in support of the order when the order is challenged by the aggrieved person in an application under section 99-B."¹⁴⁹

This verdict clarifies that the order of forfeiture should contain a valid ground for the forfeiture. There is a verdict of Lahore High Court, stating the matter as,

"The federal government's order forfeiting publication should precisely describe how it offends against the law. The matter contained in the publication must be "deliberately and maliciously" intended to insult. An order has to be passed after due care and caution. The order of forfeiture under this section may be passed although no one can be proved to be criminally liable under section 295-A because author believed honestly that the publication did not contain objectionable material."¹⁵⁰

This judgment is very clear in its objective. The order should describes that how certain document is objectionable or against the national integrity, so that the aggrieved person should be satisfied that the forfeiture has sufficient grounds.

It is clear from the above discussion that section 99-A should further be amended and its scope should be narrowed in respect of the document that are not prejudicial to the national integrity and are forfeited only to give a cover to the acts of the government.

On the other hand section 352 of the Code narrates that the courts that are undergoing trials of offences should be open to common public so that people who are interested in the proceeding of the trial may be aware of the proceeding of the trial. But the proviso to the same section empowers the Presiding Judge or the Magistrate to restrict any person from listening the proceedings of the trial at any stage of the trial. Here the thing to be discussed is that the proviso should clearly state the circumstances under which a particular person should

¹⁴⁹ PLD 1961 Kar. 129

¹⁵⁰ PLD 1960 Lah. 629

be restricted from entering into the court room. Supreme Court of Pakistan while interpreting this section stated as,

"It is an essential and salutary principle of administration of justice that it must not only be done but should also appear to be done. This necessarily carries with it the right to an open trial in the full gaze of public, including the press; this in turn leads to a healthy, fair and objective administration of justice circulated to promote public confidence in the court and is conducive to dispel all misgivings about it."¹⁵¹

Open trial builds confidence of the public in Judiciary and upgrades its respect. In such practices people's right to access information is guaranteed and the society comes at the level where right to access information is respected. If a particular person is to be denied the access thereof, the reason for such doing should be clearly stated and the reason so given should have a valid ground.

4.2 The Official Secrets Act, 1923

Pakistan has inherited this law from the colonial government after independence and implemented it with some amendments. This act does not provide the definition of the official secret and the officials have the discretionary powers to arbitrarily decide what is secret and what is available for the public access. This results in the blockage of the information of the ordinary nature. This act has become outdated but the statute books of Pakistan still contain it without necessary amendments. Mere recipient of the official information is an offender under article 5 of the act. Under article 9 a person becomes an offender if he tries to access information that is kept under the cover of official secret. Such inefficiencies should be corrected as the act can be used to punish the political opponents or those who are willing to expose the corruption of the officials.

4.3 The Qanun-e-Shahadat Order, 1984

Articles 6 & 7 of The Qanun-e-Shahadat Order, 1984 restrict the access to information from the unpublished official records and official communications respectively. The information

¹⁵¹ PLD 1979 SC 53 also in NLR 1979 SC 209

so held is on the discretion of the head of department, to be disclosed or not, to the common people.

4.3.1 Information from the Unpublished Official Records for the Purpose of Evidence

Article 6 of The Qanun-e-Shahadat Order, 1984 contains the same provision as that was there in The Evidence Act, 1872 a law that was drafted by the colonial government for Sub-Continent. The explanation to this article is new. Article 6 forbids the unpublished official records for the purpose of evidence relating to the affairs of state. The roots of this article are traced back to the colonial period when culture of secrecy was promoted to deprive the people to become aware of the doings of the government. Surely there are exceptions to the access to information i.e. if the access is prejudicial to the national security the access should be denied but the law should explain the ground for exception and the officer should not be given the discretionary powers to restrict the access thereof. There are many kinds of the affairs of the state and all of them cannot be privileged under this article. If a document contains accusation against a public servant, such document cannot be claimed as matter of state, as was stated by the court as,

“A document containing accusations against a public servant, which he claimed, resulted in his discharge, is not covered by the phrase “matters of state” and is not privileged particularly when the very question to be decided is whether the order of discharge has resulted from an allegation of misconduct.”¹⁵²

The Supreme Court of Pakistan in, while interpreting the phrase, “Affair of the State” stated as,

“the expression “affairs of state” both in England and in this Sub-Continent as applicable in matters relating to evidence, has not earned a liberal meaning to include each and every affair or matter in which the state may be involved. It is always been interpreted in a narrow sense.”¹⁵³

The state may be involve in different kind of matters some of which should be with the consultation of the common people, as the government is considered the care taker of the

¹⁵² PLD 1957 Lah. 17

¹⁵³ PLD 1992 S.C. 492

interests of its subjects. A situation may arise where the evidence from unpublished official records is required to meet the requirements of justice. The subjects have right to access the information held by the government. The public have the right to demand information about the individual and commercial activities of the state and to produce such information to the court of law as evidence, if so required, to make the government answerable about their conduct.

