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**DISSERTATION**

**LLM/MA IN: MA Human Rights and Cultural Diversity**

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**DISSERTATION TITLE**

**Right to Information: Why is it important and what are the main challenges?**

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Supervisor: Dr Clotilde Pegorier

DISSERTATION

Right to Information

Why is it important and what are the main challenges?

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## Introduction

Right to information (RTI) is an essential right for everyone which allows individuals and groups to protect their rights. It is an important protector against corruption, abuses and mismanagement of government. It can also be beneficial to governments themselves by enhancing openness and transparency in the decision-making process to improve citizen trust in government actions.<sup>1</sup> Like other rights, RTI serves as a tool to give check and balance power for citizens on government as well as benefit to improve government-citizen relationship. RTI is now becoming widely recognized in international instruments. The terms right to information, right of access to information (ATI) and freedom of information (FOI) are often used interchangeably and have long been regarded as a fundamental human right. Regarding the topic of this dissertation, RTI stands for the right of access to information from public bodies. The number of countries with RTI legislations around the world has grown over time. The reason to adopt RTI legislations may be because the governments genuinely willing to promote openness and transparency or appease their citizens and international community. Either way, it is for sure that RTI affects the way on how people participate in decisions-making process and relationship with the government, depending on how strong the RTI legislations and implementation of these legislations. Therefore, it is important to examine; *How RTI becoming an important human right? Why countries need to have a strong RTI? What are the key challenges in developing and implementing RTI laws?* This dissertation explores to address these issues expecting to contribute the development of future RTI movements.

This dissertation is structured into three chapters. The first chapter will address the overall background of the RTI. It includes a brief theoretical perspective of RTI and recognition of RTI in international and regional human rights systems, and other international organizations using RTI as tool to improve transparency and accountability.

The second chapter will demonstrate on *why we need RTI legislations*. To address this, the driven factors on the development of RTI legislation at international and national levels, and potential benefits of having a strong RTI laws with examples. It also includes the brief aspect on the relationship between RTI and press/media freedom at the final section of this chapter.

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<sup>1</sup> David Banisar, *Freedom of Information Around the World 2006: A Global Survey of Access to Government Information Laws*, Privacy International (2006), p.6

The last chapter explores the current challenges in RTI laws in formulating and implementation stages with experience from different countries. In this chapter, the principles developed by RTI activists will be used to examine challenges of RTI legislations and some study reports will be used for identifying challenges on implementation of RTI laws.

## Chapter I: Progress of right to information and human rights systems

The rationale for RTI is rooted simply in the concept of open and transparent government. The freedom of expression is a fundamental human right and of great importance in any democratic society which includes the right to receive and access information. It is considered by making available of information on government activities and operation would reduce corruption and power abuse by the public bodies. RTI is increasingly recognized not only as a human right but also an important way to promote good governance and fight corruption.<sup>2</sup> The RTI laws and policies currently covering 90% of the world population where 90 countries specifically include the RTI in their constitution.<sup>3</sup>

In its very first session in 1946, the UN General Assembly adopted Resolution 59(I), stating, "*Freedom of information is a fundamental human right and is the touch-stone of all the freedoms to which the United Nations is consecrated.*"<sup>4</sup> Moreover, Abid Hussain, the UN Special Rapporteur on Freedom of Opinion and Expression, elaborated on this in his 1995 Report to the UN Commission on Human Rights, stating: "*Freedom will be bereft of all effectiveness if the people have no access to information. Access to information is basic to the democratic way of life. The tendency to withhold information from the people at large is therefore to be strongly checked.*"<sup>5</sup> This statement highlights the importance of freedom of information at international, regional and local levels, for the fulfilment of all other rights and as an underpinning of democracy. The following section discusses the historical background of RTI over centuries.

### ***Historical trajectory of RTI***

The history of RTI laws dates back to over 250 years, when RTI law first emerged within the revolutionary philosophies of the Enlightenment in order to render government accountable for their implementations using public finances and resources. It is recorded that the world's first Freedom of the Press Act was passed in Sweden in 1766 as an effort to allow citizens to access documents that previous governments had kept secret.<sup>6</sup> It also granted citizens the right to demand information from government bodies, documents not only prepared and created by them but also those that were received by them, and for this, Swedish citizens did not have to give a reason to claim those records.<sup>7</sup>

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<sup>2</sup> Sudhir Naib, *The Right to Information Act 2005: A Handbook*, Oxford University Press (2011), p.3

<sup>3</sup>ARTICLE 19, *Right to Information around the world* at <https://www.article19.org/right-to-information-around-the-world/>

<sup>4</sup> UN United Nations, General Assembly Resolution 59(I) (14 December 1946), para.1

<sup>5</sup> UN Doc, E/CN.4/1995/32 (14 December 1994), para.35

<sup>6</sup> Heather Brooke, *Your Right to Know*, Pluto Press (2005), p.11

<sup>7</sup> Naib *Supra* n2, p.1

The 1789 French Declaration of the Rights of Man requested that citizens have right to know about government's actions: *"All citizens have the right to ascertain, by themselves, or through their representatives, the need for a public tax, to consent to it freely, to watch over its use, and to determine its proportion, basis, collection and duration."*<sup>8</sup> Despite article 14 of French Declaration did not specifically address the right to access information at that time, the idea of claiming right to know and ATI constituted in the essence of this declaration. A similar declaration adopted in the Netherlands in 1795 states, *"Everyone has the right to concur in requiring, from each functionary of public administration, an account and justification on his conduct."*<sup>9</sup>

However, it took another 200 years to emerge next FOI Act when the United States Congress passed the freedom of information act in 1966.<sup>10</sup> It was modified in 1974 aftermath of the Watergate scandal involving President Richard M. Nixon.<sup>11</sup> The 1974 Amendments to the Freedom of Information Act represent another milestone in the quest to secure the public's right to information.<sup>12</sup> These were the product of a tumultuous time in U.S political history and came on the heels of the problematic and secretive Nixon administration. The U.S Congress overwhelmingly supported the measures, and their passage was well received by the public. Since 1974, and subsequent amendment, the FOIA has allowed citizens to learn more about their family histories and personal files; it has brought to light government oversights, shortfalls, and transgressions; it has forced improvement in government regulations and activities; and it has broadened the public's body of knowledge about its government, thus creating a more informed, effective citizenship.<sup>13</sup> Until 1990, only 14 countries own the RTI laws.<sup>14</sup> Currently, 127 out of 193 UN member states and 2 non-member states have adopted the RTI laws or decrees.<sup>15</sup> The significant driving factor forward for RTI, which lead to defining and broadening the scope of the RTI came after the fall of the Berlin wall, with a strong and coordinated civic reaction to counter the information control by the authoritarian regimes behind the Iron Curtain.<sup>16</sup> After the fall of

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<sup>8</sup> *French Declaration of Human and Civic Rights* (1789) article.14

<sup>9</sup> Banisar *Supra* n1, p.18

<sup>10</sup> Brooke *Supra* n6, p.11

<sup>11</sup> Dan Lopez, Thomas Blanton, Meredith Fuchs and Barbara Elias (Eds), *"Veto Battle 30 Years Ago Set Freedom of Information Norms"*, The National Security Archive, Electronic Briefing Book No. 142 (November 23, 2004) (Access date 20 August 2019: <https://nsarchive2.gwu.edu/NSAEBB/NSAEBB142/index.htm>)

<sup>12</sup> *Ibid*

<sup>13</sup> *Ibid*

<sup>14</sup> CLD & Access Info Europe, *Global Right to Information Map* at <https://www.rti-rating.org/>

<sup>15</sup> Open Society Justice Initiative, *States that Guarantee a Right of Access to Information (RTI)* (May 2019) at <https://www.right2info.org/resources/publications/countries-with-ati-laws-1/view>

<sup>16</sup> Helen Darbishire, *Critical perspectives on freedom of expression: Ten Challenges for the Right to Information in the Era of Mega-Leaks*, Tarlach McGonagle & Yvonne Donders (eds), *The United Nations and Freedom of Expression and Information: Critical Perspectives*, University of Amsterdam (June 2015), p.7

the Iron Curtain in 1990s, the momentum of adopting RTI laws has been increased around the world.<sup>17</sup> Not only did the number of countries adopting new RTI legislations increasing, but the interpretation on the rights to access information have been developing. Banisar argued that the development of right to information has arisen mostly through the civic activists' movements at the international, national and local levels as they demand to fight corruption and promote good and clean government, press freedom, transparency and accountability.<sup>18</sup> These movements are supported by international development agencies and bodies which promote transparent budgeting such as International Monetary Fund (IMF) and the World Bank.<sup>19</sup> Other entities such as Open Society Foundation promoted and supported these movements to achieve better transparency and open governance at different levels. The development of RTI laws over centuries has not emerged out of nowhere. There are some factors behind the development of RTI laws around the world.

The doctrine of the RTI as a human right can be seen in debates among scholars. In the past decades, the debate on the development of the RTI has been significantly on the ground of theoretical, political and legal aspects. Birkinshaw argued on two important senses of FOI that it is not only important as an instrumental right in realizing other human rights but also intrinsically important in establishing what governments do on our behalf and in our name and this *"dual sense of importance promotes FOI to a human right."*<sup>20</sup> Florini also supports that by arguing that *"A human right argument combines pragmatic and moral claims, seeing access to information as both fundamental human rights and a necessary concomitant of the realization of all other rights"*.<sup>21</sup>

Right to information has been widely linked to the achievement of both transparency and accountability of the government. Transparency can be understood as a means to achieve the end of a more responsive state that more effectively achieves democratically agreed-upon ends. While the scope of transparency extends beyond RTI, it is clear that RTI plays an important role in the achievement of transparency.<sup>22</sup> Regarding accountability, RTI is necessary for exposing wrongdoings or holding

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<sup>17</sup> David Banisar, *"The Right to Information in the Age of Information"*, Jørgensen (eds.), *"Human Rights In The Global Information Society"*, The MIT Press (2006), p.73

<sup>18</sup> *Ibid*

<sup>19</sup> *Ibid*, p.74

<sup>20</sup> Patrick Birkinshaw, *Freedom of Information and Openness: Fundamental Human Rights?*, Administrative Law Review (2006), p.179

<sup>21</sup> Florini, *Introduction: The Battle Over Transparency*, Florini (eds), *The Right to Know: Transparency for an Open World*, Columbia University Press (2007), p.3

<sup>22</sup> Maeve McDonagh, *The Right to Information in International Human Rights Law*, Human Rights Law Review 13:1, Oxford University Press (20 February 2013), p.53



government accountable and preventing government corruption.<sup>23</sup> Mokrosinska argued upon the naturalistic conception of RTI is a human right because; RTI necessary for autonomous and intentional action is a human right and; under the conditions of modern societies, government information is information of this necessary kind.<sup>24</sup> She also claims that RTI, on the ground of political conception is, *“a pre-institutional moral right to which every reasonable state would give effect in its national legislation lest it lose its claim to legitimacy.”*<sup>25</sup>

RTI is also an enabling right that assists in achieving other human rights standards. It offers the ability to request, receive and freely share information that empowers individuals, journalists, Civil Society Organizations (CSO) to understand policies and actions impacting themselves and others, and to effectively advocate for their rights. The next section discusses on the development of the RTI in international and regional human rights instruments.

