CHAPTER I

The Need for Open Government

Introduction

Two undisputed facts justify the present examination of the traditional rules of secrecy in the conduct of governmental affairs. Firstly, the modern welfare state, as against the role of the state in the past, exercises multifarious powers and functions to affect the economic life and personal liberty of the individual. It is essential that these powers should be exercised for public benefit and not improperly, and this is ensured to the extent the individual has access to governmental information and the affairs of the government are not conducted in secrecy.

Secondly, a colonial regime which was not responsible or responsive to the people could follow the policy of secrecy. But a modern democratic state is answerable to the people who are entitled to know what policies and programmes, how, and why they are being followed. People have a right to know what the government elected by them is doing so that they may judge about its continuance.

Press is the conscience keeper of the citizens. It not only reflects public opinion and carries it to the government, but its major task is to feed the people with the happenings in the government and to keep the people informed about the functioning of the government. An individual, assuming that he has a legal right of access to governmental information equal to that of the press, suffers from inertia and lacks the time and the will to make an effective use of this right. It is the press whose job is to compile and publish "information" for whom the "right of access" has a real meaning.[1]

Factors in favour of open government

The two wings of the government, namely, the legislature and the judiciary function in the open. The legislature does its business through open debates by the representatives of the people to which both the people and the press have access. Similarly, the judiciary decides cases after giving a hearing to the parties in an open court. These departments do not normally carry out their operations in secrecy.

On the other hand, the executive does its business in its secret chambers to which the people have hardly any access. Now-a-days the executive

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1. See *infra* chapter II.

apart from discharging its traditional function of executing laws promulgates delegated legislation and adjudicates on controversies. Unlike the ordinary legislation, delegated legislation is made with much secrecy.[2] Whereas in the United States or United Kingdom there is a great deal of association of the people or affected interests with the making of delegated legislation by the executive this is more or less absent in India. In the case of adjudicatory (quasi-judicial) functions of the executive, due to the insistence of the courts, an administrative authority has to observe the principles of natural justice or give a fair hearing to the affected parties, but here the openness ends and the decision-making process is behind the curtain and no one knows what goes on there—whether the authority did act impartially or objectively or on the directions of a higher authority or purely on considerations of departmental policies.

The legislative and adjudicatory functions of the executive still leave substantial administrative powers about the exercise of which the people are more or less completely in the dark. In the modern welfare state these powers have grown enormously. India with its pattern of mixed economy and socialistic state is one of the most governed states in the world. What is it that the state does not do. It fixes prices, acquires goods and property, regulates sale, purchase and distribution of goods through licensing and other means, carries on trade and business, itself runs industries and other services, controls, regulates and gives credit and money, gives bounties of various kinds, detains persons in preventive detention, affects personal liberty in various ways, and regulates the economic and social life of the people. In other words, the hegemony of the executive over the individual and the community is an accomplished fact. Power corrupts and absolute power tends to corrupt absolutely. There is an inherent danger that the vast powers of the executive may not be used for public welfare but used for private gain or with corrupt motives, or arbitrarily and capriciously. In this context it is essential for the people to know what the government is doing. The first essential to ensure accountability of government to the people is the citizens' right to know or to be informed how and in what manner their government has been functioning. Unless they have access to governmental information and have the true facts, they will not be in a position to cast their votes, rationally and intelligently. A democratic government is sensitive to public opinion, but for the public to form a rational and a correct opinion it should have the facts, nothing but the true facts. It is quite often in the own interest of the government in power to allow people to have access to facts to allay their fears, doubts, suspicions and rumours. Thus one of the pillars of a democratic state is the citizens' right to know the facts, the true facts, about the administration

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2. See *infra* chapter III.

of the country.[3] This is indeed the basic postulate underlying the appointment of commissions of inquiry.

Schwartz says : "Americans firmly believe in the healthy effects of publicity and have a strong antipathy to the inherent secretiveness of government agencies".[4] In 1966 the Congress enacted the Freedom of Information Act "to clarify and protect the right of the public to information".