4.3.2 Official Communication

Article 7 of the Qanun-e-Shahadat Order,¹⁵⁴ 1984, contains the same provision as was contained by the section 124 of The Evidence Act, 1872 that empowers a government official not to be compelled to disclose the communications in official confidence concerning the industrial and commercial activities carried on by the federal government or provincial government, as well as the statutory bodies and corporations and companies that are controlled by the government. This is on the discretion of the officer to decide whether the disclosure of the information demanded is against public interest. On the ground laid down by this article any public officer can deny the access to information to the public, that is denial to the internationally protected right to access information.

While interpreting the word “communication” the court stated as,

“Word “communication in official confidence” in this article imports no special degree of secrecy and no pledge for its maintenance but include all matters communicated by one officer to another in performance of duties. This article takes not only communication made by one public officer to another but also any communication made to a public officer in official confidence by a private citizen.”¹⁵⁵

We can say that the communication made in the official confidence by a public officer should have many dimensions. Surely there are some exceptions, which will be discussed in detail under a different head in this chapter, but we can claim, in the light of the above judgment,

¹⁵⁴ Article 7 reads as, “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.

Explanation. In this Article, —communications□ includes communications concerning industrial or commercial activities carried on, directly or indirectly, by the Federal Government or a Principal Government or any statutory body or corporation or company set up or controlled by such Government”.

This provision was contained in The Evidence Act, 1872, since repealed. The Explanation to this article is anew.

¹⁵⁵ 1973 Cri. L.J. 931

that as it is understood that offices held by public officers are for the service of common man and the communication in the made in pursuance of service are for public as well. So if an individual or an organization demands the information for the evidence which is about the conduct of that office or the officer ~~should~~ not be denied.

4.3.2.1 The Question of Transparency

It is necessary that a public servant should act in pursuance of his duties as per the rules and regulations of the service held. Transparency in the government affairs is a paramount that is to be taken in consideration. If a government official is empowered to deny the information held by him, then he will not consider himself answerable by the public, resulting in the possible misconduct that is always fatal for the societies. If the access to information held or the communication made is in the general interest of the public then its denial results in arbitrary and non-participatory decisions by the officials that may cause the collapse of society. The citizens need to access information to ensure transparency in state affair and the suitable use for funds. It is needed to have a look on the activities of the public departments and the way they spend the money on different projects undertaken by them. If the officials are given privilege under the enactments as discussed above there is a chance that such privilege may be used to give a cover to the corruption made by them.

The courts or some autonomous body working in this regard should have the right to decide that the privilege so demanded can be granted or not and the official should not have the right to claim privilege at his own. It was stated by the court as follows,

“The condition precedent to claim under article 7 is that the disclosure of the content of the communication to the public officer must in his opinion be proved to injurious or detrimental to public interest. The court must, therefore apply its mind and peruse each document before disallowing any claim of privilege under this article.”¹⁵⁶

So it is clear that the denial of information to the public results in many kinds of problem and usurpation of the public funds.

¹⁵⁶ Ibid. 935.

4.3.2.2 The Question of Accountability

The culture of secrecy results in the lack of accountability. In Pakistan we can see that many national disasters and financial scams remain hidden from public scrutiny. For example fall of Decca in 1971, the blast in Ogri Camp, the scandal of Cooperative Societies, massive loans from the public sector bank, agreement with Independent Power Producers (IPPs) etc are the massive havocs, the responsible for which are hidden from the eyes of citizens of Pakistan. Commissions and committees were made to investigate these scams but the reports are confidential. While assessing the stance of Pakistan with regard to access to information it is seen that even the parliament is denied information about national security. For example parliament cannot discuss the defense budget.

