LAW *campaign*

RIGHT TO INFORMATION ACT

Expectation and reality

DR. ASIF NAZRUL

RIGHT to information is considered as one of the fundamental prerequisites for ensuring transparency, accountability and responsiveness in the relations between the state and its citizens. It acts as an important facilitator in ensuring good governance and rule of law in a country and promotes sovereign equality of different states.

Right to information underlies in the right to freedom of expression and speech as enshrined in the Constitution of various countries. The necessity of its distinct identity, however, is spelt out in the legal regime of many developed countries and has been increasingly recognised in the legal instruments of global concern. In respond to their commitment to those instruments, the developing countries have also stepped forward to develop or promulgate specific legislations to enhance access to information, previously kept restricted by domestic secrecy laws.

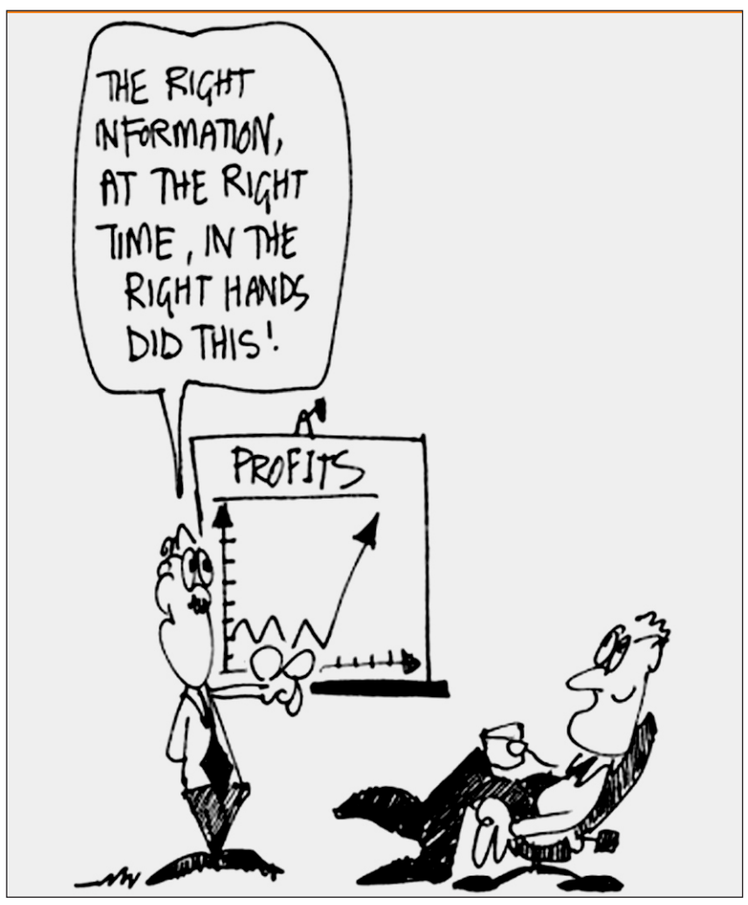
Right to information is demanded by the civil society of Bangladesh for a long period. The response of the state machinery to that demand came visibly only in the post-Ershad era. The Law Commission had produced a Working Paper on the Proposed Right to Information Act in 2002 and circulated that paper to some selected organisation in 2003. An analysis of the proposed Act should be preceded by comparable contents of right to information as found in relevant international instruments ratified by Bangladesh.

Legal bases of right to information

The relevant legal bases for the right to information are available in Article 19 of the Universal Declaration of Human Rights (UDHR), Article 19 of the International Covenant on Civil and Political Rights (ICCPR). Article 19 of the Universal Declaration of Human Rights (UDHR) defines right to information as a fundamental ingredient of the right to freedom of expression in the following terms:

Everyone has the right to freedom of opinion and expression; this right includes the right to hold opinions without interference and to seek, receive and impart information and ideas through any media regardless of frontiers.

Article 19 of The International Covenant on Civil and Political Rights (ICCPR) guarantees the right to freedom of opinion and expression, in terms very similar to the UDHR. Read with Article 2 of the ICCPR, Article 19 requires States to facilitate the development of a diverse, vigorous and independent media, and provide effective guarantees for freedom of information.



