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Right of Access to Information, Fundamentals, Barriers and Necessities in International Law

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ABSTRACT

Background: Right of the public access to official information or ability of citizens to gain access to the information held by government is called freedom of information. **Objective:** Of course, this right is not unconditional and some regulations should be observed for it. It seems that this right can be regarded as infrastructure of information freedom principle during information explosion and new communication era which requires free access to information. **Results:** This research which has been conducted with analytical –descriptive method based on library data intended to refer to conditions and restrictions of information freedom in international law while explaining concepts, sources and fundamentals of information freedom and mention its legal challenges **Conclusion:** finally present suggestion for improving right of access to information in law of different countries in the world by classifying legality rules of information freedom restrictions to logical rules , rules of legal system and rules of human rights

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INTRODUCTION

With a historical study on record of free information flow, we notice that the first experience of legislation in the field of information freedom was found in Sweden in 1776. The purpose of enacting this law which was first called freedom of the press was to create an open society in which even documents such as letters of heads of other countries to vice president should be also surprised by the public, the rule which remains in force up to now.

In addition, Colombia (enacted in 1888), Finland in 1919(it was revised and changed in 1951 and also 1999), USA (1966) and after it, Denmark and Norway in 1970, France and the Netherlands in 1978, and Canada, Australia and New Zealand in 1982, Canada (1983), Japan (1999), Poland and India (2002), also the countries which have recently revised their Constitutional Law or codified new constitutional law have expressly recognized citizens' right of access to governmental information.

This subject is important such that studying limits of information freedom principles is one of the important issues which has been considered and challenged in different legal systems in the world and in international documents. One of the important issues of information freedom is conciliation between the said freedom and different exceptions because there is fear that different exceptions will make the said freedom senseless : the exceptions such as support of national security, the classified information of public health, people's health, preventing from deviation of research on crimes, trade secrets, privacy, confidentiality of information received from international organizations etc. on this basis, the present paper which was performed with descriptive – analytical method based on library data sought to answer this question: considering sources and fundamentals of information freedom right, how are restrictions of legalities of this right classified?

Considering the raised answer, hypothesis of this paper shows that it seems that some suggestions can be presented for improving condition of this right in international law based on each of the mentioned dimensions by classifying legality rules of information freedom restrictions to logical rules, rules of legal system and rules of human rights. For this purpose, the present paper refers to conditions and restrictions of the information in international law by explaining its concept, sources and fundamentals.

Definitions of Information Freedom and Right of Access to Information:

Freedom of information means right and freedom of people to search for, gain access to, receive, collect, express and transfer information, news and beliefs which government and other associations and authorities hold and control.

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This right requires democracy, accountability of authorities and effective participation of people in management of public affairs (Habibi, 2003). This freedom is way of guaranteeing freedom of thought, expression and press and it has been identified and supported as one of the human rights in constitutional law of countries and international documents .

Freedom of information is the term which was first forged in USA and has confusing content to some extent. Perhaps, it is thought that this term means freedom of all kinds of information but this is not true. Law of some countries has more accurate title of this freedom which indicates its content. For example, France has used title of freedom of access to administrative documents and Canada has used title of access to information (Abbasy, 2011).

Right of access to information is result of information freedom and in other words, it is freedom of framed information. Right of access to information means that each of the society members at any time can demand for access to information which is kept in one of the public and sometimes private institutes and that institute can reject his request based on the definite reasons (Abbasy, 2011).

Right of access to information available in governmental institutes is regarded as one of the main ways of freedoms of expression and press because it is regarded as one of the most important legal means for preparing necessary and accurate information for exerting the said freedoms.

Information Freedom sources:

In 1946, General Assembly of the United Nations in its first meeting and resolution No. 59 announced that freedom to acquire information is one of the most fundamental human rights and freedoms which United Nations Organization has created for realizing and enforcing it and asked Economic and Social Council to hold a convention in this regard. This conference was held in 1948 in Geneva and prepared and submitted three protocols entitled News International Collection and Distribution Protocol, convention on international right to correction, international protocol of information acquisition. The first two protocols were enacted by General Assembly in 1949 and issued and declared by Economic and Social Council in 1962 as a declaration (TabatabaeiMotameni, 2009).

