

Intercepting/recording inter-personal communications: Infringing on democratic liberties of the citizens

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...the ordinary people are being suspected [of breaching national security], as if the intelligence agencies are more patriotic than the general public...! If it so happens, how come the foreigners know all secret [strategic] information of our country? Or why are our domestic products being smuggled out, and foreign commodities smuggled in, with the active cooperation of our border guards? ... General public never undermine the causes of their country; never do they betray their national interests. It is the political incumbents, military top brasses, rich traders and industrialists who betray the national causes since time immemorial.¹

– Abu Zafar Shamsuddin

In a modern democracy individual privacy is considered an inalienable fundamental right of every citizen, and infringing upon such a democratic right by any government, legally or illegally, amounts to despotic abuse of political power on the one hand and a clear breach of trust that the electorate entrusts a government with through elections on the other.

The government of the Bangladesh Nationalist Party-led four-party alliance has committed both the offences – despotic abuse of power and breach of trust – by getting a law enacted to legalise the hitherto illegal act of intercepting as well as recording interpersonal communications of the citizens.

The governing alliance, in fact, got an old law on telecommunications rewritten in February this year, by the sheer strength of its brute majority in parliament, to allow the law enforcing agencies, including various intelligence outfits, to 'intercept and record' telephonic conversations of, and exchanges of messages – electronic or otherwise – between, private citizens.² The law also stipulates penalties, financial and physical, for telephone operating companies in case of their failure to comply with the government's demand as regards intercepting and recording oral and electronic conversations between their subscribers.³

The government authorities concerned seem to have been very active in widely enforcing the law in the quickest possible time. The Bangladesh Telecommunication Regulatory Commission (BTRC) has asked all private-sector mobile phone companies, on March 16, to complete the re-registration of their clients, recording personal information of over 11 million subscribers in the electronic database within two months, with a view to facilitating the intelligence agencies to tap conversations of the phone users.⁴ The BTRC is also set to ask the Bangladesh Telegraph and Telephone Board, the public-sector telephone operating body, to re-register its subscribers, around one million, under the phone tapping initiative of the state.⁵

However, if it continues to be in force, the law allowing the police to intrude into the private spaces of the people will not only continue to erode civil and political liberties of the citizens, particularly in terms of the infringement of personal liberty, and their democratic right to the freedom of thought and expression, it will also further constrict the manoeuvrability of the democratic media, already suffering from a restrictive legal regime, to have access to public information system and thus stand in the way of the media discharging its democratic responsibility to keep the public informed about the affairs of

the state. Clearly, the legislation has served as another stumbling block to the building up of a democratic state in Bangladesh. Why and how?

Classical democratic position on individual liberty

Jean Jacques Rousseau, one of the greatest ideologues of classical democracy, believed in the 'inalienability of human liberty'. To him 'renouncing liberty was to renounce being a man'. While outlining the principles of a democratic state, the 'problem' for Rousseau, therefore, was 'to find a form of association which will defend and protect with the whole common force the person...of each associate, and in which each, while uniting himself with all, may still obey himself alone, and remain as free as before'.⁶

Rousseau found the answer in forging a 'social contract' by the people, which is to be based on their 'general will', while the clauses of the social contract are to be 'everywhere the same and everywhere tacitly admitted and recognised. ... The clauses, properly understood, may be reduced to one — the total alienation of each associate, together with all his rights, to the whole community'.

By surrendering 'all his rights' to the community, an individual, however, eventually loses none of his rights. "Each of us puts his person and all his power in common under the supreme direction of the general will, and, in our corporate capacity, we receive each member as an indivisible part of the whole," argues Rousseau. "Each man, in giving himself to all, gives himself to nobody, and as there is no associate over which he does not acquire the same right as he yields others over himself, he gains an equivalent for everything he loses, and an increase of force for the preservation of what he has."

Aware of the individuals' democratic right to freedom, the French thinker explains that what man loses by the social contract is his natural liberty and an unlimited right to everything he wants to get and succeeds in getting; what he gains is civil liberty. Rousseau here distinguishes 'natural liberty' from 'civil liberty', arguing that the former is bounded only by the strength of the individual while the latter is limited by the general will.

