



“From FOI to RTI: Some Lessons and Insights”

Issue Paper on RTI Legislation in Pakistan

Right to information is a fundamental requirement for transparency and good governance. An informed citizenry is expected to make better political choices and monitor the performance of public bodies more efficiently. A well deliberated Right to Information legislation, effective implementation mechanisms and matching political will can play a significant role in achieving this goal.

“Freedom of Information” (FOI) or now increasingly referred to as “Right to Information” (RTI) is a universal fundamental right. It can be defined as the right to access information held by public bodies. This right is recognized under Article 19 of the Universal Declaration of Human Rights (1948), which states that the fundamental right of freedom of expression encompasses the freedom “to seek, receive and impart information and ideas through any media and regardless of frontiers”¹. It is also an integral part of the fundamental right of freedom of expression, as recognized by Resolution 59 of the UN General Assembly adopted in 1946.

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

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

In Pakistan the movement to enact Freedom of Information (FOI)/ Right to Information (RTI) picked up momentum in 1990s. In the past decade the effectiveness of federal and provincial FOI laws has highlighted a number of legal and procedural deficiencies in the existing framework including; deficient scope, restrictive nature due to exemptions and exceptions, limitations of the review processes, so on and so forth. At the same time, numbers of attempts have been made to address the existing shortcomings in the FOI laws. Private member bills were presented in the Assembly demanding enactment of a fresh comprehensive RTI Law in the country in 2004, 2008, 2010 and finally in 2011. During this period, CRCP reviewed all private member bills and highlighted gaps and concerns which needed to be debated for making RTI legislation comprehensive and effective. A brief account of all these efforts is as follows:

Legislative Journey on Right to Information in Pakistan:

The first ever bill on FOI was tabled in the parliament in 1990 by Prof. Khursheed Ahmad. Senator and Naib Amir of Jamaat-i-Islami. The bill was introduced in Senate as a private

¹ UNESCO -2011

member Bill and was forcefully resisted and failed to be enacted. The second bill on the subject was moved by Senator Malik Muhammad Qasim, who was chairing the public accounts committee in 1994. However, the Freedom of Information Bill drafted by the committee could not be enacted due to forceful resistance by the bureaucracy and early dismissal of the government.

A major development occurred towards enactment of FOI legislation when, on the initiative of Fukharuddin G. Ibrahim, the Federal Minister of Law in the Interim Government headed by Malik Miraj Khalid, the President of Pakistan, promulgated a Freedom of Information Ordinance on January 29, 1997. However, the successive government of Mian Nawaz Sharif allowed this Ordinance to lapse after only six (06) months and did not enact it into law.

In 2000 a draft FOI Bill was made public by the government of General Pervez Musharraf, with the aim of soliciting public view. However, due to number of inherent deficiencies it could not get the popular acceptance by the public.

It was in this backdrop that Consumer Rights Commission of Pakistan in 2001, produced the 'Model FOI Act 2001' through a consultative process, involving local, regional and international FOI/ RTI experts, law practitioners and stakeholders, both from private and public sectors. The Model Law actually initiated the pace of having a comprehensive legislation on FOI with effective implementation procedures, wider scope, less exceptions and especially the citizens' perspective which has been missing in all earlier laws.

In October 2002, FOI Ordinance, 2002 was promulgated, which also happened to be the first, such law in the region.

In 2004 Rules for FOI Ordinance, 2002 were passed. Same year Sherry Rehman initiated FOI Bill 2004 with the objective of repealing FOI Ordinance, 2002. Interesting move was introduction of whistle-blower protection in the law. However, the incumbent government did not consider it for enactment.

In 2005, Government of Balochistan promulgated Freedom of Information Act in Balochistan followed by Sindh where Governor Sindh promulgated Freedom of Information Ordinance 2006, in Sindh. Both these were mirror legislations as of Freedom of Information Ordinance, 2002 at the Federal level and carried the same deficiencies.

In 2008 Sherry Rehman, the then Federal Minister for Information and Broadcasting, proposed FOI Act 2008, which was the amended version of FOI Bill, 2004. However, the bill did not see the light of day due to many deficiencies.