### ***RTI in international human rights instruments***

Recognition of the right to information as a human right has had a very powerful promotional effect on the development of right to information. It is one thing to call for a governance reform to be adopted in country and quite another to call on government to recognise a human right. Calls for the latter are much more strident and insistent. The right to freedom of expression and to seek information has been one of the fundamental human rights, and it has taken its place in all major international instruments protecting human rights. Although it is not specifically mentioned in the UN Charter, its importance was recognized from the very beginning of the UN. In its first session in 1946, the UN General Assembly highlighted the freedom of information is a fundamental human right and touchstone of all the freedoms.<sup>26</sup> The UN even tried to adopt a convention on freedom of information at Geneva in 1948 but the convention never came into place due to an unresolved conflict between Western countries, arguing for a free flow of information, and the Soviet Union, arguing for a balanced flow of information.<sup>27</sup> However, this effort provided the text for Article 19 of the Universal Declaration of Human Rights (UDHR) adopted in 1948<sup>28</sup> states: *“Everyone has the right to freedom of opinion and expression; this*

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<sup>23</sup> *Ibid*, p.54

<sup>24</sup> Dorota Mokrosinska, *The People’s Right to Know and State Secrecy*, Canadian Journal of Law & Jurisprudence XXXI No.1 (February 2018), p.91

<sup>25</sup> *Ibid*, p.93

<sup>26</sup> UNGA *Supra* n4, 59(I)

<sup>27</sup> Jørgensen *Supra* n17, p.54

<sup>28</sup> *Ibid*

*right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers”.*<sup>29</sup>

Perhaps the most broadly based of the rights that have been relied upon as the foundation for a right to information is the right to freedom of expression. International human rights treaties such as 1966 International Covenant on Civil and Political Rights (ICCPR) and regional instruments such as 1950 European Convention on Human Rights and Fundamental Freedoms (ECHR), 1969 American Convention on Human Rights (ACHR) and 1981 African Charter on Human and Peoples’ Rights (ACHPR) protect the right to freedom of expression and access to information.<sup>30</sup> Regarding the link between the RTI and other rights, Saras Jagwanth provides a meaningful summary of how the right to access public information is related to other rights in *The Right to Know, The Right to Live*; “*it is a component part of other rights (e.g. free expression, administrative justice, and the right to fair trial); It gives effect to and protects rights (e.g. clean environment); It assists in the enforcement of rights (e.g. right to equality); and It prevents further violations by opening up activity to constant scrutiny.*”<sup>31</sup>

#### **Scope of RTI in civil and political rights**

Freedom of expression and RTI have long been linked in international human rights systems. The UN special rapporteur on the promotion and protection of the right to freedom of opinion and expression to the Commission on Human Rights has recommended that access to information is a part of freedom of expression. In his 1998 report to Human Rights Commission, Abid Hussain, states: “*the right to seek and receive information is not simply a converse of the right to freedom of opinion and expression but a freedom on its own [...] that the right to access to information held by the Government must be the rule rather than the exception. Furthermore, there must be a general right of access to certain types of information related to what may be called “State activity”, for example, meetings and decision-making forums should be open to the public wherever possible.*”<sup>32</sup>

The 2004 Report of the Special Rapporteur also endorsed the view that Article 19 of the ICCPR comprehends the right to access information by stating: “*Although international standards establish only a general right to freedom of information, the right of access to information, especially information held by public bodies, is easily deduced from the expression “to seek [and] receive ... information” as*

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<sup>29</sup> *Universal Declaration of Human Rights*, GA Res 217 A (10 December 1948), article.19

<sup>30</sup> Article 19 of ICCPR 1966; Article 10 of ECHR 1950; Article 13 of ACHR 1969; and Article 9 ACHPR 1981

<sup>31</sup> ARTICLE 19, *Access to Information: An Instrumental Right for Empowerment*, Article 19 (July 2007), p.18

<sup>32</sup> UN Doc. E/CN.4/1998/40 (28 January 1998), para.11&12

contained in articles 19 of the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights.”<sup>33</sup> In 2011, the UN Human Rights Committee (HRC) published a new General Comment on Article 19 of the ICCPR which acknowledged that the Article 19 possess a right of access to information held by public authorities. In the case of *Gauthier v Canada*, the HRC noted Article 19 together with Article 25 of the ICCPR as: “...implies that citizens, in particular through the media, should have wide access to information and the opportunity to disseminate information and opinions about the activities of elected bodies and their members.”<sup>34</sup>

Furthermore, the HRC noted that the importance of the right of access to information was encompassed in other articles of ICCPR. General Comment No 16 on Article 17 of the ICCPR, the right of privacy, addresses the issue of access to and amendment of personal information and data,<sup>35</sup> and General Comment No 32 on Article 14 of the ICCPR, the right to a fair trial, addresses the various entitlements to information that are held by those accused of a criminal offence.<sup>36</sup> Moreover, in the case of *Zheludkov v Ukraine*, the HRC referred to Article 10 of ICCPR, the right to be treated with humanity and dignity as protecting the right of prisoners to access their medical information.<sup>37</sup> Although these developments highlighting the importance of right to information, international human rights bodies had been slow to interpret the right to freedom of expression as encompassing a right to information.<sup>38</sup> The right to freedom of expression and seek information, however, granted by the ICCPR holds the negative obligation that prohibits state to interfere the access of information.

### **Scope of RTI in economic and social rights**

The principle of the RTI can also be found in the UN International Covenant on Economic, Social and Cultural Rights (ICESCR). The correlation between the RTI and realisation of economic and social rights is increasingly recognizing. The General Comments issued by the UN Committee on Economic, Social and Cultural Rights on the interpretation of the rights protect by the ICESCR have highlighted the importance of RTI in realizing those rights enshrined in ICESCR. For example, the General Comments issued on the right to social security (art.9) states that “*The system should be established under national*

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<sup>33</sup> Report of the UN Special Rapporteur on the protection and promotion of the right to freedom of opinion and expression, E/CN.4/2005/64 (17 December 2004), para.39

<sup>34</sup> *Gauthier v. Canada*, U.N. Doc. CCPR/C/65/D/633/1995 (5 May 1999), para.13.4

<sup>35</sup> UN Human Rights Committee, *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, HRI/GEN/1/Rev.1 (29 July 1994), p.22

<sup>36</sup> UN Human Rights Committee, *General Comment No. 32 Article 14: Right to equality before courts and tribunals and to a fair trial*, CCPR/C/GC/32, (23 August 2007), p.9-10

<sup>37</sup> *Zheludkov v. Ukraine*, U.N. Doc. CCPR/C/76/D/726/1996 (29 October 2002), para. 8.4

<sup>38</sup> McDonagh *Supra* n22, p.31

*law and ensure the right of individuals and organizations to seek, receive and impart information on all social security entitlements in a clear and transparent manner.*"<sup>39</sup>

At the regional level on economic and social rights, the recognition of the RTI can be seen in the decision of the European Committee of Social Rights in the case of *Maragopoulous Foundation for Human Rights v Greece*<sup>40</sup>, as the right of access to information is a necessary condition of the enjoyment of specific social and economic rights. The Committee found that the Greek Government had violated rights protected under the European Social Charter. The right to health was said to impose on the Greek Government a duty to provide information and educate the public about environmental problems. The Committee found that, the Greek Government had failed to exercise their duty under Article 3 *inter alia* by not provide precise data and information on the number of accidents in the mining sector.<sup>41</sup> In a report published by Article 19, an NGO working on freedom of expression claims that "*The right to access public information about one's economic, social and cultural rights is not only related to these rights – it is a precondition for their realisation.*"<sup>42</sup> - restating the importance of the RTI in realisation of Economic and Social Rights.

### ***RTI in regional systems***

At the regional level human rights mechanisms, the recognition of right to information can be seen in the European, Inter-American and African regional human rights systems.

In 1981, the Committee of Ministers of the Council of Europe adopted Recommendation No. R(81)19 on Access to Information Held by Public Authorities, which states: "*(I) Everyone within the jurisdiction of a member state shall have the right to obtain, on request, information held by the public authorities other than legislative bodies and judicial authorities. ...*"<sup>43</sup> The recommendation preserves the principles on means of access, proportionality of public interests on exceptions, period of responding time and refusal guidance.<sup>44</sup> The recommendation was followed up by the Recommendation on Access to Official Documents in 2002 with the provision which calls "*Member states should guarantee the right of everyone to have access, on request, to official documents held by public authorities. This principle*

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<sup>39</sup> Committee on ESCR, *GC No. 19: The right to social security (art. 9)*, E/C.12/GC/19 (4 February 2008), para.26

<sup>40</sup> *MFHR v. Greece*, The European Committee of Social Rights, Complaint No. 30/2005 (6 December 2006)

<sup>41</sup> McDonagh *Supra* n22, p.44

<sup>42</sup> ARTICLE 19 *Supra* n31, p.18

<sup>43</sup> Committee of Ministers, *Recommendation of the Committee of Ministers to Member States on the access to information held by public authorities*, CoE, Recommendation No. R (81) 19 (25 November 1981), p.2

<sup>44</sup> *Ibid*

should apply without discrimination on any ground, including national origin.”<sup>45</sup> The 2002 recommendation provides more specific guidance on possible limitations that member states can be exempted in their legislations, requesting procedures, charges upon information request and complaint procedure.<sup>46</sup>

The judicial development of the RTI can be found in several cases before the recommendations are made. In 1979, *SundayTimes v United Kingdom (No 1)*, a case which related to the granting of an ruling by the British courts against the publication of an article about the thalidomide scandal, the ECtHR states that “Article 10 guarantees not only the freedom of the press to inform the public but also the right of the public to be properly informed”.<sup>47</sup> This statement highlights the importance of right to freedom of information from the perspective that the right not only grants the right to receive and inform information but also that the right of public to be properly informed. The later decisions narrowly interpret the scope of right to freedom of expression to those who seek information. For example, in *Leander v Sweden*, the ECtHR referred the right to receive information as merely effect stating: “[T]he right to freedom to receive information basically prohibits a Government from restricting a person from receiving information that others wish or may be willing to impart to him.”<sup>48</sup> The inclusion by the Court of the phrase “in circumstances such as those of the present case, confer on the individual a right of access to a register containing information on his personal position, nor does it embody an obligation on the Government to impart such information to the individual.” did however leave open the possibility that the Court might in the future find in favour of an applicant who sought access to government information.<sup>49</sup>

A later decision of the European Court of Human Rights clearly established that positive obligations can derive from the right to freedom of expression as set out in Article 10 of ECHR. In *Özgür Gündem v Turkey*,<sup>50</sup> the Court held that genuine effective exercise of the right to freedom of expression “effective exercise of this freedom does not depend merely on the State’s duty not to interfere, but may require positive measures of protection”.<sup>51</sup> This opened the opportunity that Article 10 of ECHR could be

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<sup>45</sup> Committee of Ministers, *Recommendation of the Committee of Ministers to member states on access to official documents*, Council of Europe, Recommendation Rec(2002)2 (21 February 2002), p.2

<sup>46</sup> *Ibid*

<sup>47</sup> *THE SUNDAY TIMES v. THE UNITED KINGDOM*, ECtHR, Application no. 6538/74 (26 April 1979), para.66

<sup>48</sup> *LEANDER v. SWEDEN*, ECtHR, Application no. 9248/81 (26 March 1987), para.74

<sup>49</sup> McDonagh *Supra* n22, p.35

<sup>50</sup> *ÖZGÜR GÜNDEM V TURKEY*, ECtHR, Application no. 23144/93 (16 March 2000)

<sup>51</sup> *Ibid*, para.43

interpreted as a positive right of access to information that calls governments to proactively disclose public information.

The ECtHR made the landmark decision in 2009 on the case of *Társaság a Szabadság v Hungary* stating that a refusal of access to information constituted a violation of Article 10 of the ECHR.<sup>52</sup> The applicant, an Non-Governmental Organization (NGO) called Hungarian Civil Liberties Union, applied FOI law to access to an application for constitutional review of laws relating to drug offences submitted to the Constitutional Court by a member of parliament. The Constitutional Court decided to refuse to grant access to the requested material had been upheld by the domestic courts on the basis that the application for review contained personal data of the member of parliament which could not be accessed without the author's approval. The ECtHR decided that the refusal of access amounted to a violation of the applicant's rights under Article 10 of ECHR. The ECtHR commenced its assessment of the merits of the case by asserting that it had "*consistently recognised that the public has a right to receive information of general interest*"<sup>53</sup> and that "*the law cannot allow arbitrary restrictions which may become a form of indirect censorship should the authorities create obstacles to the gathering of information*".<sup>54</sup> Furthermore, it went on to say that the NGO, operating as a social watchdog, entitled the same protection of its Article 10 rights as the press.<sup>55</sup> The Court then concluded, on the basis that the applicant's intention was to contribute to a public debate, that the refusal of access amounted to an interference with the applicant's rights under Article 10<sup>56</sup> and this interference by the state was found to be unjustified in that it did not meet the requirement of being 'necessary in a democratic society'.<sup>57</sup> As conclusion, the ECtHR noted that "*recently advanced towards a broader interpretation of the notion of 'freedom to receive information' ... and thereby towards the recognition of a right of access to information.*"<sup>58</sup>

In October 2000, the Inter-American Commission on Human Rights approved the Inter-American Declaration of Principles on Freedom of Expression, which reaffirms the right to information in the Preamble: "*CONVINCED that guaranteeing the right to access to information held by the State will ensure greater transparency and accountability of government activities and the strengthening of*

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<sup>52</sup> *TÁRSASÁG A SZABADSÁG v. HUNGARY*, ECtHR, Application no. 37374/05 (14 July 2009), p.11-12

<sup>53</sup> *Ibid.* para.26

<sup>54</sup> *Ibid.* para.27

<sup>55</sup> *Ibid.* para.36

<sup>56</sup> *Ibid.* para.29

<sup>57</sup> *Ibid.* para.30

<sup>58</sup> *Ibid.* para.35

*democratic institutions; ...*<sup>59</sup> The Principles 3 and 4 of the Declaration explicitly recognise the right to access information: “3. *Every person has the right to access information about himself or herself or his/her assets expeditiously and not onerously, whether it be contained in databases or public or private registries, and if necessary to update it, correct it and/or amend it and, 4. Access to information held by the state is a fundamental right of every individual. States have obligations to guarantee the full exercise of this right. This principle allows only exceptional limitations that must be previously established by law in case of a real and imminent danger that threatens national security in democratic societies.*”<sup>60</sup>

