

Law and Our Rights

"All citizens are equal before law and are entitled to equal protection of law"-Article 27 of the Constitution of the People's Republic of Bangladesh

Accountability? First Law Reform

by Martin Saldamando

RIGHT to information is an issue which touches every aspect of people's lives, and is integral to receiving a myriad of other rights. Reforming the laws in Bangladesh related to accessing information would go a long way to bringing accountability to governance in the country with immediate effect. It is therefore important to first look at some of the prevailing information access related laws in order to comment on the need for drastic reforms. Quite simply, legislative changes are required in order to make government more transparent and accountable and to do away with unnecessary hurdles. These should be referred to a group of persons having expertise on the various laws under review in this article.

The Constitution makers of Bangladesh ensured the effective participation of the people through a formulation that was adopted in the Constitution as: [Article-11] "The Republic shall be a democracy in which fundamental human rights and freedoms 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". The lack of participation by the people in the administration of governance in Bangladesh, has not only dented the progress of the country, but has also made the society more corrupt, vulnerable to terrorism and prejudice. Merely holding elections every five years does not ensure the participation by the people in the administration of governance. We need to look for ways to make the elected representatives in administration at all levels accountable to the people. The Right to Information is being viewed as a possibly potent instrument for breaking away from the feudal system in which even today government is viewed as lord and master of the common man and woman. If democracy is to prevail, citizens need to have adequate information.

The concept of Right to 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 interference and to seek, receive and impart information and ideas through any media and regardless of frontiers."

From the standpoint of the Bangladesh Constitution, this Right can be traced to Articles (32) and (39). Article (39) articulates freedom of thought, conscience, speech and the freedom of the press. In the case of "Abdul Kader vs Bangladesh" (46 DLR 596), the Judge of the

High Court Division expounded. Freedom of Speech and Expression occurring in clause (2) of Article 39 of the Constitution means a right to express one's own opinion absolutely freely by spoken words, writing, printing, painting or in any other manner which may be open to the eyes and ears. It thus includes expression of one's ideas on any matter by any means including even gestures, postures, banners and signs. It appears to us that this freedom is wide enough to include expression of one's own original ideas and also expression of one's opinion in the form of comments, explanations, annotations, solutions and answers to questions on the ideas expressed by others.

In order to understand the significance of the Right to Information in modern-day Bangladesh we can begin by looking at the current place of human rights in the national legal paradigm. The Minister for Law, Justice and Parliamentary Affairs is now finalizing a statute for the establishment of a National Human Rights Commission in Bangladesh. He recently said, "We are aware that government must be mindful of the legitimate expecta-

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tions of the people not only for the betterment of their material conditions of life but also responsive to the concerns about transparency, accountability and people's participation in the administration of governance. Our task, as representatives of our respective peoples, is not only to legislate and exercise powers and functions but also to ensure accountability through institutions (and organizations) which can act as watchdogs."

It can be argued that in Bangladesh the older paradigm of check and balance fashioned through the separation of the three traditional organs of state, i.e., legislative, judiciary and the executive, is flawed and even non-existent. Therefore, the effort being made to supplement accountability, by setting up other institutions as 'watchdogs', is misdirected. In this context, the Press in for keeping the government in check. Newspapers are currently the main users of the Right to Information in Bangladesh, however tenuous it is, in order to access information for news. But we must remember, as the Constitution makers have deemed it necessary to ensure the participation of the people, the basis of a Right to Information is not a 'newspaper right', but belongs to the public to know the information they seek.

In highlighting the Right to Information in Bangladesh, it is important to acknowledge

the link this right has with Right to Literacy. This is perhaps the most important and urgent linkage of all. All experience shows that education helps to flower the innate potential of a man. In Bangladesh there is a barren human potentiality, who have been ignored. They have no means to communicate, not to speak about any ability to access information. Today, information like air, is everywhere. But to be able to read this information, let alone handle a computer and search the internet, is the first step. The Constitution of Bangladesh has given a mandate to the state asking it to adopt effective measures for the purpose of:

- a) establishing a uniform, merit-oriented and universal system of education and extending free and compulsory education to all children to such stage as may be determined by law;
- b) relating education to the needs of society and producing properly trained and motivated citizens to serve those needs;
- c) removing illiteracy within such time as may be determined by law.

