

JUDGMENT REVIEW

BREAKING THE CULTURE OF 'SECRECY'

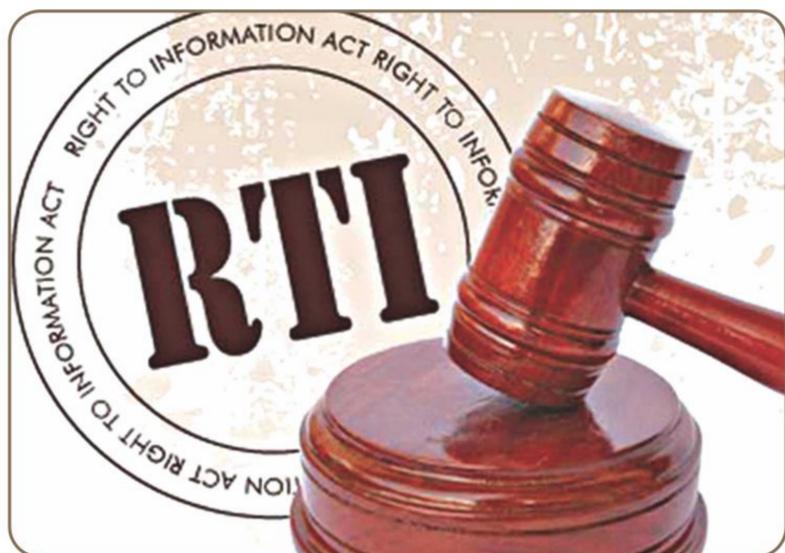
Judiciary stands for right to information

EMRAAN AZAD
DESPITE being a people's republic, democracy in Bangladesh is yet to flourish and be a value-laden model for others. Since our independence, political parties have been enjoying an unfettered cream of the culture of not disclosing everything to the countrymen. On the eve of each national election, most of the political parties promise many good things which remain very often less-realised as the time of next election approaches. Nonetheless, the political parties are considered to be an integral part of our national polity. Having signified the existence of political parties for democracy, the narrative would remain unfinished if we overlook their limitations and mal-practices. Very recently, the High Court Division (HCD) of the Supreme Court of Bangladesh has dealt with one such mal-practice, i.e. the practice of 'secrecy' concerning political parties' financial information. The issue came up in a Public Interest Litigation (PIL) in the case of *Badiul Alam Majumdar and others v Information Commission, Bangladesh and another* 8 SCOB (2016) HCD 110. The brief account of the

in the HCD which identified two important questions judicially to be disposed of. First question concerned as to whether the Information Commission can issue any direction favouring the culture of 'secrecy' and curtailing citizen's right to information. And second question related to the issue of distinguishing which information falls under 'public information' or 'private information' as far as the political parties and their activities are concerned. While dealing with the first question, the HCD observed that the direction of the Information Commission seeking political parties' consent/opinion in respect of providing information was erroneous and unwarranted under law. The Court grounded its observation on the belief that "[...] political parties, which operate in the public sphere[,] have constitutional and statutory obligations for accountability and transparency" (at p. 131). As the Court also opined, a negative opinion of the political parties in providing information would undoubtedly violate citizen's right to information guaranteed under the Right to Information Act 2009 and damage

which, if elected by them, seeks to formulate policies of good governance. This right to information is a basic right which the citizens of a democratic country aspire in the broader horizon of their right to live. This right has reached a new dimension and urgency, which puts better responsibility upon those political parties towards their conduct, maintenance of transparency and accountability to the public whom they aspire to represent in the parliament." (at p. 130). Despite positive observations made by the Court, it however could not recognise political parties as 'constitutionally recognised public organisations' with reference to article 152 of the Constitution which defines a "political party" as "a group or combination of persons who operate within or outside Parliament under a distinctive name and who hold themselves out for the purpose of propagating a political opinion or engaging in any other political activity." Article 152 clarifies that political parties are one of the necessary institutions in the government structure for a democratic State. This constitutional provision also clarifies that 'propagating political opinion' or 'political

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litigation is that one Mr. Badiul Alam Majumdar on behalf of SHUJAN (Shushashoner Jonno Nagorik), a civil society movement which works to establish and promote democracy and good governance in Bangladesh, sought to the Election Commission for some information relating to the audited annual statements of accounts filed by the registered political parties to the Election Commission. The Commission refused to entertain the request of SHUJAN on the ground that such information is exclusively of the political parties themselves. Subsequently, however, on the basis of an application filed by SHUJAN, the Information Commission decided that information concerning financial issues of the political parties is not 'public information' and would be disclosed only after taking their consent under section 9(8) of the Right to Information Act 2009. Against this decision of the Information Commission, the PIL was filed

the spirit of ensuring and guaranteeing transparency and accountability in national life. As to the second question, the Court has observed that as soon as the registered political parties submit their audited statements of accounts to the Election Commission, such statements fall under the category of 'information' as defined in the Right to Information Act. According to the Court, such statements are 'public documents' under section 74(2) of the Evidence Act 1872 and, therefore, the Election Commission is not allowed to keep such information in disguise of 'secrecy' or 'confidentiality'. In other words, people have right to know such public information. The Court has very lucidly commented: "In modern democratic countries, citizens have right to information in order to be able to know about the affairs of each political party

parties' engagement in political activity' means that there should always be people's participation and involvement. And when there is a question of people's involvement or engagement, there cannot exist any culture of practising secrecy and confidentiality. Because keeping information of political parties secret to the people is equivalent to keeping the very same people unaware about politics. Political awareness is built upon a culture of openness and inclusiveness. The best way to include people in a healthy governance system (or say establish 'good governance coupled with the rule of law') is to share information with the people without any interruption. This is what is missing in the growth of our political history.