The judicial development on the RTI occurred in the American system, in 2006 when the Inter-American Court of Human Rights (IACtHR) held its breakthrough decision in the case of *Claude Reyes v Chile*.<sup>61</sup> The case emerged in a request of an access to information relating to a deforestation project submitted to the Chilean Committee on Foreign Investment by an environmental group called Terram foundation. The Committee provided the requested information partially but did not provide written decision justifying its refusal of disclosure for the rest of information. The applicant made complaint to the domestic courts, which deemed his complaints inadmissible. The applicant filed complaint to the IACtHR arguing the Committee violated the Article 13 of the ACHR which protects freedom of expression. In its findings, the IACtHR states that “*by expressly stipulating the right to ‘seek’ and ‘receive’ ‘information,’ Article 13 of the Convention protects the right of all individuals to request access to State-held information, with the exceptions permitted by the restrictions established in the Convention. Consequently, this article protects the right of the individual to receive such information and the positive obligation of the State to provide it, so that the individual may have access to such information or receive an answer that includes a justification when, for any reason permitted by the Convention.*”<sup>62</sup> The scope of the right to freedom of expression to contribute to the recognition of a ‘right to truth’ about gross human rights violations can be found in a later decision of the IACtHR on the case of *Gomes Lund v Brazil*.<sup>63</sup> The case concerned a challenge to amnesty laws segregation prosecutions for torture and killings committed during the military dictatorship in Brazil in the 1970s. In its jurisdiction, the IACtHR held that “*the right to know the truth is related to the Ordinary Action filed by the next of kin, which is linked to access to justice and to the right to seek and receive information enshrined in Article*

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<sup>59</sup> OAS, *Declaration of Principles on Freedom of Expression* (October 2000), preamble

<sup>60</sup> *Ibid*, principles.3&4

<sup>61</sup> *CLAUDE REYES v. CHILE*, IACtHR, ser. C No. 151 (19 September 2006)

<sup>62</sup> *Ibid*, para.77

<sup>63</sup> *GOMES LUND ET AL. (“GUERRILHA DO ARAGUAIA”) v. BRAZIL*, IACtHR, C No. 219 (24 November 2010)

13 of the American Convention.”<sup>64</sup> Thus, the IACtHR further decided that Brazil was held to have violated their Article 13 right to information when read together with Articles 8 (duty to investigate grave violations) and 25 (judicial protection of rights) of ACHR.<sup>65</sup> The above judgements at regional levels human rights systems brought the Right to Information into an important human right principles and practices of international organizations.

In 2002, the African Commission on Human and Peoples’ Rights adopted a Declaration of Principles on Freedom of Expression in Africa.<sup>66</sup> Under *Freedom of Information* section, the Declaration not only endorses the scope of right to access information held by public bodies, it also laid principles on the requests, proactive disclosures, refusals of requests and complaints, sanction and protection of whistleblowers and more importantly, calls existing secrecy laws to amend as necessary to comply with freedom of information principles.<sup>67</sup>

In Asia, at sub-regional level of Southeast Asia, the 2012 Association of Southeast Asian Nations (ASEAN) Human Rights Declaration mostly follows the model of the UDHR and the ICCPR in its recognition of freedom of expression and the right to information. Article 23 of the ASEAN Declaration states that “*Every person has the right to freedom of opinion and expression, including freedom to hold opinions without interference and to seek, receive and impart information, whether orally, in writing or through any other medium of that person’s choice.*”<sup>68</sup> but it does not mention the provision found in the ICCPR that the right exists “regardless of frontiers”. This reflects the non-interference principle (or so called “Asian value”) has preserved in ASEAN charter<sup>69</sup>.

Although there are criticisms that the Arab charter is incompatible with human rights standards enshrined in UDHR regarding women’s rights and punishment for children, Article 32 of the 2004 Arab Charter on Human Rights states “(a) *The present Charter guarantees the right to information and to freedom of opinion and expression, as well as the right to seek, receive and impart information and ideas through any media, regardless of frontiers. (b) Such rights and freedoms shall be exercised in conformity with the fundamental values of society and shall be subject only to such limitations as are*

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<sup>64</sup> *Ibid*, para.201

<sup>65</sup> McDonagh *Supra* n22, p.34

<sup>66</sup> African Commission on Human and Peoples’ Rights, *Declaration of Principles on Freedom of Expression in Africa* (October 2002)

<sup>67</sup> *Ibid*, sec.iv “Freedom of Information”

<sup>68</sup> ASEAN Human Rights Declaration (2012), article.23

<sup>69</sup> The ASEAN Charter (2008), preamble



required to ensure respect for the rights or reputation of others or the protection of national security, public order and public health or morals.”<sup>70</sup>

### **RTI and international actors**

RTI has also integrated in the 1992 UN Earth Summit’s “Rio Principles” call for access to information on the environment held by public authorities to enhance citizens’ participation in decision-making about environmental issues.<sup>71</sup> This principle was also put into practice as the 1998 UN Economic Commission for Europe (UNCEC) Convention on Access to Information, Public Participation in Decision Making and Access to Justice in Environmental Matters (the Aarhus Convention), which requires that governments make information available and engage citizens before making decisions on environmental matters.<sup>72</sup> While the UNCEC Aarhus Convention specifically focuses on the right to access information regarding environmental matters, It advises state party to provide access to information as well as to collect and make available necessary information in timely manner while protecting other rights such as intellectual property, privacy and public security.<sup>73</sup> The Protocol on Pollutant Release and Transfer Registers (PRTR) was adopted in 2003 which requires state party to set up registers displaying the amount of pollution being produced by facilities and companies.<sup>74</sup> The importance of right to information in battling against corruption can be found in the 2003 UN Convention Against Corruption (CAC). The UN CAC calls for state parties to make information available by stating: “Enhancing the transparency of and promoting the contribution of the public to decision-making processes; Ensuring that the public has effective access to information.”<sup>75</sup> There are some factors that bring attentions on the RTI at international and domestic levels. The next section will discuss about some of the important factors behind the development of the RTI.

The later international instruments integrated RTI as a principle. In the UN Guiding Principles on Business and Human Rights (UNGPs) “Protect, Respect and Remedy” Framework<sup>76</sup>, access to information has laid under the Remedy pillar.<sup>77</sup> UNGPs set the effectiveness criteria for non-judicial grievance mechanisms that both State-based and non-State-based should be, *inter alia*, “Equitable:

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<sup>70</sup> The Arab Charter on Human Rights (2004), article.32

<sup>71</sup> UN, *The Rio Declaration on Environment and Development* (1992) principle.10

<sup>72</sup> UNECE, *Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (Aarhus Convention)* (25 June 1998)

<sup>73</sup> *Ibid.* article.3 and 4

<sup>74</sup> UNECE, *Protocol on Pollutant Release and Transfer Registers* (21 May 2003)

<sup>75</sup> UNODC, *United Nations Convention Against Corruption*, UN resolution 58/4 (31 October 2003) article.13(a & b)

<sup>76</sup> UN OHCHR, *Guiding Principles on Business and Human Rights*, UN, A/HRC/17/31 (2011)

<sup>77</sup> *Ibid.*, GP26

*seeking to ensure that aggrieved parties have reasonable access to sources of information, advice and expertise necessary to engage in a grievance process on fair, informed and respectful terms; Transparent: keeping parties to a grievance informed about its progress, and providing sufficient information about the mechanism's performance to build confidence in its effectiveness and meet any public interest at stake;*<sup>78</sup> At this moment, the UNGPs serving as a soft law rather than the binding treaty. Although the aspect of RTI has embedded in the UNGPs only under the Remedy pillar, it set out the foundation of future development of the RTI in business and human rights.

In 2015, all 193 UN Member States agreed to adopt the 2030 Agenda for Sustainable Development know as Sustainable Development Goals (SDGs).<sup>79</sup> The Agenda is not only about fighting poverty and social developments but also sets out ambitious goals to address environmental degradation, gender inequality, corrupt governance, and barriers to healthcare etc. One of the SDGs' which related to the right to access of information is Goal 16, which calls countries to *"Promote peaceful and inclusive societies for sustainable development, provide access to justice for all and build effective, accountable and inclusive institutions at all levels."*<sup>80</sup> Under the SDG 16, the indicator 16.10 specifically calls all countries to *"Ensure public access to information and fundamental freedoms, in accordance with national legislation and international agreements."*<sup>81</sup> ARTICLE 19 claims that *"right to information (RTI) is not just a goal in itself – it's a prerequisite to achieving sustainable development as a whole."*<sup>82</sup> For example, RTI strengthening access to healthcare and water by empowering people with knowledge to demand services; enabling communities to hold governments and companies accountable for their public services; and holding governments to account for corruption. Ultimately RTI promotes accountability on development issues as it does for more political matters such as information on budgets, spending, regulations, and decision-making. This encourages people to participate meaningfully in making important decisions that affect their lives. Thus, RTI is not just about government commitments since it also empowers people to participate, advocate and monitor for progress towards all SDGs.<sup>83</sup> There are other international organizations also recognize the RTI as an important principle to achieve their purposes.

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<sup>78</sup> *Ibid*, GP30

<sup>79</sup> UN, *The 2030 Agenda for Sustainable Development*, A/Res/70/1 (2015)

<sup>80</sup> *Ibid*, Goal 16

<sup>81</sup> *Ibid*, pt.16.10

<sup>82</sup> ARTICLE 19, *Access to information is critical to achieving the SDGs*, ARTICLE 19 (28 September 2018) (Access date: 28 August 2019 at <https://www.article19.org/resources/access-to-information-is-critical-to-achieving-sdgs/>)

<sup>83</sup> *Ibid*.

The Open Government Partnership (OGP) is one of the important initiatives which brings the RTI to use as a membership criterion. The coalition of OGP aims to promote accountable, responsive and inclusive governance by securing concrete commitments from national and subnational governments to promote open government, empower citizens, fight corruption, and harness new technologies to strengthen governance.<sup>84</sup> Currently, OGP has grown to 79 country and 20 local members that work alongside thousands of civil society organizations.<sup>85</sup> In order to join OGP, members must meet the eligibility criteria and pass the OGP values check. OGP's core eligibility metrics measure a government's performance across four key areas of open government which are Fiscal Transparency, Access to Information, Public Officials Asset Disclosure, and Citizen Engagement.<sup>86</sup> OGP uses RTI as a tool to achieve its objectives. In its core eligibility, potential member country requires to pass an access to information law that guarantees the public's right to information and access to government data is essential to the spirit and practice of open government.<sup>87</sup>

OGP is not the only initiative that use RTI as a tool to promote accountability and openness governance. The Commonwealth, which currently includes 53 independent and sovereign states, also uses RTI as a principle for its member states.<sup>88</sup> In 1999, the Commonwealth Freedom of Information Principles were endorsed by Commonwealth Law Ministers at their meeting held in Port of Spain, Trinidad and Tobago. The Principles were subsequently noted by Commonwealth Heads of Government at their meeting in Durban that year. Commonwealth Heads recognized the importance of public access to official information, both in promoting transparency and accountable governance and in encouraging the full participation of citizens in the democratic process.<sup>89</sup> These principles include; member countries should be encouraged to regard freedom of information as a legal and enforceable right; there should be a presumption in favour of disclosure and governments should promote a culture of openness; the right of access to information may be subject to limited exemptions, but these should be drawn narrowly; governments should maintain and preserve records; and in principle, decisions to refuse access to records and information should be subject to independent review.<sup>90</sup>

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<sup>84</sup> OGP, *About OGP* at <https://www.opengovpartnership.org/about/>

<sup>85</sup> OGP, *Our member* at <https://www.opengovpartnership.org/our-members/>

<sup>86</sup> OGP, *Joining OGP* at <https://www.opengovpartnership.org/process/joining-ogp/>

<sup>87</sup> OGP, *Core eligibility* at <https://www.opengovpartnership.org/process/joining-ogp/eligibility-criteria/>

<sup>88</sup> The Commonwealth, *About us* at <http://thecommonwealth.org/about-us>

<sup>89</sup> Office of Civil and Criminal Justice Reform, *Model Freedom of Information Bill*, The Common Wealth (2017),

p.1

<sup>90</sup> *Ibid.*

The Organisation for Economic Co-operation and Development (OECD) which includes 36 member countries, also applies RTI in pursuing its goals. OECD deploys right of access to information in supporting good governance, democracy and inclusive growth on its Governance Programme in Middle East and North Africa region.<sup>91</sup> At a special session of the MENA-OECD Working Group on civil service and integrity in 2019, OECD recognized the importance of the RTI by comprehensively stating that *“Access to information is the right of the people to know. Reinforcing transparency and allowing people to seek and receive public information is an indispensable tool for fighting corruption. It enables citizens and civil society to acquire the necessary information to carry out their role as watchdogs over the proper functioning of public institutions and to participate more effectively in public life. Moreover, knowing that citizens have the possibility to examine and retrace public decisions helps to foster a culture of transparency and accountability. Finally, giving citizens the opportunity to know about and better understand the reasons behind public decisions is key to renewing citizens’ relationship with public officials and gain trust in public institutions.”*<sup>92</sup>

