

Freedom of Information

*"Anyone who hides it [the testimony] has a sinful heart.
Gods aware of what you do." (Al-Quran, 2:283)*

*"Where secrecy and mystery begins
Vice or roguery is not far off."
(Dr. Samuel Johnson)*

The dismal state of governance in Pakistan can largely be attributed to the lack of freedom of information, which retards the capacity of the citizens to effectively monitor public institutions. This gives way to arbitrary decision-making, inefficient project execution and financial corruption in public bodies. Over fifty years have passed since independence but the colonial system of governance, which excluded public participation in the formulation and implementation of public policy, continues to exist in Pakistan. Important decisions having significant implications for the lives and welfare of citizens are still made in closed corridors without soliciting public views. Channels for effective public participation either do not exist or have become virtually retarded as a result of excessive bureaucratic controls and non-functioning of democratic institutions. Over the years this exclusivist system of governance has become corruption-ridden and almost completely incapable of responding to the needs and aspirations of citizens. It lacks transparency and offers little room for public scrutiny and accountability. Citizens, therefore, have lost confidence in the system and have developed an attitude of apathy towards issues of larger public concern.

Information Blockade on Various Pretexts

The pattern of governance in Pakistan thrives on the culture of information blockade or control, which is pervasive at all levels in almost all the state institutions. The vested interests block information on the pretext of national security or public interest, but as a matter of fact, to hide inefficiency and corruption from the public eyes. Several laws on the statute books, some of which date back to the colonial times, protect and promote this culture of secrecy by prescribing criminal penalties for those who leak or obtain the so-called classified information, but no elaborate criterion of classification exists at all. One such law is the Official Secrets Act, 1923, which does not provide any definition of official secrets, and hence, leaves it to the government officials to arbitrarily decide what is secret and what is open for public scrutiny. Result is that even the information of ordinary nature is kept secret on one pretext or the other. Although the Act has become largely outdated, it continues to be on the statute books without amendments. The Article 5 of the Act makes a mere recipient of official information an offender. The fact that the information might have been communicated to a person contrary to his desire is irrelevant, and therefore, does not immunise him. Moreover, the Act is quite often arbitrarily used to punish political opponents or those who are to expose corruption or inefficiency of the government.

Political Apathy

Political apathy and indifference in Pakistan is cultivated largely owing to the lack of easy access to information. In a democracy, citizens need to have information about the performance of the government so that they could make an informed decision in terms of exercising their political choices. Without having access to information, it is hardly possible to critically examine the conduct of public representatives, which in turn enhances the level of political indifference among the citizens and they find it difficult to identify with the on going political activities, thereby, rendering the political system defunct. Furthermore, planning processes at the governmental level are adversely affected by the lack of access to information. The citizens should be first informed about the nature, scope, cost and outputs of the projects in order to ensure their maximum participation in the planning. The information sharing at the planning level can ensure the sustainability of the projects. Moreover, arbitrary decision about development priorities can be prevented. The constructions of the Motorway, Prime Minister's Secretariat and Convention Centre are just few examples in this regard.

Lack of Transparency

To ensure transparency and appropriate use of public funds, citizens need to have information about various public departments, their activities and the way they spend public money meant for public welfare projects. Any restriction in this regard not only leads to increased incidences of corruption in the government departments but also causes citizens to lose confidence in their integrity and capability to deliver. The secretive culture prevalent in Pakistan largely explains people's mistrust in state institutions and lack of participation in formal economic activities. People's access to information can greatly reduce the chances of corruption. Various studies and reports on corruption, good management and accountability establish that public opinion is the best sanction. Therefore, it is necessary that public must have reasonable means of knowing material facts, of verifying them, of correlating them and of demonstrating their correctness or incorrectness.

