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Law and Our Rights

Towards a Right to Information Law for Bangladesh

By A H Monjurul Kabir

"Open government laws are not simply for the satisfaction of citizens' curiosity, they usually derive from the rights of access to records relevant to a legal interest, and there is a continuing connection between the interest which a citizen has in how the country is governed and a right of access to records about government. Such a right of access may be important in disclosing inefficiency and even corruption." - James Michael

The concept of freedom of information is founded in international human rights law and has been incorporated in the constitutions of countries. It developed out of the basic right to freedom of opinion and expression enshrined in the Universal Declaration of Human Rights (Article 19) which states: "Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interferences and to seek, receive and impart information and ideas through any media and regardless of frontiers." Similar provision can be traced in the International Covenant on Civil and Political Rights (ICCPR), the European Convention on Human Rights and Fundamental Freedoms (EHR), in the American Convention on Human Rights (AMR), etc.

The freedom of information is an issue which has gained considerable importance in recent years. At this crucial juncture of time, people feel pressing need for more access to information which has till now been in the exclusive possession of the government even though it relates to the well-being of the individual or the public at large. This is one of the greatest paradoxes of third world democracy. But the right of the public to have access to information is validly justified on several grounds. Firstly, in a democracy the people should have a right to keep themselves informed about the functions and decisions of their representatives and the government. Secondly, information gathered by government agencies is carried out at the expense of the tax payers and the taxpayers must have

some right to gain access to that information. Thirdly, the availability of information to the public will reduce the possibility of the abuse or misuse of power and will promote good governance. Fourthly, access to information will allow the public to make more informed decisions about the body politic including decisions concerning litigation.

Access to information is no doubt a key issue in the concept of our Republic. Our Republic is: "a democracy in which fundamental human rights, freedom and respect for the dignity and worth of the human person shall be guaranteed and in which effective participation by the people through their elected representatives in administration at all levels shall be ensured." In order for the people to effectively participate through their elected representatives, it is necessary that they be aware of the facts and information relating to the affairs of the Republic. If democracy has to sustain, its citizens need adequate information about the policies and affairs of the state. The right to information is no longer an elite or middle-class concern related to the right of the few to know, or the right of the media to have information. This right is directly related to survival of the most disadvantaged sections from urban slum dwellers to tribal in far-flung and remote areas. In spite of huge government efforts towards alleviating poverty, people are not able to avail of basic needs like food, water and health for sheer lack of information about the implementation. In the case of *S P Gupta v Union of India* (1987 Supp. SCC 87), the Indian Supreme Court observes:

"Now it is obvious from the constitution that we have adopted a democratic form of government. Where a society has chosen to accept democracy as its creedal faith, it is elementary that its citizens ought to know what their government is doing. The citizens have a right to decide by whom and by what rules they shall be governed and they are entitled to call on their behalf to account for their conduct. No democratic government can survive without accountability and the basic postulate of accountability is that the people should have information about the functioning of the government. It is only if people know how government is functioning that they can fulfill the role which democracy assigns to them and make democracy a really effective participatory democracy. 'Knowledge', said James Madison, 'will for ever govern ignorance and a people who mean to be their own governors must arm themselves with the power knowledge gives. A popular government without popular information or the means of obtaining it is but a prologue to a farce or tragedy or perhaps both! The citizens' right to know the facts, the true facts, about the administration of the country is thus one of the pillars of a democratic state. And that is why the demand for openness in the government is increasingly growing in different parts of the world."

So access to information is a precondition to the working of democracy. This right to information is more pertinent in a country like ours where the vast majority of the population is illiterate uneducated and so unempowered.

Towards a Right to Information Law

"It appears to us that the concepts of the freedom of speech and expression and freedom of the press as enshrined in clause (2) of Article 39 of our constitution are not different from what these mean in the United States, India and other countries where these rights are constitutionally guaranteed. Plainly speaking, these freedoms mean and include expression, publication, distribution and circulation of anything and any idea of any sort subject to the restrictions that may be imposed by law for securing any of the eight purposes mentioned in clause (2) of Article 39 of the Constitution". [46 DLR, page 600, para 16]

From the observation of our High Court Division in the case of Abdul Kader V. Bangladesh cited above, it is clear that the concepts of freedom of speech and expression and that of press are similar to the principles as enunciated in the USA and in India. But the reality is different. The existing policy of governance is 'anti-people's right to information.' It appears to be that all information in the possession of the government is secret unless there is good reason to allow public access. Access to information is most often refused because

- * The bureaucracy is still secretive and self-serving. It wants to protect itself under the cloak of secrecy.
- * The information asked for is difficult to find because the system of filing and keeping record is outdated.
- * People even do not know that they are entitled to get the information. So if they are refused, they do not insist on their right. Infact there is no effective and speedy remedy for them to realise their right to information.
- * There are some colonial laws under which certain types of information can be withheld. Some of the laws which restrict giving information are:

The Official Secrets Act, 1923.

