

Law and Our Rights

Judicial Activism: A South Asian Perspective

by Abul Hasnat Monjurul Kabir

The role of law and lawyers remains significant in protecting human rights since law is the mechanism for social engineering. The law, lawyers and judiciary have to earn the glory of being vanguard of human being as the part of the nature in performing duties to future generation and to non-human lives and entities too.

JUDICIARIES in South Asia trying to adopt an activist, court oriented approach in the matter of interpretation of fundamental rights. They have expanded the interpretation of fundamental rights and in the process rewritten some parts of the Constitution through a variety of techniques of judicial activism. The Supreme Court in India has undergone a radical change in the last few years and it is now increasingly being identified by justices as well as by people as "The last resort for the purpose of the bewildered". The transition from traditional captive agency with a low social visibility into a liberated agency with huge socio-political feasibility is an interesting development in the career of the Indian appellate judiciary. The Supreme Court of India has through judicial activism found a new historical basis for the legitimization of judicial power and acquired a new credibility with the people. This development has been the result of intense social activism on the part of some of the justices of the Supreme Court of India.

In highly evolved legal systems, such as in the US, the judiciary drew succour from as well as assimilated public opinion and stated it as a legal principle even if it meant reneging on earlier pronouncements. For example, as public sentiment changed in the 1950s, an activist Supreme Court was a formidable moving spirit behind the Civil Rights Movement where nearly a century earlier it had given racial bias a clear sanction under the law. In the US a good or bad judgment becomes the subject of constant debates in social law schools. In the words of the eminent Harvard law professor Paul Freund, the role of the Supreme Court is "Ultimately that of a moral teacher."

In most of the South Asian countries necessary institutional crutches or balances are missing. And the only real checks are public opinion and the press. If the courts fail in their duty or display gross malfeasance in upsetting constitutional norms, there is one reason why public opinion and the press will not sway towards Parliament and the Executive. The Hawala Scandal is by no means any definitive indicator of who is corrupt and who is not. It is in essence a historic symbol of an institutional overhaul that was long overdue. A churning of the democratic process in which the thrust of enlightened public opinion spiced with a dose of political opportunism and activism of the Supreme Court have converged to restore a modicum of moral authority to a system. One that has been rapidly deteriorating into a brazen display of naked political power without accountability to the sovereigns of land — the people. For the Supreme Court of India to be virtually dictating terms to the Central Bureau of Intelligence (CBI) in the Hawala case in other words, telling the executive to do its job is a reflection of a systematic breakdown of

the other branches of the Government. The Supreme Court has chosen to play its no accident. Its emergence as the grand arbiter for the sake of enforcing human rights and human dignity and welfare of the vast majority of people notwithstanding the fact that the judiciary is itself burdened with some of the same problems that afflict other limbs of the Government is a matter of constitutional dialectic.

All people need something to guide them. In their personal lives they may look to religion and religious books. In civil society, the constitution has a life of its own but it speaks only through institutions. And when one institution breaks down, another becomes more powerful

stitution of India and the Supreme Court of India hold that a new insight should inform the judicial approach in the matter of pre-trial release. If the Court is satisfied after taking into account the information placed before it that the accused has roots in the community and is not likely to abscond, it need not insist on a monetary fund and may safely release the accused on a personal bond. The human rights norm set out in the international instruments was thus translated into national practice.

India's "judicial" experiment with democracy has much to commend it. It invites access to the courts as interrogators of power and dispensers of sub-

stance as a class and pursue their collective rights. But the new public interest litigation procedure converts every citizen in India into a "Private, Attorney-General". It links democracy to justice and seeks to make power subject to accountability. Though what the judiciary of India is doing (as already mentioned) in all these cases is not without international precedent — in South Asia, India alone leads and dominates in those respects.

Under the auspices of the new Constitution of Nepal (1990) the judiciary of Nepal starts its rescheduled new democratic journey which was earlier subservient to the monarchy. The activist role of judiciary of its neighbour (India) can not influence Nepal's justice delivery system so far. Due to prolonged and complex Tamil crisis, the judiciary of Sri Lanka has to function for long under emergency period which sometimes does not even enable it (the judiciary) to establish the very fundamental rights of the people let alone its being active and sensible to various issues of public interest.

The new-born democratic system influenced by feudal lords, military clique and strong religious and ethnic groups has not yet fulfilled the basic pre-conditions of an independent and enlightened judiciary in Pakistan. Moreover, the responsibility of applying Sharia Law also creates obstacles and credibility crisis for the judiciary of Pakistan. As such application raises serious questions in the public and treated in many cases as arbitrary and contrary to the notion of democracy and human rights by various citizen's groups.

