

Legal Frameworks on the Right to Know in Iraq

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The right to know as a fundamental human right recognised in major international instruments has been identified as a corollary of freedom of expression and an extension of freedom of speech. Within this perspective the RTK shows its significance to the implementation of democracy and the implementation of other rights. In contrary, states without RTK law can hide vital material that is exposing the governments' wrongdoings through controlling the flow of information. In such an environment, massive corruption increases and violations against human rights continue concealed. Accordingly, many international conventions, including the United Nation Convention Against Corruption, require state members to implement the right to know laws.

Keywords: *The Right to Know, Freedom of Expression. International Law, Iraqi Laws, Legal Restrictions.*

Introduction

The right to know as a fundamental human right recognised in major international instruments has been identified as a corollary of freedom of expression and an extension of freedom of speech. Within this perspective the RTK shows its significance to the implementation of democracy and the implementation of other rights. In contrary, states without RTK law can hide vital material that is exposing the governments' wrongdoings through controlling the flow of information. In such an environment, massive corruption increases and violations against human rights continue concealed. Accordingly, many international conventions, including the United Nation Convention Against Corruption, require state members to implement the right to know laws.

Post-conflict Iraq has ratified these global treaties however, it still has not joined the rapid growth of states that have accepted the significance of the right to know and have implemented laws accordingly. In the last twenty years, many developing post-conflict or famine-stricken countries including South Africa, Tunisia, Morocco, Guatemala, Yemen, Lebanon, Sudan,



Mexico, Sri Lanka, India, Uganda, Angola and Sierra Leone have adopted the right to know laws.

Although the Iraqi constitution guarantees freedom of expression along with other freedoms, articles 38-46 have no explicit recognition of the RTK within its articles. Additionally, the Iraqi Federal Supreme Court has never adopted and/or interpreted article 38 of the constitution, which protects freedoms of press and expression as a protection of people's right to access public information. Drafting and passing a RTK law in Iraq could be a good initiative; however, such a law needs to be sustained and enforced consistently and independently in order to function its best purpose. Therefore, any vague and redundant laws, decrees, orders, etc. that restrict people's freedom to access and disseminate public information would be a hindrance against achieving the law's purpose.

The Iraqi legal system has massive rules and provisions, as it discussed below in details, that restrict and/or punish people's right to obtain and/or disseminate public information. In other words, the legacy effect of Ba'ath strict and secrets laws still have not been amended or void by the Iraqi Parliament after 2003. The Iraqi administration, post 2003, have even moved further to pass rules and/or regulations that strict people right to access and disseminate information. Such rules have caused a lack of accountability and transparency in which corruption thrives and more human rights violations continue unchecked.

For example, the Iraqi Publications Law of 1968 and the Iraqi Penal Code of 1969 set a 'seven years in prison' in case of publishing information insulting the government. Paragraph 226 of the Penal Code sets a punishment for anyone who 'publicly insults' government bodies or officials, to be imprisoned for up to seven years. Also, cases of defamation and insult are listed under Paragraphs 433 and 434 and concerns anyone who could be punished by detention lasting up to one year. In 2010, the Supreme Judicial Council created an exceptional court for journalists' and journalism cases; however, article 95 of the Iraqi constitution prohibits the establishment of any special courts. Moreover, the Communications and Media Commission (CMC), as the governmental primary figure regulating broadcast media, has issued different restriction rules on obtaining and publishing information. The CMC issued "binding" guidelines for media outlets. One rule required the media to "be careful when broadcasting material that ... may express insulting sentiments" or does "not accord with the moral and patriotic order required for the war on terror." Accordingly, the international standards for a proper and functioning RTK law need to be tallied below along with the acceptable restrictions in the international system. Furthermore, an insightful analysis of freedom of obtaining and disseminating information in the Iraqi legal system should be addressed and highlighted, particularly, the set of restrictions that could impede a proper RTK law function.

In 2009, a number of media correspondents, journalists, media advocacy groups, and civil society organisations have initiated campaigns to improve the transparency and further media

protection through adopting a RTK law. One of the leading campaigns conducted by the United Nations Development Program (UNDP) in collaboration with several civil society organisations presented a RTK draft law to the Iraqi parliament in 2011; however, since then the draft has never been addressed by the parliament. The Iraqi parliament instead, adopted the Journalists Protection Law No (21) of 2011, which granted journalists a right to access information held by the government for the first time.