After 37 years since the promulgation of the 1973 Constitution of Pakistan, under the 18th Amendment in April 2010, a new article i.e. Article 19-A was inserted in the Constitution acknowledging the Citizens Right to Information. Prior to this, the Constitution did not expressly given right to access of information.

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

In 2010, Another Freedom of Information Bill was moved in the Assembly by Sherry Rehman. Yet again on October 11, 2011 another bill “Right to Information Bill, 2011” was moved in the Assembly by Sherry Rehman. Both these bills were more or less same in content and text.

Consumer Rights Commission of Pakistan (CRCP), keeping in view the past experiences and after a rigorous exercise to debate challenges of all the efforts made to improve existing legislations, by involving all relevant stakeholders, experts from legal fraternity, civil society, academicians who had profound knowledge on the subject drafted Model Right to Information Act, 2012. Model law was formally launched during a press conference held by CRCP to mark the celebrations of 10th, International Right to Know Day at National Press Club Islamabad.

Latter, on the basis of this Model Law two other laws were produced which became inspiration for two new legislations i.e; Khyber Pakhtunkhwa Right to Information Act, 2013 and Punjab Transparency and Right to Information Act, 2014.

Recent Developments: Moving from FOI to RTI:

The year 2013 was most momentous in terms of recognizing citizens’ right to information in country as two provinces, Khyber Pakhtunkhwa and Punjab representing around 70 % of the population of Pakistan, enacted two reasonably good legislations.

The new legislation ‘Khyber Pakhtunkhwa Right to Information (RTI) Act, 2013’ was enacted in province of Khyber Pukhtunkhwa (KP). It was a giant leap forward in real empowerment of the general masses of KP as the law was ranked third in the list of laws around the world by RTI experts. The Act on one hand empowered citizens to access the maximum possible information concerning the working of any public body in the province and on the other following the best international practice a fully independent Information Commission was established. It was also a remarkable step in accordance with the Spirit of Article 19-A of the Constitution of Pakistan, whereby the right to information has been explicitly and emphatically declared as part of the fundamental rights.

The law is a complex piece of legislation which will require time to properly analyze and digest. And, as with all such laws, must have to be followed by effective implementation. According to sections 4, 5 and 6 of the said Ordinance, respective public bodies have to maintain and Index the public record, publish and made available the record and designate information officers accordingly to facilitate and promote the process of transparency and accountability envisaged in the law. However, the pace has been really slow so far at this front and only information Officers have been nominated. On part the provincial government this requires sincere and strong efforts to enable these legal provisions without which the extensive exercise of promulgation of the law would be futile and would only look like electioneering ploy.

Establishment of Information Commission on RTI is a welcome step. It is a popular trend in the world and has been successfully in practice in neighboring countries like India, Bangladesh and Nepal. As an independent and exclusive body on RTI, Information Commission can bring an open and fair RTI regime in KP.

Another significant clause in Khyber Pakhtunkhwa Right to Information Act, 2013 is the rapid process of disposal of complaints and imposition of daily fine of up to Rs.250 per day, up to maximum of Rs.25000 on any official who blocks any activity for preventing or delaying the disclosure of information to the requester. This will act as a deterrent and make the officials more efficient and responsive while providing information to requesters.

Setting an example and popular trend in the region KP RTI Act, 2013 has very short and brief list of exemptions regarding information sharing. The list only includes topics related to security and international relations, disclosure harmful to law enforcement, public economic affairs, policy making, privacy, legal privilege, and commercial and confidential information.

The inclusion of Secretariats of Chief Minister, Governor, Provincial Assembly of KP and subordinate judiciary in the definition of public bodies is a positive characteristic and is another welcome step and shows the commitment of the respective government towards openness and accountability.

Another step towards transparency and accountability and makes KP RTI Act, 2013 referred as sun shine law is the clause 30 which is about protection of whistle blowers.

