

# Right to Information from the Nepalese Legal Perspective

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## 1. Introduction

In the modern world where most of the state proclaimed themselves as democratic state, Right to Information is the hard core of it. It is a tool of continuing the human civilization. Human are the supreme creature of God because they have ability to make a decision and the human get the insight of rightfulness of their decision only when they have information. So to create the society of elites, the flow of information from one to another is most. As this is not the age of Hitler and Musolino where all the power is vested in autocratic ruler but is the era of democracy where the sovereignty is vested in the people ,people should have right to know everything of their or the public importance. And to ensure this notion, Right to Information has been developed as the basic human rights under various international legal frameworks and as fundamental right under the constitution of various civilized nation.

Communications means dissemination or sharing of information which could be about a sea of things, like politics, police, political parties, socio-economic situations, development, power, any kind of knowledge, entertainment, business, scientific inventions, technological innovation, philosophical speculation, plans, programmes, opinions, food, sports, human rights, environment, tourism, sex, international and non-international war, law, legal issues and so on. Communication regarding the things revolving around us, things happening in our lives, our families and societies, international

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community, across the globe. Efforts are underway in many developing countries to make people scientifically literate about things that matter in their lives. The development of new technologies including information technology has revolutionized the whole world. Almost everything people know of their immediate environment but what they can know beyond their immediate environment from the mass media.<sup>1</sup> In the modern time almost all the democratic states have guaranteed right to Information under their Constitution as Fundamental Rights starting from Sweden since 1776 which was later realized by other states too.

In the context of Nepal this right was not guaranteed until 1990. It was the Constitution of Kingdom of Nepal 1990 (2047 B.S) which has guaranteed "Right to Information" as Fundamental Rights for the first time in Article 16.<sup>2</sup> Then gradually Interim Constitution of Nepal 2007, Article 27 and the Constitution of Nepal 2015 has legitimized latest federal system, have also continued to register this right as fundamental right. Particularly, Right to Information has been guaranteed to ensure access of the people about the functions and duties of the state in an open and transparent way. By this right, the people can receive information about the functions of state, can make the people representative accountable and responsible towards them can check the irregularities and corruption in one hand and in other hand, it makes the organs of the state themselves responsible and pro people and obliged them to publicize their work through media in every three working months. Thus, it ultimately leads to institutionalization of democracy and transparency.

## 2. Evolution of Right to Information

In the international arena it got recognition as basic human rights for the first time in UDHR and later on by ICCPR under common Article 19. As per which 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."<sup>3</sup> As Nepal is also a party of this international convention it was under obligation to adopt proper legislative and executive measures to ensure this right of Nepali citizen and in pursuant to Art 9(2) of Treaty Act 1991

<sup>1</sup> PROF. DR. BAL BAHADUR MUKHIA, *COMPARATIVE JURISPRUDENCE*, Part-I (Revised ed), Malati Mukhia & Tamanna Mukhia, Subidhanagar, Kathmandu, 343, (July 19, 2019).

<sup>2</sup> CONSTITUTION OF KINGDOM OF NEPAL, Art.16, (1990).

<sup>3</sup> UNIVERSAL DECLARATION OF HUMAN RIGHTS, Art.19, (10 Dec.1948).

(2047 B.S) Nepal started to adopt various constitutional and legislative measures to ensure its compliance.

So in Nepal, the initiation for institutionalizing this right started after the movement of 1990 specifically with the restoration of democracy by abolishing the totalitarian system.<sup>4</sup> As a result it got recognition for the first time in the Constitution of Nepal 1990 as Fundamental Right. Where it was mentioned that all the citizens of the country will have the access on receiving publicly important information about any subject but there is no compulsion to provide such information which are legally to be kept secret.<sup>5</sup> Successively Interim Constitution of Nepal 2007 elaborated right to Information as the right of every citizen to demand or obtain information on any matters of concern to himself/herself or to the public. But in proviso it was provided that nothing in this article shall be deemed to compel any person to provide information on any matter about which confidentiality is to be maintained according to law.<sup>6</sup> This is how the right to information in Nepal is being developed as constitutional rights. Thus along with the change in time context and social structure, the horizon of Right to Information has been widen up which can be evident when we compared the constitutional provision of Nepal made at different time period.

Now-a-days right to information is considered as most significant in the world of law. It is the outcome of the development of history time and situation. In this respect to foreign world, for the first time in 1966, right to information was introduced in the constitution of Sweden. Then, in 1800 there was a decision from the American court of Virginia about the right to know of the public. The United State of America had implemented this law in 1966. Gradually 59 countries have ascertained the right to information throughout their constitution and have enacted a separate statute to implement this constitutional right. In South Asian Countries, India in 2005, Bangladesh in 2009, Nepal in 2008 (2064 B.S) passed specific statute in Right to Information. This right has been implemented by 114 countries till 2016. If we observe the development of international law seven countries with in the decades of 1980 and fourteen countries in 1990 had put this law into effect.