THE WRITER IS LECTURER IN LAW, UNIVERSITY OF ASIA PACIFIC.

YOUR ADVOCATE



This week Your Advocate is Barrister Omar Khan Joy, Advocate, Supreme Court of Bangladesh. He is the head of the chambers of a renowned law firm, namely, 'Legal Counsel', which has expertise mainly in commercial law, corporate law, family law, employment and labor law, land law, banking law, constitutional law, criminal law, IPR and in conducting litigations before courts of different hierarchies.

Query
 I am Aniket, currently pursuing my A-Levels. I have a query related to marijuana. I have read in many articles that in many countries smoking marijuana is legal. However, so far I know in Bangladesh it is still illegal. Even then I see many of my friends smoking it freely. I am not being judgmental but it is surprising how widely available this drug is in Bangladesh. The law enforcement agencies also seem indifferent to such scenario. Hence I would like to know the law in relation to the usage of drugs like marijuana in Bangladesh?
Aniket Khulna

Response
 Dear Aniket, Thank you for your query. This is very unfortunate that narcotics like marijuana have become widely available in Bangladesh. You are correct as to the fact that in many countries around the world marijuana is being made legal for various reasons and up to a certain limit. In some countries possessing marijuana is legal, but smoking it is illegal; whereas in some countries growing marijuana is legal, but selling it is illegal. For instance, in the United States it has been declared legal in few States and still illegal in others. In eight States such as New Jersey, New Mexico, Pennsylvania marijuana has been made legal for medical purposes with doctor's recommendation and in seventeen others it has been made legal as long as it is extremely low in Tetrahydrocannabinol (THC) which is the intoxicating ingredient. On the other hand, in countries like Belgium and Colombia possessing marijuana up to a certain amount is legal whereas in some countries like Bhutan and Brazil any kind of dealing with marijuana is illegal. One of the fundamental reasons for legalising marijuana in many countries is the latest



finding that marijuana possesses many health benefits. Based on the same reasoning very recently an act to legalize the use of marijuana for medicinal purposes was passed by German parliamentarians. However, marijuana was and is illegal in Bangladesh. Any kind of narcotics including marijuana has been declared illegal in Bangladesh as stated in the Narcotics Control Act, 1990 (hereinafter referred to as "Act"). As per Schedule I of the Act marijuana is a B-Class Narcotics. According to section 9 of the Act cultivation, production, processing, carrying, transportation, import, export, supply, purchase, sale, possession, preservation, warehousing, exhibition or use of any kind of narcotics including marijuana is prohibited and hence, illegal. However, the Act has given permission to manufacture, process, import, export, supply, purchase, sell etc. of narcotics for any approved medicine or for undertaking any scientific research provided

the same is being done under proper license, being used with proper permit and being carried or transported with proper pass. In other words, without proper medical or scientific reasons and proper license or pass any kind of dealing with marijuana is illegal in Bangladesh. To ensure the enforcement of the law regarding marijuana or any other narcotic substance a National Narcotics Control Board is established under the Act. The said Board is to act with a view to preventing the manufacture, supply, use of narcotics in Bangladesh, introducing treatment and rehabilitation for narcotics addicts, etc. You will be surprised to know that the Act also provides that the said Board may constitute a separate fund which shall only be used to create public awareness about the ill effects of narcotics and for the treatment and rehabilitation of the narcotics addicts. Moreover, the treatment and rehabilitation of any narcotic addict has also been covered by the said Act. Therefore, you can see that the law relating to narcotics in Bangladesh covers almost everything starting from illegalizing it to creating awareness and treatment. But unfortunately due to the lack of the relevant law enforcing authorities the same are not being implemented properly. Like your friends many of the young youth are freely selling, buying or smoking marijuana or any other kind of narcotics out in the open. It is regrettable that despite being aware of the situation the law enforcing authorities are not taking any proper action. I believe that you will make your friends aware of the fact that marijuana is illegal and they may have to face imprisonment if they get caught in the future.

FOR DETAILED QUERY CONTACT: OMAR@LEGALCOUNSELBD.COM.

LAW VISION

Framing a social enterprise law

ANITA GHAZI RAHMAN
BRAC and Grameen - Bangladesh is home to two of the world's largest social enterprises. Undisputed as this fact is, it is curious that our country is yet to provide a distinct legal framework to define, organise or set out the scope of social enterprises which meets the dual goals of purpose and profit (the fundamental non-profit goal of positive impact and overarching for-profit goal of maximising profits).



