Analyzing the Applicability of Right of Information as a Fundamental right in the Context of State Institutions

Saadat Ali Nadeem

Ph.D Law Scholar, Department of law, Islamia University of Bahawalpur Email: miansaadatali@yahoo.com

M Muneeb Raza

(Corresponding Author) Lecturer Law, Islamia University of Bahawalpur Email: m.muneebraza@gmail.com

Syed Wajdan Rafay Bukhari

Lecturer, Deputy Director Students Affairs, College of Law, University of Sargodha

Email: wajdan.rafay@uos.edu.pk

Abstract

Every citizen shall have the right to have the access to information in all matter of public importance subject to regulation and reasonable restrictions imposed by law. RTI laws have become a symbol of a country's commitment to good governance. Good governance means that there are fair laws, rules and regulations which are enforced impartially. This paper examines the legal frameworks of Right to Information Laws in Pakistan, and whether these have achieved the intended purpose of transparency, open government, and good governance. Furthermore, it investigates the challenges and limitations faced by individuals in exercising their freedom of information, considering factors such as security concerns, administrative restrictions, and societal norms. It delves into the legal context of right to information in Pakistan and evaluates their interpretation and application through various offices. This research paper examines the legal structure and summarizes freedom of information in Pakistan, by analyzing the provisions of constitutions, case laws, and various statutes in Pakistan.

Keywords: Governance, Right to information, Pakistan, Good Governance, Freedom of information

Introduction

The terms 'Right to Information' (RTI) 'and Freedom of Information' (FOI) are interchangeably used but the underlying meaning is the same. — **to have the ability to access information.** 'Information' as a term has been derived from the Latin words 'Formation' and 'Forma' which means giving shape to something and forming a pattern, respectively. However, the word information in these terms is used in a certain context. It denotes to that information which is held by the government. The information held by the

government belongs to the people and the government and its functionaries are custodians of this information for the time being. It belongs to the people because it is primarily the sum total of a collection of facts about the people and the country.

However, it does not necessarily mean that the government can deny access to information to the public by merely referring to any of these areas. That is why there have evolved internationally the principles or best practices pertaining to the issue as to how the information sharing process should be handled. A public body has to put in writing as to why requested information cannot be provided and bear the burden of proof in front of an appellate body to establish facts justifying the denial of access to requested.

Concept of Freedom of Information:

The concept of "governance" is as old as when human civilization developed. Simply "governance" means how decisions are made and whether decisions are implemented or not. Governance is not just in state level governments, but there is governance in local governments at the community level, in corporations, and at the international level in international institutions. The United Nations has spelled out eight major characteristics of good governance. It is participatory, consensus oriented, accountable, transparent, responsive, effective and efficient, equitable and inclusive and follows the rule of law. It assures that corruption is minimized, the views of minorities are taken into account and that the voices of the most vulnerable in society are heard in decision-making. It is also responsive to the present and future needs of society (UNESCAP, 2008). Good governance means that there are fair laws, rules and regulations which are enforced impartially. It also requires that human rights are upheld and protected fully. Internationally a strong link between effective RTI laws and good governance has been observed. RTI laws have become a symbol of a country's commitment to good governance. Before 1995 there were only 19 countries with RTI laws. Presently there are 115 countries that have enacted RTI laws. The purpose of these laws is to safeguard the right of citizens to have access to information. In case the government refuses to provide information, then citizens can send in their complaints to dedicated institutions set up for implementation of the RTI law which have the juridical power to hear cases against bureaucratic denial of information.

RTI and Other Basic Rights

The linkage between RTI and other basic rights and freedoms can be found in resolution 59(1), which UN adopted in its very first session in 1946. It stated: 'Freedom of information is a fundamental human right, the touchstone of all the freedoms to which the UN is consecrated'.

What is the logic of attaching importance to access to information to an extent that it is not only regarded as a fundamental human right but it is also identified as a yardstick to measure other freedoms? Why is freedom of information being considered as a touchstone or a benchmark for other rights and freedoms?

This clearly means that there is corresponding link between the ability to exercise the right to information and the level of the quality of life enjoyed by the citizens. In other words, the assumption is that those who have a greater level of access to information have a better quality of life as compared to those who have lesser level access to information. It also means that right to information does not, in itself, guarantee other basic rights. In other words, it empowers citizens to attain their basic human rights.