The Franks Committee of U. K. states that it is the concern of democratic governments to see that information is widely diffused, for this enables citizens to play a part in controlling their common affairs.[5] The modern processes of the government have made more obvious the need to improve the effectiveness of control. The committee observes :

> A totalitarian government finds it easy to maintain secrecy. It does not come into the open until it chooses to declare its settled intentions and demand support for them. A democratic government, however, though it must compete with these other types of organisation, has a task which is complicated by its obligations to the people. It needs the trust of the governed. It cannot use the plea of secrecy to hide from the people its basic aims. On the contrary it must explain these aims : it must provide the justification for them and give the facts both for and against a selected course of action. Nor must such information be provided only at one level and through one means of communication. A government which pursues secret aims, or which operates in greater secrecy than the effective conduct of its proper functions requires, or which turns information services into propaganda agencies, will lose the trust of the people. It will be countered by ill-informed and destructive criticism. Its critics will try to break down all barriers erected to preserve secrecy, and they will disclose all that they can, by whatever means, discover. As a result matters will be revealed when they ought to remain secret in the interests of the nation.[6]

Amongst the countries of the world Sweden is an outstanding example where executive secrecy is not the norm. There the Constitution itself declares that citizens shall have free access to official documents "subject only to such restrictions as are demanded out of consideration for the

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3. See Campbell, Public Access to Government Documents, 41 *Aust. L.J.* 73 (1967-68). There is a large literature pleading for openness in the government. For instance, see the collection of papers by different authors in T. N. Chaturvedi, (ed.), *Secrecy in Government* (1980); *Report of the Franks Committee on Section 2 of the Official Secrets Act 1911* (U. L.K., 1972); Galnoor, *Government Secrecy in Democracies* (1977); Rowat, *Administrative Secrecy in Developed Countries* (1979).

4. *Administrative Law* 127-28 (1976).

5. *Report, supra* note 3 at 9.

6. *Ibid.* at 12.

security of the realm and its relations with foreign powers, or in connexion with official activities for inspection, control or other supervision, or for prevention and prosecution of crime, or to protect the legitimate economic interest of the State, communities and individuals, or out of consideration for the maintenance of privacy, security of the person, decency and morality."[7] Campbell says: "These exceptions are broad, but the Constitution also provides that the circumstances in which official documents are to be held shall be 'closely defined' by statute in accordance with the constitutional principles."[8]

Arguments against

So much for the openness in the government. There are, however, strong arguments in favour of secrecy.

In England and other common law countries including India secrecy is the rule rather than the exception. There are a number of reasons for maintaining secrecy in government. Secrecy is necessary in the interest of defence, national security, foreign relations, criminal law, personal privacy, trade secrets, and perhaps, annonymity of civil servants in a parliamentary system and frankness in departmental communications. These points are further articulated below.

(*i*) *National security and foreign affairs :* National security and foreign affairs have always been and universally regarded as justifying secrecy. National security is of paramount importance and dealings with foreign governments is both a sensitive matter and affects national security. Various kinds of information including scientific discoveries and inventions have to be protected from disclosure. The problem here is not that of the legitimacy of these two matters favouring secrecy, but that this should not become "an excuse for a wholesale cover-up".

(*ii*) *Secrecy in police* : The task of police somewhat resembles that of the army. Whereas the army is concerned with national security, the police is concerned with the maintenance of law and order and prevention and investigation of crimes. The police organisation has to work out strategies, plan out its operations on the basis of prior secret information and carry them out all of a sudden without prior notice. Surprise and swift action and skilled manoeuvres are the key elements in police work.

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7. Quoted in Campbell, *supra* note 3 at 73.

8. *Ibid.* at 73. Also Rowat, *supra* note 3, chap. on Sweden. He says that Sweden's long experience with the right of public access "indicates that it changes the whole spirit in which public business is conducted. It gives public debate a more solid foundation, causes a decline in suspicion and distrust of officials, and this in turn gives them a greater feeling of confidence." At 12. He cites the observations of another author that in Sweden "the right of access is very seldom abused, and that it does not impede the daily work of administration to any degree worth mentioning." At 14.