On the negative side, inclusion of clause 28, declaring information as a criminal offence if it is obtained for malafide purpose and penalty amounting to Rs. 50000 or imprisonment has also been provided. It conveys the feeling that by doing so KP government is not interested in maximum disclosure of information. Moreover, this will also create a sense of fear among the requesters and ultimately become a huge impediment while accessing information under this Act.

Similarly, The Punjab Transparency and Right to Information Act, is another star in the RTI regime in Pakistan, declared 18th in the list of RTI legislations in the world ranking. In Punjab T & RTI Act, 2013 similar to KP RTI Act, 2013, the key element is the establishment of an independent and exclusive Information Commission on RTI. The other unique feature of this law is that it allows using of “public interest override test”. Under Punjab T&RTI Act, 2013, information commission has the power to decide whether revealing any exempted information is in greater public interest or not. It is viewed that this practice will help open the doors of information and decrease the culture of secrecy in the province.

Following the precedent set by Indian Act and later by KP RTI Act, 2013, the Punjab T&RTI Act, 2013 provides a simple and cost effective system for processing information requests where a reasonable time frame is given for the disposal of information request.

Another significant characteristic is that besides citizens this Act also recognizes legal persons as suitable entities for requesting information. Other individuals authorized on behalf of legal persons can also seek information. This option can prevent an individual from any type of harm or victimization by not disclosing his identity while seeking information on behalf of a legal

organization. For example, in the recent past, targeted attacks on RTI activists who sought information on a particular case or issue in India have dangerously increased. In fact, India's RTI Act, 2005 doesn't recognize an organization as a legal entity to submit request, therefore, it has to be done through an individual.

Under the Act penal actions against those public officers who refuse, delay or destroy requested information has been provided. This provision will act as a deterrent and make the officials more efficient and responsive while providing information to requesters.

The Act also brought institutions like Lahore High Court (LHC), provincial legislature, secretariat of governor and NGOs substantially financed by the Government or a local government under its purview. Another good aspect is that this Act has set a deadline i.e. August 31 for the publication of annual report about preceding financial year by Punjab Information Commission (PIC) as well as all public bodies in province. This will highlight the performance of public bodies as well as information commission and further ensures necessary actions to improve the implementation of RTI laws.

Among the weaknesses, the Punjab RTI Act, 2013 is silent on providing legal, administrative and employment related protection to whistleblowers for exposing corruption. It conveys the feeling that by doing so government is least interested to get rid the menace of corruption. Actually, risk of corruption is significantly heightened in environments where the reporting of wrongdoing is not protected. Therefore, protection of whistleblower is vital to encourage the reporting of misconduct, fraud and corruption. It is viewed that in the absence of legal protection, government employees will feel fear and not be able to disclose corruption and irregularities in public departments. Moreover, Chief Minister Secretariat is not included in the list of given public bodies' definition which shows that culture of secrecy still prevails as highest public office at the provincial level has been intentionally kept out of the purview of this law. More significantly, under this law applicant has no right of appeal in civil court against the orders of the commission, which is against the norms of justice; however, this provision is present in KP RTI Act, 2013 and India's RTI Act, 2005. Likewise, this law doesn't lay standards for record management by public bodies. In addition, there is a long list of exceptions in this law which has somewhat limited its scope. As per international best practices list of exception should be short, brief and narrowly defined.

In the backdrop of increased demand from Civil Society Organizations (CSOs) to revise weak legislations at Federal level, a Sub-committee of Senate's Standing Committee on Information and Broadcasting recently approved the Federal Right to Information Bill, 2014. The Bill is still pending to be discussed in the parliament and final approval of cabinet. Reportedly, Ministry of Information has moved a summary to Cabinet Division for final approval of this Bill by Cabinet.

Shortcomings in Implementation Mechanisms:

Most of the initial laws prior to 2013, suffer from serious flaws and inadequacies. In general, these exempt a large number of government records, exclude private sector from their preview and are weak in providing efficient implementation mechanisms. Most importantly, these laws do not override the existing laws, which restrict their mandate. Nor has provided to amend the Official Secrets Act, 1923 or repeal the same to allow greater freedom of information. Moreover, despite all the efforts to put in place comprehensive legislation on Right to Information,

sufficient demand could not be generated for implementation of these laws owing largely to the capacity deficit of government officials and to some extent to civil society organizations (CSOs), and citizens.