The Evidence Act, 1872.

The Conduct of Civil Servants Rules.

Some of the provisions of the above mentioned laws go against the democratic system of government established by our constitution and must be changed or removed altogether.

There are several means to ensure this valued right. Turning this right from theory to a living reality can be done by

- * giving executive orders directing various departments of the government and NGOs to give required and relevant information to the people which largely depends on the continuity of the government policy of openness.

* reforming various existing archaic to adopt the right to information laws and rules which is, no doubt a large and complicated process.

* by having one uniform enactment which enables people to get the information as of right.

A comprehensive separate legal enactment can ensure people's right to information better compared to two other options.

The options may be supplementary to making separate right to information law. That is why there is a growing world-wide demand the national government must make a law which applies uniformly to the whole country and sets out a clear procedure for getting information.

The last thirty-five years or so have been seen the passage of freedom of information legislation in several countries beginning with the United States in 1966, Denmark and Norway in 1970, Australia and New Zealand in 1982, Canada in 1983, Greece in 1986, and Ireland in 1998, South Africa, the United Kingdom and India are now seriously considered access legislation of their own.

The law commission of Sri Lanka in its recent 'Report on Freedom of Information' unequivocally states: "Sri Lanka should currently adopt a regime that clearly defined what information was secret and establish guidelines in respect of the exercise of discretion by government officials for giving access to other information." It also proposes a model law titled 'Access to Official Information Act'. The Law Commission of Bangladesh should seriously consider of joining this global trend of suggesting formulation of a Freedom of Information (FOI) legislation.

FOI legislation breaks with the often entrenched tradition of secrecy in several countries and, in doing so, helps empower the citizen vis-a-vis the state. Such legislation can be an effective and powerful aid to the process of economic development not just democracy. Enacting a new law to ensure people's access to information has become the demand of the day. At the same time we should not forget another very important aspect rightly mentioned by Shri Ajit Bhattacharjea in his article in the Hindustan Times, "... Laws and notification are not enough. Lacking public awareness and involvement, laws and rules have little impact. And without committed grassroots workers capable of arousing popular awareness. right to information may remain an academic achievement".

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Law and Our Rights

Right to Information: South Asian Perspective

By Waliur Rahman

Under the dark shadow of 'Affaire Kargil', as the French would say, hanging over South Asian region, the Conference sponsored by the Commonwealth Human Rights Initiative on the above subject could not have been better-timed.

With a legacy of 3 to 4 thousand years of civilization, South Asian countries and its leaders have a lot to answer and the answer must be given sooner than later.

We South Asians have inherited many things from the past - good, bad and indifferent. When Lord Clive allowed his security forces (from majors to colonels in particular) to extort bribes from £3000/- to £8000/- according to seniority, he justified that in the name of economic sustainability. Again in the name of safeguarding national security, the British introduced the Official Secrets Act of 1923. We the South Asians meticulously follow them - in exaggerated form though, the constitutional provisions of all these countries to right and access to information notwithstanding. The outcome is predictable with textbook clarity.

The citizens of all these countries are the victims. And the governments are locked in a vicious circle of bureaucratic malfeasance, lack of transparency and accountability.

Whereas in Pakistan, the overwhelming presence of military in all major decision-making processes queer the pitch in the growth of democratic institutions, and therefore, the civil society, in Bangladesh the shadow of the military and quasi-military rule from post-1975 period to March 1991, had pulverized the flourishing of democracy and civil society.

In India democratic institutions have struck roots. Many vicissitudes notwithstanding, India marches ahead as the largest functioning democracy in the world. But her bureaucracy, though functioning better than many, is still hobbled with lack of transparency and in many cases accountability. Sri Lanka is weighed down in a civil war situation. Nepal has started its multi-party democratic experiment only from 1990. John Mukela's Africa (the only other participant from outside South Asia, as a part of Commonwealth scion) has many more miles to go before we can measure the African Commonwealth democracies under a serious and credible desideratum.