However, as soon as the 'social contract' is made, Rousseau argues on, 'in place of the individual personality of each contracting party, this act of association creates a moral and collective body, composed of as many members as the assembly contains voters, and receiving from this act its unity, its common identity, its life, and its will'.

"This public person, so formed by the union of all other persons, formerly took the name of city, and now takes that of *Republic* or body politic; it is called by its members *State* when passive, *Sovereign* when active, and *Power* when compared with others like itself. Those who are associated in it take collectively the name people, and severally are called citizens, as sharing in the sovereign power, and subjects, as being under the laws of the State."⁷ "The Laws are, properly speaking, only the conditions of civil association."⁸

Fake grounds for restricting individual privacy

To determine whether a 'law' or 'condition' of a 'civil association' called 'Republic' is democratic or not, one, therefore, needs to examine whether its provisions are consistent with the 'general will' of the people,⁹ supposedly embodied in the provisions of the 'social contract', or, in other words, the constitution of the republic on one hand, and to see whether it ensures the 'individual liberty' of the 'citizens' within the framework of the Republic on the other. Besides, one also needs to examine whether the legal provisions in question are consistent with the provisions of the universally recognised international rights instruments that the State is a party to.

Notwithstanding the fact that the classical democratic method was not followed while framing the original constitution of Bangladesh for the document to become a genuine manifestation of the general will of the people, and that the constitution in the present form, after being operated upon by so many civil and military authorities, hardly remains the 'solemn expression of the will of the people', it still

guarantees the citizens, subject to reasonable restrictions imposed by law, the right to 'privacy of his correspondence and other means of communication'.¹⁰

The reasons for 'intercepting and recording' inter-personal telecommunications of the people that the objective clause of the amendment bill in questions offered was to 'control crime and ensure public order' by way of tracking down those behind various crimes and disorders, and disrupting communications between the perceived criminals as and when necessary.¹¹ Although the objective clause of the bill did not specify the categories of criminals to be hunted down by telephone tapping, many a government leader in their public oratories has argued quite clearly that the law was 'required' to take care of the glamorous extortionists and the Islamist fundamentalists engaged in violent political activism to set up a theocratic state in Bangladesh.

The reasoning hardly sounds 'reasonable', given the fact that it is common knowledge that the hardened criminals have always grown up under the direct political patronage of the political class, particularly those in power, on the one hand and the active cooperation of the law enforcing agencies on the other. The politicians and the police officials concerned, who have always been the direct beneficiaries of grand extortions by the glamorous hoodlums, always know the whereabouts of the criminals in question. If really willing, politicians and law enforcers controlling the state machinery can always take care of such hardened criminals. No individual, however powerful one may be, is capable of being stronger than the state apparatus in any political system.

Secondly, as for containing the Islamist fundamentalists, one has hardly any reason to believe that the government of the BNP-led alliance is genuinely interested in combating them to the end, simply because more than one component of the governing coalition, including Jamaat-e-Islami, have made it clear that they are there for advancing their political cause to establish the 'rule of Qur'anic law' — a political proposition diametrically opposite to the principle of democracy that preaches separation of divine religion from worldly affairs of politics, in the first place. Besides, violence remains one of the major means of Jamaat to establish its hegemony over the competing political ideologies, which has frequently been displayed by its student front, Islami Chhatra Shibir, in different educational institutions across the country for years now.

Jamaat, the local chapter of an international Islamist political movement, not only resorts to political violence in the country but also extends supports to jihadi movements beyond Bangladesh. Notably, the party made a public announcement of raising funds for the 'oppressed Afghan population', in the first week of November 2001, admittedly received contribution worth 'about Tk 12 lakh and sent 'about Tk 1.5 lakh' to the oppressed Afghans through 'private channel'. The party eventually 'stopped persuading people to contribute to the fund only after the fall of the Taliban's Islamist fundamentalist government of Mollah Omar' in the second week of November that year.¹²