If these strategies, plans and manoeuvres are known in advance to persons against whom they are directed it may not only frustrate the work of the police but also subject the police personnel to great risks and physical harm and even endanger public safety.[9] However, even police work involving investigation of crimes cannot be completely secluded from the public gaze. The accused is entitled to take the assistance of his counsel during his interrogation. Further, after the completion of investigation the accused and his counsel are entitled to know the evidence in the possession of the police which is intended to be used against him. Moreover excesses and misdeeds of the police would require disclosure.

(*iii*) *Personal privacy* : The state in modern times collects a lot of information from citizens about their affairs. This information may relate to health, business secrets or financial status of an individual. The disclosure of this information may harm their reputation and act to their prejudice. But at times even access to this information may have to be allowed to determine whether the executive has not been administering the law wrongly and with an unequal hand and giving benefits to those who were not lawfully entitled. But where the information is not relevant for this purpose, the accepted rule may be "non-disclosure", recognising the inviolable right of privacy of an individual. In the United States the Congress has enacted the Privacy Act, 1974 to protect personal privacy.[10]

(*iv*) *Secrecy in economic plans* : Secrecy may be necessary in controlling and regulating the economy. Thus budget proposals have to be kept in utmost secrecy so that the persons may not through premature disclosure gain undue economic advantages and indulge in speculative activities. Premature disclosure of economic plans and policies may frustrate their very purpose, and precipitate activities which they intended to avoid. However, secrecy on economic grounds is to be confined only to cases where the disclosure would enable persons to make unjust gains or harm national interests.

(*v*) *Protection of trade secrets* : Secrecy may be necessary to protect patent rights and trade and business affairs, both of the government and private persons, so as to guard against unfair competition.

(*vi*) *Volunteered information* : When the individual has supplied information voluntarily to the government it may be necessary to keep the information secret to save him from harassment and inconvenience. If voluntary information or its source is disclosed it may deprive the government of future information.

(*vii*) *Preventive detention and secrecy* : Unlike the Western democracies the Indian law permits preventive detention under which a person could

9. See Sharma, P.D., Secrecy Needs in Police Administration in T.N. Chaturvedi, *supra* note 3 at 209.

10. For the text of the Act, see T.N. Chaturvedi, *ibid.* at 277.

be detained in preventive detention without trial. Do the requirements of preventive detention demand secrecy of documents and information relating thereto? The answer is in the negative, except where the information in possession of the government has been supplied by a private individual, its source may have to be kept secret. There is the constitutional requirement to disclose the grounds of detention to the detenue and the courts have insisted that they have a right to look into the records to determine whether the detention was justified or not.[11] In the absence of the safeguard of adjudication by the courts to determine the merits of detention, it is all the more necessary to have the safeguard of openness to act as some check on the powers of the government against abuse.

(viii) Anonymity and frankness in departmental communications : It is said that in the interest of frank and candid advice there should be government secrecy. It is a weak ground for claiming the privilege of secrecy by the government. Campbell meets this argument by saying : "These arguments do not always carry conviction with outsiders. Ultimately the responsibility for what the agency does lies with the Minister in charge. But what harm is done if he is shown to have rejected sound advice from his subordinates, or to have acted on bad advice ? Incompetent advisers and Ministers who consistently disregard sound counsels have no place in government and their faults should not be permitted to go unnoticed".[12] Further, in order to safeguard frankness of internal discussions within the government, it may be all right to deny access to internal notes or drafts, but the public ought to have access at least to a finished document.[13]

The "candour theory" in preventing disclosure of documents has not found favour with the judges in England,[14] and also with the Indian Supreme Court. In *S P. Gupta* v. *President of India*,[15] the court ordered the disclosure of correspondence between the Law Minister, the Chief Justice of Delhi High Court and the Chief Justice of India with regard to the non-appointment of an additional judge. However, the court did caution that "candour theory" may not be completely ruled out and in some cases the public interest, on balance, may require non-disclosure.[16]

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11. *Daktar Mudi* v. *State of West Bengal*, A.I.R. 1974 S.C. 2086 ; *Khudiram Das* v. *State of West Bengal*, A.I.R. 1975 S.C. 550.

12. *Supra* note 3 at 76-77.