Furthermore, the International Financial Institution such as the IMF and the World Bank also deploy the right of access to information principle in their activities. The IMF grants its 189 member states access to information on economic policies of all member countries.<sup>93</sup> Similarly, the World Bank applies access to information policy in 2010 which grants public to access information about its projects under preparation, projects under implementation, analytic and advisory activities, and Board proceedings.<sup>94</sup> The policy also outlines a clear process for making information publicly available and provides a right to appeal if information-seekers believe they were improperly or unreasonably denied access to information or there is a public interest case to override an exception that restricts access to certain information.<sup>95</sup>

The recognition of the importance of RTI has been progressing especially after the adoption of the UHDR in 1948. The conceptualization of the RTI as human rights has also improved in past decades. Despite tireless efforts to recognise RTI in international systems, the barriers such as overbroad

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<sup>91</sup> OECD, *The OECD and the Middle East & North Africa* (Access date 3 September 2019 at <http://www.oecd.org/mena/governance/open-government/>)

<sup>92</sup> MENA-OECD Governance Programme, Access to information: What works in MENA & OECD countries, OECD (20 March 2019) (Available at <http://www.oecd.org/mena/governance/access-to-information-what-works-in-mena-oecd-countries-agenda-en.pdf>)

<sup>93</sup> IMF, *About IMF* at [https://www.imf.org/external/np/exr/center/mm/eng/mm\\_bnfts.htm](https://www.imf.org/external/np/exr/center/mm/eng/mm_bnfts.htm)

<sup>94</sup> The World Bank, Access to Information: Overview at <https://www.worldbank.org/en/access-to-information/overview>

<sup>95</sup> *Ibid.*

definition of national security existing to hinder RTI from becoming legally binding instrument. Other international campaigns on RTI has been increased in past few decades. Since 2016, UNESCO marks 28 September as the “International Day for Universal Access to Information”.<sup>96</sup> Furthermore, the agenda on RTI has also integrated in “World Press Freedom Day” held 3<sup>rd</sup> May.<sup>97</sup>

Besides from the increasing recognition of RTI as human rights and embed into international principles, there are other factors behind the development of the RTI which will be covered in the next chapter along with potential benefits of having strong RTI laws.

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<sup>96</sup> UNESCO, *International Day for Universal Access to Information* at <https://en.unesco.org/commemorations/accesstoinformationday>

<sup>97</sup> UN, *World Press Freedom Day* at <https://www.un.org/en/events/pressfreedomday/background.shtml>

## Chapter II: Why is it important to have RTI Laws?

The RTI derives from the right to expression under the notion that for an individual to be able to freely express ideas, opinions and thoughts, it should be able to freely formulate them, hence to be very well informed. Indian activist Aruna Roy argued that *“The Right to Know is The Right to Live.”*<sup>98</sup> This statement reflects that all our lives are dependent on the information we received and on the utilization of these information. One perspective is that people want to know the *truth* what their government doing with their taxes and this ideology formulated into the right guaranteed by constitutions or laws or policies to ensure the more open and accountable government. The people give the government its mandate through elections and also the power of using budget and funding that is available to government also comes from public sources. This is, it seems, very natural at least in a democracy, to hold that information inside of government belongs to the people. Some governments even extended this provision to everyone regardless of their residential or citizenship statuses.<sup>99</sup> Information held by public authorities is not acquired for the benefit of officials or politicians but for the public as a whole because the power to manage resources including budgets and authoritative power to using different forms of resources are given by the citizens. So, the owner of the information created or received by government shall be the people who give power to the government. Unless there are good reasons for withholding such information, everyone should be able to access it. Under this scope, there is the positive obligation for public authorities to publish the information and grant access of information to public.<sup>100</sup> Another aspect of the right to information is related to the right to truth, namely the obligation of every State – and the right of the citizens on the other side— to inform the public for serious incidents such as a natural disaster or an epidemic proceeding to a full investigation of these incidents and publicizing the results.<sup>101</sup>

Another factor is the changing set of expectations people have around information. Today, we have much greater expectations and even demands around participation rather than voting in periodic elections. We expect to be consulted on every development which affects us and to have a right to be involved in the governance of key social institutions such as schools and hospitals, through oversight

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<sup>98</sup> Aruna Roy and Nikhil Dey, *“The Right to Know is the Right to Live: Profile of a Remarkable Peoples’ Movement in India that Links Information to Livelihood”*, Freedom Info (30 June 2004), p.5

<sup>99</sup> United States’ and United Kingdom’s FOIA granted non-citizens to request open information they have recorded. But in Canada, only citizens, permanent residents or persons present in Canada have right to obtain information from government institutions.

<sup>100</sup> Aikaterini Yannoukakou, Iliana Araka, *“Access to Government Information: Right to Information and Open Government Data Synergy”*, *Procedia - Social and Behavioral Sciences* 147 (2014), p.334

<sup>101</sup> *Ibid.*

boards. For example: Before the public meetings in Canada, the local governments publish information on their website so that the participants will have chances to participate more effectively in discussions about it. Furthermore, every piece of information about the development of the certain issues such as road construction, including the way it will affect traffic and any environmental reports, is available online. As a result, when householders go to these meetings, they are as well informed about the development as anyone can be.<sup>102</sup>

Changing interaction with the information in modern world is another factor for the development of the right to information based on a complete revolution in the technology relating to information. We can now carry around far more information on our personal computers and mobile devices and the amount of information we are dealing is much more increasing comparing to past decades. Moreover, Powerful searching tools and electronic filing mean that we have massive information resources at our fingertips and of course the World Wide Web means that we can access virtually unlimited amounts of information in seconds. For example, 30 years ago, the very best information resource one could have in one's home was the Encyclopaedia Britannica, a 12-15 volume set that might have a few pages on the pyramids in Egypt. This was, however, a very expensive item and few people could afford it. Today, a growing number of people can access the Internet from their homes, with 1000s of pages of information about the pyramids, and almost everything else.

In addition to these global factors, a number of factors at the national level promote adoption of right to information legislation. One of these is undoubtedly the coming about of rapid processes of democratic change in many countries. These processes create a window of opportunity for adopting right to information legislation. Often, when a revolution throws off an old dictatorship or a repressive regime, adoption of right to information legislation is a key demand. For example, in Egypt, the people insisted on constitutional recognition of the right to information from the very beginning, and it was indeed included in both the 2012 'Morsi' Constitution and the more recent 2014 Constitution. Part of the reason for this was people's understanding that secrecy was part of the system that allowed the abuses perpetrated by Mubarak to take place.<sup>103</sup> In some countries, undemocratic regimes have taken it upon themselves to bring about a process of rapid democratization and in those countries, as well, adoption

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<sup>102</sup> *Gananoque Information on Town Hall Public Meetings*, (Access date 20 August 2019: <https://www.gananoque.ca/town-hall/public-meetings>)

<sup>103</sup> Toby Mendel, *Political and Media Transitions in Egypt: A Snapshot of Media Policy and Regulatory Environment*, Internews (August 2011), p.3

of right to information legislation has been a priority. For example, Albania provides both constitutional and legal guarantees of the right to information after transition from a Communist single-party system to a multi-party democratic system in 1990s.<sup>104</sup>

Another factor is that in countries which have witnesses important political shifts after long periods without major political changes. In Mexico, for example, the political transition during the early 2000s and the arrival of a new generation of public officials to the federal government, some of them coming from the same “epistemic community” as civil society advocates of transparency and accountability, created a able environment for the introduction of access to public information legislation. This legislation, while progressive in scope, included important provisions to minimize potential bureaucratic resistance.<sup>105</sup> In the United Kingdom, as well, after 17 years out of power, the Labour Party immediately promised right to information legislation when it finally came back into power in 1997.<sup>106</sup> And similar processes of political change led to the adoption of right to information legislation in Thailand in 1997.<sup>107</sup> In many countries, the international community has also provided both pressure and support for the adoption of right to information legislation. For example, in Tunisia, where international actors such as the World Bank offered the post-revolutionary government support for the adoption of right to information legislation.<sup>108</sup> Support from the international community is often supplemented by support from civil society, including both international and local groups, which can play a very important role in mobilizing support for the adoption of right to information legislation. For example, the international campaigns and movements on freedom of information by Centre for Law and Democracy link with the local NGOs in Myanmar to mobilize other CSOs and develop the RTI law.<sup>109</sup> RTI has also been used as a political tool in many democratic countries. As in United Kingdom, Tony Blair’s government had made FOI a manifesto commitment before coming to power, in Sri Lanka, Maithripala Sirisena, the current President used the RTI legislation as his key campaign pledges.<sup>110</sup> Next section discuss on the potential benefits of have a strong RTI laws with examples and perhaps, those benefits are positive attraction to have strong legislation and implementation of RTI laws.

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<sup>104</sup> Stephanie E. Trapnell (eds), *Right to Information: CASE STUDIES ON IMPLEMENTATION*, The World Bank Group (2014), p.12

<sup>105</sup> *Ibid.* p.113

<sup>106</sup> *Ibid.* p.324

<sup>107</sup> *Ibid.* p.482

<sup>108</sup> The World Bank, *International Bank for Reconstruction and Development and International Finance Corporation: Interim Strategy Note for The Republic of Tunisia for The Period FY13-14*, The World Bank Group, Report no. 67692-TN (17 May 2012)

<sup>109</sup> More at: <https://www.pgkmyanmar.org/en/project/building-awareness-civil-society-right-information-0>

<sup>110</sup> More at: <https://www.rti.gov.lk/media/news/145-getting-used-to-their-right-to-know>



## **Benefits of RTI**

There are many important benefits for having a strong RTI laws and the following are the significant benefits.

*Fighting Corruption* is one of the most important benefits of having a good RTI law. A famous U.S. Supreme Court Justice, Louis Brandeis, famously once noted: "Sunlight is said to be the best of disinfectants." referring to the importance of transparency and openness towards clean government.

The RTI is a key tool in combating corruptions and wrongdoings in government. There are many examples of right to information legislation being successfully used to combat corruption. For example, one feature of the Ugandan education system, at least in the 1990s, was significant capital transfers to schools via local authorities. A public expenditure tracking survey (PETS) in the mid-1990s revealed that 80% of these funds never reached the schools. One of the actions taken by the central government to address this was to publish data in local newspapers regarding the monthly capital transfers that had been made to local governments. This meant that both officials at the schools and parents of students could access information about the (intended) size of the transfers. As the evidence shown, few years after the programme had been implemented, the rate of loss to corruption had dropped to 20%.<sup>111</sup> In fighting corruption, the RTI can not only be used as revealing truth of corruption but as a prevention measures to eradicate corruption by public officials. For example, in Canada in 2010, the then Defence Minister Peter MacKay called the search and rescue service to provide him with a helicopter to transport him back from a fishing trip, even though the helicopters are not supposed to be used for this purpose.

<sup>112</sup> The official at the search and rescue service responded by replying: "*If we are tasked to do this we of course will comply,*" he wrote. "*[G]iven the potential for negative press though, I would likely recommend against it, especially in view of the fact that the Air Force receives [or at least used to] regular ATIs specifically targeting travel on [Canadian Forces] aircraft by ministers.*"<sup>113</sup> The significance of this incident displaying is that the official pointed to the right to information law, showing how powerful a tool it is to combat corruption. Sure enough, in due course there was a media request for the

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<sup>111</sup> Ritva Reinikka and Jakob Svensson, *Fighting Corruption to Improve Schooling: Evidence from a Newspaper Campaign in Uganda*, The MIT Press, Journal of the European Economic Association, Vol. 3, No. 2/3 (April-May 2005), p.260

<sup>112</sup> Daniel Leblanc, *Defence Minister Defends Costly Flights from Fishing Lodge*, The Globe and Mail Inc. (22 September 2011) Access date 27 August 2019: <https://www.theglobeandmail.com/news/politics/defence-minister-defends-costly-flights-from-fishing-lodge/article600882/>

<sup>113</sup> Postmedia News, *MPs Demand Resignation of Peter MacKay after release of fishing trip airlift emails*, National Post, (2 December 2011) Access date 27 August 2019: <https://nationalpost.com/news/mps-demand-resignation-of-peter-mackay-after-release-of-fishing-trip-airlift-emails>

information, and the Minister's wrongdoing was the subject of extensive media coverage. Another case on the fighting corruption using the RTI legislation can be found in the United Kingdom parliamentary expenses scandal emerged in 2009.<sup>114</sup> In the UK, NGOs and investigative journalists have used freedom of information requests to investigate the expenses of members of parliament. The information was leaked prior to the official response but helped to identify wrongdoings and led to the conviction and suspension of several members of parliament. Because of this incident, several government ministers resigned, the Speaker of the House of Commons forced to quit, and some MPs were imprisoned.<sup>115</sup> It was the first time that had ever happened in 300 years in the UK's political history and shook the British political system to its foundations.

