



LAW in-depth

Police 'excesses' in search and seizure

M.MOAZZAM HUSAIN

AN Englishman's home is his castle. In a landmark decision Lord Camden observed "By the law of England every invasion of private property, be it ever so minute, is a trespass. No man can set foot upon my ground without my license, but he is liable to an action though the damages be nothing." The Fourth Amendment, of the American Constitution says "The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures shall not be violated."

Article 43 of the Bangladesh Constitution guarantees the privacy of home and correspondence and says, inter alia, that- every citizen shall have the right to be secured in his home against entry, search and seizure subject to any reasonable restrictions imposed by law in the interest of state-security, public order, public morality and public health. In a recent case Indian Supreme Court held that no police officer nor any other public functionary can enter into the house of any citizen and conduct any search or seizure, seize anything unless he is duly authorised by law. Thus right to privacy of home is a fundamental right recognised in all democratic societies. It is, therefore, inviolable and can not be impaired unless under strict requirement of law. In view of the constitutional concern for protection of home from unnecessary entry by public functionaries law lays down principles seeking to circumscribe the propensity of excesses on the part of the police and to hold it back on human scale.

Search of persons

General provision for search and seizure are provided in chapter VII and in Sections 165 and 166 of the Code of Criminal Procedure(the Code), illustrated by the Police Regulation of Bengal, 1943, (PRB). Search may be of places or of persons. Law is a bit relaxed in respect of search of persons as persons may be required to be searched in exigent situations admitting of no time for authority to be obtained from court. Section 51 of the Code provides, inter alia, that a person arrested may be searched and all the articles found upon him may be taken into safe custody. Section 53 empowers the police to seize offensive weapons from any person arrested in the similar way. It follows therefore, that a person suspected of being in possession of articles for the possession of which he is liable to be arrested without warrant may be arrested and searched and the search should be made in between the arrest and putting him into lock-up. In case of a person searched prior to his being arrested is not provided for in the Code. Section 52 provides that a woman must be searched by another woman, with strict regard to decency. Sections 47 and 48 of the Code empowers the police to enter into the house in which the accused to be arrested is believed to have taken refuge and to arrest him subject to intimation given to the residents. If ingress is refused police is empowered to effect an entrance by breaking open the door or window provided that if the place is an apartment in the actual occupancy of a pardanashin woman, not the person to be arrested, she shall be given an opportunity to withdraw from there.

Search of places

Search of places must be under search warrant issued by a competent court. Section 96 of the Code says, amongst others, that the court may specify in the search warrant the particular place or part thereof to which only the search or inspection shall extend and if so specified search shall be strictly limited to terms of the search warrant. Section 98 provides for house-search under search warrant. Search of places without search warrant is illegal except under the justification provided in Section 165 of the Code. The substance of Section 165 is that if a police officer has reason to believe that anything necessary for the purpose of investigation is lying in a place and the time to be consumed in obtaining search warrant from court is



SYED ZAKIR HOSSAIN

likely to defeat the purpose of search may search for such thing without search warrant. While empowering police to search a place without warrant in exigent situation law has laid down certain conditions, namely, a) there must be an investigation pending b) police officer conducting investigation should search the place personally c) he must record the grounds of his belief that waiting for search warrant may defeat the purpose of the search itself d) a police officer proceeding under this section should, as far as practicable, conduct the search in person and if the authority is delegated to any other officer there must be an order in writing specifying the place to be searched and the thing for which search is to be made e) copies of the record showing justification of search without warrant and/or of the order delegating the authority of search shall forthwith be sent to the nearest Magistrate.

Section 103 of the Code provides some safeguards in terms of creditability of search such as a) before making search the officer shall call upon two or more respectable inhabitants of the locality to attend and witness the search b) the occupant of the place searched or some person on his behalf shall be permitted to attend and observe the development during the search c) list of all things seized in the course of such search and of places in which they are found shall be prepared and signed by such witnesses d) no person witnessing the search shall be compelled to attend the court as a witness unless summoned by it; e) a copy of the list prepared shall be delivered to such occupant at his request f) when any person is searched a list of all things taken possession of shall be prepared and a copy thereof shall be delivered to such person at his request; g) except upon reasonable cause no one can refuse or neglect to attend the search with impunity.