Nelson Mandela's South Africa is in my view an exception. Mandela's vision on the art of the possible in democracy as in diplomacy, would perhaps be an effective antidote to the crocodiles of Yamasukro.

Barrister M Amirul Islam, Dr Kamal Hossain and Justice Habibur Rahman Khan and Ms Maja Daruwala had set the stage on July 05 for a fruitful debate.

It was agreed that the right to information is an inherent right, but it was also understood that there would always be certain exemptions. Even in the US the First Amendment has nine exemptions. But the institutional morality has an overarching superiority over individuals - including the President. President Nixon would have never resigned but for the media disclosures and the legislative courage. Here the supreme need of transparency and accountability received a fresh shot in the arm.

Khushi Kabir, Salma Sobhan and Mahfuz Anam put their fingers in the right place. When we in Bangladesh take pride in the constitutional provisions as enshrined in articles 7 and 11 that all power belongs to the people, the people have more often than not received the wrong end of the stick. Khushi Kabir laid bare the kangaroo-pouch of FAP as Salma Sobhan told us how our politico-bureaucratic combine tried unsuccessfully in 1995 to turn the murder of Yasmeen, a humble working lower-middle class woman, into the mere suicide of a prostitute. 'Our the then Home Minister with his pliable minions around him even issued a press release to that effect.' The entire nation felt humiliated.

Pakistan's Hussain Naqi, Anees Jilani, Fakhruddin Ibrahim, Nepal's Tapan Bose, India's M D Mistry, Vikram Khub Chand, Sri Lanka's Ms Deepika Udagama, opened up new horizons in quest for accountability and transparency. Altaf Gauhar's Press legislation of 1963 sent Hussain Naqi, K G Mustafa, Majhar Ali Khan and others to prison. I mentioned about my experience in a recent International Roundtable at BHSS; when I sought clarification from the panel on the question of Najam Sethi in a Pakistani jail, I was greeted with a silence of the graveyard! Even well known scholars shy away from telling the truth. Fortunately at the CHRI conference, Najam Sethi's case generated substantive discussion, although Mr Javed Jabbar, the moderator, attempted unsuccessfully, to sweep the issue under the rug. Hasan Saeed from Bangladesh took on from me and challenged the participants to tell the truth.

Tania Amir's reference to MIG-29 purchase has to be seen in perspective. Although national security issues are not beyond public scrutiny, serious negotiations of any kind cannot be held in public glare.

The exchanges on the Right to Information and Media Freedom drew great attention. Gazi Salahuddin, Editorial Director of the Jang Group of newspapers is by now a household name in many corners of the globe. He was jailed, tortured, humiliated. But he did not yield any ground. With such brave journalists in Pakistan, why democracy seems yet a far cry in Pakistan?

Aruna Roy, perhaps, stole the thunder. A former IAS officer, married to a Bengali from Mymensingh, she has revolutionized the perception of right to information in Rajasthan and perhaps the whole of India. She has demonstrated through Mazdoor Kisaan Shakti Sangathan (MKSS) that with focus and determination everything is possible. Harsh Mander is another IAS officer who is fighting a war against lack of transparency and

accountability: and he is winning.

At the end of the day bureaucracy was again the target. Good governance is unattainable; a responsive and responsible civil society is unthinkable without a reasonably good bureaucracy. While recommending the Freedom of Information (FOI) legislation to the Commonwealth Law and Information Ministers, we must not lose sight of the fact that while you suggest safeguard for the whistle-blower, don't forget to legislate the same for the victims of bureaucratic malfeasance and political malafides: in South Asia, unlike the United States or Europe the laws of Tort are weak and I don't know of any case yet when newspapers or government officials in Bangladesh have been penalised for false and motivated reporting and thus indulging in character assassination of citizens - officials or non-officials. As Nietze said, 'if you look at the ravine for long, the ravine also will gaze at you'.

The writer a former Secretary of Ministry of Foreign Affairs is Director, Bangladesh Institute of Law and International Affairs

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Law Watch

What a Right to Information Law Should Contain

Since many groups consisting mainly to jurists, media persons, civil society members have been advocating the issue strongly over the last few years, there have been suggested drafts from different quarters.

- * The Press Council of India, under the guidance of the Chairman Mr P B Sawant drafted a law which was later updated and changed at a workshop and renamed 'The Press Council-NIRD Freedom of Information Act, 1997'.
- * The Consumer Education and Research Council (CERC), Ahmedabad, under the guidance of Prof Manubhai Shah drafted a law on the Right to Information.
- * The Working Group appointed by the United Front Government, under the Chairmanship of Mr H D Shourie drafted a law called the Freedom of Information Bill 1997.
- * The present government of India has also prepared a draft on Freedom of Information law which is not available. However, it appears that it is substantially the same as the 'Shourie Bill' as the law drafted by the Working Group is better known as.