According to Mori, "*ATI laws can provide factual evidence to confirm or deny suspicions of corruption and to justify promoting change.*"<sup>116</sup> The majority of empirical studies aim at analyzing the links between RTI laws and governance indicators, including corruption. In her study report, Roumeen Islam discovered that countries with RTI laws have lower corruption levels.<sup>117</sup> A study by Tandoc has also shown a positive correlation between control of corruption and years of implementation of RTI laws i.e the older a RTI law in a country, the more the country tends to have lower corruption levels.<sup>118</sup> Thus, although the RTI cannot be used as a 'silver bullet' to completely eliminate the corruption and all the related issues, it can be served as a powerful preventive tool and helps to bring justice caused by corruption.

Another feature of the benefit of the RTI is promoting *Democracy and Public Participation*. RTI is critical for strengthening citizens to effectively monitor and hold government to account, and to enter into informed dialogue for making decisions which affect their lives. As ARTICLE 19 has described information as "the oxygen of democracy", information is essential to democracy at a number of levels.<sup>119</sup> Fundamentally, democracy is about the ability of individuals to participate effectively in

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<sup>114</sup> Gordon Rayner, *MPs' expenses video: Telegraph data vs officially released claims*, The Telegraph (19 June 2009) Access date 27 August 2019: <https://www.telegraph.co.uk/news/newstoppers/mps-expenses/5575676/Cabinet-expenses-in-full-published-by-Telegraph.html>

<sup>115</sup> New Statesman, *Leader: Ten years on from the MPs' expenses scandal*, NewStatesman (1 May 2019) Access date 27 August 2019: <https://www.newstatesman.com/politics/uk/2019/05/leader-ten-years-mps-expenses-scandal>

<sup>116</sup> Jorge Mori, *Access to information laws and the transparent university in Global Corruption Report Education*, Transparency International (2013), p.295

<sup>117</sup> Roumeen Islam, *Does More Transparency Go Along With Better Governance?*, Economics and Politics 18 (2) (February 2006), p.153

<sup>118</sup> Edson C. Tandoc Jr, *FYI on FOI: Exploring the effects of freedom of information (FOI) laws around the world*, University of Missouri-Columbia (2013) p.14

<sup>119</sup> ARTICLE 19, *The Public's Right to Know: Principles on Freedom of Information Legislation*, London (June 1999) Preface

decision-making that affects them. Democratic societies have a wide range of participatory mechanisms, ranging from regular elections to citizen oversight bodies, for example of the public education and health services, to mechanisms for commenting on draft policies or laws. Effective participation at all of these levels depends on the right of access to information. Voting is not simply a technical function. For elections to fulfil their proper function – described under international law as ensuing that “[t]he will of the people shall be the basis of the authority of government”<sup>120</sup> – the electorate must have right of access to information. The same is true of participation at all levels. It is not possible, for example, to provide useful input to a policy process without access to the policy itself, as well as the background information policy-makers have relied upon to develop the policy. For example, Slovak law requires companies that engage in the harvesting of trees in forests to prepare a forest management plan, which must be approved by the Ministry of Agriculture. Historically, these plans were classified documents. A local NGO, the Vlk (*Wolf*) Forest Protection Movement, eventually managed to gain access to these plans, under the right to information law which had been adopted recently. Vlk’s requests for information were rejected by both the city administration and the Ministry on the ground that the Plans were “classified” information. However, Vlk were determined to access the data and took their claim to the Supreme Court, arguing that the government’s refusal to provide the information was a breach of their rights under the Act on Free Access to Information. Significantly, in 2005, amendments were introduced to forestry legislation to ensure that the information and background material used in developing forest management plans were made public. The new amendments also set a precedent for public participation in the development of forest management plans by allowing representatives of NGOs to be present at official meetings where the plans were discussed.<sup>121</sup>

Effective public participation is not the only feature of democracy but it is also about *accountability and good governance*. RTI plays an important role to strengthen accountability and openness of the democratic governments. The public have a right to scrutinize the actions of their leaders and to engage in full and open debate about those actions.<sup>122</sup> The public must be able to assess the performance of the government they elected, and this depends on access to information about the state of the economy, social systems and other matters related to public concern. One of the most effective ways of

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<sup>120</sup> UDHR *Supra* n29, Article 21(3)

<sup>121</sup> CHRI, *Our Rights Our Information: Empowering people to demand rights through knowledge*, Commonwealth Human Rights Initiative (2007) p.64-65

<sup>122</sup> ARTICLE 19, *International standards: Right to information*, ARTICLE 19 (5 April 2012) (Access date: 27 August 2019 <https://www.article19.org/resources/international-standards-right-information/>)

addressing governance problems, particularly over time, is through open, informed debate.<sup>123</sup> For example, when U.S. President Barack Obama's new online medical coverage system was first released, there were massive technical problems.<sup>124</sup> Due to complete openness about this, the problems were tracked and reported on in real time. The problems were thus repaired, and the functionality of the system improved significantly.<sup>125</sup> Also in Romania, the use of the RTI law by a coalition of CSOs for the creation of an integrity ranking of Romanian Universities led to an immediate improvement in university transparency. As a result of the study and the information disclosed, more than 25 percent of universities in the country have been proactively publishing procurement expenses on their website and advertising teaching jobs openly. The action also played a key role in the adoption of a new education bill in 2011, which introduced measures to limit nepotism. Unfortunately, without further systematic and sustainable change affected by broader corruption problems, the improvements achieved in the higher-education sector have been threatened.<sup>126</sup>

Commentators often focus on the more political aspects of the right to information, but it also serves a number of other important *individual benefits and goals*. The right to access one's personal information, for example, is an aspect of one's basic human dignity but it can also be central to effective personal decision-making. Access to medical records, for example, often denied in the absence of a legal right, can help individuals make decisions about treatment, financial planning and so on. Regarding individual benefit of the RTI, in a study done by some students at Yale of the Indian right to information law involved three control groups. The first group applied for benefits to which they were entitled – such as a passport or food rations – and did nothing else. The second group applied for the benefit and paid a bribe – on average of about US\$25 – to get the benefit. The third group applied for the benefit and then followed up with an application under the right to information law for information about their claim. While the second group had the highest success rate, the third group was not far behind. This is significant, among other things, because the cost of a right to information application is just about US\$0.15.<sup>127</sup> Also

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<sup>123</sup> *Ibid.*

<sup>124</sup> Ashley Killough, *Obama apologizes for insurance cancellations due to Obamacare*, CNN (8 November 2013) (Access date: 27 August 2019 at <https://edition.cnn.com/2013/11/07/politics/obama-obamacare-apology/index.html>)

<sup>125</sup> Sheryl Gay Stolberg and Michael D. Shear, *Inside the Race to Rescue a Health Care Site, and Obama*, The New York Times (30 November 2013) (Access date: 27 August 2019 at <https://archive.nytimes.com/www.nytimes.com/2013/12/01/us/politics/inside-the-race-to-rescue-a-health-site-and-obama.html>)

<sup>126</sup> Maira Martini, *Right to information laws: Impact and implementation*, TI (9 May 2014) p.3

<sup>127</sup> Leonid Peisakhin and Paul Pinto, *Is transparency an effective anti-corruption strategy? Evidence from a field experiment in India*, Yale University, *Regulation & Governance* (2010) 4, 261–280

in Bangladesh, while implementation on public project has been slow, an increasing number of RTI requests have been made by NGOs and activists to access public services such as health, housing. Prior to the enactment of the RTI law in Bangladesh, it was unlikely to access such services without bribing public authorities.<sup>128</sup>

An aspect of the right to information that is often neglected is the use of this right to facilitate *effective business* practices. RTI is a necessary right to prevent and remedy corporate abuses of human rights. Where harms have occurred, companies involved often have far more information about the processes, products and decisions that resulted in the harm, including scientific information about companies' operations, contracts with business partners, and documentation of their decision-making. If victims of these harms are to have meaningful access to remedy, they must be able to obtain all relevant information.<sup>129</sup> Commercial users are, in many countries, one of the most significant user groups. This is an important benefit of right to information legislation and helps answer the concerns of some governments about the cost of implementing such legislation. Openness also helps ensure that tenders and other public spending procedures are fair. Businesses that were unsuccessful in the tender can apply for information as to why they failed. This not only helps keep tenders honest, but it also helps the businesses prepare better for future tenders. The World Bank, for example, now requires all successful bidders to provide key information about the bidding, such as the points awarded to the successful bid under each category and the overall value of the tender award on their websites.<sup>130</sup> The open data that many governments are releasing in large quantities has been used by many different social actors to develop tools that benefit society in different ways. The economic value of all of this activity has been assessed at many billions of dollars. Public authorities hold a vast amount of information of all kinds, much of which relates to economic matters and which can be very useful for businesses. In the United Kingdom according to the World Bank, businesses make request by using FOIA to; obtain background information on tenders, including previous submissions made by competitors and background information held by the public authority; obtain data for resale or reuse at a profit and; use for public relations.<sup>131</sup>

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<sup>128</sup> Martini *Supra* n126 p.3

<sup>129</sup> Business and Human Rights Resource Centre, *Access to Information*, Introduction at <https://www.business-humanrights.org/en/corporate-legal-accountability/special-issues/access-to-information>

<sup>130</sup> The World Bank, *The World Bank Policy on Disclosure of Information*, Washington (2002) para.36

<sup>131</sup> The World Bank, *Implementing Right to Information: A Case Study of the United Kingdom*, Washington (2012), p.26-27

Openness promotes greater participation and hence greater ownership over development initiatives. This can help ensure *sound development* decisions and also good implementation of projects. It also helps ensure that development efforts reach the intended targets. For example, in South Africa, local groups have used the RTI law to obtain water delivery benefits that they were due. In one example, villagers in Emkhandlwini had no water, whereas neighbouring villages were receiving water deliveries from municipal tankers. With the help of a local NGO, the villagers filed an RTI request for minutes from the council meetings at which water programmes had been discussed and agreed, for the council's Integrated Development Plan (IDP) and for the IDP budget. This information showed that there were plans to deliver water throughout the region, but that somehow Emkhandlwini had been left out. Armed with this information, the villagers were able successfully to reassert their claims for water<sup>132</sup>.

These examples demonstrate the potential that RTI laws can have if effectively used. However, the passage of RTI laws alone does not guarantee to achieve these benefits. An effective implementation and an enabling environment are also crucial that citizens can effectively use their RTI and enjoy the benefits of RTI.

### ***RTI and press/media freedom***

Since, doctrine on the media is very broad and many aspects to cover, the following discussions pay specific attention on the RTI and press freedom and media. In a democratic society, a free press is important crucial as it allows citizens to access information they can use to monitor and evaluate the government. The media supply information to the people as well as serving the watchdog function on behalf of the citizens. Some even argued that the country's democracy depends on the freedom of press.<sup>133</sup> The UN states on the media as "Fact driven decision-making can significantly alter our political, social and economic perspectives. Therefore, open and pluralistic media are, perhaps, most precious when they simply provide the mirror for society to see itself. These moments of reflection are instrumental in defining community objectives, making course corrections when society or its leaders have lost touch with each other or gone astray."<sup>134</sup> Following this statement by the UN it highlights the link between RTI and FOI as "*The right to access information can be interpreted within the legal frameworks that support freedom of information as it applies to information held by public bodies, or in*

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<sup>132</sup> Toby Mendel, *The Right to Information and Citizenship: Background Paper for a Conference on Freedom of Information in Zambia* (2011), p.3

<sup>133</sup> More at [http://www.abajournal.com/magazine/article/free\\_press\\_linda\\_klein](http://www.abajournal.com/magazine/article/free_press_linda_klein)

<sup>134</sup> World Press Freedom Day *Supra* n97

*a wider sense to encompass both access and circulation of information held by other actors, where it becomes intrinsically linked to freedom of expression.*"<sup>135</sup> Therefore, the combination of the RTI and citizen participation in media can only contribute to an increased sense of ownership and empowerment. While media serves as a check and balance agent in democratic society, there are still challenges in totally relying on the media alone. The following arguments reflect why we shall not always rely on the information provided by media.

News media might have their own agenda in providing information on the events. For example, in a special report on the Massacre in Myanmar by Reuters which caused two local journalists faced charges under Myanmar's Official Secrets Act, the terms used by the Reuter are questionable. The massacre in Inn Din village, Rakhine State revealed the brutally deaths of 10 Rohingya villagers by the army's 33rd Light Infantry Division, supported by the paramilitary 8th Security Police Battalion, according to four police officers, all of them members of the battalion. <sup>136</sup> There is no doubt that grave violation of human rights was committed by military forces at that area and those who committed shall be brought to justice. However, the sensitive religious words such as "Buddhist" and "Muslim" are widely used in this special report. While the facts are true, the intention is doubtful. Although the Reuters' effort to identify the perpetrators is acceptable, the report led many other Buddhist people in Myanmar to have negative impression on two local journalists. From the aspect of freedom of information, the two journalists tried their best to investigate the truth on the brutal war crimes committed by the arm forces (later they were awarded Pulitzer Prize and freed by amnesty). However, in my opinion, the usage of sensitive words created more splits between two major religious communities at that area and difficult to reconcile, thus, it is vital that choice of words shall be done with utmost care.

