

An informed citizenry is a condition precedent on democracy

■ Venkatesh Nayak

Power tends to corrupt and absolute power corrupts absolutely.’¹ More than two hundred years ago, fed up with the abuse of power by the degenerate *ancien regime*, the French people established a Republic based on the notion of equality for all human beings. Nepal, today, is poised similarly at the threshold of democratic transition. Soon people will elect a Constituent Assembly that will chart the nation’s collective destiny while putting in place systems to ensure that there is little room for abuse of power by any person or institution. In a similar exercise the French National Assembly declared in 1789 - “**Society has the right to ask a public official for an accounting of his administration.**”² In order to hold public officials accountable to their actions, people should have the right to know what the government is doing in their name and why. People’s right to seek and receive information should be constitutionally guaranteed and a corresponding obligation to disclose information should be placed on all public institutions and entities receiving public monies or performing public functions. Nepal has the historic opportunity of changing the very paradigm of governance from one of secrecy and need-based disclosure of information to one of transparency where secrecy in government will have to pass the public interest test to be held legitimate and valid.

The Bill on Right to Information – 2063 (RTI Bill) drafted to give effect to people’s right to demand and receive information of public importance guaranteed under Article 16 of the Nepalese Constitution is a welcome move. However the Bill requires significant improvement if it has to match international standards for information access laws.³

Presumption of openness and maximum disclosure

The RTI Bill merely recognises the right to obtain information of public importance.⁴ This is not enough. The access law must establish the basic principle that all information in a democracy is held by public in-

stitutions in trust, for the sake of the people and not for the sake of furthering any private interest. No public institution, no document or record, in essence no information, should be left out of the ambit of the RTI Bill. Unless one or more exemptions in the RTI Bill are attracted, all information should be available to people (and not merely citizens) on demand. In order to avoid difficulties in interpretation, the RTI Bill will have to be fortified with an overriding clause giving its supremacy over all existing laws, rules, regulations and orders or any instrument having the effect of a law.

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In a global economy where privatisation is the order of the day, all private bodies performing public functions or those which are financed by public funds also hold information that may impact on people’s lives. There is no reason why these institutions should be exempt from the requirement of being transparent in their operations. The South African information access law covers all organisations in the private sector, all multi-national companies, banks, insurance corporations, software companies, industries and private business. Yet no company or firm has quit South Africa complaining that the transparency regime imposed by the access law has adversely affected their ability to make profit. If the State has the determination to establish a regime of transparency all public and private bodies will have to acquiesce. Nepal has the opportunity to show

this determination and make its access law all-embracing.

Narrowly drawn exemptions to disclosure

Private bodies will agree to coverage under information access laws if there is statutory protection for their legitimate commercial interests and trade secrets. The RTI Bill in its current form does provide such protection to private bodies when they are third parties to an information request.⁵ However entire classes of information are exempt from disclosure in the

name of national security, maintaining public peace and order and 15 other grounds have been provided for rejecting an information request.⁶ International best practice requires that all legitimate exemptions be subject to a harm test and time bound disclosure. For example, all information that the Government may decide to keep undisclosed on its own or under any statutory requirement will not be accessible if the RTI Bill becomes law.⁷ This provision gives blanket powers to any public institution to put a stamp of secrecy on any document and withhold it from the people in perpetuity.

Instead, the Bill will have to be amended to insert a specific harm test into every exemption clause. For example, access may be denied if disclosure will significantly undermine national security, or if disclosure will result in unwarranted invasion of the privacy of an individual, or if disclosure of information will adversely affect the competitive advantage of a public or private body in business and commercial matters. The Bill should make it mandatory for all such exemptions to become inoperable for information beyond a specific date. Countries around the world have adopted time bound disclosure requirements for even exempt records and the period of secrecy may vary from 10-20 years. Furthermore the Bill should be amended to make it mandatory for all public and private institutions to disclose information if such disclosure outweighs all other interests, especially of the vested kind.

Independent Appellate Authority

Given the potential of strong access laws to open up the dark nooks and corners of government to public scrutiny, resistance to their implementation must be planned for. Softer and persuasive measures to implement the law will include provision of training programmes for officials and issuing detailed departmental guidelines laying down systems and processes for giving information to the people. However in the absence of an independent appellate body like the Information Commission in India, or the Information Commissioners in the UK, Canada and Mexico, the access law in Nepal is more likely to be honored in the breach. An Information Commission with financial, staffing and operational autonomy must be set up for hearing complaints from people who have been denied access to information in an unreasonable manner. Eminent people with a proven track record of probity and integrity in public life, who will champion the cause of transparency, should be appointed to this Commission through a process of public consultation. The Commission should have the powers

of the highest court of the land including the power to impose penalties on erring officials. At the same time the access law must provide adequate protection for all persons who disclose information in good faith including those who blow the whistle in corruption and wrong-doing in public institutions and prevent them from being harassed or penalized.

Transparency increases people's confidence in public institutions:

Emerging wiser from their harrowing experience at the hands of the aristocracy and the church, two hundred years ago, the French peoples recognised that it was every human being's natural right to resist oppression.⁸ Resistance becomes necessary when all other measures fail. Nepal stands as a shining example of resisting an absolutist regime in the 21st century. The system of government that the Constituent Assembly will eventually craft has no option but to be transparent if it has to gain the confidence of its people. Openness and responsiveness to people's needs are the only democratic methods available to minimize resistance to its development policies and programmes. A good RTI law reduces the distance between the government and the governed by making information accessible to them in an easy, inexpensive and timely manner. "An informed citizenry is a condition precedent on democracy."⁹ Only a well informed citizenry can participate in democratic processes in a meaningful way and defend it against vested interests. ■

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- 1 The British historian Lord Acton in a letter to Bishop Mandell Creighton in 1887.
- 2 Article 15, *Declaration of the Rights of Man and the Citizen*.
- 3 For international best practices and standards of access laws.
- 4 See Preamble. The author's comments are based on a reading of the unofficial translation of the RTI Bill circulated by civil society organisations in Nepal. The comments are true to the extent of the contents of the unofficial translation.
- 5 This applies to situations where a requestor may seek information from a public institution about a private company that is under its regulatory control or supervision. That private company becomes the third party to the information request in such cases, the applicant being the first party and the public institution which has been approached for the information being the second party.
- 6 Section 11.
- 7 Section 11(e).
- 8 Article 2, *Declaration of the Rights of Man and the Citizen*.
- 9 S P Sathé, *Right to Information*, Rashtriya Publishers, New Delhi, 2006: page 2.