The Constitution provides Bangladesh therein provides

very wide, as quoted below:

Section 123: Evidence As to Affairs of State — No one shall be permitted to give any evidence derived from unpublished official records relating to any affairs of State, except with the permission of the officer at the head of the department concerned, who shall give or withhold such permission as he thinks fit.

Section 124: Official Communications — No public officer shall be compelled to disclose communications made to him in official confidence, when he considers that the public interests would suffer by the disclosure.

The draconian Official Secrets Act was initially promulgated by the British Colonial administration in 1923, and has survived virtually intact up to the present day. This Act should be outright repealed. Article 5 of this Act makes it a crime for an official to communicate any information, which, among other things, was "entrusted in confidence to him by any person holding office under government or which he has obtained or to which he had

Therefore, the public servants must be accountable for any such decisions that they make.

There is still no clear legal definition on information in Bangladesh. As a result of this it is not possible to identify, discriminate and demarcate. In precise terms, the rights and obligations on accessing information. If one goes by the various case laws, it has been decided that affairs of the State should be given a restricted meaning and those should be such affairs that divulgence of which would jeopardize some important interests of the State. [PLD 1955, Lahore, 39]. Courts in Pakistan have refused to allow copies of privileged official records acquired by official means to be used as documents in court. The Bangladesh Supreme Court in a judgment reported in 48 DLR (AD), pg. 171 has disapproved obtaining a copy of internal communication of the government noting and disallowed enforceability of the right evidenced by such government noting in the following words:

"No legal right can be founded on these inter-ministerial/divisional communications."

The Judge cited the case of

access owing to his position as a person who holds or has held office under government." The government servants in Bangladesh are forbidden from sharing information with the public, even with their colleagues from another department or ministry. The Government Servants Conduct Rules provides as follows:

Section 19: "Communication of official documents or information; A government servant shall not, unless generally or specially empowered by the government in this behalf, disclose directly or indirectly to government servants belonging to other ministries, divisions or departments, or to a non-official person or to the press, the contents of any official document or communicate any information which has come into his possession in the course of his official duties, or has been prepared or collected by him in the course of those duties, whether from official sources or otherwise."

The accessibility of government-held records should be viewed as a citizen's right, enforcement of which makes the government more democratic and accountable. The public servants become more efficient and careful in performing their duties and obligations bearing in mind the burden of accountability. The bulk of decisions made by civil servants affect the citizens and community directly and significantly.

"Bangladesh vs. Dhaka Steel Works Ltd." (45 DLR (AD) 69, para 83) of which is as follows:

"83. We must however sustain the further contention of the learned Additional-Attorney General that the Government's noting ... are not enforceable, because those were internal exercises of the Government and were never communicated to the respondents. No legal right can be founded on those notings. The respondents are not also supposed to obtain a copy thereof."

So on the one hand, there is no formal definition on public information and on the other, the general public is unaware of the nature and type of information that can be demanded from the public authorities. Open, accountable, democratic governments will allow free access by the public to information concerning the sphere of public administration, except to information for which secrecy can be legitimately claimed such as military secrets. The 'culture of secrecy' is the main obstacle in front of the exercise of the Right to Information in Bangladesh. The lack of democratic culture and exercise, particularly among the subterranean bureaucrats, have made it difficult for the common people to access information relating to public interest.

Recommendations

Besides reforming the laws previously outlined, mechanisms are needed in order to

provide access to such information for the citizens which would facilitate people's control over corruption and the arbitrary exercise of power. A good place to start would be to scrutinize and review the system of interface between the ordinary citizen and the police.

If one wants to lodge a complaint with the police in Bangladesh, in many cases the police will refuse to record one's information. Also, as we have seen in the case of the student Rubel, who was picked-up and subsequently murdered in police custody, and in the pernicious practice of picking-up street children before an Opposition sponsored haral and tossing them into jails, as well as other examples which show that there is no accountable process for recording of arrested individuals or for informing their family members of their arrest.