Right to information, however, could never be understood unless its elements are delineated. The UN Special Rapporteur on Freedom of Opinion and Expression has provided extensive commentary on this right in his Annual Reports to the UN Commission on Human Rights. According to his 1998 and 2000 Annual Reports, the contents of the right to information can be summarised as follows:

- Public bodies have an obligation to disclose information and in order to comply with that obligation they should establish open, accessible internal systems for ensuring the public's right to receive information within strict time limits.
- Right to information includes right to understand the importance of information. The law on freedom of information should therefore make provisions for relevant public education and the dissemination of information regarding the right to information.
- A refusal to disclose information may be based only on genuine and legitimate and measurable public interest and that refusal must be accompanied by substantive written reasons.
- The cost of gaining access to information should not be minimal and affordable.
- The law should require that other legislation be interpreted, as far as possible, in a manner consistent with its provisions.
- Individuals should be protected from any legal, administrative or employment-related sanctions for releasing information on wrongdoing, viz. dishonesty, miscarriage of justice and corruption.

Comparing to the aforesaid legal contents, the Bangladesh Constitution speaks very little about the right to information. Article 39 of the Constitution guarantees freedom of expression. As freedom of expression presupposes a right to have information, Article 39 can be said to have provided the necessary impetus to frame a Right to Information Act. This has yet not been done in the last three decades. Furthermore, the relevant constitutional and international guarantees are diluted by preserving a number of domestic secrecy laws including the Official Secrecy Act and the Conduct of Civil Servants Rules as well as some provisions of the Evidence Act.

Analysis of the Draft Act 2002

The analysis below is based mostly on a Memorandum, prepared by a leading international organisation working for promoting right to information.

Definition: The Law Commission's draft law extends freedom of responsibility to private bodies as well as to public ones. However, in order to avoid the risks of narrow and undue interpretation of the definition of a public authority, it must be clarified that the definition includes all elected, statutory as well as constitutional bodies. Furthermore, the definition of information should encompass all information held by public authorities, rather than just information relating to their functions.

Access procedure and fees: According to the proposed law, citizens desiring access to information must submit a form purchased from the relevant public authority, detailing the particulars of the information sought and the manner in which access is desired. This access procedure could be improved in various ways. First, the law should not be restricted in scope to individuals but should benefit all legal persons like businesses, political parties and NGOs. Second, the access procedure can be simplified by requiring only the applicant's name, contact details, and details about the information sought to facilitate its location. Third, fees may be charged for the release of information, but only to cover the administrative costs of disseminating the information. The proposed law should also contemplate that requests could be submitted by email.

Regime of exceptions: International standards suggest that a public authority should not refuse to disclose information unless i) disclosure threatens to cause substantial harm to a legitimate aim and unless the harm to the aim is greater than the public interest in having the information.

In contrast, paragraph 14 of the Law Commissions' Working Paper states that "a provision may be incorporated in the proposed Act to the effect that the proposed Act shall be applicable subject to the provisions of the prevalent restrictive laws." Given the highly restrictive nature of the Official Secrecy Act, it is feared that any such provision would drastically squeeze citizen's access to information. The right to information law should rather explicitly override any other laws that impose excessive, unreasonable and unacceptable prohibitions on access to information.

Omissions : Besides the above shortcomings, the proposed Act fails to address a number of important issues usually covered in international comparable instruments. These are follows:

a) Protection of benevolent disclosure: The law should provide protection for individuals who, in good faith, release information on official corruption, maladministration and negligence.

b) Promotional and Educational Activities: In order to facilitate transformation to the culture of transparency, the law should provide for training of relevant employees within public authorities and promote the idea of freedom of information, both within government and in society-at-large.

c) Severability: If a document contains a mix of information, some of which is captured by an exception, and some of which is subject to disclosure, the law should specifically provide for the disclosure of non-exempt material.

Concluding remarks

The Draft Law discussed above may be welcomed with caution as a positive initiative to advance freedom of expression and information in Bangladesh. But, unless it supersedes existing secrecy legislation, provides for extensive education and training, protects the whistleblowers, establish independence of the relevant appeals tribunals and, above all, unless an enabling political culture developed, the Act could contribute little to promote right to freedom of information.

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FACT *file*

USA

Interrogation techniques amount to torture

AMNESTY INTERNATIONAL

Coercive interrogation methods endorsed by members of the US government amount to torture or cruel, inhuman or degrading treatment and violate international law and the USA's treaty obligations, Amnesty International said today, as it called on the USA to end its practice of holding detainees incommunicado and in secret detention.