PRB has formulated ten rules to be followed by a police officer conducting search amongst which the ones found uncommon with the above are a) the occupant of the house or in his absence person in charges of the house shall be given an opportunity to compare the copy of the seizure list with its

original; b) no place should be searched without warrant merely because the occupier is an absconding offender; c) before commencement of search the person of every police officer, every witnesses and informer shall be examined before witnesses and the owner of the house or his representative e) law does not require a search to be made by daylight but there are advantages in searches by daylight the searching officer should apply his discretion whether daylight should be waited. It also lessens the inconvenience of the inmates of the house f) articles or weapons found at a house-search or on the person of a prisoner shall be carefully labelled and signed g) if the materials seized do not permit counting piece by piece, they should be collected and packed in bundles; must in all cases be sealed and marked by search witnesses and entered in the search list.

Dhaka Metropolitan Police Ordinance, 1976, provides for search by a police officer any person in streets suspected of being in possession of stolen property and for search and seizure of false weights and measures. It also provides for penalty for unlawful entry, vexatious search and detention by police officer.

Concluding remarks

A plain reading of the above reveals the concern of the Constitution, laws, regulations and rules for protection of the liberty of citizens and their right to be secured at home in particular. But if we see the law and reality does it produce a happy scenario? The questions that crop up are: a) how constables conduct searches into the passenger-luggage inside a bus or other transports? Are they so empowered by law? b) since law permits search of a suspect after arrest how wholesale search inside a bus or otherwise is conducted? c) is a roaming search with the hope of incidental discovery of contraband article is permitted by law? d) does an investigating officer care much about asking any respectable men to witness the search? e) before starting search does he expose himself and his accompanied forces to search by the witnesses? f) does he seize the article in a manner so as to identify the same to the satisfaction of the court during trial? g) does he care about the right of the occupant of the house to witness the search? h) in cases of alleged seizure of heroin and its examination by chemical examiner if the identity of the substance sent for chemical examination is challenged as not being the substance seized how the bona fide of the transaction will be proved before court?

These are obvious avenues for miscarriage of justice to the utter detriment of personal liberty of citizens and their right to protection at home guaranteed by the Constitution and unless effectively addressed possibility of innocent people being victimised is bound to go unabated.

M. Moazzam Husain is an Advocate of the Supreme Court.

FACT file



Denial of justice in Myanmar

The most recent crackdown on members and supporters of the opposition party National League for Democracy (NLD) in Myanmar (Burma) highlights the systemic denial of justice for political activists in the country.

More than 250 people, including Daw Aung San Suu Kyi, have been detained or are missing since a violent attack on the NLD on 30 May 2003. Many have been held incommunicado for more than two months without charge or trial. Some have reportedly been tortured, and many have been injured. They are apparently held because of their peaceful political activities.

Such violations of the most basic human rights are not unusual in Myanmar. People are often arrested in the middle of the night and taken, with head hooded, to an unknown location. They are then deprived of sleep, food and water, interrogated for long periods, and threatened or beaten by members of the state Military Intelligence.

Prisoners are frequently deprived of any outside contact before being brought to trial - if they are brought to court at all. The authorities can order people to be held for up to five years without any appeal to the courts, and with no charge and no trial. Those brought to trial may not know what charges have been brought against them or even that their trial is taking place until they arrive at it. Trials are frequently held in secret, and prisoners are usually denied their right to a lawyer or to call or question witnesses. Complaints of torture to the judge are usually ignored. Often prisoners are not allowed to see the judgement against them and are unable to appeal.

And for what "crimes" does this happen? People have been charged with spreading, or intending to spread "false rumours" for telling jokes, writing poems, being a member of a dissenting political organisation, or having contact with one; organising peaceful demonstrations; trying to pass on information about human rights violations; even wearing the colour yellow (the colour of the NLD).

The vague wording of some laws gives the authorities sweeping powers to curtail freedom of expression, assembly and association, and to detain peaceful critics. The authorities can repeatedly detain people for up to five years with no trial, charge, or right to appeal. Poor prison conditions and inadequate medical care mean that many prisoners have serious health problems.