13. This is the position in Sweden. See Rowat, Law on Access to Official Documents, in T.N. Chaturvedi, *supra* note 3 at 5.

14. For instance, see the Opinions of Lord Morris of Borth-Y-Gest and Lord Upjohn in *Conway* v. *Rimmer*, (1968) A.C. 910, 957, 993-994 : Lord Salmon in *R.* v. *Lewes Justices, ex parte Secretary for Home Dept.*, (1973) A.C. 388, 413 ; and Lord Scarman jn *Burmah Oil Co.* v. *Bank of England*, (1979) 3 W.L.R. 713, 759. Also see Eagles, Cabinet Secrets as Evidence, 1980 *Pub. Law* 263, 268, notes 41 and 42.

15. A.I.R. 1982 S.C. 149. Per Bhagwati, J. at 239.

16. Also the opinion of Lord Scarman in *Burmah Oil, supra* note 14.

The need for balance

There is thus a conflict between the factors necessitating openness and those requiring secrecy. None of the arguments for secrecy enumerated above can be accepted without reservations though some of them possess considerable validity and strength. It is paradoxical that one basic factor, namely, the greatly expanding role of the modern government, which demands openness, also goes against it. Speaking about the "inevitable tension between the democratic requirement of openness, and the continuing need to keep some matters secret", the Franks Committee states :

> This tension has been increasing in recent years. In part this is because the dangers to the State have changed in character and become more complex, and have come to seem internal as well as external. The processes of government have become more sophisticated ; the activities of a government increasingly affect all the affairs of the citizen. Its economic manoeuvres have come to be considered no less vital to the basis of the life of the community than the movement of its troops. Many new advances in science have both peace-time and military applications. Rapid changes in society, and the increased influence of centralised institutions, further complicate the issue. More and more information about the private affairs of citizens comes into the possession of the Government : there is a feeling that the Government should safeguard the confidences of the citizen almost as strictly as it guards information of use to an enemy.[17]

Though openness is essential to the functioning of a democratic society, yet secrecy also bears the same quality so as to protect certain vital national interests and for a few other reasons. A proper balance has to be drawn between the needs of openness and the requirements of secrecy, but this balance has to be tilted in favour of openness than it had been hitherto. In other words, till now secrecy was the rule rather than the exception, but this proposition has now to be reversed. It is the openness which ought to be the rule and secrecy the exception. The Indian Supreme Court in *S.P. Gupta* v. *President of India*[18] has made a strong plea for open government. Mr. Justice Bhagwati speaking for the majority on the subject said that "open government is the new democratic culture of an open society towards which every liberal democracy is moving and our country should be no exception."[19]

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17. *Supra* note 3 at 9.
18. A.I.R. 1982 S.C. 149.
19. *Ibid.* at 234.

Keeping in view all the above conflicting factors and recognising the need for open government three points or issues emerge in the context of considering the amendments to the law relating to official secrecy.

Firstly, the nature of documents which may require secrecy may have to be specified with reference to the subject-matter with which they are dealing, instead of regarding every government document to be secret. In other words, except for the documents dealing with certain matters, all other documents should not have the benefit of official secrecy. Secondly, even within the category of "protected documents", public interest may justify their disclosure, that is, a balance may have to be drawn between the interest of the government in non-disclosure and the interest of the community in disclosure. Thirdly, there may be "class documents", that is, documents belonging to a certain class, which require protection because of the very nature of the class to which they belong and not because of their contents. The "class" doctrine recognises that certain interests are invariably to be protected and are so overwhelming that they should outweigh any other public interest demanding disclosure of documents. Here the important question is whether the "class" doctrine should be recognised. All these aspects are examined in the pages to follow.

Openness in government has two other aspects. Firstly, there is the aspect of applying criminal sanctions against a person either communicating or receiving information in possession of the government. Secondly, there is the question of imposing a positive legal obligation on the government to supply information when asked for by an individual. The former is negative in character and prevents leakage of information. The latter not only assumes that exposure of information is permissible but casts a positive duty on the government to give the demanded information, except in specified cases where the rule of secrecy may have to be followed in the national interest.