Against the background of worsening economic difficulties, substantial increase of the problem of corruption and poor economic performance, made Pakistan dependent on IFIs in terms of getting development loans, especially for balance of payment support. In 2001, Asian Development Bank (ADB) for releasing first tranche of loan made it mandatory on the incumbent government to enact FOI laws in Pakistan. Under this tremendous pressure and dire need of financial support, Freedom of Information Ordinance, 2002 was enacted. The way the law was enacted was undemocratic. The Ordinance lacked legitimacy not only because of its pedigree (i.e. not having been adopted by a democratically elected legislature) but also because it fell well short of international best practices. The law is currently applicable to all Federal Public Bodies in Pakistan.

The Freedom of Information Ordinance, 2002 was considered controversial from various perspectives. According to I.A. Rahman, “The Ordinance is flawed in concept and content. Unless it is drastically changed to accommodate the public views it will serve only as a vehicle for denying information instead of making it accessible to citizens”². Documents excluded from being considered as record are too vast with a large area of exceptions, it does not provide for appeal in case information is not provided, involves punishments for “frivolous “ complaints and no protection offered to “whistle-blowers”. The definition of public bodies was restrictive and did not include industry and corporations.

It is also important to note that the Freedom of Information Ordinance, 2002 does not include political parties and thus one cannot make any direct requests for information about them. Political parties register limited information only to the Election Commission of Pakistan which includes annual audited accounts (often poorly reported), internal party election (which is often a formality considering the hereditary tradition in politics in Pakistan), assets of party members and details of election expenditures.

There was a complete lack of political will and parliamentary ownership as the law was enacted without any consultation with the parliament. Capacity deficit and lack of will to implement the law in true letter and spirit, by the respective government departments, failed to generate enough demand and to disclose information proactively. Owing to these deficiencies the number of information requests submitted under FOI is dismally low; hence, the efficacy of the various provisions of the available FOI could not be tested. Some of the results of these deficiencies had significant effects on the very purpose the law intended to provide to the citizens, for examples:

- The available information revealed that no separate funds were allocated since 2002 to facilitate the implementation of the FOI-2002 in any Ministry/ Division or line departments.
- Government trained only the inductees in Ombudsman office. Training of the designated officials was conducted mostly by different NGOs.

² Rehman, Report on Freedom of Information Ordinance, 2006

- Online availability of FOI Ordinance was not made in Urdu and other regional languages.
- Not even a single ministry advertised in public interest to inform the public about FOI Ordinance, 2002.
- The Cabinet Division did not issue any formal instructions to the Ministries/ Divisions and line departments for uniform implementation of FOI 2002.
- There appeared to be lack of meaningful coordination mechanism as well as any serious attempt to monitor the progress and to establish fully functional reporting systems.

As mentioned earlier the Balochistan Freedom of Information Act, 2005 and Sindh Freedom of Information Ordinance, 2006 are mirror legislations to the FOI Ordinance, 2002 and has the same deficiencies. Thus, are as ineffective as the Federal legislation on FOI.

After a long span of silence on the issue from the government quarters, in 2008, FOI Bill, 2008, was moved by Sherry Rehman, the then Federal Minister for Information and Broadcasting, which was the amended version of FOI Bill, 2004. CRCP, and other civil society organizations continuing the difficult work to strengthen the freedom of information (FOI) framework in Pakistan, expressed reservations about the proposed FOI Bill. In particular, the bill did not offer any improvements to the existing institutional mechanism for processing information requests and hearing complaints, and the new bill also removed an important “whistle-blower” protection provision which was part of the earlier FOI Bill moved in 2004 by Sherry Rehman. Moreover, the procedures for accessing information would continue to be burdensome and complex in nature. It was also observed that the bill lacked a “public interest” test. It did not clarify the status of provincial FOI laws or the application of the proposed bill to local governments, and failed to mandate a time limit for public bodies to respond to information requests.