Unlike Nepal, Sri Lanka and Pakistan, the judiciary of Bangladesh attained some remarkable progress though at slow pace towards judicial activism and in shaping public interest litigation particularly in environmental matters. The judiciary, especially the highest judiciary of the country that is the Supreme Court has not been reactionary to appreciate to emerging need to conserve environment and human health besides playing a crucial role of protector or defender of conventional human rights.

The role of law and lawyers remains significant in protecting human rights since law is the mechanism for social engineering. The law, lawyers and judiciary have to earn the glory of being vanguard of human being as the part of the nature in performing duties to future generation and to non-human lives and entities too.

The writer is the Secretary General of Law Watch, an alternative platform for legal and human rights studies and action. This is the abridged version of the paper presented in the 15th Global Conversation on "What You and I Can Do for Future Generations" held in Brisbane, Australia on 28th September, 1997 organised by World Future Studies Federation in cooperation with UNESCO.



DO YOU FEEL, HOW WE FEEL?

— If parliament fails, the bureaucracy becomes more powerful, if the executive is weak, parliament assumes a stronger role. If both lose their credibility by abdication their responsibilities then the courts begin concerning themselves not only with policies but also examining their wisdom and need.

What the Supreme Court of India is doing for the protection and promotion of human rights and the establishment of the organic accountability of the government for the first time is not without international precedent. In 1893, Italian judges became public heroes following the arrest of more than 1000 people, including cabinet ministers in a kickback scandal involving organized crime. Similarly heads rolled in France, Germany, Spain and in 1996, two former South Korean Presidents were given life imprisonment for assuming state power without any legal claim and basis and for other serious charges. In many of these countries people's movement backed the judiciary when it took the executive to task.

The judiciary in India has sincerely tried to give effect to the human rights norms embodied in the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) have been incorporated into the domestic law by a process of judicial process of judicial interpretation. The entire law of bail was "humanized" by a judicial interpretation of Article 21 of the Con-

stantive social and economic justice. It creates new ways of eliciting information and provides the possibilities of comprehensive remedies. Like all social experiments, it needs the discipline of integrity, due process and courage. The end result may not be cataclysmic in civil and political society or, by itself effect distributive justice. But it will create a responsive administration and mitigate harshness, arbitrariness and pain. Courts of justice are not in the words of an insightful Indian Supreme Court judge for powerful people with quibbling minds and long purses. It is an invitation for the disadvantaged and disempowered to feel their faith in constitutional democracy, necessary if the constitution is to be ascribed a meaning consistent with justice.

Through dynamic judicial activism which definitely includes extremely beneficial and co-operative attitude toward public interest litigation, the judiciary of India sets a milestone, opens a new horizon in the South Asian region. In fact what public interest litigation in India has done is to introduce a new concept of trusteeship of the public interest. Hitherto the common law reposed the protection of the public interest in the Attorney-General who alone could represent public causes in court. Restrictive rules of standing restricted ordinary citizens from voicing their public concerns and challenging the abuse of power and authority through the courts. No doubt, groups of citizens could get to-

HIV in Prison

PRISONS can be harmful to health. AIDS, tuberculosis, hepatitis B and C are among the many afflictions that prisoners in both poor and rich countries face. People are sent to prison to be punished, but not necessarily to receive a death sentence. In those societies most seriously affected by HIV, it is likely that people in prison will also have high rates of HIV. There is also growing evidence that many inmates contract HIV while in prison. For example in 1992, Americans in prison were twenty times more likely to become infected with HIV within one year than those on the outside.

What is it about the prison environment that fuels the spread of HIV? Prison amplifies the risk of HIV infection through IV drug use. That drug users who have been to prison are twice as likely to be HIV positive compared to those who haven't. In Yugoslavia, 50% of IV drug users in one prison survey were HIV positive. Drugs easily permeate prison walls, where inmates commonly share makeshift injection equipment. Rarely has the seriousness of this been adequately perceived by the authorities. Only in one experimental project in Switzerland are clean needles and syringes provided to stop the spread of HIV in prison, although some authorities around the world do provide bleach for cleaning injection equipment.

But even where drug use is uncommon, as it is in much of sub-Saharan Africa, prisons are a risky place to be. Governments and the public have been slow to accept the reality of male-to-male sex behind bars. Nevertheless it is a feature of prison life all over the world. In a survey of AIDS service organizations carried out by the Panos Institute entitled *On the Margins: Men who have Sex with Men in the Developing World*, about one third of respondents reported that male-to-male sex among prisoners was frequently or occasionally encountered.

Everywhere there are numerous anecdotal reports about sex in prison. "[Homosexuality in prisons] is a subculture, specifically in the long term prisoners, who take what call their 'wives' in prison slang," says Michael Hubschle, Namibia's Deputy Director of Prisons and Correctional Services. Researchers in Zambia found that about 8% of the 452 inmates at Kamfinsa prison admitted to having had homosexual sex in prison. However indirect questioning suggested the proportion was much higher.