More than 1,300 political prisoners, including monks, students, lawyers, teachers, writers, shopkeepers, political activists, are currently detained in Myanmar. They are held under laws that breach international human rights standards, and denied the protection of those safeguards that exist in Myanmar's legal system.

Source: Amnesty International.

LAW opinion



Lawyers must strive to uphold professional dignity

M. SHAMSUL HAQUE

Last couple of years as it was found that the dignity and gravity of the highest institution of the Judiciary of our country was wave aside. Slum people were deployed to be seated around the Supreme Court building, boot-shorts on it's ventricle, chanting slogans within its four walls, walloping the doors and windows, all these wretched events were administered in a place where persons with high dignity are congregated every day. All these events achieved nothing but created chasms between the lawyers, which culminated to violence rocks in Dhaka Judge Court resulting 87 injured. What a misfortune!

People witnessing this unpleasant situation. One of my acquainted shopkeepers having a newspaper in his hand exclaimed that the illiterates are far better than those lawyers. My helpless eyes were regulated to his face but I could not say anything.

I wonder! The hands of a lawyer where the pen has been placed how that can be used to administer stones, bombs and scuffling. Presumably, the politics of now a day inspired a few lawyers to be tuned to the nugatory political culture. It is alarming to the whole lawyers society, even to the entire nation.



I may be excused to remind here that the lawyers are the part and parcel of the judiciary; and the judiciary is the last resort of justice. A lawyer being equipped with knowledge, dignity, integrity, honesty, and high ethical standings with patience and respecting attitude to others cannot treat politics unlike a blunt or layman. They must not be a party to a commotion of violence because people trust them and their profession bears a tradition.

Unfortunately some of the lawyers of our country work as political activist for getting undue favour. They see everything unilaterally for the purpose of serving their party men outstripping their conscience and feelings of right or wrong. It is harsh but true that some of this type of lawyers have earned fame in the country. In my humble way I would like to say that the eminent lawyers may enrich political parties but a political party may not glorify the lawyers, though can make them politicians.

I am afraid things are dark ahead. Time has not yet been elapsed; the lawyers should extend their hands of unity to each other irrespective of political affinities, at least for the sake of social peace and order. Of course, I do not mean for leaving aside the politics by the lawyers but it should be regulated within the scarf of mannerism.

Lastly I beg to appeal to the senior most leading lawyers to have an effective strive for panting the unity of the lawyers of the country and to stop splashing so that the society as a whole may not fall into a catatonic trance.

M. Shamsul Haque is an Advocate of the Supreme Court.

LAW update



Independent Anti-Corruption Commission

A toothless tiger in the making?

MOIN GHANI

BANGLADESH has, in recent years, been categorised as the most corrupt nation in the world by reports of various donor agencies. While we may disagree with the validity of the assessments and question the methods used for reaching such a conclusion, there is no denying that corruption is a serious problem that needs to be addressed. It is also beyond dispute that corruption is one of the main reasons for which Bangladesh has been unable to achieve its expected level of development. It is of prime importance that the issue of corruption is addressed soon in order to attain a faster rate of economic development.

In the run up to the last parliamentary elections all the major political parties had identified corruption as a social problem and pledged their commitment to combat corruption. The two major political parties had included the creation of an independent anti-corruption institution in their election manifestos. In light of the ineffectiveness of the Bureau of Anti-Corruption it had been the popular demand of the general public to set up an independent institution to combat corruption. With a view to implement its election manifesto the Government has drafted the Anti-Corruption Com-

mission Act, 2003 which aims to set up an independent Anti-Corruption Commission to combat corruption. However, the absence of the main Opposition Party from the Parliament means that there is a greater burden on the press and the civil society to come up with meaningful and constructive criticisms of the Act setting up the independent Anti-Corruption Commission.

Formation of the commission

One of the biggest concerns surrounding the formation of the Anti-Corruption Commission has been the procedural aspects of its formation, particularly the composition of the Selection Committee which is meant to nominate the Chairman and the Commissioners to be appointed by the President. According to the draft Act a three-member Commission, consisting of a Chairman and two Members, will be appointed by President on the recommendation of a six-member Selection Committee. What is worrying is that the Selection Committee will consist of:

- (1) the Minister for Finance,
- (2) the Minister for Law, Justice and Parliamentary Affairs,
- (3) a Judge of the Appellate Division nominated by the Chief Justice,
- (4) a Judge of the High Court Division nominated by the Chief Justice,
- (5) the Comptroller and Auditor-General, and
- (6) the Chairman of Public Service Commission.