The chapter is meant to address and answer the following issues: how the right to access information has been handled in the Iraqi legal system on one hand, and; on the other hand, to examine the valid laws, rules, and regulations that constrain the people rights to access and/or disseminate information? By examining these constraints and rules to RTK, the chapter is also meant to answer the question of the applicable law in case of adopting a RTK law.

RTK Framework in the Iraqi Legal System:

Legal and regulations' structures concerning the RTK and FOE in Iraq are a matter of substance. The researcher has highlighted that Iraq might adopt laws pertaining to RTK and FOE; however, if these rules are improperly implemented, they might only slightly support the rights. In other words, so long as freedoms' function in Iraq are hampered by a prior restrictions' rule, culture of secrecy, public authorities' resistance to information dissemination, and lack of capacity building in the public bodies, FOE and RTK would be hardly implemented.

Within this preceptive, many rules in the Iraqi legal system, as explained below, are classified as violating FOE and publishing information rights that would be prior restraints to any adopted RTK. Within this regard there is a diversity of responsibilities under which some acts would be considered criminal liability, civil liability, and/or some of which entail as an administrative liability. Massive rules in the Iraqi legal system with respect to restricting people's rights to know include and are not limited to: crimes of inciting the regime,; disclosing secrets or communications; and crimes of public' disinformation such as distributing a false advertisement. Therefore, the following discussion is to tackle all the legislations/provisions so-called 'neighbouring laws' concerned with publishing information and media and press freedoms, in which it could be a big challenge to implement any proper RTK law in Iraq.

Inadequate and Imprudent Constitutional Provisions:

Iraq has enacted numerous pieces of legislation, including the Constitution of 2005, that address freedoms and human rights in direct and indirect ways. These rules could be interpreted as promoting human rights however, could be furtively interpreted as a support of the state to control public rights and the media outlet. Hussam Alhaj, a legal researcher and journalist, believes that many of these regulations are destructive and pernicious as its rules are open to clandestine misinterpretation.

Major articles of the Iraqi Constitution addressing freedoms and liberties are the following: (i) Article 38 guarantees freedom of expression through all means, freedom of press, printing, advertisement, media and publication, and the freedom of assembly and peaceful demonstration. The same article has restricted these freedoms through adding that they should not violate public order and morality. (ii) Article 39 assures the protection of the right of association. (iii) Article 40 guarantees the right of communication and correspondence. (iv) Article 42 guarantees freedom of opinion through asserting the rights to thought, conscience, and belief. (v) On the other hand, Article 46 prohibiting any restriction on practicing any of the stipulated rights and freedoms except by a law or according to a law under the condition that the restriction shall not harm the essence of the rights of freedom’.

The text of Article 38 (2) of the permanent Constitution of 2005 suggests that the freedoms are generally acknowledged and that its exercise is absolutely and unconditionally guaranteed. However, this is not true when considering the preamble of the mentioned article. The article has approved the guarantee of freedom of information for the benefit of individuals, though its exercise is accompanied by two constraints: the first constraint is not to disturb and violate the public order, while the second constraint is not to disturb and violate the morality.

This article, although is a step forward in strengthening the environment for freedom of expression in Iraq, is not enough to guarantee freedom of expression. The absence of legal legislation and the security de facto constitute a concern and attempts to intervene by officials to weaken this constitutional article and turn it into a text that loses its presumed power. Moreover, the article has also conditioned the practice of these freedoms upon the respect of public order and public morals. This would limit the executive scope of the rights and allow the executive authority to restrict certain types of expression according to a simple requirement that does not conform to the principles of public order and morality.