Lack of Public Accountability

It is owing to the lack of public accountability and culture of secrecy that many disasters, national debacles and financial scams continue to remain shrouded in mystery. These include, among others, fall of Dacca in 1971, Ojri Camp blast, cooperative societies scam, massive secretive borrowings from public sector banks, agreements with Independent Power Producers (IPPS) and Kargil debacle. Investigation reports by different committees and commissions on some of these tragedies remain confidential. It is astounding that even the reports of various committees and commissions on reforms in areas such as policing, education and corruption are treated as confidential, and therefore, inaccessible by citizens. Where does Pakistan stand in terms of access to information can be assessed from the fact that even the Parliament is denied access to vital information not only about national security but also about civil matters. The Parliament is not

allowed to discuss defence budget, and even the issues that are not related to combat capability of the forces. In popular perception, information is blocked less for reasons of security and national interest and more to hide corruption, policy blunders and incompetence.

Regulated and Controlled Media

The role of media in disseminating information on social and political issues can hardly be over-emphasised. The capacity of media to disseminate independent information in Pakistan is regulated and controlled through several laws. Journalists and media practitioners do not have any legal right to get information except through their informal connections with the bureaucracy and the ruling elite. However, at times, the governments selectively leak some information, which they find to their advantage. This partly explains that why Pakistani media is more comfortable with political issues and statements of the political leaders, than social issues that require investigative journalism, accurate data and correct information, which is difficult to obtain in the absence of freedom of information.

Absence of Formal-legal Arrangements for Access to Information

In the absence of formal-legal arrangements for access to information, a lot of time, energy and resources of media, concerned citizens and civil society organisations is wasted in obtaining access to information through informal means and arrangements. Some argue that information illegally or informally acquired cannot be used for legal purposes. In most cases, the citizens have no means, other than informal, to know how the concerned government quarters have dealt with matters involving important rights and privileges of the citizens. There is no procedure available to know the manner in which the decisions were taken. Citizens are generally provided with very brief order of the authorities without assigning any reason or justification. However, in *Bisvil Spinners Case*, the Supreme Court of Pakistan held that information acquired through informal means could be used for seeking relief and remedy in case of legal violation by the government departments.

Information Blockade by the Government Departments

Many public departments conduct researches and studies on subjects with significant implications for the health and safety of citizens as consumers. Mostly, these are kept secret from the public on the pretext that their publication may cause panic among the citizens. The cost of this callous attitude is monumental as people continue to use hazardous goods and services without having access to the relevant facts. Furthermore, this secrecy allows the problems to continue unabated as the uninformed citizenry fail to muster up pressure whereby the relevant agencies could be forced to undertake effective remedial measures. It will be appropriate here to refer to a report of Pakistan Council for Research on Water Resources (PCRWR) on Bottled Water, which stated that 51% of bottled water was not fit for drinking purposes, and 70% of the water filters were

substandard, but did not reveal the names of the faulty brands. Moreover, the access to the copy of the draft law on clean water was denied to Consumer Rights Commission of Pakistan (CRCP) by the PCRWR despite repeated requests. This attitude does not allow consumers to make informed choices. Such examples abound in the governmental departments.

Information Blockade by Regulatory Bodies

In view of ongoing corporatisation and privatisation of public services, several regulatory bodies have been set up to protect interests of various stakeholders including the consumers. These regulatory bodies include National Electric Power Regulatory Authority (NEPRA), Pakistan Telecommunications Authority (PTA) and Gas Regulatory Authority (GRA). The relevant Acts and Rules oblige these regulatory bodies to solicit views of all stakeholders including consumers before taking important decisions. For a meaningful participation in the proceedings of the regulatory bodies, access to information is a pre-requisite. Experience until now, however, has been very discouraging as the regulators have largely failed in ensuring access of consumer groups to required information and data. On certain occasions, access was granted too late to facilitate any effective participation. For instance, in November 2000, NEPRA provided access to the proposed Automatic Fuel Adjustment Formula just one day before the public hearing, and thus precluded CRCP and other citizens from examining the formula independently. In June 2000, Pakistan Telecommunication Authority (PTA) held a public hearing to solicit views of citizens and consumer groups on a proposal of Pakistan Telecommunication Corporation Limited (PTCL), which sought rationalisation of tariff to eliminate cross-subsidies. CRCP requested PTA to provide it access to the relevant reports and data so that the same could be independently scrutinised to find out whether PTCL's request was based on authentic and scientific calculations. But the access was flatly denied and CRCP had to approach the High Court where the case is pending. It may be emphasized here that the whole rationale and credibility of regulators depend on effective participation of all stakeholders, particularly consumers, which is not possible without timely access to all the relevant data and information.