This leads to another important question. How level of access to information empowers people to attain their basic human rights and vice versa? For example, if people know the total budget of a dispensary or of a school in their area, they will demand corresponding quality in the services. Similarly, if they know the total cost to be incurred on the proposed road in their area, they can create public pressure on their representatives and officials if the quality is compromised because of the kickbacks.

In these examples, we find the linkage of right to information with public accountability and democracy. This is the power of the right to information. **Background.**

RTI is widely regarded as a fundamental human right, and under international law it falls within the scope of freedom of speech. Pakistan is a signatory to the International Covenant for Civil and Political Rights (which covers the freedom of speech), and as such is obligated to provide this right to its citizens. The 1973 Constitution of Pakistan did not recognize access to information as a constitutional right though Article 19 did provide for freedom of speech. Through the 18th Amendment in 2010, Article 19A was included to grant freedom of information and right to information as a constitutional right in Pakistan. The Article 19A reads as: "Right to Information: Every citizen shall have the right to have access to information in all matters of public importance subject to regulation and reasonable restrictions imposed by law". Hence through the Article 19A, right to information, is a constitutional right of all Pakistanis. To actualize this right, various provincial and federal governments have promulgated laws so that citizens have access to public information and can exercise their right to get the information that they need.

Pakistan was the first South Asian country to enact a law on freedom of information, it has passed the Freedom of Information (FOI) Ordinance at the Federal level in 1997. This Ordinance was later revoked and a new Freedom of Information Ordinance was issued in 2002, which has a legal status to this day as it was covered under the 17th Amendment to the Constitution. In 2004, the Freedom of Information Rules 2004 were enforced by the Federal Government, which described the procedural aspect of the Freedom of Information Ordinance. In 2016, a draft of a new federal Right to Information (RTI) bill was proposed by Pakistan's federal government in hopes of replacing the Freedom of Information Ordinance of 2002, but the approval of the bill is still pending.

Before this Ordinance, the issue of public documents was dealt with under the provisions of the Qanoon-e Shahadat Order 1984. Article 85 and 86 define public and private documents, but the purpose of these articles was to facilitate production of documents as evidence in courts, and not for ensuring transparency in the Government, or for granting right of information to the public. Pakistan became the first country in South Asia to have an RTI, when the Federal FOI Ordinance 2002 was promulgated on 26th October 2002. Later on 18th June 2004, the Cabinet Division framed the Freedom of Information Rules to operationalize the law (Centre for Peace and Development Initiatives, 2015). The Federal FOI Ordinance was in force for 12 years before it was repealed and the new law on Right to Information Act 2013 was promulgated. The 2002 FOI Ordinance was a weak law by any standards followed globally on right to information. Besides having many lacunas, it was also not fully implemented. In retrospect, it seems that it only came into being because of the requirement of the ABD loan, and not for promoting the basic human right of access to information. What is more disconcerting is that it formed the basis and laid the ground for becoming the model for the provincial laws that followed. Hence the laws that were promulgated in Baluchistan (still in force) and Sindh (replaced with a new RTI law now) in the subsequent years were a ditto copy of this law, and suffered from the same gaps which also constrained their implementation. Prior to 2010 the 1973 Constitution of Pakistan did not explicitly recognize citizens' right to access information as it states that "every citizen shall have the right to freedom of speech and expression, and there shall be freedom of the press, subject to any reasonable restrictions imposed by law". As Pakistan signed the International Covenant for Civil and Political rights (ICCR), it was required to incorporate a right to information in its legal structure. The right to access information added to the Constitution by the 18th Amendment, which declared that under Article 19-A "Every citizen shall have the right to have access to information in all matters of public importance subject to regulation and reasonable restrictions imposed by law." Both federal and provincial governments issued various laws in order to allow Pakistani citizens to exercise their right to access public data.

