Toward a Media Regulatory Reform in Middle East and North Africa: Workshop on the Right to Information

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Background Paper

I. Introduction[1]

Louis Brandeis, an eminent jurist and United States Supreme Court Justice, defended the value of transparency and openness in 1913 by noting: "Publicity is justly commended as a remedy for social and industrial diseases. Sunlight is said to be the best of disinfectants; electric light the most efficient policeman."[2] At the time, only one country in the world, Sweden, had passed a right to information (RTI) law giving the public a right to have access to documents held by government. The right to information has since been broadly recognised internationally as a human right, including through decisions of the Inter-American Court of Human Rights,[3] the European Court of Human Rights[4] and the UN Human Rights Committee, in its 2011 General Comment on Article 19 of the *International Covenant on Civil and Political Rights* (ICCPR).[5]

Globally, as of May 2017, 116 countries, including nearly every democracy, had adopted an RTI law. However, the Arab World is among the world's weakest regions on this important human rights indicator. Today, just five of the Arab League's twenty-two member States have adopted RTI laws: Jordan (2007), Tunisia (2011), Yemen (2012), Sudan (2015) and Lebanon (2017). At the same time, several Arab countries – including Egypt, Morocco and Tunisia – have guarantees of the right to information in their new constitutions and a number of Arab countries – including Palestine and Morocco – are developing RTI laws. Nearby, both Afghanistan and Iran have adopted laws.

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[2] Louis Brandeis, "What Publicity Can Do", *Harper's Weekly,* 20 December 1913. Available at: www.law.louisville.edu/library/collections/brandeis/node/196.

[3] *Claude Reyes and Others v. Chile,* 19 September 2006, Series C, No. 151.

[4] *Társaság A Szabadságjogokért v. Hungary*, 14 April 2009, Application no. 37374/05.

[5] General Comment No. 34, 12 September 2011, CCPR/C/GC/34, para. 18.

II. Benefits of the Right to Information

There are several key benefits which flow from having an effective system for the right to information. First, this is key to facilitating a flow of information upon which democratic participation in systems of government depends. In order to be able to engage properly, the electorate must be well informed about the decisions of their government, as well as the underlying basis upon which those decisions are being made. This is true for voting, but also for any other decision- or public policy-making exercise. The best way to ensure that citizens are able to provide input into governmental decisions and other processes is to provide them with direct access to government information, allowing them to get an unfiltered picture of what is going on.

The participation promoted by RTI laws also extends to development initiatives, which can lead to greater local ownership over these initiatives. This, in turn, can help improve decision-making processes around development projects and also improve implementation of these projects by engaging their intended beneficiaries. For the same reason, greater transparency can help ensure that development efforts reach the intended targets.

A third benefit of the right to information is enhancing relations between citizens and government. When governments become more open and share information on a formal basis (i.e. under an RTI law rather than just informally through personal contacts), this can help control rumours and build a more solid basis for the information that circulates in society. This, in turn, helps build better relations and trust between citizens and the government.

A fourth benefit is in promoting accountability, a core value of democracies. The essence of accountability is that members of the public have a right to scrutinise and debate the actions of their leaders and to assess the performance of the government. This is possible only if they can access information about matters of important public concern, such as the economy, social systems, unemployment, environmental performance and so on. Once again, the right to information is key to ensuring this. A related, and particularly high profile, benefit associated with the right to information is combatting corruption. Different social actors – including investigative journalists, watchdog NGOs and opposition politicians – can use an RTI law to obtain information which would not otherwise be available to them and then use it to expose wrongdoing.

The right to information can also provide more tangible benefits to public bodies by improving administrative and organisational efficiency. Having a set of "fresh eyes" look over processes can lead to useful ideas about how they may be improved. Although not always pleasant to receive, constructive criticism is, nonetheless, important to fostering improvements. Moreover, the public accountability fostered by a functioning right to information system can impact civil servants' attitudes

towards efficiency and resource management. Just as an employee is likely to work harder if their supervisor is standing nearby, the knowledge that an official's actions are subject to public scrutiny will lead them to be more careful and judicious in their decision-making, and to take greater care over how public resources are spent.