Transparency International Bangladesh (TIB) has been one of the strongest advocates of an independent Anti-Corruption Commission. They have put forward two options for the appointment procedure of the Chairman and the Commissioners. Option one suggested a five member Selection Committee consisting of the Chief Justice, two persons nominated by the Prime Minister and the Leader of the Opposition, and two other persons nominated by the nominees of the Prime Minister and the Leader of the Opposition. The President would appoint the nominees of the Selection Committees.

Option Two had suggested the formation of a two-member Selection Committee consisting of the Chief Justice and the Secretary of the Cabinet Division. The Selection Committee would send its recommendations to the Parliament and the MPs would select the Commissioners in a secret ballot. Option One would have accommodated the Opposition's views but would also have alongside required co-operation from the Opposition. Option Two would have required an amendment to Article 70 of the Constitution. It is perhaps because of these problems that the Government did not consider the TIB proposals appropriate. However, the TIB proposals would have given more credibility to the neutrality and independence of the Commission.

An effective and politically neutral mechanism to investigate and prosecute corruption is a prerequisite to any successful anti-corruption strategy. The danger with the present draft Act is that the composition of the Selection Committee and the procedure for the appointment of the Commissioners will cast doubt on the independence and neutrality of the Commission. It would perhaps be better to keep the two Ministers out of the Selection Committee so as to ensure the independence of the Commission.

Independent prosecution

The draft Act, while giving the Commission the power to carry out prosecution, has unfortunately not outlined the institutional framework with which the Commission will function. The Act merely states that the institutional framework will be determined by the Government. The Act does not set up or even

outline the details of any prosecution section of the Commission. In the absence of such a prosecuting section the Commission, after carrying out the investigation will have to rely on the Public Prosecutor to carry out the prosecution. The present Bureau of Anti-Corruption, which the new Commission is meant to replace, had to go to the Public Prosecutor in order to prosecute anyone after completion of the investigation. The record of the Bureau in carrying out prosecutions speaks for itself. Without the powers and institutional framework to independently prosecute government officials, the Commission will be as ineffective as its predecessor, the soon to be defunct Anti-Corruption Bureau.

Recruitment of employees

The draft Bill states that the Government will frame rules for the appointment of the employees of the Commission. The remuneration and other benefits of the Chairman and the Commissioners will be determined by the Government. According to Section 33 of the draft Act the Bureau of Anti-Corruption will cease to exist once the Commission is established and the employees of the Bureau will become employees of the Commission. The Commission will appoint those employees it is satisfied with and request the Government to withdraw the rest of the employees from the Commission.

Transparency International Bangladesh had suggested that it would be better to give the Commission a fresh start by appointing staff through a transparent and competitive process. Experts in the fields of investigation, law, banking, finance, procurement etc. could also be employed, on a contract basis, if required.

The danger with recruiting officials from the former Bureau of Anti-Corruption is that the new Anti-Corruption Commission will be seen as merely a successor of the old and ineffective Bureau. If there are any lessons to be learnt from the failure of the Anti-Corruption Bureau it is that an institution which has the function of investigating official malfeasance cannot function effectively with staff employed by the Government.

Concluding remarks

Corruption is a social cancer that must be challenged in order to build a better future for Bangladesh. The non-transparency of the decision making process and the arbitrary use of power is what has led to our society being inflicted by the cancer of corruption. What is required is to bring about a change in the basic approach to governance. The people with power need to be enlightened enough to realise that it is in their own best interest to have checks and balances to their exercise of power. The Government needs to realise that it is not just in the interest of the country but actually in the interest of the Government itself to have a truly effective and independent Anti-Corruption Commission.

Unfortunately, doubts remain as to how effective and independent the Commission set up by the draft Act will be. The draft Act itself does not go the whole mile. The concerns regarding the draft Act are not just about what is in the draft Act (e.g. the composition of the Selection Committee) but more importantly about things that have been left out, particularly the institutional framework for an independent prosecution agency.

Moin Ghani is an Associate of a law firm.