In order for Bangladesh to have a transparent criminal justice system free from the arbitrariness of the police, procedural safeguards for arrest and custody must be clearly demarcated in detailed directions. These directions would translate into the right of the accused or his family to have access to information regarding his arrest and detention such as: preparation of a memo of arrest to be counter-signed by the arrestee and a relative or neighbor of the arrestee, preparation of a report on the physical condition of the place of detention in appropriate registers at the police station, display of details of detained persons at a prominent place at the police station and at the district headquarters. In addition, the following information should be made available to any citizen of Bangladesh simply on request:

Details of registration of cases and disposal of investigations into crimes against women and children, and other vulnerable groups.

Number and list of persons in police custody, period of their detention and reasons for custody.

Number and list of persons in custodial institutions including jails, 'safe custody' and children's shelter homes, reasons for and length of custody, details of presentation before courts, etc.

There should be mandatory provisions for visits to jails, mental asylums, women's and children's shelter homes by NGO workers and independent citizens who are to have full access to inmates and their records, and also have quasi-judicial authority to enquire into any complaints of abuse. As a start, by just having access to the above listed information, it would demonstrate to the public the enormous potential power of information, if it be placed in the hands of citizens, to combat corruption and the arbitrary exercise of power over them that they experience in their daily lives.

Consultant Commonwealth Human Rights Initiative (CHRI)

lawwatch

Further Violations to the Basic Rights of Slum Swellers

THE following human rights organisations have expressed their shock at a circular sent by the Prime Ministers office to the NGO Bureau asking the NGOs to stop their development work in Dhaka slums and instead follow the government's sudden decision. This circular issued on 25 September was forwarded by the NGO Bureau to several NGOs on 27 September, a week before the UN's commemoration of a Decade of Rights to Habitat and Housing — to which Bangladesh is a party.

The NGOs have been carrying on various development programmes in the area of micro-finance, education and health. They have by now invested many millions of takas in their programmes, which has helped the poor to find self employment, to educate their children and to improve their quality of life.

We are alarmed at the pre-emptory and casual call for suspending activities which are part of long term planning. This is not only a violation of human rights to life, livelihood, shelter, but also jeopardises our national interests, as most of the slum dwellers are gainfully employed in industrial work, the transport, construction and service sectors.

Following a sudden and rapid eviction of over 50,000 persons from 17 slums in Dhaka last month, most of the residents have been dislocated and shelterless. The government has, in the last two weeks, carried out a rapid and random survey to elicit responses from slum dwellers regarding their options for residence. The survey was carried out without proper monitoring and the slum dwellers have complained that their views are not being correctly recorded.

We would urge upon the government to honour its international and constitutional obligations to the right to livelihood and shelter and not to contribute further to the dislocation of citizens. We would further demand that the government follow the recommendations of various government appointed task forces to provide tenurial rights to slum dwellers in available khas land and allow for a long term implementation of its development ideals by cooperation between government and non-government agencies.

Ain-O-Salish Kendra, BLAST, ODHAKAR, Chinnomul Shishu Kishore Shongtha, RMMRU, Karmajibi Nari.

Child Labour: Bangladesh Perspective

by S M Morshed

DESPITE the anti-child labour campaign across the world, child labour is an unpleasant and unwanted reality in many countries including Bangladesh. Recently an important magazine of Boston, published an article called "Child Labour in Asia" and mentioned that among nine countries with the highest child labour, Bangladesh is in 6th place.

At present, the number of child workers in Bangladesh is 8.6 million. Among them 4.12 million child workers are employed in agriculture. In urban areas, there are half a million girl child workers among 1.13 million child workers.

With possible lower population growth and increase of women education rate in view, it can be anticipated that child labour will gradually decrease in the future.

Types of Work

Children are employed in various forms of economic activities. From a rapid survey conducted by ILO and Unicef in 1994, it was disclosed that children are employed in about 301 types of economic activities in the urban areas. This includes breaking stones/bricks, selling flowers, collecting garbage, knitting, various forms of industrial labour etc. The survey says that there are 201 types of child labour in old district headquarters, 133 in new district headquarters, 133 in thana headquarters, 23 in hill tracts and 95 in rural areas. The findings of another survey on "Hazardous form of Child Labour" shows that Children are also employed in some dangerous works. Electrical work and welding, working in chemical materials factories, selling and carrying of drugs are included in this category.

Laws about Child Labour

The existing laws about child labour in Bangladesh are:

Mine Act-1923

No child under the age of 15 will be employed or will be allowed to be present underground places.