In addition to these institutional and governance goals, the right to information also serves a number of important individual or personal goals. The right to be able to access information about oneself that is held by public authorities is part of one's basic human dignity. It can be useful to help individuals make personal decisions. For example, individuals may need to access their medical records in order to make decisions about medical treatment. It may also be necessary to access information to correct mistakes present in government records. Without such corrections, serious problems can occur.

One final, and often overlooked, benefit of the right to information is economic development. Public authorities collect and hold vast amounts of information on a wide range of issues, much of which is relevant to economic or social trends, which businesses can put to good use. In many countries, commercial businesses are a significant user group of the RTI system. Another economic benefit stemming from openness comes in the form of more efficient and competitive tendering for government contracts. Openness tends to drive down costs over time, by ensuring that contracts are awarded fairly to the most competitive bid. Also, open contracting allows bidders that were unsuccessful to see the scoring and where they did poorly compared to competitors. This not only helps expose any biases or wrongdoing, but it also helps the businesses make their bidding more competitive the next time.

III. Advocacy for the Right to Information

The development and passage of RTI legislation is often the result of intense advocacy efforts by a range of actors. While civil society often plays a leading role, the energies of many other potential stakeholders should be harnessed for a successful campaign. This includes journalists and media actors, who often have a particular stake in the passage of RTI legislation. Their involvement is particularly important since, besides being major consumers of government information, they have a particularly loud megaphone to promote the adoption of RTI laws. Business interests are also major beneficiaries from RTI, although experience suggests they can be more difficult to bring on board at the campaigning phase.

It is also very important to mobilise grassroots support, although this is not always easy. In many countries, relative apathy toward government activity can hamper efforts to pass RTI legislation, or to update and improve existing legislation. By contrast, RTI initiatives can often thrive in countries where there is a long history of secrecy and governmental abuse, as this is likely to endow citizens with a healthy mistrust of government, and a clear understanding of the nasty things governments can get up to if not properly watched.

In all cases, it is useful to focus advocacy attention on specific events that either involve transparency or illustrate the need for an RTI law, such as a corruption scandal or a cover up of human rights abuses. In Bulgaria, for example, the nuclear disaster at Chernobyl was one such catalyst for action. The government's failure to disclose important information about the size and extent of the disaster led to a movement called *Ecoglasnost*, which worked with international and regional organisations to enact the *Environmental Protection Act*. This, in turn, went a considerable way towards opening up government, and ultimately helped to pave the way for subsequent RTI legislation. In India, a labour dispute over unpaid wages, and efforts by a grassroots workers and peasants rights group to obtain government records connected to the dispute, were core motivations for the movement for RTI. The group in question, MKSS, has since become a leading global voice for the right to information, so much so that they are now more identified with RTI than with their original mission of promoting minimum wages for workers.

In cases where the national government is particularly intransigent about RTI, it may be useful first to seek breakthroughs at the regional or local level. These lower levels of governments may prove more sympathetic because they include a particularly strong champion of RTI, because they are controlled by different political parties than the national government, or because they do not hold much high-stakes secrecy information. A breakthrough at a lower level jurisdiction can increase pressure at higher levels of government, since it demonstrates that RTI is eminently achievable.

IV. Drafting RTI Legislation

The importance of RTI as a mechanism for public accountability means that the drafting process for an RTI law should not be unduly rushed and should be the subject of a robust consultative process that allows all interested stakeholders to provide input. Journalists and civil society, who are often among the more active requesters, should be consulted on their needs, and public officials should also be brought into the process, among other things in order to voice and then assuage any concerns they may have. This type of outreach can help to limit bureaucratic resistance both during the adoption phase and once the law is passed.