Apart from Jamaat-e-Islami, and other fundamentalist components of the BNP-led governing alliance, there are Jamaatul Mujahideen Bangladesh (JMB) of Shaikh Abdur Rahman and Jagrata Muslim Janata Bangladesh of Siddiqui Islam alias Bangla Bhai, the much talked about fundamentalist duo who, in a bid to challenge the non-Islamic rule in the country, admittedly carried out a series of bomb blasts in public places late last year, taking quite a number of politically innocent lives. No sane person would deny the need to take care of these obscurantist killers, but there is hardly any reason for the people to believe that the incumbents have genuine democratic commitment to politically uproot the fundamentalist menace, particularly when some important BNP insiders are on record to have repeatedly claimed that there were 'some ministers and members of parliaments belonging to the ruling BNP behind the rise and expansion of Islamist militancy in the country'. Abu Hena, a lawmaker elected from the Rajshahi-3 constituency of parliament on a BNP ticket in 2001 elections, was expelled from the party on November 24 last year for making public statement accusing some ministers and party legislators of providing supports to the Islamist militants.¹³ But such accusations gained solid ground when Bangla Bhai, while on police remand, reportedly told the investigators, more than once, that he used to receive active support from a state minister and a police official in conducting extra-judicial operations.¹⁴

Ironically enough, the minister for posts and telecommunications, Aminul Hoque, who found it important to officially propose to the cabinet the idea of legalising the hitherto illegal act of tapping telecommunications of the citizens to take on violent crimes, himself is widely accused of providing support and shelter to the fundamentalist Bangla Bhai and his Islamist killer gang. One, therefore, has no reason to accept the pronounced objective behind legalising intercepting and recording conversations of the private citizens is to take on violent crimes unleashed by the Islamist fundamentalists.

There is rather an unpronounced objective, which has already been unearthed by the media: political leaders in the opposition camp, leaders opposing the ruling views in the governing parties, journalists, leaders of civil society groups and some business leaders top the list of people that the government has been preparing for tapping the telephones of.¹⁵

Clearly, the law is being used in violation of the constitutional guarantee to one's inalienable right to 'privacy of his correspondence and other means of communication'.

The phenomenon reminds one of George Orwell's nightmarish novel, *Nineteen Eighty Four*, which provides the readers with a haunting account of a power structure that controls not only information but also individual thought and memory — the worst imaginable crimes as regards the destruction of truth, freedom, and dignity of the individuals.

The law in question, therefore, does not qualify to be a democratic 'condition' of 'civil association' called Republic, because the reason that the government has offered for intercepting and recording interpersonal communications – hunting down the hardened criminals and Islamist fundamentalists – is fake and the 'restriction' imposed on the private citizens is totally 'unreasonable' as it violates a major provision of the 'social contract' called constitution that promises 'privacy of correspondence and other means of communication' of the 'citizens' within the framework of the Republic.

Besides, the legal provision is also inconsistent with a major international rights instrument – the Universal Declaration of Human Rights, 1948 – which proclaims that 'no one shall be subjected to arbitrary interference with his privacy ...or correspondence ...'.¹⁶

Infringing the freedom of speech and expression

If in vogue, the law in question will not only continue to arbitrarily interfere with the citizens' democratic right to 'privacy and correspondence', it will also continue to curb people's inalienable right to the 'freedom of speech and expression' – a right that the constitution of Bangladesh apparently guarantees, conditionally though, to the citizens.¹⁷

The freedom of speech and expression, which is required to exercise another constitutionally guaranteed right – the right to the 'freedom of thought and conscience'¹⁸ – includes, as interpreted in the Universal Declaration of Human Rights, 'freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers'.¹⁹ While telephone, cellular or non-cellular, remains one of the prime medium of communication between citizens to 'seek, receive and impart information and ideas', intercepting and recording the citizens' inter-personal telecommunications, electronic or otherwise, amounts to an unambiguous 'interference' with one's democratic right to the constitutionally guaranteed freedom of thought and conscience, speech and expressions. Notably, the Supreme Court of India observed in 1997 that tapping of telephonic conversations is unconstitutional, arguing that 'when a person is talking on telephone, he is exercising his freedom of speech and telephone-tapping, unless it comes within the grounds of restrictions, is violative of the freedom of speech'.²⁰ Clearly, the law in question effectively infringes on people's right to the freedom of thought and expression, a major creative component of life that distinguishes human beings from other animals. It is, therefore, an undemocratic 'condition' of the 'civil association' called Republic, and therefore, unacceptable for those committed to democratic way of life.