Federal

The FOI Ordinance authorizes Pakistani citizens to gain access to data held by the national government. The Ordinance only pertains to the Federal Government organizations and does not apply to any provincial governments or private entities funded by the national government. The Freedom of Information Rules 2004 details the procedure through which the governmental data can be requested: applicants must pay a fee and enclose the purpose of their inquiry by providing specific reasons as to why they need the information. If the requested information is not provided in 21 days, the applicant may file a complaint to the head of the public body. Only access to public records is permitted, which excludes such documents as notes,

timings of meetings, personal bank account data, classified information, data pertaining to national security, etc. The draft of the federal RTI bill is not significantly different from the FOI Ordinance of 2004, however, it has a change in scope as the new bill is not restricted to only governmental organizations, but it also applies to non-governmental bodies that are funded or registered by the national government.

Provincial

The FOI Ordinance of 2004 laid the basis for the following two provincial laws: The Baluchistan Freedom of Information Act in 2005 and Sindh Freedom of Information Act in 2006. In addition, the Khyber Pakhtunkhwa Right to Information Act (KPK RTI) and the Punjab Transparency and Right to Information Ordinance were both passed in 2013. The KPK RTI Act covers not only official governmental bodies, but also non-governmental entities that are funded by the government (for example, locally funded public service organizations). The Punjab RTI Act can be used not only by the citizens of Pakistan, but also by legal bodies that are registered within Pakistan territorial borders. Sindh repealed and replaced its 2006 Act a decade later with the Sindh Transparency and Right to Information Act, 2016.

Linkage between Access to Information and Corruption

Countries with access to information laws are also believed to be less corrupt because these have the added tool with which they can demand information and thus make the Government more transparent. A cursory look at the 2016 report of Transparency International's annual Corruption Perceptions Index, show that the ten countries scoring best in Transparency International's annual Corruption Perceptions Index, also have effective legislation enabling the public to see government files. The same list also indicate bottom ten countries perceived to be the worst in terms of corruption, not even one country has a functioning access to information regime (Cabinet Division Government of Pakistan, 2015). These same countries are also faced with internal turmoil, insecurity and domestic undemocratic political regimes. While Pakistan also faced insecurity, its ranking according to the Transparency International Perception ranking improved from 139 most corrupt countries in 2012 (Transparency International, 2012) to 127 most corrupt countries in 2013 (Transparency International, 2013), and to 116 most corrupt in 2016 (Transparency International, 2016). In another global report: World Justice Project Rule of Law Index, the Global ranking of Pakistan in its 2014 report was 96 (The World Justice Project, 2014), and in its 2016 report, the global ranking of Pakistan had improved to 79 (World Justice Project, 2016). One of the indicators that the report focuses on is "absence of corruption". According to the 2013 Rule of Law Index, in "absence of corruption" category Pakistan ranked 90th out of 97 countries (The News, 2014). And in 2016 Rule of Law index, it ranked 97th out of 113 countries.

Reference (World Justice Project, 2016)

Resolution

In 2010, the insertion of Article 19A in the Constitution, through the 18th Amendment, was a significant development for promoting transparency, accountability and for considering access to information as a constitutional right in Pakistan.

Article 19A guarantees the right to information (RTI) and enables citizens to access information held by public bodies, subject to reasonable restrictions imposed by law. This provision was a positive step towards enhancing transparency and empowering citizens to hold the government accountable. Pakistan is the first country in South Asia to have adopted a Freedom of Information (FOI) law, introduced as an ordinance by a military ruler in 2002. However, it soon became evident that the legislation was made on the condition of the Asian Development Bank (ADB), and not out of public interest. It was considered ineffective legislation that failed to promote transparency in government work and establish accountability to the Pakistani people; it lacked basic principles of transparency and accountability.

The year 2013 was a progressive year in terms of the RTI movement in Pakistan. Khyber Pakhtunkhwa and Punjab enacted effective right to information laws, enabling citizens to exercise their constitutional right of access to information held by public bodies. Sindh followed suit, by enacting the Sindh Transparency and Right to Information Act, 2016, on March 13, 2017.

The federation also repealed the weak FOI 2002 ordinance and introduced The Right of Access to Information Act, 2017. Similarly, Balochistan repealed its ineffective law and introduced the Balochistan Right to Information Act, 2021, in February 2021.

Despite these five laws being in place since 2013, however, public officials continue to try to legalise secrecy by adopting vague arguments and misinterpreting some provisions in these laws.