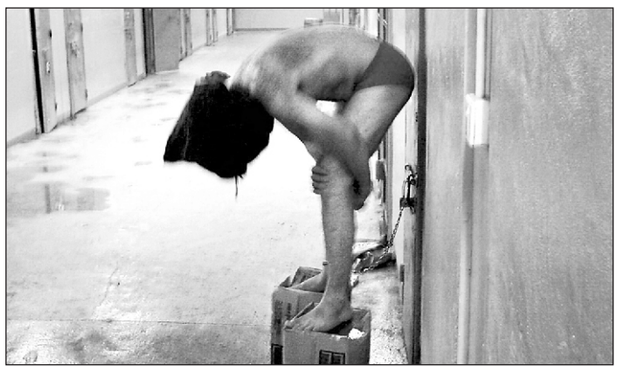
Citing current and former officials, today's New York Times claims that Khalid Shaikh Mohammed, an alleged leading member of al-Qa'ida held in an undisclosed location for more than a year, has been subjected to interrogation techniques including "water boarding" in which the prisoner is forcibly pushed under water to the point that he believes he will drown. "This would be a clear case of torture", Amnesty International said, adding that water submersion is a technique that has been used by countries notorious for their use of torture.

The New York Times states that the techniques used against Khalid Shaikh Mohammed were among a set of secret rules approved by the administration for use against "high value" detainees in the so-called "war on terror". Separately, Secretary of Defence Donald Rumsfeld told a Senate committee yesterday that Pentagon lawyers had approved methods of interrogation in Iraq such as "sleep management", "dietary manipulation" and "stress positions". Such so-called "stress and duress" techniques have been widely alleged by former detainees held in US custody in Afghanistan some of whom were subsequently transferred to Guantánamo Bay.

Under questioning by the committee, Secretary Rumsfeld said that: "Any instructions that have been issued or anything that's been authorised by the Department have been checked by the lawyers" and "deemed to be consistent with the Geneva Conventions". "These techniques of torture or cruel, inhuman or degrading treatment are grave breaches of the Fourth Geneva Convention, amounting to war crimes, and violate the Convention Against Torture to which the USA is a state party," Amnesty International reiterated.

Amnesty International noted that the Committee Against Torture, the expert body established by the Convention Against Torture to oversee its implementation, has expressly held that restraining detainees in painful positions, hooding, threats, and prolonged sleep deprivation are methods of interrogation which violate the prohibition on torture and cruel, inhuman or degrading treatment. In the past two years, human rights organisations, including Amnesty International, have raised this issue at the highest levels of the US administration. "The US administration still has not learnt that ill-treatment and abuse are a slippery slope to torture and should be totally prohibited", Amnesty International said, reiterating that torture is strictly prohibited in all circumstances, including in times of emergency and war. "All US detention facilities around the world, holding prisoners captured in the context of the "war on terror", must be opened to independent monitors and all allegations of torture and cruel treatment subjected to vigorous independent investigation."

Amnesty International is a London based Human rights organisation.



LAW *update*

UPDATED

MONEY LOAN COURTS

Aiming at fast but not furious disposal

BARRISTER TUREEN AFROZ

FINANCIAL sector in Bangladesh comprises of mainly banking sector, insurance companies, stock market, non-bank financial institutions and micro financing institutions. Out of these, banking sector dominates the financial system, accounting for more than 95% of its total assets. Banking sector in Bangladesh suffers from chronic inefficiency. According to FSAC (Financial Sector Adjustment Credit) Report of the World Bank, problems in banking sector in Bangladesh can be generally categorized into four main groups:

(a)Economic - such as, when the *loan rate of interest* does not reflect real risk and price because of excessive control.

(b)Prudential such as, when the capital adequacy requirements are not effectively enforced or there does not exist any appropriate loan classification mechanism.

(c)Institutional such as, when there exist weaknesses in relation to loan screening and supervision or weak management information system.

(d)Legal such as, the loan default system was perpetuated because of the delays and inadequacy originating the system.

However, at this moment, the biggest problem of Bangladesh banking system is the bank loan default problem. There are various reasons for loan default problem in Bangladesh, such as, inefficient loan classification mechanism, improper banking supervision, lack of accountability on the part of bank officials, high loan price, risky economic environment, corruption, unethical use of political power, ineffective and inadequate judicial remedy for financial corruption or frauds etc.

