A number of civil society organisations have drawn attention to the need for strengthening Pakistan’s existing Freedom of Information (FOI) legislative framework on September 28— the Right to Know Day. FOI is not to be confused with media freedom. FOI is an important component of the international guarantee of freedom of expression, which includes the right to seek and receive as well as impart information and ideas. It has to do with access to information and disclosure, which can enable public discourse in larger national interest on issues of governance. FOI has been described as the ‘oxygen of democracy’ by Article 19, the Global Campaign for Free Expression.

Within this context, this comment is aimed at exploring the current instruments and the approaches that can be adopted to strengthen the FOI-related normative framework in the country. The issue has assumed importance in Pakistan for a number of reasons. First, the opportunity to review constitutional covenants with respect to the said subject must not be missed in view of the on-going debate on constitutional amendments. Secondly, there appears to be a renewed interest in Pakistan’s existing Freedom of Information Ordinance, 2002, which despite its weaknesses is still in force. In fact, the incumbent government had signaled its intent to repeal the law and re-enact legislation on assuming office a year ago. The third imperative stems from the openness of the electronic media and heightened interest of the literate population of Pakistan in current affairs, and the recent burgeoning of disclosures—the motivation behind some of which are a point of great debate today. Lastly, the access to information clauses in the Kerry-Lugar Bill also create an imperative for the government to strengthen its own normative framework.

The Constitution of Pakistan does not refer to the right to seek and receive information as elements of freedom of expression. Article 19 states that “every citizen will have the right to freedom of speech and expression”. Freedom of information is not explicitly included in the guarantee of freedom of expression, which includes the right to seek and receive as well as to impart information and ideas. Pakistan has also neither signed nor ratified the United Nations’ International Covenant on Civil and Political Rights. However, despite this lack of clarity, the Supreme Court in a 1993 ruling stipulated that the right to freedom of expression includes the right to receive information. Here, it must also be noted that the Universal Declaration of Human Rights (UDHR), in its Article 19, which guarantees the right to receive information, is widely recognised as having acquired legal force in customary international law, since its adoption in 1948. The current constitutional amendments, therefore, need to clarify if FOI is an explicit civil right in Pakistan.

It must also be noted that it is purely coincidental that Article 19 of Pakistan’s Constitution and Article 19 of the UDHR focus on the same subject. Article 19 is also incidentally the name of the Global Campaign for Freedom of Information—oxygen of democracy by Dr. Sania Nishtar
Free Expression, an international NGO which conducted an in-depth analysis of the 2002 Ordinance, as has been described later in this comment.

Pakistan was the first country in South Asia to promulgate a FOI law. Two laws have been promulgated, to date — both as presidential ordinances. The FOI in 1997 lapsed, as it could not be re-promulgated whereas the 2002 Ordinance, which was promulgated to comply with an Asian Development Bank conditionality, acquired permanent status after the 17th Amendment. This federal statute was followed by similar legislation in Sindh and Balochistan.

Article 19, the Global Campaign for Free Expression, issued a memorandum to articulate its views over the 2002 Ordinance the same year. A number of positive features of the ordinance were highlighted. Among these were “inclusion of the interpretation clause, the right to appeal to the ombudsman, a clear time frame for release of information and the inclusion of courts and tribunals in the definition of public office.” The memorandum also alluded to many weaknesses of the 2002 ordinance. In particular, the excessive broad regime of exceptions and the restrictive approach to the definition of public record.

Several sections of the 2002 ordinance in particular exclude many categories of public documentation from the purview of this law. The lists of exemptions in the 2002 Ordinance are broad and seem to implicitly extend to information that is proprietary, intellectual property right or trade secret-related; information of a personal nature; personal health and employment-related information, and information relating to procurement processes that involves pre-qualification information. The list also includes classified information where disclosure would undermine protection of public interest as regards public security, defense, and military matters; international relations; and financial, monetary, or economic policy. These exceptions when truly exercised are justified.

The issue relates to the exemption list in the area of information that is termed ‘privileged internal’ or ‘other information’. As part of this many internal notes, memoranda, and deliberations on state policies and laws are precluded from being in the public domain. Deliberations of the ECC or the cabinet, for example, are not in the public domain and when they are declassified, the time window to make meaningful use of the information is already lost. Even if these concerns are addressed, the utility of any FOI law remains questionable in Pakistan since many laws can still be invoked at any time to override the statute. Various sections of the penal code and a number of laws of contempt, official secrets, and censorship are notable in this regard and make the existing FOI statute, in effect, toothless. It needs to be explored if protection and immunities can be built into the new iteration of the FOI law to guard against this.

As the law has to operate in the broader context of governance, review of transparency promoting laws, particularly in the area of whistle blower protection, and accountability assume importance, as these can be supportive to promoting a culture of freedom of information. The analysis presented in the memorandum also brings to attention the absence of a provision to strengthen the public’s right to know and the lack of a clear obligation on training authorities to train public sector functionaries in this regard.

The most important aspect of developing and implementing an FOI legislative framework is to change the institutional culture within government agencies and the civil society. Governments inherently mistrust the civil society and perceive FOI as a tool that meddlesome NGOs and individuals use for harassing public functionaries. Some NGO and individuals, on the other hand, also have very complex motives and tend to abuse the ‘right to know’ prerogative. On the other hand, public functionaries often unduly guard information that can be put to constructive analysis by impartial civil society actors, benefiting the government in turn. The government needs to fully appreciate that the public has a legitimate interest in being kept informed in a democratic society. The civil society must also be cognizant of the fact that governments have a legitimate interest in withholding information in certain circumstances.
In order to fully realise the potential within FOI as an essential underpinning of participatory democracy, good governance and accountability, both sides must exercise this right with great prudence and responsibility. However, it must be recognised that FOI is not an end in itself, but a means of improving governance. In that respect, it is just part of a holistic approach that needs to be fully institutionalised.

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