Universal Declaration of Human Rights in 1948 also stipulates that everyone is entitled to freedom of opinion and the said right means that he/she is free to acquire information and thoughts and publish it by all possible means and without border considerations (Article 19).

Article 19 of International Covenant on Civil and Political Rights in this field declares that:

Everyone has right to freedom of expression. This right includes right to search, acquire and publish information and thoughts of any type without considering borders whether verbally or in writing or artistically or by any other means.

Paragraph 1 of Article 13 of Convention on Child Rights also declares that child has freedom of opinion. This right includes freedom of searching, receiving and sending information and opinions of any type without considering borders in writing , verbally or in the form of artistic works or any other means as the child selects.

Article 6 of Declaration on rights and liability of people, groups and institutions of society enacted in 1998 by General Assembly of the United Nations stipulates that: every person is entitled to take the following actions individually or collectively:

Access to information relating to human rights and fundamental rights : he/she has right to know, search and acquire how these rights and freedoms are kept and enforced in local laws and judicial systems .

As stipulated in Universal Declaration of Human Rights and other international documents, he/she can publish, quote or publish information and knowledge relating to human rights and fundamental freedoms freely.

He/she can discuss, investigate and select opinion about human rights and fundamental rights and attract attention of people in this way.

European Convention of Human Rights has also recognized freedom of information:

Everyone has right of expression. This right includes having opinions and receiving and transferring information and thought without considering borders and without interference of public authorities (Article 10).

American Convention on Human Rights (Article 13) and African Covenant on Human and public rights (Article 9) also accepted information freedom (Abbasy, 2011).

Fundamentals of Information Freedom:

Transparency / openness:

Transparency is a political term which has taken legal form. As some theorists have pointed out, concept of transparency has comprised of different layers and becomes complex in different fields. However, for guiding identification of transparency elements, it should be acknowledged that insight, knowledge and public access to information available in public institutes are of the most important elements of transparency and a transparent administrative and legislative system is the system which provides insight for its citizens. On this basis, access of people to information available in public institutes provides public insight in an advanced and affective level (Uhl, 2003).

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Necessity of Open Governments:

There are different reasons for necessity of open governments and three major reasons can be mentioned in this field:

First, almost the most traditional reason for open governments is that open government facilitates control of action and reaction of public institutes. The above sentence is based on this assumption that power creates corruption. Individually, control requires access to information for defending the person against government and preventing potential, abuse of power by government against him. From the citizenship point of view, control is mainly necessary for preventing abuses by the individuals whom people have selected for ruling. Awareness and insight of the external supervisor are the precondition of supervision and control which is obtained as result of transparency and the more the public insight , the less the mismanagement or concealment of mismanagements (Stiglitz, 2002).

Second, increase of rationality and advisory aspect and efficiency of decision making processes and as a result, public trust in government are dependent on open government because responsible rulers i.e. the rulers who are asked to explain their activities to the people are more able to achieve better and more reasonable decisions with more effective methods (Meyer and Hinchman, 2002).

Third, some thinkers believe that the most important and reasonable reason for transparency is that it reinforces active participation of citizens in political affairs. Transparency is one of the main conditions for orienting will of individuals is that this will plays vital role in creation of democratic society. This basis of transparency relies on advisory democracy theories. Based on these theories, open government cannot be limited to parliamentary control forms but transparency should include broad scope of mechanisms which make participation of citizens in policymaking possible with effective ways of access to policymaking and statement trends.

Therefore, transparency is the precondition for participation of citizens in political system. Only an open system can fulfill benefits of citizens and publish information and finally use requirement and obligation of its citizens. For this reason, some theorists believe that transparency and democracy are two joint principles (Lor and Britz, 2007).