Sometime, governments run state-run media for propaganda purposes. For example, China Central Television (CCTV) is used to spread propaganda on "*tell China's story well*".<sup>137</sup> Moreover, China Daily has struck deals with at least 30 foreign newspapers – including the New York Times, the Wall Street Journal, the Washington Post and the UK Telegraph – to carry four- or eight-page inserts called China Watch, which can appear as often as monthly. The supplements used to spread Chinese government's

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<sup>135</sup> *Ibid*

<sup>136</sup> Wa Lone and Kyaw Soe Oo et. al, *Massacre in Myanmar: How Myanmar forces burned, looted and killed in a remote village*, Reuters (8 February 2018) at <https://www.reuters.com/investigates/special-report/myanmar-rakhine-events/>

<sup>137</sup> Louisa Lim and Julia Bergin, *Inside China's audacious global propaganda campaign*. The Guardian (7 December 2018) at <https://www.theguardian.com/news/2018/dec/07/china-plan-for-global-media-dominance-propaganda-xi-jinping>

propaganda at international level.<sup>138</sup> In order to counter-check the government's propaganda published by state-run media, the independent media are necessary. However, independent media required equal opportunity to access to information as state-run media. Thus, they can validate the authenticity of information provided by the state-run media. Another way to validate the information by media (whether state-run or independent) is by public. Individuals can use RTI laws to request authentic information to verify the authenticity of the information. Therefore, RTI is important not only for the media but also for the citizens to monitor government's activities and counter-balance the fourth estate of a democratic society. Revisiting to the relation between RTI and corruption, studies have found that having a free press can lower corruption levels and this is consistent with the watchdog function of the press.<sup>139</sup> For example, Mexico's FOI law has also helped to bring corruption to light. Journalist Fátima Monterrosa won a 2007 National Journalism Award by using the law to uncover a series of fraudulent procurement orders coming from the President's Office.<sup>140</sup>

The development of social media significantly changes the way of how we are receiving and distribution information. On daily basis, social media feeding loads of information to everyone accessing it and transforming our way of dealings with information. It provides space that citizens have greater access to more news and information than before, which in turn enhances democratic society. Social media has enhanced the way that information is produced and shared, via websites and various social media platforms. Many social media users have started contributing to the media agenda, sometimes even directly through their blogs and social media posts in popular sites such as Twitter, Facebook and YouTube. Thus, the right of access to information becomes more salient, especially if citizens begin to demand direct access to information instead of relying on news media and press.<sup>141</sup> This leads to the discourse of freedom of information which has been spreading, although slowly, around the world. In this age of blogging and social media, journalists are no longer the only individuals who seek and demand information.<sup>142</sup> Thus, freedom of information benefits both media and citizens. However, with social media granting the speed of information flow, it also fueled the widespread of pre-existing negative effects such as disinformation, fake news and hate speech etc. For instance, Facebook has the largest share of users in Myanmar (around 20 million users out of 53 million citizens) yet it struggling

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<sup>138</sup> *Ibid*

<sup>139</sup> Sebastian Freille et.al, *A contribution to the empirics of press freedom and corruption*, European Journal of Political Economy 23 (2007) 841

<sup>140</sup> Gregory Michener, *FOI laws around the world*, Journal of Democracy 22(2) (April 2011) 145-159

<sup>141</sup> Tandoc *Supra* n118, p.6

<sup>142</sup> *Ibid*



to prevent the widespread of hate speech causing intense conflict between ethnic armed group and national army (Tatmadaw).<sup>143</sup> Although RTI cannot act as a one-stop solution to tackle all these challenges, it can be served as a mean to counter-balance by accessing and analyzing of authentic information regarding government activities. Nevertheless, the time gap between the emergency of fake news and disinformation and resolving time may still be there before reaching the truth.

While, above arguments on the benefits and features of the RTI seem to be convincing to adopt an RTI laws or policies, the practical issues on the passage and implementation of RTI laws can never be simple. The next chapter will tackle the main challenges of adopting and implementation of RTI laws.

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<sup>143</sup> Elise Thomas, *Facebook Keeps Failing in Myanmar*, Foreign Policy (21 June 2019) at <https://foreignpolicy.com/2019/06/21/facebook-keeps-failing-in-myanmar-zuckerberg-arakan-army-rakhine/>

### **Chapter III: Challenges in formulating and implementing of RTI Law**

After discussing several benefits and importance of having a good RTI law, this chapter discusses on the formulation and implementation of RTI laws using analysis from different countries. It starts with the major principles which used to formulate RTI laws and discusses on challenges specifically in passage of RTI laws. Then, it deals with the challenges in implementation of RTI laws in some countries.

#### ***Challenges in formulation***

RTI (or FOI) legislation can be seen as an essential step to create the enabling environment for citizen's right of access to information held by public bodies. Theoretically, having a strong RTI law can increase government openness and responsiveness to requests for information. The RTI laws primarily aim at regulating the proactive disclosure of information and creating the mechanism which citizens can request information from government bodies. Over the years, several attempts have been made by activists to develop principles aimed to strengthen RTI. The process of formulating RTI legislation clearly presents tough challenges. The following discussion based on the principles developed by international organizations working on RTI so that it can be contrasted with existing national laws to identify challenges.

ARTICLE 19 has published a set of nine principles, proposing the standards on freedom of information legislation that can help when transforming RTI values into legislation. These Principles are based on international and regional law and standards, and evolving State practice. They therefore provide a useful framework in which to discuss the features of RTI legislation.<sup>144</sup> Principles are important as standards but on their own they are not enough. However, they can use as a guidance to formulate a strong RTI law. The principles that ARTICLE 19 proposing are: Maximum Disclosure, Obligation to Publish, Promotion of Open Government, Limited Scope of Exceptions, Processes to Facilitate Access, Costs, Open Meetings, Disclosure Takes Precedence and Protection of Whistleblowers.<sup>145</sup> Contrasting to ARTICLE 19's principles, the Commonwealth also published Model Freedom of Information Bill in 2017 which outlined text of articles that should be set out in domestic RTI (or FOI) laws.<sup>146</sup> The significant difference in two document is that Model Freedom of Information Bill set out by the Commonwealth does not propose the establishment of separate independent body (for example, Information Commission) because many Commonwealth small island states and developing countries

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<sup>144</sup> ARTICLE 19 *Supra*, n119

<sup>145</sup> *Ibid*

<sup>146</sup> Commonwealth *Supra* n89

experience human resource constraints which may make the staffing of such a position difficult.<sup>147</sup> In practical, the challenges on passage of RTI laws and implementation have some identical issues. Therefore, the challenges in formulating and passage of the law in the following discussion based on the scope used by CLD and Access Info Europe to analyze RTI laws in each country.<sup>148</sup>

- ***Presumption in favour of access***

A right to information law should establish a presumption in favour of access as one of the purposes of the legislation. In most cases, this will reverse the pre-existing practice of secrecy which previously prevailed in the public sector. Ideally, the presumption should be supported by a set of purposes or objectives of the law. These should not only emphasise aspects of the right of but also point to the wider benefits of the right to information that were discussed in previous chapter – such as fostering greater accountability, encouraging participation and combating corruption. For examples, the Indian Right to Information Act states: “*Subject to the provisions of this Act, all citizens shall have the right to information.*”<sup>149</sup> This is a rights-based statement. The South African Act states: “*A requester must be given access to a record of a public body*” if that requester complies with the given procedural rules.<sup>150</sup> This is more of a procedural rights statement. Both the Indian and South African laws include clear statements of purpose of their RTI laws. This presumption should apply to all public authorities, defined broadly.

ARTICLE 19’s Maximum Disclosure principle suggests that “*Freedom of information legislation should be guided by the principle of maximum disclosure.*”<sup>151</sup> The principle of maximum disclosure preserves the basic rationale of RTI legislation and is explicitly stated as an objective in many national laws. An important aspect of this principle, as mentioned in 1999 the Commonwealth Freedom of Information Principles, is that the public authority seeking to deny access to information bears the burden of proving that it may legitimately be withheld.<sup>152</sup> This principle also suggests that the scope of the law should be very broad as enshrined in the Aarhus Convention.<sup>153</sup> ARTICLE 19 also suggested that everyone, not just citizens, should benefit from the right and an individual requesting access should not have to

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<sup>147</sup> *Ibid*, p.1

<sup>148</sup> CLD *Supra* n14

<sup>149</sup> India *Right to Information Act 2005*, No.22 of 2005 (2005), sec.3

<sup>150</sup> South Africa *Promotion of Access to Information 2* (2000), sec.11(1)

<sup>151</sup> ARTICLE 19 *Supra*, n119

<sup>152</sup> *Ibid*

<sup>153</sup> Aarhus Convention *Supra* n72, Article 2

demonstrate any particular interest in the information or explain the reasons for the request.<sup>154</sup> However, some disagreements can be seen to that point, even for the laws in developed countries. For example, while the US and UK laws granting the right of access to anyone, regardless of their nationalities, the Canada law grants only to the persons residing in Canada and Indian RTI act allows only citizens to have right of access.<sup>155</sup> In reality, the tension between granting information access to “citizens” and “any person” does not necessarily matter in exercising the RTI law. For example, a person (A) who is not a resident of Canada can ask another person living in Canada (B) to make information request and forward that information to A. There is no stopping by Canadian law for doing so as the sensitive information are already restricted to anyone by Canadian FOI law and it won’t provide access to anyone until the expiration date of that information or overridden by public interest rules. Including or excluding legal persons in the right to request information can create confusion regarding the rights of legal persons, including companies, media and non-governmental organisations, as well as unincorporated community and citizens groups, which often request information as entities, rather than as individuals.<sup>156</sup> The principle of maximum disclosure also suggested that information should be defined broadly to include all information held by the body in question, regardless of form, date of creation, who created it and whether or not it has been classified.<sup>157</sup> The scope of the obligation to disclose in terms of the bodies covered should also be broad. All three branches of government – executive, legislative and judicial – should be covered and no public bodies should be excluded from of the law. Public corporations should also be covered and many argue that even private bodies which are substantially publicly funded or carry out public functions should be included within the ambit of the law. In South Africa law, even private bodies are required to disclose information which is needed for the protection or exercise of any right.<sup>158</sup> This principle also holds what *form* of information shall be disclosed and that need to be clearly defined in the law. Since information can be in any type of formats such as tangible or intangible form of documents, tables, pictures, audio/visual records, all type of possible formats that recorded at government bodies shall be covered in the law. The India’s RTI law states that “‘*information*’ means any material in any form, including records, documents, memos, e-mails, opinions, advices,

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<sup>154</sup> ARTICLE 19 *Supra* n119

<sup>155</sup> US *Freedom of Information Act* (1996), article.3(a); UK *Freedom of Information Act* (2000), sec.1.1; Canada *Freedom of Information Act* (2018) sec.4(1); India *Supra* n149 sec.3

<sup>156</sup> ARTICLE 19 & APR, *Asia Disclosed: A Review of the Right to Information across Asia*, ARTICLE 19 London (2015), p.12

<sup>157</sup> ARTICLE 19 *Supra* n119

<sup>158</sup> South Africa *Supra* n150, definition “private body”

*press releases, circulars, orders, logbooks, contracts, reports, papers, samples, models, data material held in any electronic form and information relating to any private body which can be accessed by a public authority under any other law for the time being in force;*"<sup>159</sup> India's RTI laws even cover 'samples' and 'models' form which literally means people can access anything that can provide information regardless of form it has taken. The right of access can be more difficult to achieve within the system where secrecy culture has been long rooted. For instance, Indian RTI Act had to overrule the preexisting British Colonial Official Secret Act (OSA) 1923 and any other contradicting law to achieve its purpose. Linking to the British Colonial OSA, Myanmar also has been struggling to adopt RTI Laws and there are many drawbacks on the efforts of CSOs challenging with long secrecy behavior of military regime.<sup>160</sup>

- **Proactive disclosure**

The best approach for dealing with vast amounts of information is simply to make as many records as possible automatically and unconditionally available. This limits the need for government decision making and is therefore less of a drain on resources. Moreover, it is clearly better for the "demand side," as proactive disclosure reduces the number of requests and delay in information receipt.<sup>161</sup> The RTI law should set an obligation on public authorities to publish, on an automatic or proactive basis, a range of information of key public importance. Although the right to request and receive information is at the heart of an RTI law, automatic disclosure is also a very important means of ensuring that information is provided to the public. It helps ensure that all citizens, including the vast majority of citizens who will never make an access to information request, can access a minimum platform of information about public authorities. Automatic disclosure has received ever greater attention in modern RTI laws, and many include very extensive proactive publication obligations for public authorities. ARTICLE 19 claims that "*Public bodies should be under an obligation to publish key information.*"<sup>162</sup> Freedom of information implies not only that people can access information they desire from public bodies, but also that public bodies proactively publish and disseminate for public interest. Otherwise, the information is only known to those specifically requesting it, when it is of importance to everyone. Publishing information will often be more economical than responding to multiple requests for the same information.<sup>163</sup> The scope of the

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<sup>159</sup> India *Supra* n149, sec.2(f)