In 2010 and 2011 two Bills were moved by Sherry Rehman. Both these Bills were similar in nature and far better than the earlier version moved in 2008. As mentioned earlier most of the suggestions were made part of the Bill suggested by the civil society organizations and CRCP back in 2008. It was not clear why Ms. Rehman introduced the bill as a private member and not through her political party which was in power, raising concerns on whether this was yet another failed attempt. However, the bill was far better than the previous one moved in 2008.

The government referred the bill to the concerned standing committee of the House for further deliberations. The new RTI bill proposed to repeal the 2002 Ordinance on Freedom of formation in an effort to make all public and private bodies falling within its ambit, increasingly accountable to Citizens and it was an attempt to facilitate and encourage the disclosure of information for greater transparency. The new bill proposed access to information of every citizen to any department of the government and also included private bodies. As far as exceptions are concerned they are dealt to ensure that all restrictions and exceptions on right to information are weighed against the greater “public interest”. Furthermore, the bill required organizations to “proactively publish” their records. The bill also took a leap forward and provided protection to the “whistle-blowers”. Another provision was added under which it was required that, any decisions by which it was decided ‘not to grant information to an applicant’ must be explained clearly to him and to point out alternatives. The bill suggested the existence of a body that can monitor and provide guidance for the issuance of records to Public Information Officers. On the deficiencies the bill yet again failed to provide specific time limit for internal appeals. Other promotional measures which include central monitoring and promotion of

implementation, undertaking public educational efforts, providing training for officials and reporting on steps taken to implement the law were substantially missed out thus creating a huge vacuum in providing comprehensive and effective implementation mechanism.

However, no matter how much these laws were deficient in content nevertheless are widely seen as positive developments and a significant break from the past culture of secrecy in which even the minimum access of citizens to official records was subject to official discretion. In fact, these laws introduced a cultural shift, whereby citizens can demand information, while relevant departments have to justify the denials if they opt for rejecting information requests. These efforts, no doubt created a big shift from “Freedom” to access information to be recognized as “Right” to have information from the public bodies.

Provision of the article 19-A under the 18th Constitutional Amendment to the Constitution of Pakistan, 1973 in 2010, totally changed the landscape of FOI regime in Pakistan. Considerable receptiveness has been observed at all fronts especially among the political fraternity. This changed discourse laid the formal ground for bringing in change in the old and rudimentary FOI legislations in the country and speed up the efforts on putting in place RTI legislations in provinces like Punjab and Khyber Pukhtunkhwa where there was no law at all.

Procedural Activism: A Tool to mobilize demand

Keeping in view the problems being faced in the area of FOI and RTI, Consumer Rights Commission of Pakistan (CRCP) has been working to develop and practice the concept of procedural activism. Procedural Activism entails to activate different clauses which are inherently required to operationalize the existing laws on FOI and actually highlight the apparent gaps in implementation of these clauses. It has been significantly effective to make these laws responsive to the number of information requests submitted to different government department and also generated effective demand for operationalization of these laws in the country. Number of information requests was submitted by CRCP to various departments/public offices in the focused areas³ in order to operationalize different clauses of these laws.

During the course of implementation of the procedural activism, it was noticed that, in response to the information requests to various public bodies, on one hand, even basic steps, which are required under the law, have not been taken for implementation of these laws. For example, only 9 public departments have notified designated officials, whereas 5 public departments⁴ notified their designated officials in response to CRCP’s requests. Similarly, some departments do not provide detailed public information on their websites⁵; and most of the public departments do not index their records⁶. All these are the basic procedural requirements to fully implement RTI laws.

³ Focused areas were education, health, law and justice, and safety nets for the poor and marginalized like food support program etc.

⁴ FDE, PBM, MoH, Ministry of Religious Affairs, Zakat and Usher, Inspectorate General of Police (IGP), ICT.

⁵ Benazir Income Support Programme (BISP), District Health Officer (DHO) Islamabad Capital Territory (ICT), Public Safety and Public Complaints Commission (PS&PCC) Quetta, etc.