In terms of the drafting process itself, many countries look to regional leaders for inspiration, and it is not uncommon to see particular regional trends emerge as a result. For example, several African RTI laws allow users to file requests with private companies, if they can demonstrate that the information sought is necessary for the exercise or protection of a right. Originally a feature of South Africa's RTI law, this provision is unheard of outside of Africa. In the Arab world, the best example to follow is Tunisia, whose RTI law ranks as the 11th strongest in the world according to the RTI Rating, a comparative assessment of global RTI legislation.[6] However, since no national RTI law is perfect, drafters should also look to the model laws that have been developed by standard-setting bodies, such as the African Union's Draft Model Law

[6] See: www.RTI-Rating.org.

for Member States on Access to Information[7] and the Organisation of American States' Model Inter-American Law on Access to Information.[8]

V. International standards for strong right to information legislation

The main principle which underlies the right to information is a presumption in favour of maximum disclosure with limited exceptions. This means that the aim of RTI legislation should be to provide access to as broad a range of information as possible, while restricting access only where this is necessary to protect a legitimate interest. However, in order to ensure that an RTI system operates smoothly, there are several other characteristics which should be built into the legal framework, including simple requesting procedures, effective and independent oversight, sanctions for non-compliance, protection for good faith disclosures, proactive disclosure and promotional mechanisms. For greater clarity, it is useful to examine each of these concepts in greater detail.

a. Right of Access and Scope

A key element of an effective RTI law is a rule establishing a broad presumption in favour of access to information held by public bodies. This is best guaranteed through constitutional recognition of the right to information as a human right. The principle of maximum access should also be specifically enumerated in the RTI law through a presumption in favour of access to all information held by public bodies, subject only to limited exceptions. A statement of principles which emphasises the benefits of the right to information, and which calls for a broad interpretation of the law, can be helpful in guiding public bodies, as well as courts and other oversight bodies, in interpreting the law.

A strong RTI law should specify that it applies to all public bodies. "Public bodies" should be defined to include all branches (executive, legislative and judicial) and levels of government, as well as State-owned enterprises and constitutional, statutory and oversight bodies. In addition, international standards mandate that the right to information should apply to private organisations which perform a public function (such as providing electricity or water services) or which receive public funding (such as through a subsidy or grant programme) to the extent of that function or funding.

It is also important to define broadly the scope of information covered by the law as including any material held by or on behalf of public bodies which is recorded in any format, and regardless of who produced it. This should include access to documents and other records, including databases, as well as to information contained in those documents or other records, which public bodies may need to compile from the records they hold. An example might be calculating the total amount collected in traffic fines over a given period of time.

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[7] Available at: www.law-democracy.org/live/wp-content/uploads/2012/08/draft-AU-law.pdf.
[8] Available at: www.oas.org/dil/AG-RES_2607-2010_eng.pdf.

b. Procedures for Requesting Information

In order to operate effectively, an RTI system requires robust procedural rules governing how requests for information are to be filed by requesters and then processed by public bodies.

Requesters should only be required to provide limited information to file an access request, namely a clear description of the information they are seeking and an address for delivery of that information (which might, in appropriate cases, be an email address). Requesters should, n particular, not be required to provide a reason or justification for their request. The RTI law should make it as easy as possible to submit requests, including by a range of means of communication (such as in person, by mail or electronically).

The law should also set out clear rules for how public bodies should respond to requests. This should begin with how they receive requests, imposing a duty on public bodies to assist requesters who need help to file requests, for example because they are having problems describing the information they are seeking or because they are illiterate or disabled. Public bodies should be required to provide users with a receipt for their request, setting out the details of when and how it was filed.

A good RTI law will also include clear timelines for responding to requests. Public bodies should generally be required to respond as soon as possible and in any case to respond within a maximum time limit, ideally of two or three weeks. In exceptional circumstances, such as where the requester has asked for a large volume of information or where extensive consultations with third parties are required, the law may allow for an extension to this time limit, for example of another two or three weeks, with notice being provided to the requester.

Where the public body does not hold the information, better practice is to transfer the request to a different public body, which does hold it. In such cases, the original timeframe for responding should still apply. Where the public body does not hold information and is not aware of any other body which does hold it, it may return the request to the requester.