<sup>160</sup> PEN Myanmar et.al., *Myanmar Freedom of Expression Scorecard* (2 May 2019), p.11

<sup>161</sup> Laura Neuman and Richard Calland, *Making the Access to Information Law Work: The Challenges of Implementation*, Florini (eds) *The Right to Know*, Columbia University Press (2007), p.17

<sup>162</sup> ARTICLE 19 *Supra* n119

<sup>163</sup> *Ibid*

obligation to publish proactively depends on resource limitations, but the amount of information covered should increase over time based on the capacity of the public bodies. Publishing information proactively will not only save the cost (for example, photocopy, postage and printing charges) but also save substantial amount of time. The RTI laws shall set positive list of types of information that government bodies must proactively publish. Typically, the types of information includes; operational information about how the public body functions, including costs, objectives, audited accounts, standards, achievements and so on, particularly where the body provides direct services to the public; information on any requests, complaints or other direct actions which members of the public may take in relation to the public body; guidance on processes by which members of the public may provide input into major policy or legislative proposals; the types of information which the body holds and the form in which this information is held; and the content of any decision or policy affecting the public, along with reasons for the decision and background material of importance in framing the decision.<sup>164</sup> Regarding publishing information, while Switzerland does not explicitly set the list of types of information to be published, India and Canada RTI laws set the positive lists and UK's law granted authority to Information Commissioner to perform the scheme.<sup>165</sup>

This obligation also related to the availability of Open Government Data (OGD) which refers to the disclosure by public authorities of datasets in open, machine-readable formats, free of copyright or other re-use restrictions, has become increasingly popular in recent years.<sup>166</sup> However, the performance of OGD significantly depends on the capacity of government in resource mobilization as well as the political will of that government. According to the Global Open Data Index, 90% of the 10 lowest ranking countries are developing countries.<sup>167</sup> One thing to highlight is that OGD does not primarily rely on having RTI law, yet they are interrelating and supporting each other in openness and access to information in general. For example, although Singapore has no RTI law, the Index shows that it stands in the 20 highest ranking countries. Another criticism on OGD is that publishing government data is primarily depending on the country's government authorities meaning that the government has flexibility in choosing which type of data they will be published through OGD platforms except clearly expressing in country's FOI or RTI acts. Thus, activists call on to revise the current RTI laws to provide for proactive

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<sup>164</sup> *Ibid*, p.4

<sup>165</sup> Switzerland *Federal Act on Freedom of Information in the Administration* (2004); Canada *Supra* n155, article.5; India *Supra* n149, sec.4 & UK *Supra* n155, article.19-20

<sup>166</sup> Mendel *Supra* n132, p.8

<sup>167</sup> Open Knowledge Foundation, *Global Open Data Index: Place overview* at <https://index.okfn.org/place/>

disclosure that guarantee non-personal government data will be open by default, available in machine-readable formats, and published under open licenses that allow the data to be re-used.<sup>168</sup> The scope on proactive disclosure depending on the capacity and resources as well as dedication of government on openness, this uncertainty causes massive challenge in RTI and OGD synergy.

- **Requesting procedures**

The RTI law should set out clear procedures for accessing information. Although this is rather mundane, it is at the same time fundamental to the successful functioning of a right to information regime. The law should, for example, make it easy to file a request (it should be possible to file one electronically or orally and, where necessary, requesters should be given assistance in filing their requests), strict rules should be established for responding to requests, notice should be required to be given of any refusal to grant right of access to information and at least the outlines of the fee structure for successful requests should be set out in law. Other provisions such as method of request (electronically or physically), language, notion that no identification shall be provided by the requester, respond time limit to information request, extension to process the request and reusability of information provided should be set clearly in the law. There should also be an obligation to provide reasonable assistance when needed such as to assist person of disability or illiteracy. The term 'reasonable' provides public bodies with flexibility of assistance based on the capacity and resources available. The specific type of assistance should be reinforced by the public bodies under the supervision of oversight body such as Information Commission with regulations or bylaws. However, some other provisions should be specifically set rather than being flexible. The time frame of responding the request is also vital to achieving purposes of RTI law. Some laws failed to serve their objectives because of the lack of provision of time frame and public officers can excuses to avoid the information from being disclosed. For instance, Thailand's Official Information Act failed to specify the number of days to respond the requests but only set as "reasonable period of time"<sup>169</sup> it creates challenges toward the proper implementation of the law.<sup>170</sup> The law should also grant that requester does not need to provide reason to request the information. From my point of view, there are three aspects why the reason of the request should not be given. First, if the reason is to investigate corruption in public body, the officials may destroy or sanitize the important information before disclosure. Second, the safety of the requester may

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<sup>168</sup> More at <https://opendatabarometer.org/4thedition/report/>

<sup>169</sup> Thailand *Official Information Act* (1997), sec.11

<sup>170</sup> ARTICLE 19 & APR, *Supra* n156, p.49

threaten if the information requested related to the corruption committed by powerful people and third, the requester can provide the false reasons and there is no point in denying of the request. After all, requesting information by RTI law is entitled to human rights and so, in my opinion, no reason is needed for exercising this right. However, some restrictive RTI laws prescribe that information may only be obtained by giving reasons or require a person states his/her interest in the information. Nepal's RTI Act prescribes that the requesters need to give reason for the information request<sup>171</sup> while Indian RTI Act specifically stating that *"An applicant making request for information shall not be required to give any reason for requesting the information or any other personal details except those that may be necessary for contacting him."*<sup>172</sup>

The fees shall not be charged for requesting of information, but can be charged for other type of costs such as photocopy, postage etc. This type of costs but not the amount of fees, should be clearly expressed in the law. For example, India law prescribed on how the fees would be charged for obtaining information.<sup>173</sup> The waiver should also be set for individuals with financial hardship to make them conveniently file information request. Finally, the RTI law should impose the reusability of the disclosed information except where a third party (which is not a public authority) holds a legally-protected copyright over the information.

- **Exceptions**

RTI law should establish clearly those cases in which access to information may be denied, the so-called regime of exceptions. Formulating exceptions is perhaps the most challenging and complicated part of the RTI laws. Exceptions define which information shall be disclosed to public or kept secret. On the one hand, it is obviously important that the law protect legitimate secrecy interests. On the other hand, this has proven to be the *'Achilles heel'* of many access to information laws.<sup>174</sup> The UK Freedom of Information Act 2000, for example, is in many ways a very progressive piece of legislation. At the same time, it has a vastly overbroad regime of exceptions, with 22 different exceptions and exclusions, which fundamentally undermines the whole access regime.<sup>175</sup> Another important aspect is that the relationship of RTI legislation with secrecy legislations caused a major challenge. If the RTI law contains

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<sup>171</sup> Nepal, *Right to Information Act* (2007), sec.7(1)

<sup>172</sup> India *Supra* n149, sec.6(2)

<sup>173</sup> India *Supra* n149, sec.6(1)&7

<sup>174</sup> Freedom Info, *World Bank Disclosure Proposal Assessed at Consultation*, FreedomInfo.org (30 April 2009) at <http://www.freedominfo.org/2009/04/world-bank-disclosure-proposal-assessed-at-consultation/>

<sup>175</sup> UK *Supra* n155, Part.II



a comprehensive statement of the reasons for secrecy, it should not be necessary to extend these exceptions with secrecy legislation. This, along with the fact that secrecy laws are normally not drafted with the concept of openness and given the plethora of secrecy provisions that are often found scattered among various national laws. Therefore, it is extremely important that the RTI law should, in case of conflict, override secrecy legislation. It is, however, fine for secrecy laws to expand upon exceptions that are set out in the right to information law such as national security or privacy. For example, Tunisia's secrecy laws contradicted to RTI was replaced, in March 2016, with a significantly revamped Organic Law. Although the overriding effect is not mentioned, exceptions are allowed only insofar as they are based on the law. Also, the law is an Organic Law so has priority over lower forms of legislation and the right is also guaranteed in Article 32 of the Constitution states "[T]he state guarantees the right to information and the right of access to information and communication networks."<sup>176</sup> And also, Article 5 of the South African RTI law provides: "This Act applies to the exclusion of any provision of other legislation that— (a) prohibits or restricts the disclosure of a record of a public body or private body; and (b) is materially inconsistent with an object, or a specific provision, of this Act."<sup>177</sup> Even more important is a rule specifying that administrative classification of documents cannot defeat the access law. In this context, it is worth noting that classification is often simply a label given by the bureaucrat who happens to have created a document, or his or her superior, and that this cannot possibly justify overriding the RTI. But of course, classification can provide useful guidance to civil servants on whether or not a document may be sensitive, which is very different from saying that it can form the basis for a final decision about this in light of a request for information. Therefore, it is important that the regime of exceptions provided for in the freedom of information law should be comprehensive and other laws should not be permitted to extend it. In particular, secrecy laws should not make it illegal for officials to divulge information which they are required to disclose under the freedom of information law.

ARTICLE 19 claims that exceptions should be clearly and narrowly drawn and subject to strict "harm" and "public interest" tests.<sup>178</sup> A refusal to disclose information is not justified unless the public authority can show that the information meets a strict three-part test which are; the information must relate to a

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<sup>176</sup> Tunisia's Constitution of 2014, article.32

<sup>177</sup> South Africa *Supra* n150, article.5

<sup>178</sup> ARTICLE 19 *Supra* n119, p.5

legitimate aim listed in the law; disclosure must threaten to cause substantial harm to that aim; and the harm to the aim must be greater than the public interest in having the information.<sup>179</sup>

For the first test, a complete list of the legitimate aims which may justify non-disclosure should be provided in the law. This list should include only interests which constitute legitimate grounds for refusing to disclose documents and should be limited to matters such as law enforcement, privacy, national security, commercial and other confidentiality, public or individual safety, and the effectiveness and integrity of government decision-making processes.<sup>180</sup> Exceptions should be narrowly drawn and based on the content rather than the type of the document. Time limits shall also set for the exceptions. For example, the justification for classifying information on the basis of national security may well disappear after a specific national security threat subsides.<sup>181</sup>

The setting of legitimate aimed list alone is not absolute to determine exceptions. The harm text must also be done to examine whether the releasing of information can cause actual harm to the public. In some cases, disclosure may benefit as well as harm the aim. For example, the exposure of corruption in the military may at first sight appear to weaken national defence but actually, over time, help to eliminate the corruption and strengthen the armed forces.<sup>182</sup>

The law should be favour of public interest over harm meaning that even if it can be shown that disclosure of the information would cause substantial harm to a legitimate aim, the information should still be disclosed if the benefits of disclosure outweigh the harm.<sup>183</sup> For example, certain information may be private in nature, but it can expose high-level corruption within government. Therefore, the harm to the legitimate aim must be weighed against the benefit of public interest in having the information made public.<sup>184</sup> Basically, defining exceptions should be considered on the basis of proportionality of harm and interest where latter is more beneficial, the law should guarantee for disclosure of that information.

National security is perhaps the main challenge in setting exceptions in RTI laws. Tshwane Principles states *“(b) Given that national security is one of the weightiest public grounds for restricting information, when public authorities assert other public grounds for restricting access [...] they must at least meet the standards for imposing restrictions on the right of access to information set forth in these Principles*

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<sup>179</sup> *Ibid*

<sup>180</sup> *Ibid* p.6

<sup>181</sup> *Ibid*

<sup>182</sup> *Ibid*

<sup>183</sup> *Ibid*

<sup>184</sup> *Ibid*

as relevant. (c) It is a good practice for national security, where used to limit the RTI, to be defined precisely in a country's legal framework in a manner consistent with a democratic society."<sup>185</sup> As it stated, the national security is necessary to protect the people from harm, however contents of exceptions in RTI law shall take account on the three-part test. Excessive classification can strengthen to maintain the culture of secrecy, which in turn, jeopardize the purpose of RTI. For example, excessive classification is impeding information sharing between government agencies and excessive secrecy in government sabotaged attempts to find, track, and catch terrorists before 9/11 and in its report, 9/11 Commission concluded the 9/11 Commission concluded "Current security requirements nurture over classification and excessive compartmentation of information among agencies."<sup>186</sup> Therefore, exceptions shall be carefully identity without affecting other rights such as privacy rights and intellectual properties rights.

- **Appeals**

RTI law should guarantee the right to appeal any refusal of access to an independent oversight body such as Information Commission. If this is not available, then the decision about whether or not to disclose information is essentially at the discretion of public officials, which means that it is not really a right. At the same time, an internal appeal (i.e. within the same public authority) can be useful as it provides the authority with a change to reconsider its original position and experience in many countries has shown that this can often lead to the disclosure of information. Ultimately, of course, one can normally appeal to the courts, but experience has shown that an independent administrative body is essential to providing requesters with an accessible, rapid and low-cost appeal. Basically, courts take too long and cost too much for all but the very most determined requesters. The role of this body is particularly important in terms of interpreting exceptions to the right of access, given the complexity and sensitivity of applying the regime of exceptions.