The public order and morality as a flexible concept became a very controversial issue in Iraq due to the failure of the constitution to define the meaning of ‘violating public order and morality’. For example, the Journalists Protection Law No. (21) of 2012 has granted for the first time the right to know in the Iraqi legal system. The Law, as it discussed in detail below, granted journalists the right to obtain and disseminate information so long as this information is not harmful and/or against the public or morality. The Federal Board of Supreme Audit law No (33) of 2011 also requires the Council of the Board to make all the auditing records / results available. However, the law sets an exception to the above requirement by giving the Board an authority to withhold any report that endangers National Security. The law relying on the basis of national security would be used by executive officials as a pretext to justify withholding information and records.



Uday Hatem, the head of the Society for Defence of Press Freedom in Iraq stressed the importance of having a definition of the mentioned phrase. He indicates that having the phrase ‘violating public order and morality’ without proper legal definition might be subject to misapplication of the executive authority and would lead to an impact on the proper applications of the exercise of freedoms. Sultan Abdullah also believes that the term ‘public order’ is a flexible and variable system and that it opens up a wide gap for differences in seeking solutions and may sometimes lead to increased problems rather solving them. Christopher Dickey highlighted that Saddam's regime took different measures to restrict the free circulation of information in Iraq such as using ‘public order and morality’ as a legal justification to suppress all kinds freedoms. He added that “Saddam Hussein banned the private ownership of typewriters in Iraq, and kept copying machines under lock and key as if they were weapons of mass destruction.”

Ultimately, the Iraqi Federal Supreme Court has ruled in case No.63/2012 that the judiciary system has discretion to determine the nature of the acts that are not provided for by a law, according to the concept of public order and morality. The court pointed out that such a discretion has to be within the community rules and customs at a specific time and place. In other words, in the light of no applicable provision for an act, it shall refer to the competent court to determine whether the conduct is contrary to public order and public morals or not, taking into consideration societal norms approved by members of society at a particular time and place. However, the court decision is still ambiguous as it has not tackled and incorporated article 46 of the constitution that prohibits any restriction on practicing any of the specified freedoms and rights except by a law or according to a law.

Legalising the restrictions based on ‘public order and morality’ should not go above the principle of public best interest. Moreover, Iraq is a multicultural state, as the Iraqi constitution stated in article 3, thus, public order and morality should be extensively identified across the diversity of the state before being considered as restrictions on people’s freedom of expression. The UN Human Rights Committee pointed out in its General Comment No. 22, that “the concept of morals derives from many social, philosophical and religious traditions; consequently, limitations... for the purpose of protecting morals must be based on principles not deriving exclusively from a single tradition. Any such limitations must be understood in the light of universality of human rights and the principle of non-discrimination.”

On the other hand, pursuant to the Iraqi Constitution of 2005, all laws enacted pre-2003 are still in force. These laws from the Saddam Hussein era impose improper restrictions on people’s right to obtain and disseminate information. Article 130 of the Constitution stipulates that the legislation shall remain in effect unless it is repealed or amended in accordance with the provisions of the Constitution. The Coalition Provisional Authority (CPA) Order No. 7 also confirmed that most provisions of the 1969 Penal Code remain in force; however, any lawsuits falling under articles 81-84 were suspended unless there was permission from the

administrative of the Coalition Provisional Authority. The articles of Penal Code No. 111 of 1969 affirm the freedom of expression's connection to national security, public morals and the 'supreme interest of the country'. For example, Articles (81), (82), (83), (179) and (200) concerning the crimes of publication, disseminations and other means of expression have sentences ranging between two years' imprisonment to life imprisonment. Other articles related to the freedom of opinion, defamation and libel such as articles 202, 227, 215, 225, 229, 305, 327, 372, 404 and 434 will be discussed in detail below. CPA has also issued Order No. 65, which established the Communication and Media Commission in Iraq (CMC), has rules contradicting free press and speech, as will be discussed below.

In addition, there are other relevant laws that assert strict rules against freedom of expression and could impede any proper RTK implementations. Such a large body of laws restricting rights and freedoms that violate the provisions of the 2005 Constitution are still valid to be used to reduce legitimate criticisms against government practices. For example, Iraqi Publications Law No. 206 of 1968; The Ministry of Culture and Information Law No. 49 of 1981; Iraqi Journalist' Syndicate Law 178 of 1969; Journalists Protection Law No.21 of 2012, and the Press Act No. 206 of 1986. As well as CPA Order No. 14 on Hate Speech and Order No. 19 on Freedom of Assembly. All of these laws and orders are still in force and contradict the constitutional provision of rights and freedoms.