Types of Transparency:

Theoretically, transparency is classified in to three groups though these three classes are interrelated. The first type is called information transparency. It means that people should be aware of the governmental actors and decisions and have access to governmental information.

The second class is called participatory transparency. It means that all people can participate in political decisions whether through agency or direct participation transparently. Some researchers have considered participation as requiring transparency of information as Alsadair Roberts writes in letter (unofficial document) of access to governmental information that: any political participation is meaningless without access to information of government and without revelation of this information. According to Roberts, if there is a restriction in this field, it should be expressly legislated and there should be convincing justifications for them (Roberts, 1999) .

The third type of transparency is responsiveness. It means that government or any institution which makes decision is expressly responsible to judicial system, public thoughts at time of violating law and when its performance has serious effects on benefits of people. Among them, public thoughts particularly mass media can help people recognize performance and activity of the government, can participate in political decisions and finally force official authorities to respond (Balkin, 1999).

J.Stiglitz studies transparency from another viewpoint. He believes that lack of transparency and openness reduces quality of decision making. Confidentiality of decisions reduces decision making option. By making more mistakes, authorities defend more to protect them and keep decisions more confidential. In this way, they reduce this option resulting in reduction of decision making quality (Stiglitz, 2003)**.**

Another writer has discussed transparency from the viewpoint of corruption. He believes that the formula which he applies for evaluating corruption is as follows:

C=M+D-A

In this formula, C is corruption; M is monopoly in the field of goods and services which causes rant. D is discretion and ability to decide how rants are allocated, A is accountability. In this formula, lack of accountability is considered. According to this writer, corruption means abuse of position for gaining personal, group and party benefits without accountability of the authority or authorities or disclosure of their decisions and express and lawful communication of decision making processes to the people (Lor and Britz, 2007).

In democratic systems, the distances between governmental authorities and people are shortened or minimized and participation of the people and their support of government strengthen bases of the government and its legality. For this reason, access of people to governmental issues plays important role in effective participation of people.

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It can be generally said that disclosure of issues causes people, groups and governmental institutions to worry about their decisions because they are constantly judged by the public. One of the writers regards this characteristic i.e. rulers' fear of people as distinctive feature of democratic systems. He writes: when government fears people, this is called freedom and when people fear government, this is nothing but autocracy (Curran, 2000).

Public participation in determination of fate and continual supervision:

In contemporary world, information freedom has been recognized as participatory democracy requirement and has been named democracy oxygen due to its useful functions because if the people don't know what happens in their society and actions of rulers and managers of society are hidden for them, how can they play role in management of society affairs and play important role (Cotterrell, 1999). One of the large shortcomings of democracy is that majority cannot be criterion or reason for truth of a thing, perhaps, one or more informed persons can think better than the majority and make better decisions and information freedom is a way of responding this shortcoming. By virtue of this freedom, public information and particularly information of governmental apparatus should be accessible freely to the people of society and right of people's access to this information should not be limited. Henceforth, only the majority should not make decision but the majority informed of society problems should make democratic decisions. In the past, public participation in government and determination of their fate mostly occurred in election days and after it, neither the electors were informed of the affairs which their agent performed nor they obliged their elected agents to inform and be accountable toward their principals. But at present, such haphazard participation should be replaced by comprehensive participation and continual supervision of people. People not only should select their rulers and managers but also should have access to information on performance of the managers and ask them to give information after election whenever they want. Governmental apparatuses should be obliged to give their information to the public by observing some exceptions and take necessary measures for performing this duty. In other words, information freedom and right of public access to information of governmental apparatuses are the most important means of public supervision on government which have been expressed in the eighth principle of our Constitutional Law.