For example, the Registrar Office of the Supreme Court (SC) of Pakistan, the Election Commission of Pakistan (ECP), and various other constitutional institutions resist disclosing information under the federal RTI Act 2017, arguing that the Act does not apply to bodies established by, or under, the Constitution.

This ambiguity needs to be addressed, by providing a more inclusive and clearer definition of "public body" in the Act. It is worth mentioning that Section 2(e)(iv) of the Indian Right to Information Act 2005 explicitly covers bodies established by or under the Indian Constitution.

The Pakistan Information Commission (PIC) clarified in a judgment to the Registrar Office SC that Section 2(ix)(e) states that "Any court, tribunal, commission, or board under the Federal law" falls under the purview of the Act. Interestingly, despite this clarification, the Registrar Office filed a writ

petition before the Islamabad High Court (IHC), and the IHC allowed the petition and dismissed the order of the PIC.

Section 2(ix) may be amended to explicitly declare bodies established by or under the Constitution as public bodies under the Act, and to include the offices and secretariats of the president and the prime minister in the definition of "public body."

This gap — and other loopholes in the federal Act — have led to 73 orders of the Pakistan Information Commission being challenged in the high courts. In a case involving the Senate of Pakistan, instead of implementing the PIC's order or challenging it in the Islamabad High Court, as required under the Act, the Senate secretariat sent a letter to the Commission stating that the Chairman of the Senate is authorized to declare any or all records of the Senate secretariat as classified.

The information requested from the Senate secretariat pertained to the total number of sanctioned and vacant posts, the quota for the disabled, etc, which the Commission declared to be public information under the Right of Access to Information Act 2017.

Another flaw that needs to be addressed is Section 6 — "Declaration of the public record" — which does not require the provision of a list of records that will be accessible to citizens. Good RTI laws, including the Indian RTI Act 2005, provide a negative list and declare all other records as public records, which are accessible to citizens. Moreover, Section 7(f) of the Act gives powers to the minister-in-charge to classify certain records, which is vague and evasive and should be removed.

Khyber Pakhtunkhawa

In the case of the Khyber Pakhtunkhwa RTI Act 2013, it covers the subordinate judiciary in the definition of public body but leaves out the Peshawar High Court. Higher courts should also be held accountable. Section 2(I)(v) may be amended to explicitly include the Peshawar High Court within the purview of the Act.

Section 26 of the KP act explains the powers of the KP Information Commission. The commission itself should be vested with the powers to initiate contempt proceedings, to ensure the implementation of its orders, as in the case of the PIC. Then, Section 28(1)(e) describes the use of information obtained for malicious purposes as an offence with ulterior motives and frivolous design. However, a good RTI law should not focus solely on the possible misuse of information; instead, it should aim at facilitating maximum disclosure of information. There are other laws in place that deal with the misuse of information. Therefore, Section 28(1)(e) serves no purpose other than discouraging citizens from using this law and should be deleted.

Punjab

Although the Punjab RTI law is a good piece of legislation, it still needs a few improvements. For example, in Section 2(iv), "any court" implicitly includes Lahore High Court as a public body, but this could be made more

explicit to avoid confusion. While section 5(2) states that the government shall appoint "not more than 3 commissioners", appointing just one commissioner may not suffice for the effective implementation of the Act and to ensure citizens' right to access information.

Furthermore, Section 5(2) does not require the government to appoint one commissioner from each of the three categories, ie judiciary, civil society and bureaucracy. This ambiguity can be addressed through amendments that make it binding on the government to appoint commissioners from each of the three categories.

In March 2021, a retrogressive amendment was introduced to Section 5(6) of the Punjab Act, in which the provincial government was empowered to extend the tenure of the commissioners for a further three years. This amendment needs to be withdrawn, as the expectation of extension may influence decisions/ orders of commissioners.

Additionally, the Punjab Information Commission lacks the power to initiate contempt proceedings to enforce its orders, unlike the Pakistan Information Commission. To rectify this, a sub-section should be added to Section 6(5), allowing the Punjab Commission to initiate contempt of court proceedings and impose penalties on any officials who fail to comply with its orders.