Child Act (Labour Mortgage) 1933

If any guardian or any employer employs any child under 15 in any form of labour harmful for the child, without proper salary or for any other gain, or any form of labour which is not terminable within one week's notice, they will be considered to have committed punishable crimes. Agreements for such work will be void also.

The Employment of Children Act, 1938

No one will be allowed to employ any child under the age of 15 in any goods delivery work related with railway passengers, cargo or mail transportation or in the areas near any port.

The Tea Plantations Labour Ordinance, 1962
No child who has not completed his twelfth year shall be required or allowed to work in any tea plantation.

The Shops and Establishments Act, 1965

No child under the age of 12 will be employed in any institution. Permission has to be taken from chief inspector to employ children of 12 to 18 years any time after 07 AM to 08 PM.

The Factories Act, 1965

No child under the age of 14 will be employed in any factory work. If any child under 18 years employed in any work with dangerous machinery has to be trained about the work or has to work under supervisor.

Children Act, 1974

It is forbidden by the law to employ children in beggary or any kind of exploitation. Provisions of Punishments for Violating Child Law (Labour Mortgage) 1933:

For employing any child under 15 in any form of labour harmful for the child, without proper salary or for any other gain, or any form of labour which is not terminable within one week's notice —

• For a person despite being the guardian or parent of a child and doing an agreement for labour mortgage of the child will be fined up to Tk 50.

• Any person doing an agreement with the parents or guardian of a child under which the parents or guardian employs the child into labour mortgage will have to give a penalty of Tk 200.

• Any person employing any child or giving permission to employ any child in any place under his authority knowing about the child labour mortgage and for implementing the agreement, he will be punished to pay a penalty of Tk 200.

Anti Child Labour Programmes in Bangladesh

Government and NGOs have been implementing mainly two types of anti child labour programmes in Bangladesh. These are:

- a) Anti Child Labour Campaign Programme for creating mass awareness.
- b) To fulfil children's needs through alternatives of child labour.

On the other hand, according to the agreement, signed by BGMEA, UNICEF and ILO on 14 July 1995, children under 14 working in garments industries are exempted from their employment and are given the aid for education with a monthly scholarship.

Dealing with Dissent: The "Black Laws" of Bangladesh

While political opposition parties have repeatedly promised to repeal the law if elected, the law has been maintained when governments of different hues have been formed. For example, during the rule of the Bangladesh Nationalist Party (BNP) from 1991-1996, thousands of people belonging to the Awami League were arrested under the Special Powers Act. During her election campaign, present Prime Minister Sheikh Hasina promised to repeal the Act if elected. In March 1997, the Prime Minister announced that there was no plan to repeal the Act; its utility to past governments justified its existence. Not surprisingly, the Awami League Government has used the Act extensively to detain BNP activities.

As a result, during the struggle for independence from Pakistan, Bengali freedom fighters were routinely arrested and detained. Upon independence, the political leadership of Bangladesh declared its commitment to ending arbitrary arrests and detention and when the Constitution of Bangladesh was promulgated on 6 December 1972, it did not provide for preventive detention. This pledge was short-lived.

In September 1973, the Parliament passed the Second Amendment Bill which amended Article 33 of the Constitution of Bangladesh and authorised Parliament to pass preventive detention laws. While the inserted provision did provide for some safeguards — such as the production of the detainee before an Advisory Board within six months of his or her detention — the effect of the amendment was to open the way for wide-scale arbitrary detention.

Five months after the enactment of the Second Amendment Act, the Special Powers Act 1974 (the Act) was passed. The Act was purportedly designed to crush "black marketeers", however it was immediately used to detain political opponents. The primary targets of the Act were suspected members and sympathisers of the radical left and Jumma activists in the Chittagong Hill Tracts. For the past 25 years, successive governments have used the Special Powers Act to

control Freedom of Expression and suppress political opposition. The limited safeguards provided in the Act mean that it is also used by District Administrators as a tool of intimidation against the families of suspected opponents, and people engaged in personal feuds with the authorities.