The core connection between these restricted rules and the RTK is that these restrictions are vaguely drafted in general and could be interpreted in a way that gives a variety of meanings. These restrictions would encourage to abuse freedoms seekers and could only be applied in situations which bear no relation to the original aim stated in the law. Additionally, ambiguous provisions fail to provide suitable signs of what behaviour is precisely prohibited. Consequently, these restrictions employ an unacceptable frightening effect on all means of freedom of expression, including RTK, as people would stay in the safe zone and avoid censure.

To address the legal provisions that contradict/constrain people's right to know and to obtain public information and/or disseminating information, it is essential to classify the type of conduct/act stipulated first. In the Iraqi legal system many acts that are classified as criminal liability, civil liability, and others with administrative liability are in contrary to the freedom of expression and publication. Hence, the following section is to highlight the related provisions that challenge/restrict the proper implementation of the right to know in Iraq.

Conclusion

It has been internationally recognised that the right to access and receive information held by public authorities is an important human right aspect. The International Law, through its different notion such as the United Nations and other regional conventions, highlighted the necessity of comprehensive legislation to assure RTK. Iraq however, is a signatory member to

both UDHR and ICCPR, has not complied to these conventions in passing RTK legislation. Hence, it is crucial to adopt, on an urgent basis, a thorough and dedicated law on the right to know in line with the international standards.

Article 19 in its interpretation to the international notion of the right to access, receive, and impart public information, has constructed a set of international principles that any RTK should take into consideration in admitting access to public information law. Although these principles specify accurately the techniques that a state would reach in maximum openness, they would not be enough unless used by journalists, activists, human rights' supporters, lawyers, and even by public officers. Without the role of society in general and the human rights' advocates in particular; those who understand what society needs and are dedicated to transparent and accountable government, adopting these RTK international principles would not be enough. A survey on 130 journalists conducted by the Center for Strategic Studies at the University of Jordan found that 49% of journalists did not use the "right to information" law during their work because they believed that other means of access to information were more effective. Moreover, another study conducted by the New Jordan Center for Studies indicates that 42% of journalists do not know what the right to information law is.

Iraq in its opportunity to re-establish its democratic political and social structures should ensure full respect for human rights. Accordingly, the state should adopt a comprehensive and dedicated act on the right to know that gives the people the full right to access, receive and disseminate information. However, any implemented RTK law should incorporate the above international standards. In a nutshell, any RTK law should cover the followings:

First: the law must clearly state that everyone should have the full right to access, receive and disseminate public information held by authorities and could be only subject to a limited and clearly drafted set of exceptions. Moreover, the law should clearly define what falls under the term 'public authorities', as it should include the executive, legislature and the judiciary branches and all constitutional bodies operating under these branches.

Second: the law should set out clarified and detailed procedures for demanding information. In other words, it should include how to lodge a demand, verbally or written such as by personal filling, email, fax or mail, offering assist to requesters if necessary. Also, a well-defined time frame for answering the applicants. Finally, along with other things, the satisfied information form to be provided to the requester, such as obtaining a hard or electronic copy and the precise fees for obtaining information.

Third: the public authorities should have a responsibility on disseminating information on a practical basis. Such a duty would supplement the right of people to demand information. The information of the public authority should include the programs and activities of the

government, financial data, and any appropriate information that is related to the public authority.

Fourth: as the international law recognises the sensitivity of some information and the possible damage that disclosing such information would make, a RTK law should incorporate a comprehensive and detailed list and the exceptions of rejecting an information demand. However, these exceptions should be implemented only for the sake of protecting public interests – such as national security, privacy and law enforcement. On the hand, the RTK law should provide a ‘public interest override clause’ where information should be revealed as disclosing such information to the public is more significant than the harm it would cause. Moreover, the RTK law should state that its provisions supersede if it conflicts with any (secrecy) rules.

Fifth: any adopted RTK law should stipulate the right to appeal if a request for information was refused or any provisions of the RTK law are not implemented. The law should clarify the competent authority(s), the internal appeal within the same public authority and external appeal to an independent body, to receive cases and oversight the proper implementation of the law, and also guarantee the right to appeal before a competent court.