Right of Access to Information:

To realize transparency goals, different practical solutions have been thought. One of these solutions is the arrangement which they have made as rights of citizens to access to information. In recent decades, most countries formally have accepted right of access to information. In some cases, they have mentioned this case in their constitutional law like South Africa. Although this right has not been expressed in laws in many countries, knowing and having access to information are of the primary rights of the citizens and have been mentioned in different laws implicitly. Of course, information of governmental institutes or the organizations relating to public benefits should be accessible and private organizations are excluded. In case work of private and governmental agencies interferes, laws of access to information prevail. There are some cases that right of access to information is so clear that there is no need for enactment of laws. Evident instance of these cases is activities of legislation assemblies. It is said that enactment of laws of access to information is not applicable because there is enough transparency in their work. Yet, this absolute power is not exerted in any country and they made exceptions for it. One of the controvertible exceptions is the case relating to national interests of the countries. In these cases, governments usually are vested with full power to prevent from disclosing information. This procedure has many critics and it is said that instances of conflict with national interests should be specified exactly not to abuse this extensive concept for restricting rights of citizens.

Anti-Corruption Actions and Access of People to Information:

In addition to provision of opportunities for public participation in decisions about public issues and also supervision of people on performance of the society managers, right of access to information in governmental apparatuses is an important way for anti-corruption measures (Clark and Sikkink, 2013).

Some theorists believe that transparency is one of the key methods for preventing corruption, detection of corruption and support of government integrity. When people have access to budget of the country, its allocation to governmental apparatuses and its consumption and the contracts which these apparatuses conclude with different persons and on differ occasions, many opportunities for administrative and financial corruption are reduced. The incompetent easily cannot enter the governmental apparatuses and many channels of rant are closed. Secrecy is the excessive cover behind which errors of government and its officials are hidden and freedom of information aims to replace it with open government (Héritier, 2003).

Another basis for defending freedom of information and access to governmental information is that the entire government and its information belong to people and rulers and managers of society are direct or indirect agent and attorney of people. On this basis, any landlord can have access to his/her property and be informed of

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its management. Information available in governmental apparatuses doesn't belong to government but it belongs to people and government keeps information on behalf of the people (Nehl, 1999).

People as principal can ask their agent to give information about his term of office and tell them what he did with the public budget and how he managed their affairs (Stiglitz, 2002).

Conditions of Legality of restrictions in International Law:

There are common rules in many conventions and international documents for evaluating legality of information freedom restrictions. With help of these rules, lawyers, attorneys and defenders of freedom of expression and information can confront with illegal restrictions which are against the said freedom.

Universal Declaration of Human Rights, International Covenant on Civil and Political Rights, American Convention on Human Rights and European Convention of Human Rights have predicted three rules for achieving legality of the restrictions which can be imposed on freedom of expression and information. Certainly, the countries which are obliged toward these documents should apply this tripartite rule in their laws and courts. Considering that the said rules have been mentioned in all important documents of human rights and because all countries have been obliged to observe Universal Declaration of Human Rights, courts of all countries can be obliged to apply these three rules.

The first part of this rule declares that any kind of restriction should be established only by law and the second part mentions that creation of any restriction should be due to one of the legal goals which have been expressly mentioned in the law for one of the legal purposes. Third, it should be proved that it is necessary to enact it. Universal Declaration necessitates that any restriction is established only for identifying and fulfilling the benefits specified in a democratic society. International Covenant on Civil and Political Rights and American Convention declare that restrictions should be necessary for supporting the benefits mentioned in the convention and European Convention combines two concepts of necessity and democratic society and expresses that any restriction should be necessary in a democratic society. Although the American Convention doesn't refer to necessity of having restriction in a democratic society, The InterAmerican Court of human rights has declared that any restriction on freedom of expression and information should fulfill the conditions stipulated by European Court of Human Rights.

International Covenant on Civil and Political Rights:

Freedom of expression and information is one of the fundamental human rights which have been supported in International Covenant on Civil and Political Rights. Paragraphs 2 and 3 of article 19 of the covenant say that:

1- Everyone is entitled to freedom of expression. This right includes freedom of searching, acquiring and telecommunicating any kind of information and opinions aside from the available borders which can be vindicated vocally, in writing or artistically or any one of the media selected by the people.