All the above drafts have their strong and weak points. However, there are certain things which any Right to Information/Freedom of Information/Transparency Law must contain. These are:

Minimal exceptions

The Right to Information is a Fundamental Right and can be subjected only to the restrictions allowed by the Constitution. In drafting the law, care must be taken to keep the exceptions within the limits prescribed by the Constitution.

The right of access to official/government-held information should be a wide right. The exceptions to the rule of giving information must be limited and specific. The law must not contain a long list of exceptions couched in terms general enough to ensure that all kinds of information can be refused taking the help of the law. This has happened in the case of the Tamil Nadu Right to Information Act which has all of 22 exceptions, and the Shourie Draft Bill, which, along with numerous exceptions contains an all-pervasive clause that information can be denied if its disclosure does not subserve any public purpose. A Right to Information does not need to disclose any specific need. If a person must show public purpose every time he seeks information, it would give unlimited discretion to public bodies to refuse information.

Upgradation of systems

The law should contain provisions for setting up specific systems for storing and disseminating information and upgrading the existing systems for enabling easy access. There must be specific provisions for priority-wise computerisation etc. of government offices.

Allocation of funds

The law must contain a specific allocation of funds for the purpose of operationalising the Right to Information. Without this, the law will be a dead letter and will have no effect.

Accountability

A Right to Information law must lay down clearly the principle of accountability. That is, it must state specifically as to who is responsible for providing the information. Penalties should be imposed on officials, who delay, without any just cause, the giving of information or refuse on unwarranted grounds.

Independent forum for appeals

The law should contain a simple and independent procedure for appeals from refusals to give information. The appellate forum should be an independent person or institution such as an Ombudsman.

Duty to inform

The law must cast a positive duty on public bodies to inform the public in case of certain projects and activities which relate to the public. This envisages giving information without being asked for it. It must be made

mandatory and regular to give out certain kinds of information on a mandatory basis. This kind of information would include rules, information on proposed projects and schemes, and other relevant information which needs to be given out and updated routinely.

Reasonable fee structure

The law, if it provides for a levy of a fee for getting information must ensure that the fee is reasonable and does not act as a deterrent for asking information and does not end up debarring information from the disadvantaged groups who cannot afford the fees. The law must provide for waiver of fees in certain circumstances and for certain classes of people such as those living below the poverty line.

Methods of communication

The law must contain a specific directive for simplification of official language. Information-giving should be in a form which can be easily understood by people. There must be a focus on traditional means of giving information. As of now, most information is contained in official gazettes and publications which are usually unavailable and are of no use to the lay citizens, given the low literacy levels. The law should ensure proper use of the electronic and print media as well as use of conventional methods of communication as per the target group.

Time limit

The law must contain a provision for timely imparting of information. The concerned public officials should face a penalty in case the information is not given in time. The time limit should be reasonable and should not jeopardise a person's rights. Time limits should be set in order of urgency and accessibility. Information regarding a person's life and liberty should be made available forthwith or within the shortest possible time, say within 48 hours. Information which is available at hand should also be given in a shorter time. The Shourie Bill provided for a period of 30 days with a further period of 30 days for giving information. This period seems unreasonable for all kinds of information.

Protection of privacy

The law must take into account the protection of an individual's privacy. Personal information held by the government must be exempt from disclosure. However, if disclosure in the public interest greatly outweighs the preservation of individual privacy, then disclosure should be allowed.

Application to private bodies

Although, strictly speaking, the Right to Information is for government-held information, the law must make it binding on private bodies to disclose certain kinds of information which could affect the public health, etc. This is especially in view of increasing globalisation and incidents like the Bhopal Gas Leak in India which claimed many lives and put to irreparable harm even future generations.

Protection of whistleblowers

The law should give protection to public officials who give certain exempted information where it is necessary to do so in overwhelming public interest or to disclose some serious corrupt practice, etc.

Publicity and training

The law must contain a mandatory procedure for publicising its contents. Often, laws are passed without their knowledge percolating down with sufficient speed or impact and therefore fail to bring about the desired change in the systems.

The Right to Information law must also contain a strong aspect of training and orientation of public servants at all levels, in order to bring about an effective change in the culture.

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