In past, various initiatives have been undertaken to tackle the loan default problem in Bangladesh. Initiatives included prosecuting willful defaulters; imposing prohibitions against defaulters holding public offices or bank directorships; putting limitations on access to new loans; denying import licenses to industrial loan defaulters; shaming defaulters by publishing lists; setting up *Credit Information Bureau* to record the performance of borrowers; establishing a large *Loan Review Cell* in Bangladesh Bank to review all newly sanctioned bank loans over Tk. 10 million etc.

However, the above measures, adopted overtime, were found to be inadequate in tackling the massive loan default problem of the country. In early 1990s, it was strongly realized that "a weak legal infrastructure" is mainly responsible for non-recovery of default loan and thus for "deterioration in the quality of overall credit management in Bangladesh". Accordingly, a number of new acts have been enacted (such as, *Money Loan Court Act* 1990, *Bank Company Act* 1991 and *Bankruptcy Act* 1997) and old Acts have been necessarily amended.

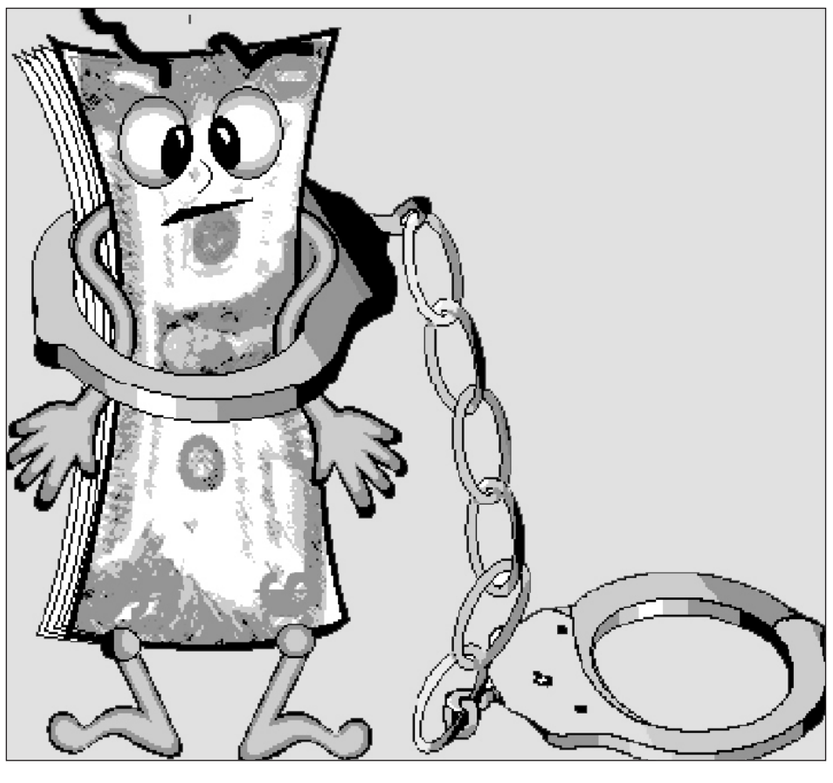
In 1990, the *Money Loan Court Act* was enacted with a view to (a) establishing loan courts at district level; (b) closing the legal loopholes; and (c) ensuring prosecution of defaulters more rigorously than ever before. However, the *Task Force Report on Financial Sector Reforms*, Government of the People's Republic of Bangladesh, 2000 concluded that: "… the progress in relation to recovery of default loan is not significant even after formulation of new Acts and formation of new courts that too only for recovery of default loans."

It was observed in 1999 that even though there were ninety (90) Money Loan Courts in overall Bangladesh, the performance of these courts has been disappointing. Until the end of 1999, only 9.41% of total litigated amount in the Money Loan Courts could be recovered. As of March 2003, over 40,000 cases were pending with Money Loan Courts, depriving the government of realizing more than US $ 1550 million. Among the 40,000 pending cases, 22,000 were pending for over five years, 5,700 for four years, 4,600 for two years. Hearing of 3,400 cases was pending for previous one year. [Staff Correspondent, "40,000 cases pending with Money Loan Courts", 3(1241) *Onirban* (March 9, 2003)]. In addition, most of the settled loan cases of the Money Loan Courts are small loan defaulters leaving the major loan defaulters to perpetuate their default culture for ever.