2- Vindication of the rights predicted in the second paragraph of this article is accompanied by duties and responsibilities. Therefore, it may be subject to some restrictions but these restrictions should be established only by law and if necessary:

A- Fort protecting rights and dignity and credit of others by observing the said cases

B- For supporting national security or public order or public health and ethics.

The Siracusa Principles:

The Siracusa Principles are the interpretive document in which general strategies for legality of restriction on freedoms and rights predicted in international covenant have been determined. That part of the said principles which can be relied for evaluating legality of information restrictions includes:

No restriction or justification but restrictions or justifications included in the covenant is accepted for the rights guaranteed in the covenant. Domain of the restrictions which have been mentioned in the covenant should not be interpreted to endanger essence of the related right.

All conditions of restriction should be interpreted in favor of the limited rights.

Any restriction should be established by the special right and considering its style and context.

The restrictions which have been recognized in a covenant on an applicable right should be stipulated by the law and compatible with goals and intentions of the covenant.

Each one of the restrictions mentioned in the covenant should not be contrary to its goal (restriction).

No restriction should be applied arbitrarily.

All imposed restrictions can be disqualified and damage may be compensated in case of their imposition.

Each one of the restrictions of a right recognized in covenant should not cause discrimination.

Whenever imposition of a restriction in framework of covenant is subject to necessity of that restriction, it means that it is based on one of the justifying reason for restrictions recognized in article relating to the covenant, responds to a public or social need, follows a legal goal and has relation with that goal.

Any kind of evaluation relating to necessity of a restriction should be based on objective considerations.

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In application of a restriction, states should not use any limiting method except for the means which are necessary for achieving the goal.

Responsibility for justification of restriction on the rights guaranteed in covenant shall be assumed by the states (Rights, 1984).

The condition mentioned in article 122 of the covenant that any restriction should agree with the rights identified in the covenant is implicitly applicable for restrictions of other rights identified in the covenant.

Conditions for restriction of the covenant should not be interpreted such that it restricts vindication of the human rights which have been supported by other means of binding international obligations of states.

European Convention on Human Rights:

Freedom of expression and information has been supported in article 10 of European Convention on Human Rights. European Court of Human rights has expressed that freedom of expression constituted one of the main bases of a democratic society and is regarded as one of the major conditions for progress of that society and evolution of all people and this freedom is applicable to information and opinions which disrupt, shock or encourage the state or any part of community (Roberts, 1999).

The second paragraph of article 9 and article 10 of European Convention on Human Rights Protection has expressed about balance between principle of these principles and their scopes:

Freedom of clarifying religion or beliefs of a person will be subject to the restrictions which have been stipulated in the law in a democratic society due to public health.

It is necessary to protect public order, health or ethics or support of others' rights and freedoms (the second paragraph of Article 9). Everyone is entitled to freedom of expression.

Since application of these freedoms is accompanied by rights, duties and responsibilities, it can be subject to formalities, conditions, restrictions or the punishments which have been stipulated in the law and they are necessary for protecting public security, territorial integrity or public health, preventing disclosure of the confidential information, supporting the power and neutrality of the judiciary (article 10).

European Court of Human Rights has issued a tripartite rule considering the above articles for completing a tripartite rule. As a starting point, the above court emphasized that it didn't confront with two conflicting principles one of which it should prefer but confronted with one principle i.e. principle of freedom of expression and information which is subject to some exceptions and these exceptions should be interpreted restrictively (Roberts, 2001). Legality of this restriction also includes this requirement that restrictive law should be properly given to the public and its regulations should grant foreseeablity to its addressees. It means that it should be regulated so accurately that it enables citizens to foresee results of application and regulation of their behavior (Uhl, 2003). However, it is not necessary to mention restriction in the codified law and it should be reasonably foreseen through judicial procedure. Therefore, the European Court declared that restriction should be based on support of one of the interests predicted in the second paragraph of Article 10 which also have exclusive aspect.