Blocking free flow of public information

Free flow of public information remains one of the most important components of democracy, as without public information the citizens of any country find it absolutely difficult to develop informed opinion about the state of affairs of the Republic, usually managed by politicians and civil servants. In between remains the mass media, the prime vehicle for the people to have access to public information, which help people make necessary political moves to ensure that the managers of the state adhere to the provisions of 'social contract' signed between the citizens within the framework of the Republic. But the law in question has actually struck the last nail in the coffin of the democratic concept of free flow of public information.

The reason is simple: the legal regime guiding the government functions does allow neither the ministers nor the civil servants to disseminate public information to the mass media. The ministers are oath bound not to 'communicate or reveal, directly or indirectly', 'to any person', 'any matter which shall be brought under' his/her 'consideration or shall become known' to him/her while 'discharging duty'.²¹

The civil servants, on the other hand, are bound by their conduct rules that make it a punishable offence for any officer to disclose, 'directly or indirectly', to any 'non-official persons' or 'to the press' any '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'.²²

A couple of examples should clarify as to what rigour the conduct rule in question is being applied against public servants, particularly when it comes to the perceived divulgence of public information to the press.

The commerce ministry suspended, in the first week on December last year, two of its employees on the charge of 'leaking information' relating to the WTO negotiations as regards the market access of LDC products to the industrialised countries.²³ A newspaper reported earlier that the World Trade Organisation, in its first draft to be debated in the Hong Kong ministerial, had agreed 'full market access' for the products of the least developed countries, including Bangladesh, to the rest of the world's markets, while the developed United States and certain developing countries like India and Pakistan actively opposed the idea.²⁴

Given the national economic interests involved in the trade negotiations within the WTO, it is of importance for the country's people in general and the exporters in particular to remain updated about every phase of the negotiations, and on the role that the bureaucrats, in other words the public servants living on public money, are playing in the process of the negotiations. It is, therefore, a serious democratic responsibility of the government to regularly provide the public with information on both counts. But in the present case, the government has not only failed in its duty to the public, it has rather punished two individual government employees for their perceived 'crime' to leak information to a media outfit that was eager to keep the public informed about developments in a matter of serious national interest.

Such anti-people use of conduct rules is, however, not a monopoly of the incumbents. The previous government/s also used it in the similar manner.

Under such undemocratic legal and political an environment the country's media discharges its democratic responsibility, as much as possible, to keep the people informed. Now that a legal tool is there for the government to 'intercept and record' even the informal interpersonal exchange of views among citizens, many a journalist will hesitate to make critical queries on various social, political, economic and cultural issues. Even if they make the queries, a minister and/or a civil servant on the other end would hardly speak out their minds to the media people, fearing government reprisals.

The result is obvious. The law in question has completed the process of converting the people's republic called Bangladesh to a police state, where the governmental bodies refuse to divulge public information on the one hand and control thoughts of the citizens on the other. The piece of legislation

has really appeared to serve as, to coin an Orwellian phrase, Thought-Police for an undemocratic political establishment — a double-edged sword, restricting free flow of public information on the one hand and dissemination of dissenting thoughts and views on the other.

Postscript

It is, perhaps, quite clear now that the recently enacted Bangladesh Telecommunication (amendment) Act, 2006 will continue to provide any government with a legal instrument to arbitrarily invade into the private spheres of the citizens, effectively curb the citizens' democratic right to the freedom of expressions and block entirely the free flow of public information. Ironically, such an obtrusive law has been made in the name of protecting 'national security' and restoring 'public order'. A free nation does not deserve such a humiliating treatment from any government elected by the people.

True that two legislators of the opposition Awami League recorded their 'note of dissents' against the proposed amendments to the law when scrutinising them in the parliamentary standing committee on the Ministry of the Posts and Telecommunications, arguing that 'the amendments, if adopted, would seriously undermine the people's fundamental right to privacy'.²⁵ But, I am afraid there will be no spontaneous initiative from any future government, even if there is a change of guards in the next general elections, to do away with the extremely undemocratic piece of legislation.