It is vital that the oversight body must be independent from influence of reigning government. Oversight body working under the influence of government authority may result in jeopardizing the purpose of the RTI law. If the oversight body works under the control of government, it is difficult to disclose information that can cause harm to government but gaining public interests, for example, corruption of high level

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<sup>185</sup> *Global Principles on National Security and the Right to Information* (the Tshwane Principles) (12 June 2013), principles.2(b) & (c)

<sup>186</sup> Nikki Swartz, *The World Moves Toward Freedom of Information*, *The Information Management Journal* (Nov-Dec 2004), p.21

government staffs. Moreover, the position of the members of oversight body may be threatened, thus, their roles and positions must be protected by the RTI law. Regarding to independence, Thailand's 1997 Official Information Act grants right to appeal of refusal on request but the oversight body (Official Information Board) is not independent and its oversight competences are very limited, and it also does not have power to issue binding decisions.<sup>187</sup> Oversight bodies for monitoring and implementation of RTI law play a vital role in realisation of the law. Independence of these bodies still have challenges and effects the implementation of the objectives of RTI in some countries.

- ***Sanctions and protections***

The government records shall be protected by the law and it should provide that obstruction of access to, or the willful destruction of records is a criminal offence. It is very important to provide for sanctions for willful obstruction of accessing information granted by the RTI law. Experience suggests that administrative sanctions (i.e. fines or disciplinary measures) are far more likely to be used (and hence to be effective) than criminal sanctions. Sanctions should also be available at the institutional level for public authorities which are systematically failing to respect the right to information. Regarding this scope, while Bangladesh and South Sudan impose sanctions to anyone who obstruct of access or destroy records may penalize (monetary fine or imprisonment) under their acts,<sup>188</sup> Denmark and Switzerland's RTI laws failed to impose penalties to protect information from being destroyed.<sup>189</sup> The law should also establish minimum standards regarding the maintenance and preservation of records by public bodies. Such bodies should be required to allocate sufficient resources and attention to ensuring that public record-keeping is adequate.<sup>190</sup>

It is also important to provide protection to officials or individuals who disclose information in good faith either pursuant to the law or to expose wrongdoing (whistleblowers). Otherwise they will be reluctant to disclose information especially when they operated under the secrecy cultures. Of course, it is complicated to define 'good faith' in the law however it is necessary to set this notion in RTI law so that the individuals who act to pursuant of RTI law can be protected. India's RTI law protected individuals by stating "*No suit, prosecution or other legal proceeding shall lie against any person for anything which*

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<sup>187</sup> Thailand *Supra* n169, Sec.28

<sup>188</sup> Bangladesh *Right to Information Act 2009*, article.27; South Sudan *Right of Access to Information Act 2013*, article.52(1)

<sup>189</sup> *The Danish Access to Public Administrative Documents Act (1985)* & Switzerland *Supra* n165

<sup>190</sup> ARTICLE 19 *Supra* n119, p.3

*is in good faith done or intended to be done under this Act or any rule made thereunder.*"<sup>191</sup> Nepal's 2007 RTI Act explicitly granted protection of whistleblowers and even further, it encourages civil servants to uncover the information related to corruptions and irregularities.<sup>192</sup> However, Denmark and Switzerland do not provide any legal protection towards whistleblowers in RTI laws or any other legislations. Protection of whistleblowers is an extremely important scope of RTI regime failure to do so will impose threats on pursuant of the RTI objectives.

- **Promotional measures**

According to CLD's scope of RTI law, a number of promotional measures are needed if implementation of RTI laws is to succeed, such as a requirement to appoint dedicated officials (information officers) or units with a responsibility for ensuring that they comply with their information disclosure obligations, a central body should be given overall responsibility for promoting the right to information and public awareness-raising efforts (e.g. producing a guide for the public or introducing RTI awareness into schools) should be required to be undertaken by law. Sri Lanka RTI Act provides the appointed of information officers to handle the information requests and appeals.<sup>193</sup> As a minimum, the law should make provision for public education and the dissemination of information regarding the right to access information, the scope of information which is available and the manner in which such rights may be exercised. For example, the Bangladeshi Information Commission should increase awareness about the RTI by disseminating information on the protection and implementation of this right.<sup>194</sup>

The official body responsible for public education should also play a role in promoting openness within government. Initiatives might include incentives for public bodies that perform well, campaigns to address secrecy problems and communications campaigns encouraging bodies that are improving and criticizing those which remain excessively secret. For example, Indian RTI Act enable the Information Commissions to order that authorities conduct trainings of their public officials.<sup>195</sup>

The oversight body shall be tasked with the production of an annual report to Parliament and/or Parliamentary bodies on remaining problems and achievements, which might also include measures taken to improve public access to information, any remaining constraints to the free flow of information which have been identified and measures to be taken in the year ahead. Public bodies should be

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<sup>191</sup> India *Supra* n149, sec.21

<sup>192</sup> Nepal *Supra* n171, sec.29

<sup>193</sup> Sri Lanka, *Right to Information Act*, No.12 of 2016 (2016), sec.23

<sup>194</sup> Bangladesh *Supra* n188, sec.13(5)

<sup>195</sup> India *Supra* n149, sec.19(6) & 26(1)

encouraged to adopt internal codes on access and openness. In Bangladesh and India, the information commissions prepare an annual report on the activities of public authorities as well as its own activities. The report is presented to parliament and made available to the public.<sup>196</sup> The above obligations shall be set out in the RTI especially for the countries with long culture of secrecy.

### ***Challenges in implementation***

The capacities of RTI laws also depend on how effectively they are implemented by the government and utilized by citizens and the media. The following discussion based on the studies regarding implementation of RTI laws in different countries.

- ***Lack of resources and political will***

Implementing RTI law not only requires solid political will as well as infrastructure and human resource to accommodate the realization of rights provided in the law. Therefore, availability of resources is fundamental in ensuring effective implementation of the law. Many countries facing this challenges in terms of financial, human and time resources at national and local levels. Resource allocation is directly related to political will. The limited resource allocated to implement RTI from government can undermine the performance of public officials. Proper infrastructure is needed to facilitate access to information and proactive disclosure. For example, without having access to internet, it will be quite challenge to access information published via e-government platforms. Studies show that the majority of governments do not have specific budget resources and rely on public officials who take on this additional task.<sup>197</sup> Only a few countries have established separate budget dedicated to implement their RTI laws, but the amounts vary quite significantly. For instance, in Mexico, the government spends approximately 0.033 percent of GDP to finance its access to information system. In Canada, this amount is much lower: 0.0007 percent of GDP.<sup>198</sup> In Asia, nearly all national implementation reports in the region emphasise that a lack of resources is a major challenge hindering the successful work of oversight bodies.<sup>199</sup> Additionally, resources for the implementation of the RTI legislation and for meeting the records management requirements are scarce and this may lead to delays in responding to requests.<sup>200</sup> The lack of resources is only part of the problem and that public officials are often not interested in

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<sup>196</sup> Bangladesh *Supra* n188, sec.30 & India *Supra* n149, sec.25

<sup>197</sup> Martini *Supra* n126, p.6

<sup>198</sup> *Ibid*

<sup>199</sup> ARTICLE 19 & APR *Supra* n156, p.8

<sup>200</sup> *Ibid*

learning about their RTI obligations. According to ARTICLE 19 report, a survey in Bangladesh has revealed that NGOs have better awareness of their statutory duties than public bodies.<sup>201</sup>

- ***Lack of awareness among the government staffs and public***

In many countries, the lack of awareness of RTI is still a practical challenge even years after the enactment of the law. In Bangladesh, the majority of public officials are still not aware of the law. As a result, many of them refuse to accept RTI requests from citizens.<sup>202</sup> Citizens may not be aware of their legal right to access information from public bodies or may be reluctant to assert it in some contexts, either because of fear of a suppressive regime, or a predominant culture of not questioning authority. In other cases, there are structural barriers – such as low access to internet in developing countries – to access information. The lack of awareness of public can also weaken RTI progress at domestic level. Low numbers of information requests from public can lead to weakening pressure towards authorities to improve their request handling practices and open up their information to the public. For instance, India has one of the most active civil societies on RTI in Asia and many awareness raising activities are conducted by government agencies. However, level of awareness in rural areas is low which resulted in gap between rural and urban levels of participation in decision making process.<sup>203</sup> Reports showed that lack of awareness can also lead corruption and nepotism caused people to bribe public officials or dissuades from requesting information from the public bodies.<sup>204</sup>

- ***Defining exceptions***

Another common challenge in implementation of RTI law is overbroad definition of exceptions or interpretation of secrecy legislation. Other associating legislations can also undermine the scope of RTI. For instance, Myanmar's current National Records and Archives Law fails to respect standards regarding RTI in several key respects.<sup>205</sup> This situation creates enormous challenge to RTI since Myanmar has still not adopted RTI law, it becomes problematic that other laws are being put forward which risk undermining the longer term objective of opening up government. If RTI law has not clearly granted with overruling power over other secrecy laws which can cause conflict with information disclosure, the purpose of RTI can never be achieved. For example, in China, where public officials

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<sup>201</sup> *Ibid*

<sup>202</sup> Martini *Supra* n126, p.6

<sup>203</sup> ARTICLE 19 & APR *Supra* n156, p.8

<sup>204</sup> *Ibid*

<sup>205</sup> CLD, *Myanmar: Archives Law Fails to Respect the Right to Information* (28 August 2019) at <https://www.law-democracy.org/live/myanmar-archives-law-fails-to-respect-the-right-to-information/>

may be sanctioned for revealing information that they should not have revealed.<sup>206</sup> The overbroad definition of exceptions can also create challenge in disclosing secret information. In Indonesia, NGOs reported that national security and foreign relations exemptions are defined too broadly in the law and in South Korea, the “national security” exemption is often interpreted widely and the reasons for refusal of disclosure are not properly explained.<sup>207</sup>

- ***Oversight bodies and proactive disclosure***

In countries lacking an independent and well-resourced oversight agency, the implementation of the law is weak and the RTI law is unlikely to lead to more transparency and accountability. In Uganda, for example, an executive oversight body was established but staffed with partisan individuals and without meaningful budget allocated for its operations.<sup>208</sup> As a result, there is an implementation gap and distrust in the system, and citizens, the media and NGOs still resort to private connections to access public information that derailed the purpose of RTI law.<sup>209</sup> Moreover, in India, the average waiting period for a Central Information Commission decision is 6.2 months and 30 percent of information commissioners’ places are vacant.<sup>210</sup> Without the proper jurisdiction power, structure and independence role, the oversight bodies will not be able to implement the RTI law effectively. Although the majority of RTI laws include comprehensive provisions on proactive disclosure of information, implementation reports indicate that, public authorities do not regularly publish information that they are obliged to under RTI legislation. For example, despite progressive provisions on proactive disclosure in Indonesia, a study showed that information is not sufficiently available proactively, largely due to inefficient information management systems and a lack of capacities and skills in the public bodies.<sup>211</sup> The challenge of proactive disclosure also related to the resource allocation and political will of government in implementing RTI laws mentioned above.

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<sup>206</sup> *Ibid*

<sup>207</sup> *Ibid*

<sup>208</sup> Martini *Supra* n126, p.5

<sup>209</sup> *Ibid*

<sup>210</sup> ARTICLE 19 & APR *Supra* n156, p.9

<sup>211</sup> *Ibid*



## Conclusion

Despite efforts made, the importance of RTI over previous decades has often overlooked or reluctant at international and national levels in the past. Rather than recognize RTI as a whole, majority of efforts show that RTI has been applied as a cross-cutting principle to achieve specific thematic issues. For example, the Aarhus Convention applies right of access to information widely but specifically in environmental matters. The 2030 Agenda for Sustainable Development also applies access to information as one of the indicator under Goal.16 “in accordance with national legislation and international agreements”<sup>212</sup>, yet recognition of RTI at international level seem to be underdeveloped. However, the progress of recognition on RTI can be seen in modern principles and agendas, and it is the positive progress of RTI in international human rights systems.

The above discussions demonstrated that while the importance of RTI and pursuing its benefits are convincing, there are several challenges to formulate as well as implement the RTI law. Political will to resource allocation and availability of resource may vary however, the examples from different countries show that effective implementation of RTI is depending on the political interest of the government rather than justification on the lack of resources. Overbroad interpretation of national security is still a major challenge in defining exceptions of RTI laws. Despite the international efforts to pursue clearer view on national security, such as the Tshwane Principles, the main actors on defining national security still be the state governments. Moreover, the right to privacy and intellectual properties rights shall also take account in defining exceptions. Effective participation of CSOs and Media is required to impose pressures on governments to adopt the new or amend the existing RTI legislations. With properly utilization, social media can also serve as a powerful means for awareness raising on RTI in public.

Finally, it is critical for the countries, that pursuing to adopt the RTI legislations, to learn from other’s countries experience and develop the RTI laws with relevance of international standards and national contexts. Crucially, with the rapid development of information technology and other driving factors, it is time to put more efforts on the development of RTI at international and national levels to ensure everyone can enjoy their right.

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<sup>212</sup> SDGs *Supra* note 79

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