With the democratization of the world in around the decade of 1990s, Right to information has been accepted as an essential issue and was evolved as

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<sup>4</sup> Junar Babu Basnet, "The Effectiveness of Right to Information", 3 A JOURNAL OF RTI 57( 30<sup>th</sup> Poush,2074B.S).

<sup>5</sup> CONSTITUTION OF THE KINGDOM OF NEPAL

<sup>6</sup> INTERIM CONSTITUTION OF NEPAL, Art. 27 (2007).

new generation rights. Consequently the trend of enacting specific statute on Right to information increases rapidly in latter year

### 3. Nepalese Legal Frameworks On Right to Information

#### 3.1 Constitutional Provisions

Constitution of Nepal 2015 has enshrined the right to information as the fundamental right of every Nepali citizen in part 3. As per it every Nepali citizen shall have the right to receive the information of their importance or of public important on any subject however as proviso of this provision it is mentioned that it shall not be compulsion to provide the information which is legally be kept secret.<sup>7</sup> Right to information is not absolute right. When we talk about right to information the another right that everyone has to take into notice of Right to privacy. These two rights come in conflict if not properly managed. Since some time some information might be of confidential nature. The exposure may jeopardize the sovereignty, integrity, security of nation and harmonious relation among the people and/or may deteriorate the health, morals and safety of the people. Thus to prevent such situation and to eliminate the possibility of misuse of right to information the modern state including Nepal has guaranteed another right as fundamental right which is known as Right to Privacy. According to Constitution of Nepal exception the circumstances provided by law, privacy in relation to person, family, residence property, documents correspondence and their reputation is inviolable.<sup>8</sup> These two rights though apparently seems to be conflicting with each other but are equally important for the proper functioning of modern state and benefit of people. Thus these two rights have to go hand in hand without harming one another. In order to give the effect to constitutional provisions and judicial decision the Parliament of Nepal enacted the Right to Information Act 2008 (2064 B.S) and its Rule in 2009 (2065 B.S.). Right to Information Act has altogether 38 Sections, 1 Annex and 6 Chapters.

#### 3.2 Legal Provisions

As discussed above Right to Information Act proclaimed in its objective that this Act has been enacted to make the functions of the state open and transparent in accordance with the democratic system and to make responsible and accountable to the citizen; to make the access of citizens simple and easy to the information of public importance held in public bodies;

<sup>7</sup> CONSTITUTION OF NEPAL, Art 27, (2015 B.S).

<sup>8</sup> *Ibid*, Art 28.

to protect sensitive information that could make adverse impact on the interest of the nation and citizen, and for the necessity to have legal provisions to protect the right of the citizen to to be well-informed and to bring it into practice.

This Act has defined the right to information as the right to ask for and obtain information of public importance held in the Public Bodies and this term shall also include the right to study or observation of any written document, material held in Public Body or proceedings of such Public Body; to obtain a verified copy of such document, to visit or observe the place where any construction of public importance is going on and to obtain verified sample of any material or to obtain information held in any type of machine through such machine.<sup>9</sup>

And under its scope it has covered all the public bodies which has been defined under Section 2 (a). To achieve its objectives it has made some important provisions as follows:

1. Responsibility of Public bodies to to classify and update information and make them public, publish and broadcast,<sup>10</sup>
2. Every Public body has to make the arrangement of Information officer so as to disseminate the information.<sup>11</sup>
3. Prescribed the procedure for acquiring information from public body so as to systematize the process.<sup>12</sup>
4. Procedure for filing the complaint and appeal if any public body deny to give the information.<sup>13</sup>
5. Establishment of National Information Commission for the protection, promotion and practice of right to information.<sup>14</sup>
6. Provision regarding classification of Information<sup>15</sup>
7. Provision regarding the protection of whistle blower so as to encourage the employee to inform about the irregularities taking place in their working area.<sup>16</sup>

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<sup>9</sup> Right to Information Act, Sec 2(e) (2009).

<sup>10</sup> *Ibid* Sec.4 .

<sup>11</sup> *Ibid*, Sec 6.

<sup>12</sup> *Ibid*, Sec 7.

<sup>13</sup> *Ibid*, Sec 9 and Sec.10.

<sup>14</sup> *Ibid*, Sec 11.

<sup>15</sup> *Ibid*, Sec 27.

<sup>16</sup> *Ibid*, Sec 29.

8. Provision of Punishment for those who violated right to information and compensation for the victim.

Apart from this the government has also brought Information Policy. And as NATIONAL INFORMATION COMMISSION is entitled to hear and decide the cases of information, it has adopted the procedure for proceeding and deciding the complaint 2067.

**Restriction on Right to Information:** Right to Information is not an absolute right. It can be restricted under certain conditions which are as follows;<sup>17</sup>

- I. If the information has serious effect on Nepalese sovereignty, indivisible, national security, public management of peace or international relation and so on.
- II. Such information which has direct impact over the investigation of crime.
- III. Financial business and monetary welfare or the preservation of intellectual property of banking or business which has the serious effect on secrecy.
- IV. The information has directly effecting among the races or between the communities.
- V. The public agencies shouldn't have to be away from the responsibility to publish the information except the danger of individual secrecy, personal life, property, health but there might be a lot of proofs and causes which are not to be published.