Finally: The law should also include a structure of penalties and protections. Imposing punishments for any deliberate hindrance of the right of obtaining information, such as any damage of records, declining to liaise with the requirements of exposing information stated in the RTK law, or rejecting to assist with the role of the oversight bodies. On the other hand, there should be protections for those disclosing public information in good faith, whether releasing such information is conducted according to an obligation in the law itself or exposing information related to a wrongdoing.

Iraq however, has not adopted a RTK law yet. Valid laws addressed above include rudimentary provisions on the right of people to access public information. The Iraqi constitution of 2005 has asserted the right to freedom of expression in Article 38, yet the right was constrained by the phrase ‘public order and morality.’ This phrase has broad concepts, in terms of timing and placing, that are difficult to define as Iraq is a multi-national, religious and sectarian country as stated in Article 3 of the Constitution in which it also opens the door for the government' authorities to crackdown on any opinion under the breach of public order justification.

According to the Iraqi Constitution, all current laws including those law adopted under Saddam Hussein regime, are considered valid unless explicitly void or modified by the Iraqi Council of Representatives. As a result, a huge number of highly restrictive legal provisions to the basic rights and freedoms and also area open to a crackdown on any legitimate criticism of the government practices or public officials.

The Iraqi Penal Code, along with other above-mentioned laws, contain a huge number of restraints on the right to access information and/or what would be published. For example, Article 6 of the Journalists' Protection Law (JPL) guarantees the right of the journalists to access information, records and and official releases, and public authorities should assist providing such information, except if disclosing this information would be damaging to public order and/or is conflicting with the law. Such a restriction is undoubtedly an improper basis for the right to obtaining information. Hence, public bodies have the full discretion to reject information on the basis of damaging public order.

Some of the above assessed laws in this chapter contain a number of positive provisions that seek to provide effect to constitutional protections and international standards to the freedom of expression. The Journalists Protection Law, for example, aims to certify that the journalist's rights are upheld – including their right to health insurance and a pension; setting rules that oblige the government to assure the safety of journalists, and the journalists' right to protect the confidentiality of the sources of information. More importantly, the laws guarantee the right of journalists accessing information to help provide the actual picture of government policies and strategies to the community.

However, some positive provisions are addressed. The above-mentioned laws have failed to completely follow the international standards. The wide-ranging restrictions on freedoms established in the mentioned laws are signally inadequate protections for the public interest. As a previously mentioned example, the Iraqi Penal Code of 1969 and Publications Law of 1968 impose up to seven years in prison for journalists insulting the government. The restrictions listed above, where either far beyond what is legitimate to restrict freedom of expression, or are excessively vague. For example, Article 403 Iraqi Penal Code of 1969 prohibits what constitutes violating the “public integrity”, thus offenders contravening this article are liable to be sentenced for a two-year imprisonment. The other wide-ranging restrictions on incitement and defamation undoubtedly impede the right of freedom of expression. Such provisions would punish any offensive message, regardless of how slight and what damage it caused, with imprisonment or massive fines. These restrictions apply extensively upon all kind of mass media, including the broadcasting and printed press.

The vagueness of the language used is complex in view of the fact that the penal code and other above assessed laws include irrational exemptions for free speech and expression. The listed sanctions, such as for defamation and incitement, must be proportionate and rational to the offence committed. These severe penalties should only be applied for repetitive or major offences and not to hinder people's freedoms. Moreover, it is better for such punishments to escalate in strictness, as an accused would be given necessary warning before harsher punishments are carried out as a last resort. Thus, as these provisions have failed to follow the global standard of freedom and they would constitute a major rolling back of the freedoms in Iraq, the researcher would recommend the followings:

First: The Iraqi Federal Supreme Court should clarify what fall under the concepts of public order and morality as to control restrictions, by the executive authority, on the freedom of expression and publication. Hence, the Court should provide a comprehensive and suitable interpretation of the term public order and morals stipulated in Article 38 of the Iraqi Constitution and other valid laws.