It is also important for the law to set clear rules regarding the fees which may be charged for granting access to information. It should be free to file an RTI request, which constitutes the exercise of a human right. Public bodies may charge reasonable fees to recoup the actual costs they incur in responding to an RTI request, such as for postage or for photocopying, although better practice is not to charge for staff time, again taking into account that this is a human right. Many progressive RTI laws also include fee waivers for impecunious requesters and for requests for personal information.

Requesters should have a right to stipulate how they would like to receive the information, for example in hard copy, electronic format or via inspecting the information at the premises of the public body. This may also impact the issue of fees, as electronic provision of information should always be free since, by definition, it does not involve copying or sending costs. These preferences should normally be respected unless this would pose a risk of harm to a fragile record or unduly inconvenience the public body.

c. Limited Exceptions

It is universally accepted that the right of access is not absolute. Even the staunchest supporters of RTI would agree that governments need to keep some information secret. This need is addressed through regimes of exceptions in RTI laws. To give effect to the right to information, however, the regime of exceptions should be crafted and interpreted as narrowly as possible, and should only protect information the disclosure of which would pose real a risk of harm to a legitimate interest.

Three central features characterise a regime of exceptions which respects international standards. First, the exceptions should only protect legitimate interests. The precise wording and level of detail by which these interests are described varies from law to law, but there is a remarkable level of consistency regarding the nature of the interests which are protected. In particular, better practice RTI laws protect only national security, international relations, public health and safety, the prevention, investigation and prosecution of legal wrongs, privacy, legitimate commercial interests, management of the economy, fair administration of justice and legal advice privilege, conservation of the environment and legitimate policy making and other operations of public bodies. This list is exhaustive, and many RTI laws do not even protect all of these interests.

Second, all exceptions should be subject to a harm test. The mere fact that information is related to one of the protected interests is not enough to justify withholding it. Rather, information should be able to be withheld only if officials can identify a specific harm that would be likely to result if the information were disclosed. Thus, in democracies, a lot of information about national security – such as the budget allocated to defence and the number of people under arms – is available, although information about sensitive weapons may be withheld. In general, officials should be able to identify a harm that is substantial, probable and imminent, rather than speculative or merely within the realm of possibility.

Third, exceptions should be subject to a public interest override. Even if it is found that disclosure of the information would be likely to harm a protected interest, the information should nonetheless be disclosed if the overall public interest in disclosure outweighs that harm. For example, information about weapons purchases might be sensitive but if that information disclosed evidence of corruption, the greater public interest would lie in rooting out that corruption (indeed, this would also be important to maintain national security since corruption undermines

security). It is generally accepted that information about serious human rights abuses should always be disclosed.

In addition to these three features, a good RTI law should also include a severability clause, whereby if only part of the information which has been requested falls within the scope of the regime of exceptions, this should be redacted or removed and the rest of the information should still be disclosed.

Sunset clauses are another important limitation on exceptions. As information gets older, its sensitivity or potential to harm a protected interest diminishes. Progressive RTI laws recognise this by stating that exceptions cease to apply after a period of time, generally between 15 and 20 years.

Where information is withheld, public bodies should be required to provide requesters with notice of the exact legal provision being relied upon to refuse to disclose the information, along with information about how to lodge an appeal against that decision.

d. Appeals, Oversight and Sanctions

Effective oversight is critical to ensuring strong implementation of RTI laws, and depends, most importantly, on the existence of an independent administrative body which has the power to hear appeals against refusals to disclose information and other breaches of the RTI law. Better practice is to assign this role to a specialised body, such as an Information Commission or Information Commissioner. Experience in other countries, particularly developing countries, has clearly demonstrated that allocating this role to an existing body is rarely effective.

It is essential that this body be independent if it is to be able to conduct effective oversight of public bodies. A key element of this is the appointments process for the members of the Commission, which should be protected against undue political interference. It is also good practice to prohibit politically connected individuals from being nominated and to require members to have specific types of professional expertise. Good laws include mechanisms to protect the financial independence of the oversight body, for example by having its budget approved by parliament, and to protect the tenure of members of the oversight body, so that they cannot be dismissed without due cause.