Rape, often of younger inmates by older ones, also occurs. But it is even harder to get information about how common this is. Kaundja Mbure a prison counsellor in Namibia admits that even she does not know the extent of the problem among the inmates she works with. "Sometimes they tell us, but sometimes they are afraid, because there are some prisoners who are keeping knives and stuff like that to kill others. They are threatened, you know."

When HIV positive prisoners become ill, treatment facilities are rarely up to the task of caring for them. For example in Lurigauchon prison in Peru, as many as 9% of inmates are believed to be HIV positive. When these inmates begin to succumb to AIDS, they are isolated in a separate wing of the prison. There are few doctors and no medicine for treating the oppor-

tunistic infections associated with AIDS.

In some countries such as Namibia and Italy, inmates who become very ill are sent home to their families or communities. In Italy patients are even released from prison for short periods for medical care. This scheme ran into trouble two years ago when one HIV positive inmate who was supposed to be at a treatment centre committed another offence.

In many prison systems, including Russia and Namibia, when HIV positive prisoners are identified either by testing or by their symptoms, they are segregated from the rest of the prison population. Prison authorities argue that segregation serves as much to prevent prison abuses of others as to prevent the further spread of the virus. In reality, segregation makes prisoners feel stigmatised and isolated and pushes the disease underground. In addition many prisoners with HIV may not be identified by the authorities and will be integrated with other prisoners. Those believed to be negative may be under the false impression that they can have made to male sex without fear of contracting HIV.

In South Africa, a movement led by NGOs and church groups persuaded the prison authorities to change their policies and integrate HIV positive and negative prisoners. Before that, says Kekana, "the warders just wanted [those with HIV] to be locked away and refused to monitor them. The [HIV positive] prisoners were very depressed. Some attempted suicide or tried to make daring escapes."

According to the European Community and World Health Organization, guidelines for HIV control devised by National AIDS Control programmes should apply equally to people in prison. Recommendations include the right to be integrated with HIV negative prisoners and to confidentially, equal access to medical treatment and counselling and, in a package of measures known as harm reduction, access to condoms, clean needles, syringes and bleach.

For harm reduction to work, prison authorities must recognise that risky practices inevitably occur in prison life. However laws banning male-to-male sex exist in most developing countries. Prison authorities argue that distributing condoms would encourage illegal acts.

Among developing countries, South Africa has one of the most enlightened policies. In nearby Namibia, Michele Hubschle uses the lessons of South Africa to campaign for change.

"I am citing this story all the time. A young guy came to a prison last year in South Africa. He was a regular blood donor so he was clean. He got AIDS in prison and in that case I don't know if it was out of choice or forced sex, but the reality was that after a few months he had full blown AIDS. So the family decided to take the minister of correctional services to court. I am telling my Colleagues on a continuous basis that it is better to cope with the reality here in our prisons and provide condoms, do it together with counselling and education of prisoners."

Source: PANOS-Media Aids Information

Police Prejudice Cashes in on Post-Communist Permits

by Kester Kenn Klomegah

POLICE harassment of dark-skinned people in Moscow and other Russian cities is getting worse, say the victims.

Detention, assaults and extortion are an everyday occurrence, not just for African and Asian residents, but also for people from neighbouring republics who were once part of the Soviet Union.

Vladimir Verahkov, a spokesman for the Moscow militia, revealed the prejudice which fuels such harassment when he said it was "more than obvious" why certain groups of people are stopped and asked for the internal passports which everyone is required to carry. "This is a category of people who are more prone to crimes than anyone else", he said.

A more accurate description of the situation comes from Sergey Kovalev, chairman of the Presidential Human Rights Committee, who notes sardonically: "It's easier to catch blacks than to catch criminals."

Victims of racial harassment do not go to the courts for redress, because they know they will not get a hearing. Jahilil Ismailov, a trader

from Azerbaijan tells how the police "looked at my residence permit and just tore it in half... They held me for five hours. It was like a concentration camp."

"They forced me to stand with my hands behind my head until I fell to the floor. They were holding pistols, pretending to shoot... They provoke you and subject you to a body search as though you are a criminal."

Another Azerbaijani, Asadaga Mekhtiev, a 33-year-old teacher, has a similar story. "There is terrible harassment of Azerbaijanis, Georgians, Armenians and other coloured people", he says. "As soon as police see that there are blacks, not Russians, they make arrests immediately, without tangible reason."

"The police examine your stamp, tell you the permit is incorrect and impose fines", as well as making racial slurs.

Aslan a 20-year-old Chechen who has lived in Moscow for three years, says that "every time you go out, you can count on being stopped at least once. I'm always afraid of the subway where the police frequently mount checks on foreigners."