4.4 The Constitution of the Islamic Republic of Pakistan, 1973

There was no provision about the access to information in the constitution of Pakistan prior to 18th amendment. Article 19 spoke about the freedom of expression and speech that was interpreted by the Supreme Court of Pakistan as freedom of information as discussed in the first chapter.¹⁵⁷ About this situation the Supreme Court of Pakistan stated in the Constitutional Petition 77 to 85/89 commonly called the Memogate Scandal in these words,

“Most petitioners and respondents, and their learned counsels seem to have ignored or glossed over the significance of this major constitutional change. It is an unfortunate facet of our history that during the 64 years since Pakistan’s independence in 1947, the people of Pakistan have been, at times, disserved by a non-inclusive governance paradigm where information critical to them has been withheld from them.”¹⁵⁸

Article 19-A that deals with the freedom of information was inserted in the constitution by the eighteenth amendment in 2010. This Article gives the people of Pakistan the freedom to access information as it states that “Every citizen shall have the right to access to information in all matters of public importance subject to regulation and reasonable restrictions imposed by law.”¹⁵⁹

¹⁵⁷ PLD 1993 SC 473

¹⁵⁸ The Supreme Court of Pakistan, Constitutional Petition 99 to 85/89

¹⁵⁹ Article 19-A, The Constitution of Pakistan, 1973.

This article grants the right to access to information to every individual. This Article finds the significance when particular information is of public interest. The Supreme Court stated that, "The people in quest of the truth have mostly been left with conjectures, rumors and half-truths. Concealment of information has, in turn, led to a distorted history of the country and to a destabilizing division in the polity."¹⁶⁰

According to the Court Article 19-A has contributed to the people's right to access information as,

"Empowered the citizens of Pakistan by making access to information a justifiable right of the people rather than being largesse bestowed by the state at its whims article 19A, enabled every citizen to become independent of power centers which, heretofore, have been in control of information on matters of public importance. ...the principle of law is that the fundamental right under Article 19A is a grant of the Constitution and, therefore, cannot be altered or abridged by a law enacted by Parliament."¹⁶¹

This judgment has clarified that the people have the vested right to know the acts of their government and the functionaries working on its behalf. Now, under Article 19-A this right has become fully justifiable, inalienable and fundamental right as is stated in chapter II of the constitution. While arguing this judgment the opinion of a columnist is worthy to be looked at. He states in these words,

"The legislature, after reading the apex court's judgment elaborating the scope of Article 19A, may feel proud that for the first time it has bestowed on the citizens an unbridled right of access to information. So long as Article 19A is part of the supreme law of the land, nobody, including the apex court, can deny to the citizens their guaranteed fundamental right. There should not be any attempt, as the Court emphasized in his note, to limit or play down the scope of such right "through an elitist construction whereby information remains the preserve of those who exercise state power."¹⁶²

The importance of the right to access information has assumed importance after the said judgment of the Supreme Court of Pakistan. Though The Freedom of Information Ordinance was promulgated in 2002 but it had not any provision of the constitution of 1973 in its support. Now the situation is different as the constitution has recognized access to information as fundamental human right. Arguing this, a columnist wrote,

"The right to information changes all this, rather it challenges all the drawbacks within the system. People now have the right to ask for any information of public interest from state

¹⁶⁰ Ibid.

¹⁶¹ Ibid.

¹⁶² Dr. Ikram ul Haq, "Right to Access Information", *The News*, January 17, 2012

institutions and officials. It also makes it mandatory for public institutions to maintain proper records and publish certain important information for the convenience of people. Through exercising this right, citizens can have access to official records and can challenge any discrepancy. As a result, this will usher in an era of transparency and will promote a more open and interactive relationship between the public and government functionaries. It will also assist in doing away with the colonial era approach of subverting the people and keeping them in the dark regarding official business. Public monitoring of the allocation and utilization of funds and resources will make the continuance of corrupt practices difficult. Citizens will finally have a say in the democratic process and will be able to contribute actively towards strengthening it.”¹⁶³

4.5 The Local Government Ordinance, 2001

This ordinance also includes provisions about right o access information according the activities of the government. The important things to be discussed are as discussed under.

4.5.1. Meeting of Zila Council

Section 42(7) of the Ordinance states that the common people shall have the access to the meetings of the Zila Council in order to know that what decisions are taken and policies made in public interest. For this purpose the meetings will be organized open to common public. This initiative was aimed to bring transparency in the state affairs and to promote the culture of openness. By this way the representatives of public come to the access of common man.