Second: As it has been mentioned above, the wide-ranging defamation and incitement provisions are considered the best methods to be used by powerful authorities to crackdown on any opponents. These rules adopted in the 1969 Penal Code criminalise involvement in some kind of practices of expression such as chanting, singing, shouting in a way that provokes opposition; criminalise involvement to support “prohibited ideologies” with the aim of publishing materials; criminalise attaining materials that encourages any constitutional alteration; or publishing materials/disseminating information under the justification of protecting “state secrets”. Thus, it is recommended to review and repeal the following provisions of the Penal Code: (i) The restriction in articles 178, 182, 228, 327 and 437 on publications under the justification of state secrecy. (ii) Criminalise defamation and incitement, mainly against public authority and figures, in articles 202, 227, 229, 372; 433, 434 and 435. (iii) Restricting the right to publication; under the ‘false news’ justification and under different grounds, in articles 179, 180, 210, 211, 305, 403, 404, 438.

All these listed provisions contradict the right of people to obtain and disseminate information that is considered by the International Covenant on Civil and Political Rights (ICCPR) that Iraq already has signed and ratified. Therefore, the Iraqi legislative authority should review and repeal all unjustifiably numerous provisions restricting freedom of expression and publication in line with the international standards on the right to access and disseminate information.

Third: All the criminal sanctions in the informatics’ crimes draft law, fines and imprisonment, are disproportionate punishments and violate the international standard, particularly Article 19 of ICCPR and Article 33 The United Nations Convention on Anti-Corruption (UNCAC). Moreover, concerning the importance of the right of people to know, the draft law has failed to provide legal protections for whistle-blowers in compliance with the United Nations Convention on Anti-Corruption. Therefore, such a provision would hinder the proper adoption and implementation of any right to know law in Iraq. Thus, the Iraqi parliament should provide legal protection for people who expose information on public or private wrongdoings in line with Iraq’s commitments to the UNCAC. Also the legislative authority should take formal legislative footing to place CPA Order 59 on the protection of whistle-blowers. CPA Order 59 certifies the protection of whistle-blowers from punishments or any action against them. Order 59 also stipulated a reward that’s up to 25% of the recovered amount to be given to the whistle-blower if the blowing of the whistles lead to the repossession of public funds. Hence, it is



recommended that the draft law should not be adopted until a comprehensive revision and amendment are implemented.

Fourth: The various restrictions on journalists, addressed above, are highly challenging from a freedom of expression perspective. For example, the Iraqi Journalists' Protection Law has limited its protection and privileges to Iraqi journalists only, which means that foreign journalists in Iraq are not protected by the JPL provisions. Moreover, the confidentiality of journalists' sources is very important and hence, journalists should not need official consent to quote public officials. The mass media should benefit from additional protection against seizure and search, and no boundaries should be placed on the right of publication of materials merely on the ground that they are offensive to, or are critical of the government. On the other hand, Article 3 of JPL should be revised to assure that everyone (journalists and non-journalists) have the right to obtain public information. It should also assure that public officers may not decline to indicate whether or not they hold the needed information, unless stated in the law that the public interest outweighs the information disclosure. Accordingly, it would be more concrete to address this matter within the context of a comprehensive law on the right to know, where the limitation could be properly addressed, rather within the context of the Journalists Protection Law. As granting the RTK to certain people in any other law would not be substituting the essential need to adopt a proper access to information law or right to know law, this guarantees everyone the right to obtain and disseminate information held by public authorities. Adopting such a law would efficiently elaborate the means in which demands for information will be administered, lay down constricted administration exceptions on the right, afford the proper appealing if a request has been denied, and "curb the pre-existing culture of mutual suspicion between public bodies and the media."

Finally: taking into the consideration the massive restricting rules in Iraqi laws, it is fundamental that any RTK law should contain a determined comprehensive list (the exceptions) of refusing an information demand. Setting such a list should identify certain protected interests, such as national security, privacy, and business competitiveness. The law should also set the sole allowance for information refusal disclosure if such information could cause harm to the previously mentioned interests. However, the law should stipulate the public interest domination over any protected interest as the public interest supersedes any sort of harm. Most importantly, the RTK law should include a supremacy provision that overrides its rules in case of any conflict over other laws.



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