International Laws Guaranteeing Freedom of Information

Citizens' right to freedom of information is also recognized in the Universal Declaration of Human Rights (1948), International Covenant on Civil and Political Rights (1976) and UN Guidelines on Consumer Protection (1985). Article 19 of the Universal Declaration of Human Rights reads: "Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers." Further developing on this, the Article 19 (2) of the Covenant on Civil and Political Rights mandates each state to recognize the right of individuals to receive information. The Consumers International (CI), formerly known as International Organisation for Consumer Union (IOCU), provided eight rights, which include, *inter alia*, the right to information. These rights were later recognised in the UN Guidelines on Consumer Protection, which reiterate that consumers have the "right to be given the facts needed to

make an informed choice or decision. Consumers must be provided with adequate information enabling them to act wisely and responsibly.” It may be pointed out that Pakistan has signed and ratified the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights, and hence, is under obligation to ensure citizens’ right to freedom of information.

Freedom of Information Legislation in Other Countries

More than thirty-five countries in the world have already adopted various legal arrangements for freedom of information, ranging from constitutional guarantees to independent legislation on Freedom of Information. These include, amongst others, Sweden, the USA, Canada, New Zealand and Australia. Sweden has the longest history of transparency and openness in government operations as its Freedom of the Press Act, which also deals with Freedom of Information, dating back to 1888. The USA enacted the Freedom of Information Act in 1966, which was later amended in 1974 to make it more effective. Canada passed the Access to Information Act in 1982. In the UK, the civil society had to struggle for long to have the Freedom of Information Act before it could finally be passed in the House of Commons in November 2000. In India, a bill is pending with the Parliament since June 2000.

Efforts for Freedom of Information Legislation in Pakistan

In realization of the above problems and in keeping with the international developments, several attempts have been made during the last one and half decades to introduce freedom of information legislation in Pakistan with the aim of ensuring transparency and public accountability in governmental departments. For the first time, it was Prof. Khurshid Ahmad, Senator and *Naib Amir* of *Jamaat-i-Islami*, who tabled a private Freedom of Information Bill in the Senate in 1990. Later, in 1994 the Public Accounts Committee, headed by Senator Malik Qasim, drafted another Freedom of Information Bill. Both of the bills were forcefully resisted by the bureaucracy, and hence, could not be enacted.

A major development in the context of freedom of information legislation occurred when, at the initiative of Fakhruddin G. Ibrahim, the Federal Minister for 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 succeeding government of Mian Nawaz Sharif allowed this Ordinance to lapse and did not enact it into law. Civil society organizations and citizens, however, continued to demand freedom of information legislation. Lately, the military government of Gen. Pervez Musharraf has committed to enact freedom of information legislation. It made public a draft bill in August 2000 with the aim of soliciting public views but the draft was sketchy, lacking in necessary details as well as effective implementation procedures. Furthermore, it was restrictive in its scope, and missed out the citizens’ perspective.

The inadequacy of the government draft prompted the Consumer Rights Commission of

Pakistan (CRCP) to adopt a proactive approach on the subject, and it finally came up with a Model Freedom of Information Act, 2001. A. Salman Humayun, et al. under the auspices of CRCP, drafted this Model Act. This Act has been drafted from citizens' perspective and has been presented to the government for consideration.

MODEL FREEDOM OF INFORMATION ACT, 2001

Before drafting the Act, CRCP undertook research on relevant issues and reviewed the freedom of information laws in various countries. These countries included the USA, Canada, the New Zealand, Sweden, Australia, South Africa, Belize and Thailand, etc. CRCP also reviewed the draft laws by the governments or civil society organisations in India and the UK. On the basis of these researches and reviews, CRCP held intensive in-house discussions as well consultations with legal experts. Finally, a draft was produced and presented before a National Consultation on November 27-28, 2000, organized jointly by the CRCP and Liberal Forum Pakistan, with the aim of optimising it in the light of suggestions made by representatives from the various sections of society. The Consultation involved leading lawyers, members of social action groups, academics, experts on economic planning, retired judges, journalists, political activists as well as active citizens.