The fact is somewhat different from that is provided by the law as the state of law and order is very poor in Pakistan. It was the need of time that an effective system of implementation as well as independent body to monitor these provisions should have been framed to fulfill the demand of the provision. No such body was formed nor was the well defined rules given for smooth implementation of this Ordinance so the desired results could not be achieved.

4.5.2. Dissemination of Information

Section 76 states that the Union Council Administration will gather the information for socio-economic surveys and will disseminate this information in the general interest of public. Here again, as discussed above, there is no provision that what sources will be used to disseminate this information. Either this information will be published or be disseminated by some other methods. Law should have provided it but it remained silent regarding this issue.

¹⁶³ Gulmina Bilal Ahmad, “Empowering the People”, *Daily Times*, December 09, 2011

4.5.3. Statement of Public Information

Section 114(4) & (5) of the Ordinance states that the local government is under obligation to maintain necessary statement of the accounts and such ~~statement should be placed~~ on a conspicuous place for public scrutiny.

No such reports were made to put the accounts for public scrutiny. However some reports were prepared that were mere creation of official minds not based on factual assessments with regards to the expenditures.

The success of such law is based on the public trainings and awareness. If the public were aware of these provisions, and all other like this, they were in better position to demand there right to access information from district administration under the provisions of this Ordinance.

4.5.4. Citizen's Right to Access Information

Section 137 of the ordinance empowers a citizen to access information of the public interest from the local government administration. This information may include the statement of expenditures, activities and policies undertaken by the local government administration.

This section further empowers a citizen to gather information about the official staff and performance of the office of the local government administration. Such information shall be maintained monthly and be kept at a permanent place for the public access. But unfortunately no such information was maintained and published to be seen by the public.

4.5.5. Comments on the Local Government Ordinance, 2001

The provisions that encourage the right to access information are discussed above but unfortunately these are not fully enforced by the local government administrations in the country. The notification of rules by the provincial governments was needed to implement the provisions that ensure the access to information to the common people but this process remained in abeyance as no such rules were made. The ordinance is silent about the situation

if the government fails to ensure the access to information as provided under section 137. The Ordinance provides the appointment of District Ombudsman, for redress of breach, but so far such Ombudsman is hardly appointed by government in the districts to entertain the grievance applications. Initiatives to make the public aware about these provisions are not taken by the government so only some people are aware about these reforms and requests for the information under these provisions are fewer.

4.6. Pakistan Electronic Media Regulatory Authority Ordinance, 2002

PEMRA ordinance deals with the rules to regulate the conduct Electronic Media that is considered the easiest source to be equipped with information by the public, having a variety of source. This ordinance opens with the phrase “to improve the standard of information”,¹⁶⁴ but there are some things that are to be taken in consideration with regard to the present research. As is hoped, by looking the preamble that open with the promise to information, the ordinance should not pay hurdles to the access to information.

Article 5 empowers the federal government to issue a directive to the Authority (PEMRA), on the matters of policy. The government is to decide that what kind of matters fall under this head. And the federal government is privileged to decide that the directive, aimed at a particular issue that is according to the wishes of the federal government, is to be issued to the authority that is under obligation, as per the provision of article 5 of the Ordinance, to obey the instructions addressed in the directive. This article contain a provision under which the authority may cause to seize the broadcast of certain TV channel in pursuance to stop it from broadcasting a particular information regarding the acts of the government or the acts of its sub-ordinate department.

¹⁶⁴ Preamble to the Pakistan Electronic Media Regulatory Authority Ordinance (PEMRA), 2002.

There is also a provision relating the prohibition of broadcast in The Pakistan Electronic Media Regulatory Authority Cable Television (Operations) Regulation, 2002 under article 21 and 25. Article 21 reads as,

“The authority, or an officer so authorized by the Authority, may, giving reason in writing, prohibit any cable TV operator or a licensee from re-broadcasting or distributing any programme or a specific channel, if the Authority, or as the case may be the officer, is of the opinion that such particular programme or content of the channel broadcast are likely to create hatred among the people or is prejudicial to the maintenance of law....”¹⁶⁵

If a licensee broadcasts the programme that was prohibited by the authority under article 21 then article 25 comes to force authorizing the seizure of the broadcast machinery and the other equipment that was used to the broadcast. Further the officer is given the power to seize the premises where the “offence” was committed. The authority may impose punishment for such acts.