The most important role of the oversight body is to hear appeals against claims of breaches of the right to information law, and the body should have appropriate powers to discharge this mandate, including to review any relevant document, to compel witnesses to appear before it and to inspect the premises of any public body. It should also have the power to make legally binding and enforceable orders, in particular for public bodies to disclose information.

To ensure the smooth and rapid handling of appeals, the law should set out clear timelines for this, as well as at least a general framework of rules, for example that the requester has a right to be heard. The law should also stipulate that appeals are free of charge and do not require legal assistance. Given that the right to information is a human right, in an appeal the government should bear the burden of demonstrating that they acted in accordance with the law.

Beyond appeals, better practice is to provide for sanctions for officials who engage in wilful breaches of the RTI law. This can be very important to signal to officials that the government is serious about implementing the law. Even if sanctions are rarely applied, their mere presence helps foster greater respect for the system and the occasional imposition of sanctions will send a clear message to officials. In many countries, the law provides for criminal sanctions for obstruction, but in practice these are very rarely applied. A more modern approach is also to provide for administrative sanctions for more minor wrongs.

In addition to these sanctions, an RTI law should grant legal immunity to officials and members of the oversight body and its staff for acts undertaken in good faith to implement the law or to undertake their duties under the law. This is very important to give officials the confidence to release information, something which may constitute an important cultural change for them. Ideally, the law should also provide protection to those who release information on wrongdoing (whistleblowers), as long as they act in good faith, although in many countries this is provided for in separate, dedicated whistleblowing legislation.

e. Proactive Publication

Another important feature of modern RTI laws is a regime for proactive publication. With the spread of the Internet, these obligations have become ever more extensive to the point where, in democracies, governments are expected to disseminate most documents which might be of interest to the public. This kind of publication can save public resources, since it is far simpler to put documents online and point requesters to them than to respond to several, or even to one, request for the same information. Although the specific scope and focus of what is published varies enormously from country to country, certain types of information are commonly published, such as information about how the public body is structured and functions, its regulatory framework, opportunities to engage with it, the social and other benefits it distributes, and detailed financial and budgetary information.

VI. Key challenges in implementation of RTI legislation

RTI can present a difficult cultural shift for public officials, particularly in emerging democracies. Many of these individuals are used to operating under a presumption of secrecy and it can often be difficult to simply reverse this traditional approach. Indeed, implementation of RTI legislation is an ongoing challenge even in many established democracies.

To ensure effective implementation of RTI legislation, the RTI law should ideally include a basket of promotional measures aimed at improving the ability of public bodies to respond to RTI requests. For example, most RTI laws require public bodies to appoint an individual (an information officer) who is responsible for receiving and processing requests for information.

Effective implementation also requires robust training programmes to help officials understand and how to apply the new rules in practice. This should include material about their new obligations under the law, but also about the benefits and importance of RTI.

In order to facilitate access, including by speeding up response times, better practice RTI laws put in place systems to improve records management standards and practices. Compiling registers of documents which public bodies have in their possession can be helpful data management tools and can also facilitate the requesting process by helping the public understand what is available.

It is important to raise public awareness about the new RTI law and citizens' rights under it. Ideally, overall responsibility for this will be allocated to a central body, preferably an information commission, but individual public bodies should also be required to help reach out to their constituents in this regard. Promoting demand is particularly important in new RTI systems, since absent strong demand there will be little incentive for public bodies to engage in robust implementation, or supply-side, efforts. Poor implementation can dampen demand for RTI, as early requesters become disillusioned with the system, and may be unlikely to return if their first experiences are negative, creating a vicious circle. Early intervention to promote both strong implementation by public bodies and strong demand among journalists and civil society actors is the best strategy to promote implementation, hopefully triggering a virtuous circle of effective supply promoting strong demand and vice versa.

In order to facilitate understanding and monitoring of implementation, the RTI law should require public bodies to report annually on what they have done to implement the law, including statistics on the number of requests received, the percentage that were refused, the reasoning behind these refusals and so on. The oversight body, or another central body, should consolidate this information into an annual report to be placed before the legislature. Both aspects of reporting are key to monitoring and evaluation of the system, which in turn helps to pinpoint areas for improvement.