During the National Consultation, different views emerged on the question as to whether freedom of information is a constitutional right in Pakistan. Some jurists were of the view that the Constitution of Pakistan makes no explicit mention of freedom of information. Dominant view, however, was that the Article 19 of the Constitution, which deals with freedom of speech and expression, provides a reasonable basis as no freedom of speech or expression is conceivable without freedom of information. In this context, references are made to several Supreme Court decisions, which recognize freedom of information as a necessary pre-condition for any meaningful exercise of freedom of speech and expression. It is also pointed out that in India the freedom of information has received judicial recognition as a fundamental right in view of its being a part of the right to freedom of speech and expression as well as right to life and liberty. Supreme Court decisions reiterate the citizens' right to information by pointing out that in a democracy government must ensure transparency and that it could claim secrecy in very few matters relating to the public. In view of these decisions by the higher courts in Pakistan and India, CRCP believes that the right to freedom of information needs to be ensured through elaborate legal provisions and administrative procedures.

Freedom of Information is not an absolute right. Keeping certain information classified may be necessary, in general public interest, during the course of public administration. This may be for the reasons of national security, public order or to protect privacy of individual citizens. But the scope of such secrecy must be kept to the absolute minimum. Areas where there may exist the need for secrecy should be clearly defined. Furthermore, the determination of what constitutes a secret should not be made arbitrarily but on the basis of certain guidelines and criteria. Currently, everything about national security or defense is treated as classified without any distinction as to what clearly relates to combat

effectiveness and what falls more in the category of general administration. Same holds for the intelligence and other law-enforcing agencies.

Any good Freedom of Information legislation must strike a balance between the citizens' right to information and their right to privacy. In this context, information has become a commodity in the new economic arrangements, and the public is demanding protection of their information and definition of their ownership rights. CRCP was mindful of this since the very beginning, and for this reason, had allocated a special session on this subject in the National Consultation. It emerged during the discussions that the scope of privacy in the case of public officials must be restricted to the minimum so that it does not become an excuse to hide irregularities and corruption. It was particularly pointed out that all the information about the academic records, bank loans, and property, etc. of public officials should be open to scrutiny. The medical information, however, should be treated as confidential.

Currently, most of the laws in Pakistan include 'good faith' clauses, which are generally interpreted to provide a cover to the inefficiency and incompetence of public officials. A strong view emerged during the CRCP consultations that public officials should be made accountable for unlawful delay or denial of information or for their repeated misconduct. In such cases, redress should be available in terms of damages and compensations. Punitive damages or compensations may be granted when there are complaints of repeated misconduct on the part of a public official or a public office.

It was also argued, during CRCP Consultations, by some jurists that some provisions in the existing legislation further restrict access to information, for instance, the Article 6 and 7 of the *Qanoon-i-Shahadat* Order (Law of Evidence), 1984. Article 6 reads 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." Furthermore, the Article 7 says that no public official can be compelled to disclose communication "when he considers that the public interest would suffer by disclosure." Therefore, they stress that Statutes dealing with Freedom of Information must empower courts, and not the executive, to determine as to what constitutes 'public interest' with regard to the questions of disclosure or non-disclosure. However, in case of *Ms. Benazir Bhutto vs. Federation of Pakistan*, the Supreme Court of Pakistan held that privilege claimed under Article 6 and 7 of the *Qanoon-i-Shahadat* does not give absolute power to public officials to retain the documents or evidence at their will. Therefore, it clearly establishes what constitutes public interest is to be determined by the courts.

The aim of the present publication is to provide a comprehensive legislation on the Freedom of Information from citizens' perspective in order to encourage effective public participation in various decision-making processes, and promote transparency in and accountability of public administration. It is hoped that with the concerted efforts of the concerned citizens and civil society organisations, it would be possible to put the Freedom of Information legislation on the Statute books.

*"A popular government, without popular information or
the means of acquiring it, is but a prologue to a farce or a
tragedy or perhaps both."
(James Madison)*