4.7 The Freedom of Information Ordinance, 2002

4.7.1 Introduction

Freedom of Information Ordinance was promulgated by the Government of Pakistan in October 2002. The aim was to reduce the culture of secrecy that prevailed in the state departments from the colonial period. It was also aimed to promote accountability and transparency in state affairs. For the smooth implementation of the ordinance the cabinet division notified freedom of information rules in 2004. This ordinance came to force at once and it remained valid by 17th amendment to the constitution of Pakistan that which identified all orders and ordinances of the military government. Because of this reason, though it is called an ordinance but is applicable as an act passed by the parliament.

Pakistan was the first country of South Asia which promulgated the law for the access to information to provide the citizen access to government held information. At the provincial level Sindh and Balochistan enacted law for freedom of information that is the copies of Freedom of Information Ordinance, 2002. Before proceeding further

¹⁶⁵ Article 21, The Pakistan Electronic Media Regulatory Authority Cable Television (Operations) Regulation, 2002.

4.7.2 Access to Information under this Ordinance

Access to information under this ordinance can be discussed under the following heads.

4.7.2.1 Record and the Maintenance of the Record

Sections 2(i) define “record” to facilitate the access and to lessen the possibility of declare something “not as record”. Record under this section includes printed or written document, any map, diagram, film, microfilm used for official purposes. Further section 4 addresses the officials to maintain the records to facilitate access to information. The rules for the maintenance of the records may be prescribed by the concerned department. This provision is added to the ordinance to ensure the people an easy access to the government held information and minimizing the scope of denial information demanded.

Sections 5, 6 and 7 address to publish, computerize and to declare particular record as public record respectively. Because to access the published record is not difficult in these days as the education rate is higher than it was in previous days. If the information held by the government and the policies of the people welfare are published, every individual of the country have a chance to have access thereof resulting in the best practice of the public consultation for different projects.

On the other hand if the record is computerized, as per the provision of section 6 of the ordinance, the process to access is much easier as the computerized record may easily be available on the internet on website of the concerned department for the public scrutiny. Internet is the facility of the day and is available easily as the mobile networks have started to give access thereof so the information available on the internet can be accessed everywhere in Pakistan.

Section 7 underlies the rule to declare certain records as public records. This record includes, the policies and guidelines by the concerned department in general interest of the public or regarding the affairs of the state. The transactions that involve accusation and disposal of

something and the expenditure thereof are in the realm of public record and subject to be made available to the general public at demand. If a public body has granted a license or has allotted other benefits and privileges or has made a contract or agreement, it to be declared as public record. The final orders or the decisions relating to the members of the public are also included in this category. The federal Government is authorized to declare any record as public record by notification.

4.7.2.2 Official to Accommodate the Request to Access Information

The public body is under an obligation under section 10 of the ordinance to designate an officer whose is duty bound to take requests for the access to information and take all measures to ensure easy access to of the public to the information requested. By the designation of the officer in this regard it is much easier for a common man to go straight to him except going to and fro in vain. If such officer is not designated or he is not available at the seat, the officer incharge of the department is the person to whom the request is to be made. The officer so designated to provide the copy of the record that is demanded for information under section 11 of the ordinance. The access to information under this ordinance is available only to the citizens of the Pakistan.

4.7.3 Exemptions

There are certain types of information that are exempted from the public access under this ordinance. Section 14 restricts public bodies not to disclose the information that is excluded from access under this ordinance. The information exempted from access under this ordinance can be categorized as follows.

4.7.3.1 Prejudicial to International Relation

The information that, if disclosed, would cause serious harm to the interest of Pakistan with regard to the relation with the government of the other state or with the organization of which only states are member. Such information may be excluded from access to avoid the grave

damage that may be caused by the disclosure thereof under section 15 of the ordinance. The officials are not bound, under this ordinance, to disclose such information to the public.

4.7.3.2 Harmful to Law Enforcement

The information that, if it is disclosed, may cause an offence to be committed or may harm the step to be taken in pursuance of an investigation in a case by the official designated for the same are exempted from disclosure. The information that is likely to reveal the identity of a confidential document, whose disclosure is prejudicial to law enforcement, or the information that may cause the escape, for the custody of law enforcing agency are not accessible. There is some information that may harm the security of a system or property is also not subject to access under section 16 of the ordinance.