According to European Court, necessity of a restriction doesn't mean its inevitability but it is more than only reasonability or desirability. An urgent social need should be also available for applying restriction on freedoms and rights stipulated in the covenant. Finally, restriction should be based on the legal goal which it follows and the reasons which have been given for justifying legality of restriction should be relevant and sufficient (Stiglitz, 2003).

To evaluate if intervention in freedom of expression and information is justifiable for sufficient reasons, the European Court pays attention to public interest of claim. As the information which is subject to restriction, it implies a public affair and it can be restricted only when it is certain that propagation of that information will lead to undesirable consequences which the state legally fears. Restriction rate should be also considered. Absolute restriction such as prohibition of media to disclose any information relating to the claims on trial is unacceptable. Courts will confirm intervention in freedom of expression only when they are convinced that the said intervention has been necessary considering events and circumstances of the special case which has been common among them. Procedure of other contracting states is considerable as a criterion for evaluation of necessity of a restriction (Stiglitz, 2002).

The contracting states are qualified for ascertaining necessity of a restriction but this discretion limit is supervised by European Court in all cases. This supervision should be absolute and not be limited to ascertain if a government has applied its discretion limit reasonably with carefulness and good faith. Instead, necessity of any restriction should be proved convincingly (Balkin, 1999).

Domain of discretion changes based on the intended goal, for example, support of the ethics should be evaluated extensively but the goal which is objective such as environmental support will have more limited discretion by protecting trade secrets (Banisar, 2010).

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Conclusion:

Different exceptions and restrictions which have been mentioned in this paper and studied are acceptable when human rights are legal from the viewpoint of international system that is they are based on principled , rules and logic of human rights. The rules on which basis legality of restrictions of information freedom is measured can be classified into three groups:

A- Logical rules:

It should be noted that freedom of information is principal. Therefore, the rules which govern relationship between principle and exception should be followed to determine rules governing relation between them. For example, no restriction can exclude freedom of information or make it senseless because in this case, relationship between the principal and interest is reversed. No exception can be more than its principal because exception is majorly rejected. Exception should not be ambiguous because ambiguous exception is rendered void. Exception should be interpreted restrictively.

B- Rules of Legal System:

Considering that settlement of dispute between legal rules is mentioned (the rules which are included as exception in rules governing freedom of information), principal rules should be restricted as legal system of the country permits. In other words, imposition of exception on principle of freedom of information should be legal based on legal system. For example, if right of information is identified in freedom of information law, its exceptions should be also predicted in the same law or other laws. Other legislative authorities such as Council of Ministers cannot restrict freedom of information by enacting bylaw or resolution because resolution is not qualified for restricting rights predicted in the law.

C- Rules of Human Rights System:

Considering that right to freedom of information is recognized as human rights, the restrictions which are applied on this right should not be contradictory with the criteria which have been specified for legality of human rights restrictions. For example, freedom of action should not be restricted unless it is necessary. Restriction on freedom of information should be based on circumstances of a democratic society. If it is possible to realize a goal with other means and methods which are less important than restriction of freedom of information, the restriction should not be imposed, restriction of freedom of information should be used only as the last way and restriction of freedom of information should not lead to vitiation of other rights. In addition, states usually don't disclose the data and information which are produced with government in the public domain by putting in domain of intellectual properties and this vitiates freedom of information, thus, they should be excluded from domain of intellectual properties. But what are the reasons for this suggestion?

First reason: governmental units don't need to have necessary motivation for continuing their activities unlike writers, investors and publishers of private sector by granting proprietary rights to data and information which are produced by them because they perform their duties such as collection of research data and information based on their discretion and duty for provision of public services not with motivation of achieving intellectual property.

Second reason: necessary expenses have been paid before by the tax payers i.e. people for the information which is prepared by the government. Therefore, it can be claimed that rights of that information belong to the citizens who have paid its production costs and not the governmental unit which has produced the said information on behalf of the citizens.

Third reason – many interests such as social welfare and realization of educational and cultural values are fulfilled beyond economic interests resulting from protection of intellectual property by publishing governmental data and information through internet.

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