Sindh

In the case of the Sindh Transparency and Right to Information Act 2016, there are various typographical mistakes that need to be fixed. However, Section 2(i)(iv) may be substituted by "(iv) any Court, Tribunal, Office, Board, Commission, Council, or any other body established by or under the Constitution or a provincial law."

Section 12(5) limits the choice of the Chief Information Commissioner of the Sindh Information Commission to retired senior government servants, which is not fair and reasonable. It should be possible to select the Chief Information Commissioner from any sector (civil society, retired government officers and legal experts), and the only consideration should be the relevant expertise of the person being considered.

Furthermore, Section 12(8) of the Sindh Transparency and Right to Information Act 2016, states that a member of the commission will not be able to hold office if the member reaches the age of 65 years. This can be a problematic restriction; as certain members may reach the age of superannuation without completing a full term of three years. In fact, this was an issue in KP as well, where the first Chief Information Commissioner of the KP Information Commission had to relinquish office before his term expired, at the age of 65 years.

Balouchistan

In the case of the Balochistan RTI Act 2021, the law still suffers from multiple flaws, which need to be fixed in the light of regional and international best practices and the requirements of Article 19A of the Constitution.

For example, Section 2(n)(iv) explicitly does not cover the superior judiciary, which is not fair, as higher courts too use public funds and must be accountable. Then, Section 7(2) requires submitting a copy of the Computerized National Identity Card (CNIC) while submitting an information request — which is burdensome for a common citizen. Furthermore, Section 7(5) requires the applicant to state a reason for requesting information, which is against local, regional and international best practices.

There is no such requirement in the laws of Punjab, Sindh and KP or at the federal level. This requirement has no useful purpose but, instead, may become an excuse on the part of ill-intentioned officers to question the given reasons, delay disclosure and harass applicants.

The requirements of providing a CNIC and stating the reason for obtaining information were the major stumbling blocks in the FOI Ordinance 2002 and the repealed Balochistan Freedom of Information Act 2005. That was the reason, citizens, civil society and journalists demanded effective legislation. The implementation of these laws faces significant challenges, evident in the failure to establish the Balochistan Information Commission within the stipulated 120-day timeframe and the prolonged non-functionality of the KP Information Commission due to vacant positions of information commissioners.

Additionally, the Sindh Information Commission lacks a functional website, while the complaint redressal mechanisms of all four commissions exhibit inadequate responsiveness and fail to adhere to the prescribed timeframes outlined in their respective laws.

It is imperative that public bodies prioritise proactive disclosure of information through their websites, relieving the burden on public information officers (PIOs) and streamlining the processing of information requests. Relevant authorities must address these critical challenges to ensure the effective implementation of these laws and overcome the obstacles that hinder access to information.

In order to truly establish an effective right to information regime in Pakistan, prompt action is required to rectify the identified flaws and gaps in existing legislation. Meanwhile, parliamentary oversight should be enforced effectively.

By improving implementation mechanisms and enforcing these laws, Pakistan can cultivate a transparent, accountable and participatory governance system, hopefully fostering a brighter and more inclusive future for the nation.

https://www.dawn.com/news/1776292

Recommendations

- a. The law should place a clearer positive obligation on public bodies to provide assistance to all requesters who need it.
- b. Public bodies should be required to inform requesters within a maximum of five working days where they do not hold the requested information and they should be required to transfer requests where they know of other public bodies which do hold it.
- c. The law should make it clear that lodging a request is free, that a certain number of pages of photocopies for example 10 or 20 pages will be provided for free and that fees will be waived for poorer requesters.
- d. The law should place a general obligation on public bodies to provide access to information in the format preferred by the requester, subject to limited exceptions (for example to preserve the record).
- **e.** A regime for free reuse of public information, perhaps pursuant to an open licensing system, should be provided for.

Conclusion

It is pertinent to mention here that enactment of the law is not enough for transparency and the right to information. Loopholes in Pakistan's Right To Information laws often make it difficult for citizens to exercise their rights to obtain information. Authorities must address these gaps to ensure transparency in governance. In countries like Pakistan, which are on the way towards development, there are factors and forces, which try to sustain and protect the little gains that have been made in the area of human rights and democracy.