4.7.3.3 Privacy of Identifiable Individual

If the disclosure of particular information is prejudicial to the privacy of an identifiable individual or the access to mean harm the fame of an individual such information is excluded to be accessed under section 17 of the ordinance. A law does not encourage the practice that is meant to defame an individual by accessing information, the access to which has no public interest.

4.7.3.4 Prejudicial to Economic and Commercial Affairs

If the information about the pre-mature proposals of abolition or variation of tax, duty, interest rate, exchange rate or any other instrument of economic management is disclosed would be likely to cause damage to the economy or the information that if disclosed may cause damage to the financial interest of public body. This also include the information that if is revealed to a competitor of public body may cause damage to lawful commercial activities to undertaken by a public body. On the grounds enumerated above, the ordinance exempts the information that falls in the categories that are discussed above, from disclosure under section 18 of the ordinance.

4.7.4 Implementation of the Freedom of Information Ordinance, 2002

For transparent and accountable governance the importance of right to access information cannot be denied. Government has taken some steps towards the implementation of the ordinance that are listed below.

4.7.4.1 Freedom of Information Rules, 2004

For the effective implementation of a law, rules explaining its implementation procedures are very important. It is common practice in Pakistan that law is made and the procedural matters are left for the official to decide. A clear set of rules facilitates the public to demand their entitlements conveniently and the officials can easily perform their duties as well. After the Promulgation of the Ordinance there was a demand from the individuals and civil society organization to formulate rule for the implementation of the ordinance.¹⁶⁶

The cabinet division notified The Freedom of Information Rules in June 2004. These rules deal with the fee charged for the information,¹⁶⁷ and the procedure to provide the copies of the requested information to the requester.

These rules are silent in respect to the quick handling of urgent requests. The designated officer should have been permitted to accommodate such requests without the waiting period of 21 days.

4.7.5 Weaknesses in Freedom of Information Ordinance, 2002

4.7.5.1 Sphere of Exclusions

The sphere of exclusions is very broad in The Freedom of Information Ordinance 2002, as discussed above, because of which the scope of the ordinance is narrowed down. The aim was to promote the right to access information to strengthen the scope of accountability and

¹⁶⁶ Mukhtar Ahmad Ali, "Implementing Information Law" *The News*, June 3, 2003. Mukhtar Ahmad Ali is the Head of Centre for Peace and Developmental Initiative (CPDI), a civil society organization which led the campaign for the notification of freedom of information rules.

¹⁶⁷ Section 4(1) of the Freedom of Information Rules, 2004.

transparency in the affairs of state. If the public bodies are aware that they are answerable to the people for their deeds and the people have the right to demand the information held by them for scrutiny this may lead to the best practices in the affairs undertaken by them and lessening the scope of misconduct and corrupt practices.

4.7.5.2 Existence of Secrecy Laws

The laws and rules that are aimed to promote the culture of secrecy are still on the statute book, despite the promulgation of the ordinance. It is the need of time to amend or repeal such laws that are meant to conceal information from the public. For example The Government Servants (Conduct) rules, 1964 speaks as follows,

“No Government servant shall, except in accordance with any special or general order of the Government shall 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.”¹⁶⁸

These laws may cause to feel the government officials they are under legal obligation, not to permit access to any information, which they have in their official confidence.

4.7.5.3 Tenure of the Government Officials in a Particular Office

There is no system to secure the tenure of the government officials in a particular office. If the superior authorities are not happy with the officials they are being transferred from their seat of side lined for being not obedient to the superiors. Such official are reluctant because of the reason that if the information requested brought some difficult circumstances for their superiors then they will have a tough time despite the fact that the information given was fair and under the scope of this ordinance.

4.7.5.4 The Culture of Secrecy

The culture of secrecy, in the government department, has deep roots. The shadows of this culture can be seen on laws, official attitudes and practices. It is very difficult to curb this culture as the goal can be achieved by high level commitment and consistency in this regard.

¹⁶⁸ Rule 18, Government Servants (Conduct) Rules, 1964.

The top political leadership should make efforts to transform the culture of secrecy to the openness and accountability. In the absence of the political will and efforts to promote this culture things cannot change. The government should hold trainings and workshops to train the officials to give access to the information to public.