#### 4. Judicial Contribution of Right to Information

In Nepal Judiciary has played a significant role in regard to the development of RTI laws and its implementation even in the situation where there was no law and afterwards, which can be evident from following case laws-

In the case of Barrister Bal Krishna Neupane and then Prime Minister Girija Prasad Koirala, Supreme Court held that the openness and transparency as the foundation of democratic governance thus emphasized on the duty of government to provide the information about their activities to the citizen and recognized the right of citizen to ask and gain such information from government. Having realized this fact the new constitution has managed the right to information of the citizen as the fundamentals right.<sup>18</sup> Similarly in the

<sup>17</sup> Ibid, Sec 3.

<sup>18</sup> Mahendra Bista, *Democracy, Right to Information and Freedom of Press*, 3 RIGHT TO INFORMATION JOURNAL 40, (30th Poush, 2074).

another case of Right to Information, *Gopal Siwakoti, the resident of Kathmandu metropolitan Ward no -31, Putalisadak v. Government of Nepal, Ministry of Finance*, Supreme Court affirmed the right to information of applicant in the matter of Arun Third hydro electricity project as it is the project of public importance but as at that time there was no specific law to guide the flow of information from public body to individual, Supreme Court made 7 guidelines for the flow of information and issued the directives in the name of Government to make a specific Act on Right to Information.<sup>19</sup>

Furthermore, in the case against professor Dr. Bhimraj Adhikari, the central exam controller and the register of Tribhuvan University, and the National information commission located in the Kathmandu metropolitan ward no 10, the supreme court held that in the modern democratic state it is the duty of government to disseminate the information of public importance. Government should not keep the information confidential except in the case of public benefit and national security as democracy believe in openness and transparency. And as the Tribhuvan University has provided the authority to its students to re-total their marks if not satisfies and Art 27 has guaranteed the right to information of every Nepali citizen in the matter of their importance which don't violate the law the students shall have right to demand the photocopy of their answer sheet subjected to the terms and condition of Tribhuvan University. (2066, writ no 066-Wo-03690)

Thus the Supreme Court has issued the directives in the name of several government authorities to implement right to information in so many issues and disputes filed in the court. That is why its role in regard to development of right to information is significant.

#### 4. Challenges of the Implementation of Right to Information Act and Courts decision

Nepal does not have a long history of Right to information, In around a decade noteworthy changes have been made in regard to **Right to Information**, however, still there are so many challenges and problems which are yet to be settled. Some of them are as follows;

- **Right to Information Act** is misunderstood as the Act of Journalist.
- Lack of awareness about this law in the demand side as well as supply side.

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<sup>19</sup> *Gopal Siwakoti v. Government of Nepal, Finance Ministry, Writ No 3049 (2050).*

- The tradition of maintaining confidentiality
- Lack of political and administrative commitment.
- Lack of realization of responsiveness in the public officials.
- The system of taking the oath of maintaining confidentiality.
- Lack of modern technology for keeping the record of information in public bodies.
- Lack of competent human resources in NATIONAL INFORMATION COMMISSION.

## 5. Conclusion

The right to information is the backbone of every democratic state. This right include the right to ask for and obtain information of public importance held in the Public Bodies and also include the right to study or observation of any written document, material held in Public Body or proceedings of such Public Body; to obtain a verified copy of such document, to visit or observe the place where any construction of public importance is going on and to obtain verified sample of any material or to obtain information held in any type of machine through such machine. Utilizing this instrument as right but not as mercy, the individual can be responsible, the county can proceeds towards good governance, irregularities and corruption can be rooted out, rule of law can get status quo, transparency and accountability of public bodies can be enhanced. In the nation where there is rule of law and sovereignty is vested in people, this right can be very effective tool for putting limitation on government and their arbitrary action. This right obliges the government to be accountable and transparent so often government tries to shade this right in the name of privacy. The unwillingness of government and the negative attitudes of public officials towards the right to Information often create hindrances in its implementation. In the developing countries like Nepal where the irregularities and corruption rate is high in public bodies, it is hard to implement this right as it get less priority from concerned sector.

At present despite we have so many good laws and provision governing and regulating right to information in Nepal, they are not being properly implemented as they ought to be. There are various reason behind it. Some of them are political instability, self engagement of public official who are entitled to execute the laws in the dishonest activities, ineffectiveness of National Information Commission, lack of execution of decision of Supreme Court etc. However there are also the positive changes. In comparison to



previous time, these days the people are being aware about their right to information, the public officials are gradually being sensitive in this issues, National Information Commission is trying to taking effective measures as far as possible, in every public body these day there has been the appointment of information officer or information desk so as to make easy follow of information. These are the good initiatives which have to be continued. And though this is right of individual it can't be effective until and unless every sector or every concerned bodies work collaboratively. So a joint effort is needed to institutionalize this right. When we work together for its effective implementation we can create a beautiful Nepal and prosperous Nepali.

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