It is unfortunate that the implementation of RTI Laws in Pakistan is not satisfactory. Despite of enacting strong and progressive RTI laws, implementation is a big question especially in the province of Balochistan and Sindh. On the other hand, federal government and provincial governments of KP and Punjab are making continuous efforts to properly implement their respective RTI laws.

Lack of awareness about social and political rights in Pakistan is the reason of failure of RTI regime. It is high time that government, media and civil society in Pakistan join hands to raise awareness about RTI among masses. Now, citizens of Pakistan should be enabled and empowered to call for their fundamental human right to know because.

Case References

IN THE SUPREME COURT OF PAKISTAN (Appellate Jurisdiction)

Present: Mr. Justice Qazi Faez Isa, CJ Mr. Justice Amin-ud-Din Khan

Mr. Justice Athar Minallah

Civil Petition No. 3532/2023 (On appeal against the judgment dated 13.06.2023 passed by the Islamabad High Court, Islamabad in ICA No. 190/2023)

Mukhtar Ahmad Ali. ... Petitioner

Versus

The Registrar, Supreme Court of Pakistan, Islamabad and another. ... Respondents

https://www.supremecourt.gov.pk/downloads_judgements/c.p._3532_2023.pdf

Pakistan Information Commission

Government of Pakistan

1 st Floor, National Arcade, 4-A Plaza F-8 Markaz, Islamabad

Website: www.rti.gov.pk Phone: 051-9261014 Email: appeals@rti.gov.pk @PkInfoComm

In the Pakistan Information Commission, Islamabad

Appeal No 1700-01/22

Uzair Ahmad (Appellant) Vs. National Bank of Pakistan (Respondent)

ORDER Date: August 19, 2022 Zahid Abdullah: Information Commissioner https://rti.gov.pk/wp-content/uploads/2022/09/Uzair-Ahmad-Vs-National-Bank-of-Pakistan.pdf

https://rti.gov.pk/order-on-appeal-no-1700-01-22-uzair-ahmad-vs-national-bank-of-pakistan/

ORDER SHEET IN THE LAHORE HIGH COURT,

MULTAN BENCH, MULTAN

JUDICIAL DEPARTMENT

Case No. Writ Petition No. 9315 of 2019.

Hakeem Muhammad Saeed Versus Deputy Commissioner, Vehari https://sys.lhc.gov.pk/appjudgments/2019LHC3344.pdf

References

- 1. ^ "The Gazette of Pakistan" (PDF). October 16, 2017.
- 2. ^ Ali, Khan; Saleem, Muhammad; Shoib, Muhammad (2015-04-01). "An Analysis of Right to Information Laws of Pakistan and India". Rochester, NY. SSRN 2588362. {{cite journal}}: Cite journal requires |journal= (help)
- https://www.ssoar.info/ssoar/bitstream/handle/document/58643/ssoar-par-2018-2-sardar-
 - Governance_and_the_Right_to.pdf?sequence=1&isAllowed=y&lnkna me=ssoar-par-2018-2-sardar-Governance_and_the_Right_to.pdf

Pakistan Research Journal of Social Sciences (Vol.2, Issue3, September 2023)

- "Memorandum on the Federal Government of Pakistan's Freedom of Information by Article XIX," last modified November 2002. http://www.foiapakistan.com/articles/FOI%20Article%2019%20 Memo%20on%20FOI%20Act%202002.pdf.
- "Right to Information." http://www.foiapakistan.com/right-to-information.html.
- "The Khyber Pakhtunkhwa Right to Information Act, 2013." http://kp.gov.pk/uploads/2016/02/3._Right_to_Information_Act,_2013_.pdf.
- Sahi, Nokhaiz. "Senate committee agrees to draft RTI bill 2016." *The Nation*, February 1, 2017.
- Sardar, Riffat. The Right to Information Laws in Pakistan: A review and an Analysis. Kathmandu: devsuits-Developmental Pursuits, 2002.
- https://pakvoter.org/right-to-information-rti-and-citizens-of-pakistan/
- https://cpdi-pakistan.org/archives/20209
- https://www.article19.org/resources/country-report-the-right-to-information-in-pakistan/
- https://www.law-democracy.org/live/wp-content/uploads/2012/08/Pakistan.RTI_.Note_.Oct17.pdf