4.8 Freedom of Information Bill, 2008

Freedom of Information Bill, 2008 was proposed by Federal Minister for Information of the Pakistan People Party Ms. Sherry Rehman. Previously, in 2004 Ms. Sherry Rehman, then MNA, proposed Freedom of Information Bill, 2004 to the National Assembly as a private member bill. The aim was to enact a national law on Freedom of Information and to repeal the ordinance of 2002. The bill was not debated in under the government of Pakistan Muslim League (Q). Later, when PPP came to power 2008 bill was proposed by the same member, but then a Minister, to the National Assembly for debate.

4.8.1 Analysis of the Bill

As compared to the existing laws for the access to information in Pakistan, the Bill of 2008 contains many improvements. The provisions are much clear in order to minimize ambiguity for the interpreters. For example the definitions of public records and public bodies are improved. There are provisions for recording the reason for the exclusion of the record from access as well as the classified records to be disclosed after 20 years. The bill also proposed to reduce the process time to 14 days from 21 days.

The bill contains a number of provisions of the Freedom of Information Ordinance, 2002 which this bill aims to repeal. Some provisions are for the improvement of the existing provisions. Such provisions are definition of complainant; maintenance and indexation of records and computerization of records.

This bill does not provide an improved mechanism for processing request to access information. If the bill is enacted into law there is a possibility that the rules to access

information will remain same. The bill should propose some improvements in respect of requests for access to information.

There should be a provision for the protection of whistle blowers in the bill as it was included in the Freedom of Information Bill, 2004. Instead this bill provides indemnity to the officials for the acts done in good faith and in the public interest and the test to determine good faith is missing in this bill. There are many important things which are not included in this bill. For example the requester is not defined. There is nothing to determine public interest. The bill does not speak of the provincial laws after it is enacted into law by the parliament.

Frankly speaking the bill of 2004 was more comprehensive than the bill of 2008. But this is better than the Freedom of Information Ordinance, 2002. The bill includes very substantive improvements than the existing laws. But possibility of misinterpretations prevails due to unclear exceptions. The bill must make reference to provincial Freedom of Information Laws to show that it has been drafted after taking in consideration the ground realities.

4.9 Factors Restricting Access to Information in Pakistan

The laws that deal with the access to information in Pakistan are discussed above. Now some others factors, that are important to be taken in consideration, to form a better law and order situation. These factors are as follows.

4.9.1 Poor Maintenance and Indexation System

There are written instructions for the maintenance and indexation of records. The Secretariat instruction no. 70 provides detailed procedure to maintain records. The instruction no. 53 is about the inspection procedure of the secretariat to monitor the compliance of the instructions. This system is prevailing from decades however the maintenance of the records is neglected in most offices of the government departments. The records rooms are very few to accommodate the whole burden of the record. So the records are randomly kept where the space is available making it difficult to find when required to respond a request for access to

information. The departments which have records rooms do not send records according to the instructions no. 77 to 80.

On the other hand the indexation system of the records is also very poor in the public as well as private offices. In the absence of an efficient indexation system it is difficult to locate a record for public scrutiny. If the indexation system is properly implemented it would be easier for the public bodies to entertain access to information request.

4.9.2 Condition of Equipments and Computerization

The government departments require equipments to disclose the information requested under the laws that govern right to access information. The records of a large number of ministries and departments are not computerized yet to facilitate the access procedure. The officials still rely on the conventional methods of record keeping. Where computers are available the officials are not trained to exchange information via email and a large number of government officials do not have email addresses. Same is the case with the photocopy facilities in the government offices. The existing machines are very few to take up the whole burden of the photocopies causing delay in the official work.

4.9.3 Restrictive Attitude

The requests from the people for the access to information are not taken seriously by the government officials and their attitude is very restrictive, sometimes discouraging a requester for information. The cases where the requested information is provided are very few. A large number of information is withheld and is not provide against the request for access thereof. A very common plea to restrict the request to access information is that the requested information is regarding the official business or it is about the government functions so it cannot be disclosed to the public. Where it is evident that the disclosure will cause to expose the wrong doings of the officials, in such situation the requests are suppressed. Records about the decision making process is kept out of the public access.

The restrictive attitude prevails for different reasons, among them the culture of secrecy and lack of clear rules are important.

4.9.4 Weak Legal Framework

Despite the fact that Pakistan is equipped with the law that ensures access to information, but there are weaknesses in the legal framework in this regard. Right to access information is a constitutional right under article 19-A of the constitution but the implementation and enforcement mechanism is very weak. There is need to formulate rules that are more practical than the existing to enforce and monitor the right to access information. The existing law(s) need to be reviewed to lessen ambiguities and exclusions and to broaden the scope of access to information.