Notably, no government has yet struck out from the statute book the Telegraph Act, 1885, enacted by the colonialist rulers, empowering the authority to intercept and/or stop transmission of any telegraphic message in the name of 'public emergency' 'or public safety'.²⁶

While the law was made by the English rulers to oppress the freedom fighters of the day, neither any government of Pakistan after independence the Britishers, nor the successive governments of Bangladesh after independence from Pakistan has even thought of repealing the law. The reason is simple: With an obtrusive legal regime in place, it is easier for any government to rule at will, without any democratic transparency and accountability — a proposition that our political class is very fond of.

However, the citizens committed to democratic way of life that envisages liberty of the individuals within the framework of a Republic cannot afford to entertain such despotic aspirations of any political party. Besides, as Alexis de Tocqueville, famous author of *The Old Regime and the French Revolution*, asserted, 'only liberty can produce patriotism in citizens and greatness in nations'. Bangladesh needs both, patriotism and greatness, and therefore, the country needs to do away with all the laws like Telecommunication (amendment) Act, 2006 that stands in the ways of liberty — civil or economic, political or cultural.

End notes....

1. (Atmasrmiti (Memoirs), Sahitya Prokash, Dhaka, Unabridged edition, 2005, p.492. Emotionally as well intellectually enraged by interception of his son's letter, sent from the UK, by the intelligence agencies of the erstwhile Pakistan, Shamsuddin wrote these words in his personal diary on January 9, 1971.
2. Clause 97 a, Bangladesh Telecommunication (amendment) Act, 2006.
3. Clause 97c, Ibid.
4. New Age, Dhaka, March 18, 2006.
5. New Age, Dhaka, March 30, 2006.
6. The Social Contract and Discourses, Everyman's Library, London, 1968, p.12.
7. Ibid, p.13
8. Ibid, p.31
9. Article 7(2) of the constitution of the People's Republic of Bangladesh claims that the 'Constitution' is the embodiment of the 'solemn expression of the will of the people'.
10. Article 43 (b), The Constitution of the People's Republic of Bangladesh, as modified up to 31st May, 2000, The Ministry of Law, Justice and Parliamentary Affairs, the People's Republic of Bangladesh. The article in question says: Every citizen shall have the right, subject to any reasonable restrictions imposed by law in the interests of the security of the state, public order, public morality or public health – ...to the privacy of his correspondence and other means of communication.
11. Report of the Parliamentary Standing Committee on the Ministry of Posts and Telecommunications, Bangladesh Jatiya Sangsad, February 2006, pp.6-7.
12. [Weekly] Holiday, Dhaka, March 8, 2002.
13. New Age, Dhaka, November 25, 2005.
14. New Age, Dhaka, March 23, 2006 and March 25, 2006.
15. New Age, Dhaka, December 14, 2005.
16. Article 12 of the Universal Declaration of Human Rights, 1948.
17. Article, 39 (2), the Constitution of the People's Republic of Bangladesh, ibid. The article says: Subject to any reasonable restrictions imposed by law in the interests of the security of the state, friendly relations with foreign states, public order, decency or morality, or in relation to contempt of court, defamation or incitement to an offence – a. the right of every citizen to freedom of speech and expression; and b. freedom of the press, are guaranteed.
18. Article, 39 (1), ibid. The article says: Freedom of thought and conscience is guaranteed.
19. Article 19 of the Universal Declaration of Human Rights, 1948)
20. People's Union of Civil Liberties v. India, AIR 1997 SC 568. Quoted by Mahmudul Islam in Constitutional Law of Bangladesh, second edition, Mullick Brothers, Dhaka, 2003, p.242.
21. The Oath (or affirmation) of Secrecy, Article 148(2)(b), Third Schedule, the Constitution of the People's Republic of Bangladesh, op-cit.
22. Clause 19, the Government Servants (Conduct) Rules, 1979.
23. New Age, Dhaka, December 7, 2005.
24. Ibid, November 28, 2005.
25. Report of the Parliamentary Standing Committee on the Ministry of Posts and Telecommunications, op-cit, p.3
26. Section 5(1)(b) of the Telegraph Act, 1885. The section reads: On the occurrence of any public emergency, or in the interest of public safety, the Government or any officer specially authorised in this behalf by the government may ... order that any message or class of message to or from any person or relating to any particular subject brought for transmission by or transmitted or received by any telegraph, shall not be transmitted or shall be intercepted, or detained, or shall be disclosed to the government making the order or an officer thereof mentioned in the order.