While political opposition parties have repeatedly promised to repeal the law if elected, the law has been maintained when governments of different hues have been formed. For example, during the rule of the Bangladesh Nationalist Party (BNP) from 1991-1996, thousands of people belonging to the Awami League were arrested under the Special Powers Act. During her election campaign, present Prime Minister Sheikh Hasina promised to repeal the Act if elected. In March 1997, the Prime Minister announced that there was no plan to repeal the Act; its utility to past governments justified its existence. Not surprisingly, the Awami League Government has used the Act extensively to detain BNP activities.

The Special Powers Act provides for the detention of individuals to prevent the commission of 'prejudicial acts' against the State. Section 2 (f) of the Act, provides that 'prejudicial acts' include prejudicing the sovereignty, or security of Bangladesh, creating or exciting feelings of enmity and hatred between different communities and interference with the

maintenance of law and order. The Act does not provide any guidance on the burden of proof necessary for the government to conclude that an individual is likely to commit a prejudicial act. As a result, detentions under the Special Powers Act are based on allegations unsupported by evidence.

Detention under the Act is generally made at the behest of the District Magistrate or Additional District Magistrate in the area. In most districts the District Magistrate is also the District Administrator, as Article 115 of the Constitution of Bangladesh provides that subordinate courts are under the control of the Executive. The failure of the separation of powers has meant that detentions are often politically motivated within districts. The Ministry of Home Affairs must then, within 30 days, provide a report stating the grounds upon which the person has been detained. The Act allows for initial detention of a period of one month, after the said period an Advisory Board can extend the detention for a further six months, and then again for six months, indefinitely. Detainees are denied the right to legal representation before the Advisory Board.

The only hope for most detainees are the few lawyers who are prepared to file petitions of habeas corpus before the High Court Division of the Supreme Court of Bangladesh on a pro bono basis. The cost of legal fees for filing such petitions extends

to over Tk 10,000 (or \$US 200); well outside the financial reach of most people detained under the Act. As a result, only around half of those detained are ever able to take their cases before the High Court Division of the Supreme Court of Bangladesh. Ironically, the High Court Division holds the only hope for the speedy release of detainees. From 1974 to March 1995, 10,372 petitions of habeas corpus were moved before the High Court in Dhaka. In 10,651 (or 90.3%) cases, the court found that there was prima facie reason to believe that the detention was illegal. Ultimately detention was found to be valid in only 8.57% of cases. While the Supreme Court of Bangladesh in the case of *Bhikri Akhter Hossain v Bangladesh* and others held that courts have the power to order compensation in the case of illegal detention under the Act, cases of compensation are rare and are limited to high profile political cases.

Further, the frequency with which the Special Powers Act has been used, has increased drastically since its introduction. In 1974, a total of 513 individuals were detained under the Act. In the six months from January to June 1999, 6,650 individuals had been detained pursuant to its provisions. All types of people are detained under the Special Powers Act — politicians, students, the families of opposition leaders and personal enemies of police personnel and Administrators. However, the most easily de-

finned recent targets are suspected opponents of the 2 December 1997 Peace Accord in the Chittagong Hill Tracts (CHT).

On 12 April 1999, Dipayan Khisa and Usain Marma, students in the CHT were arrested without a warrant by the Bandarban Thana Police. They were produced before the local Magistrate and remanded for three days, after which time they were sent to Bandarban District Jail. On 16 April 1999 Dipayan Khisa and Usain Marma were served with identical orders and grounds of detention under the Special Powers Act. They were detained on the grounds that they were members of an armed terrorist group, and had distributed leaflets that incited hatred against Bangladesh. Both students were able to secure the services of a lawyer who filed writ petitions 1375 and 1376 of 1999 in the High Court Division of the Supreme Court of Bangladesh. On 14 June 1999 the court ruled that their detention was illegal and ordered the release of Dipayan Khisa and Usain Marma. Both had been illegally detained for two months, and were denied compensation. Their experience is shared by thousands of others each year.

The proposed Public Security (Special Provision) Bill would provide the Government of Bangladesh with yet another avenue for the suppression of opposition. In a region in which a plethora of human rights abuses are excused in the name of 'national security', the Special Powers Act is already one of the most resilient limits on active democracy. Until the Government of Bangladesh commits to securing fair democratic processes and mechanisms of responding to dissent, the Special Powers Act will remain at once an accepted tool of government and an albatross around the neck of a country that aspires to be a mature democracy.

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