CHAPTER 5

5. Conclusion and Recommendations

Right of access to information is an internationally guaranteed human right that must be ensured by the governments of states by active legislations. All other rights emerge from this right. There are different ways that governments adopt to give respect to this right. By now, more than 90 states have national laws on access to information.

The right is given respect by international Human Rights documents that put an obligation on the governments of the states to legislate as well as ensure this right. International Financial Institutions (IFIs) stress the states to legislate for the smooth implementation of right to access information.

Pakistan has also legislated for the right to access information in order to bring transparency in state affairs. Though Pakistan is the first country in South Asia which has legislated in this respect but the law is not comprehensive as compared to international standards as well as other countries. This law gives access to the official records but the definition of the record is not comprehensive. Everything that may be termed as record should be included under this definition in order to provide better access.

The scope of exceptions is broad in the Ordinance of 2002 that is contradicting to the international standards. The laws that are meant to maintain the culture of secrecy are also in force. The government is required to repeal or amend such laws in order to bring in accordance with the law to access information. Although this Ordinance provides for the publication of certain records but the practice is different from that is provided by the law. Such publications are not available for the public scrutiny because these are published in small numbers and the circulation process is also very poor. Most often these publications gather dust of the record rooms.

The international standards demand the education of the people for the right to access information. Unfortunately this practice is not established in Pakistan. There are some civil society organizations in Pakistan that are working for this right. But the goal cannot be achieved without the support of the government. Government of Pakistan do not look serious for taking such steps that can bring awareness among the people.

Finally it can be assessed that the Ordinance of 2002 is not comprehensive to provide access to the information that is needed by the people for better contribution in the democracy. The parliament should consider this issue and is required to hold debate for the improvement of the law to access information. There are some recommendations at the end of this study that are meant to bring improvements to the existing law on access to information in Pakistan.

5.1 Recommendation for Improvement

There are some recommended improvements that if made can enhance the culture of openness and access to information.

5.1.1 Parliament

1- Parliament and the Provincial Assemblies should form committees to oversee the process of implementation of the legislation to provide access to information. An annual report of the activities of the parliament should be published. These reports would be helpful to serve as a useful crossing point between Parliament and the public and also bring to light the performance of these legislatures which is otherwise not available to the public.

2- Parliament should also address the issue of proactive dissemination of information and the media should not be denied access to the documents and materials that is meant to be exposed to the public. Parliamentary press gallery should be strengthened to disseminate the information proactively.

3- The laws that are conflicting with Access to Information Laws should be repealed or amended to promote the culture of openness. Existing media laws should also be taken in

consideration and the parliament should also consult the civil society organizations to make policies for the promotion of media laws with regard to dissemination of information.

4- Independent arbiters should be appointed to monitor the implementation of the legislation.

These arbiters should also be powered to adjudicate the conflict.

5- The officials should be given trainings to make the access procedure easier.

6- The Provincial legislatures should take steps to pass Access to Information Laws for the provincial governments and their departments.

7- Every official file carry a tag of confidential, restricted or secret may be subject to review by the Parliamentary Committee.

8- The parliament should debate, while promulgating the law to access information, the financial implications and human recourses.

5.1.2 Government Departments

1- Important official meetings should be open to the journalists and the representatives of civil society organizations. In exceptional circumstances such meetings should be declared closed door and the reason for such doing should be recorded in writing.

2- Institutions and ministries of the federal and provincial governments must be under an obligation by the law to share maximum information proactively.

5.1.3 The Access to information legislations

1- The exception should be minimised and narrowly defined. All other information and documents, such as noting on the files and minutes of meetings be declared as public documents.

2- The exception should not be absolute rather the law should provide the procedure to determine whether the disclosure should be in public interest or not.

- 3- The implementation mechanism should provide penalties for the officers who are responsible for the denial, damage and destruction of the requested information. Unfair delay should also be questionable.
- 4- Government departments should under an obligation to publish annual reports for the public scrutiny.
- 5- The law should contain a provision for the protection of whistle-blowers.

5.1.4 Donors and IFIs

Donors and International Financial Institutions (IFIs) should stress on the government to enact a good and comprehensive law for Access to information.

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