⁶ FDE, Ministry of Education (MoE), CDA, Ministry of Health (MoH), Health Department Balochistan, Education Department Balochistan, etc.

On the other hand, it was observed that public officials/departments are unaware of the existence of FOI laws, as officials of the public departments, like Pakistan Bait-ul-Mal (PBM), Capital Development Authority (CDA), Federal Directorate of Education (FDE), etc., demanded/requested the copies of the laws from CRCP when submitted information requests. Besides, there were number of telephonic queries regarding FOI laws by the members of public bodies where CRCP had submitted information requests. These officers were not even aware if any such law existed in country.

Overall response rate at the federal level out of total 75 submitted information requests, 58 were responded positively which makes it a high success rate of 77.33%, especially when compared to the feedback of other provinces. Designated officials, provided only 2 requested information, whereas heads of Public bodies provided 17 and the bulk i.e. 39 were made possible with active intervention of Federal Ombudsman.

Similarly, in Balochistan, under Balochistan FOI Act, 2005, 41 information requests were submitted out of which 12 were positively responded by Designated Officers and heads of concerned Public Bodies and 8 were facilitated by Provincial Ombudsman. As such the overall success rate remained 48.78%. 21 requests are pending with Provincial Ombudsman. They have been issuing frequent reminders/holding hearings but the Public Bodies such as Home Department Balochistan and S& GAD are not very responsive to their calls. Only one, information was directly responded by designated officials, which reflects a tighter and centralized control by respective heads of Public Bodies.

Moreover, against 29 information requests submitted under Sindh FOI Ordinance 2006, information has been provided for 17, which renders a success rate of 58.62%. This relatively higher success rate as compared to Balochistan can be attributed to the personal interest taken by the concerned DG AT Sindh Ombudsman Secretariat, who expedited the pending cases and ensured timely provision of information.

This situation not only points to the lack of interest on the part of government and public bodies to ensure FOI, but also shows serious capacity deficit and lack of understanding on part of the government bodies. Moreover, getting information through FOI law is slow and time consuming.

Besides, using the concept of procedural activism, CRCP also focused on capacity building of civil society actors as well as of government officials and awareness raising among citizens in all four provinces. The training workshops and policy dialogues, were conducted which have been very successful and generated a very informed discussion on the topic, mobilized demand for operationalization of FOI laws, and formulated recommendations and viable policy options for improving FOI laws and their implementation. The most significant in this regard has been the capacity building and training sessions held with staff of Provincial Ombudsman, Balochistan, which actually translated into speedy disposal of pending cases.

Way Forward:

RTI is regarded as oxygen for democracy. It is imperative for the transparency and smooth running of a democratic system, good governance; reduction in corruption and to enhance accountability in any country. For achieving all these, recent developments in KP and Punjab have set a pace for enacting comprehensive and effective laws on RTI in Pakistan. Presently, Freedom of Information Ordinance, 2002 is applicable at federal level, whereas, Sindh and Balochistan have also replicated the same as mirror legislations. These laws have failed to serve the citizens due to inherent deficiencies and vehemently ignored international standards such as: maximum disclosure of information, obligation to publish key information, promotion of open government, short list of exceptions, rapid and fair processes to facilitate requester, cost effective procedure, open meetings of public bodies and whistleblowers protection. In the backdrop there is a dire need to repeal the obsolete legislations and must put in place comprehensive and meaningful legislations.

Weak implementation mechanisms can be significantly improved through consistent engagement. Serious focus on trainings and capacity building of government officials would result in overcoming the issues of implementation under the relevant laws. Similarly, education and awareness of the citizens, political activists and workers, media persons, academia, and CSOs, about how to use the right to information, would actually strengthen the demand side of implementation mechanism, which is currently a big snag with almost all the legislations.

It is only when people in Pakistan know that they have the right to demand information from their government and that they will actually begin doing so; the real fruits of the legislation would be realized. Media and civil society organizations have a huge role to play in order to mobilize the demand side and make ordinary citizens understand the efficacy of such an important piece of legislation, as they can repeatedly file requests for information and then report on any malfeasance they discover.