The reasons, identified in various studies, for such poor performance of the Money Loan Courts are:

(a)Money Loan Courts suffer from inefficient case management system. As a result, the courts fail to strictly follow the legal time limits by which they are supposed to settle the claims between parties.

(b)Frequent stay orders from the High Court Division of the Supreme Court of Bangladesh obstruct the usual proceeding of the Money Loan Courts.



(c)There exists an overall culture of non-cooperation by bank officers, judicial officers, legal professionals and the parties involved to expedite the case disposal.

(d)Corrupt and unethical practices of banking administration inhibit the proper functioning of the Money Loan Courts.

(e)Political lobbying by influential defaulters makes the entire judicial mechanism ineffective.

As the 1990 Act proved to be less effective, the government has recently enacted the *Money Loan Courts Act* 2003 with a view to 'inspire and encourage efficient entrepreneurship' as well as to 'protect interest and security of financial institutions restoring discipline in the financial sector'. Under the new *Act*, the Money Loan Courts are to dispose cases within three months.

It is too early to comment as to whether the new *Act* has been successful in enhancing a better case management system than under that of the old *Act*. However, some critical observations can be made. Since its adoption in May 1, 2003, the new *Act* has aimed at disposing the cases of Money Loan Courts at the shortest possible time. One striking feature of the new *Act* is of course to utilize the 'alternative dispute resolution' mechanism along with the formal court system. The huge success of alternative dispute resolution at family courts in 12 districts of Bangladesh since June 2000, has prompted the government to incorporate similar provisions for mediation in the *Money Loan Courts Act 2003*. The government claims in October 17, 2003 that the Money Loan Courts could successfully resolve more than 9,000 cases, within only 5 months (May September, 2003) of enactment of the new *Act*. [Report, *The Bangladesh Observer* (October 17, 2003)]. This does portray a positive picture of the workability of the Money Loan Courts regime under the new *Act*.

It is, however, stated that these disposed off cases are only 22% of the total pending cases of the Money Loan Courts. If this speed of resolving the cases (9,000 cases in 5 months) remains, then just to resolve the already pending cases at Money Loan Courts (40,000 in number, pending as of March 2003), it will take almost 23 months i.e. nearly two years. Also, while resolving the pending cases, new cases will be initiated and as such, the huge backlog of cases will remain for ever. Even though the government claimed to have achieved success in speedy disposal of loan default cases within 5 months of enactment of the new *Act*, the volume of overall default amount is still very high. The Finance Minister, M. Saifur Rahman, in mid November 2003 declared that Banks in Bangladesh are in fact currently stacked with US $ 3515 million in default loans. [Staff Correspondent, "Tk 20,736 Crore Loans in Default Hands", *The Daily Star* (November 17, 2003)].

Loan default problem in Bangladesh is like a chronic disease, which will take long time to cure. The fast disposal of pending cases may help to tackle the problem up to certain extent. However, it is stated that the major evils behind the loan default problem still remain outside the purview of regulatory bodies. They are:

(1)Wide spread 'corruption' and 'unethical practice' that leads to the over all default culture in Bangladesh.

2.Political lobbying by major and powerful loan defaulters.

Unless and until, these evils are fought back furiously, by taking recourse only to speedy disposal of cases will be a futile attempt to tackle loan default problem in Bangladesh. The efforts of the Money Loan Courts will have to be much more rigorous, while dealing with corruption, unethical practices and/or major loan defaulters in disposing of the cases. In this regard, Money Loan Courts will have to boldly avoid the scope of any political pressure, no matter even if it comes from the Prime Minister's Office. The common men have lot to expect from the Money Loan Courts. These courts should in disposing of the cases keep in mind that it is the people's money that is being held up by the defaulters. If the loaned amount is not repaid in due time, it raises the cost of lending substantially. Due to increase in cost of lending, good borrowers are adversely affected as there is an erosion of capital from banks. Also, due to loan default, many prospective investment ventures are hauled, which further degenerates income and employment of the common people. Such macro-economic turmoil puts the national economy in 'growth crisis' and the 'poorest of the poor' of the economy suffer. Therefore, the Money Loan Courts should deal default cases with explicit courage, notwithstanding any pressure from any corner of the society. The courts should diligently opt for not only 'fast' but also 'furious' disposal of cases.

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