The launch of the Digital Bangladesh initiative of ICT4D (ICT for Development) has seen not only exponential rise in tech-based startups, but also many initiatives defining themselves as "social enterprises", with the number of competitions looking to fund social enterprises particularly combining both economic and social objectives also on the rise. Sector participants at present work on an ad-hoc definition of social enterprise. However, it is clear that there are variants of this definition which differ from expressing a social enterprise as: two entities - one profit and one non-profit, to a company which expends its revenue or profits in social good and any number of models in between. It is admirable that Government is taking a progressive view to social enterprise growth. However, it is the time to bring social enterprises within a legal framework or, at the very least, to define what a 'social enterprise' is, in order to resolve the structural and financial uncertainty of such ventures.

There are entities who pitches for investment on a for-profit investment platform while also define themselves as 'social enterprises' in other competitions to qualify for non-profit grants. One cannot blame the founders for being confused about or trying to take advantage of, this lacuna of legal definition. The need for law on social enterprises or at least a definition has become more pertinent because of the promulgation of the Bangladesh Securities and Exchange Commission (Alternative Investment) Rules, 2015. The Rule allows the highest percentage of return to funds investing in "Impact Investment". Rule 2(10) of the said Rules defines "Impact Investment" as "an alternative investment fund which invests in equity and equity linked instruments of such companies, organisations, and funds which are engaged in activities with the intention to generate a measurable and beneficial social or environmental impact in addition to financial returns, as justified with internationally recognised criteria". The markers for impact investment in Bangladesh therefore is investing in organisations which satisfies 'social' or 'environmental' performance norms while yielding also financial returns. The definition however also talks

about investment in 'equity' while opening up investment not just to companies but also "organisations" which deliver social and environmental impact. Does this therefore allude to a 'social enterprise' being a for-profit company or firm advancing a specific social or environmental goal? Any fund or investor will agree that for every investment, structure of the investee entity is a key consideration and ties in with the end goal of exit. For investing in a non-profit or a for-profit organisation one must look into some internal matters. Such as in non-profit the payments are in the form of 'donations' or 'grants' unless it is a 'loan', however impact investment is not a donation, a grant or a loan. In case of a for-profit, what percentage of the company/firm's operations should be for social good in order to qualify for investment? Taking the SDGs as an example, would a garments manufacturing unit running a school educating workers' children qualify or should reliance be on specific systems of quantification such as Acumen Fund's BACO (Best Alternative Charitable Option) or GIIN's IRIS (Impact Reporting & Investment Standards) or Global Impact Investing Rating System (GIIRS)? This is obviously a simplistic example setting out an over-wide range, the author's point being only to have the reader reflect on what the parameters and qualifying criteria should be.

In the absence of specific legal guidelines, there has to be a social enterprise model consisting of a parent non-profit entity and for-profit subsidiaries. However, from a growth perspective and looking at how social enterprise law can evolve, guidance can be taken, inter alia, from US or UK where there is special law or an additional layer of registration/certification under law to incorporate. Given the intersection of evolving laws, Governmental guidance is required to provide clarity in terms of law, definition, qualification and taxation relating to social enterprise, a clear guideline on what can and cannot be done and also to bring this burgeoning sector within a regulatory framework. This has to be done keeping in mind the need for lower registration costs and optimal tax structure given the less-profit, more social good objective.

THE WRITER IS AN ADVOCATE OF THE SUPREME COURT OF BANGLADESH AND MANAGING PARTNER AT THE LAW FIRM, THE LEGAL CIRCLE.

FOR YOUR INFORMATION

Say no to child labour

ACCORDING to International Labour Organization (ILO), around 168 million children remain trapped in child labour today, many of them work full-time. They are deprived from enjoying their rights to education, health and indeed to surf through the happy moments of childhood. More than half of them are exposed to the worst forms of child labour such as work in hazardous environments, slavery, or other forms of forced labour, illicit activities including drug trafficking and prostitution, as well as involvement in armed conflict. In 2002, the ILO launched the World Day Against Child Labour with an aim to focus attention on the global extent of child labour and the action and efforts needed to eliminate it. Each year on 12 June, the World Day brings together governments, employers and workers organizations, civil society, as well as millions of people from around the world to highlight the plight of child labourers

and what can be done to help them. The theme of this year's World Day Against Child Labour is titled as "In conflicts and disasters, protect children from child labour". As many countries are now affected by war, conflict and disaster, the 2017 World Day Against Child Labour focuses on the impact of conflicts and disasters on child labour. The ILO advocates for an urgent global action to tackle child labour in areas affected by conflict and disaster. The SDG Target 8.7 aims to "eradicate forced labour, end modern slavery and human trafficking and secure the prohibition and elimination of the worst forms of child labour". This target is to be achieved by 2030. In doing so, the global community needs to launch an all-concerted action to intensify and accelerate action to end child labour, including in areas affected by conflict and disasters.



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