"Sometimes, we'll be stand-

ing, waiting for a bus, and they'll drive up to us because we're easily recognised from the crowd."

Part of the problem stems from frustration at the crime and corruption that has afflicted Russia in the wake of the far-reaching political and economic changes that have accompanied the fall of communism. These social ills have engulfed the law enforcement agencies, who have looked around for someone to blame.

In 1993, for instance, the Moscow authorities accepted and strictly enforced *propiska* (residence requirements), a legacy of totalitarian control from the Soviet period.

The *propiska* — which appears as a stamp in internal passports — was developed originally to stem the flow of rural people into towns and cities and to keep track of people's whereabouts. It restricted every resident to one legal place of residence and was a requisite for getting a job, entering a school or university, getting married and for several other activities.

The highly bureaucratic procedures involved in obtaining this vital document have en-

couraged bribery and fake marriages.

Abdulla Khamzayev says one of the problems is that victims of police abuse have no reliable legal recourse: the abuser and the possible source of legal remedy are one and the same.

He claims that "corruption and insufficient understanding of proper legal practice" in the judiciary is exacerbated by "a widespread lack of trust in law enforcement."

"The Soviet people are the last to seek protection from the law. And that's particularly true of Muslims. They've never seen protection from the government... Who can you turn to?" asks Khamzayev.

Several human rights organisations are now pressing Moscow to establish and enforce penalties for law enforcement agents guilty of racial discrimination or acts of violence against people whose only offence is to lack a particular permit. — GEMINI NEWS

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The Dilemma of Unnatural Death

"In fact the postmortem system in Bangladesh was faulty from the beginning. country it's police, who are not experts in this field, take the decision first whether autopsy will be conducted on the deadbody or not,"

by Ruhul Motin

WHEN Sabir Ahmed died in Dhaka Medical College Hospital his family had no time to grieve. Because he was not a natural death. The middle-aged man, a resident at Mohammadpur Geneva camp, died from stab injuries a day after he was kidnapped by some unknown miscreants and left in coma in front of the hospital.

Because Ahmed died an unnatural death in a hospital a police case is a must under rules. The family can't take the body until doctors perform a post-mortem and gives a death certificate. The postmortem is not possible unless police files their report on the death.

The scene of death is also an important factor in this regard. Ahmad was a resident under Mohammadpur police station, but his death occurred under Rahman police station. It had to be decided which of the two police stations would deal with the case.

"Since we reside under Mohammadpur police station we filed the case there. But Ramna police station was also involved. So we started shutting between the two police stations," said relative of Ahmed. Said he, "It was not time to mourn for the death. Because we were worried about how to get the body from the hospital for burial."

No option was thus left for the unfortunate family but to run from one thana to another thana. Even then they could not collect the spot investigation report from the police station until noon, long hours after Ahmed's death. Doctors would not touch the dead body until the police report reach them.

For Ahmed's relatives, who gathered outside the hospital, it was long tormenting hours of waiting for the body.

It was almost 24 hours the grieving family spent to fulfil the official requirements before they could collect the body from the hospital.

The process is tortuous. To collect an autopsy report, one has to sweat a lot moving from one department to another in addition to running after the police. Doctors say the system is outdated. Moreover, the hospitals are understaffed, unable to cope with growing number of unnatural deaths.

Postmortem is a medical examination made after unnatural death that involves police investigation too.

As per the existing rules, physicians take decision to carry out postmortem on a body after getting the spot investigation report from police.

According to Bangladesh Penal Code and Police Regulation, a case must be filed with the police concerned after an unnatural death of any person and the police after spot investigation will take decision whether it was a natural or unnatural death. They send a spot report to doctors if they think that the death is unnatural.

"Doctors never touch the dead body until they think that the spot investigation report sent by police is correct," said Jaedul Karim, a teacher of Forensic Department of Dhaka Medical College.

"In fact the postmortem system in Bangladesh was faulty from the beginning. In our country it's police, who are not

experts in this field, take the decision first whether the autopsy will be conducted on the deadbody or not," Dr Karim pointed out.

He said most police are likely to make mistakes in their spot investigation reports as they have little knowledge about the related medical science.

Dr Karim attributed the unusual delay in delivering the postmortem reports to frequent mistakes in the spot investigation report sent by police.

Such hazards could have been avoided if there were Coroner Department like they have in countries like Britain, India and Sri Lanka," he said.

According to medical science, a Coroner is entrusted with the responsibility of conducting postmortem. The department can be staffed with the policemen who have experience in the related medical science.

A police official, who spoke on condition of anonymity, said police send dead body to hospital with the spot investigation report even though there may not be any sign that the death is unnatural.

"Police do not want to take any chance. Because many of these cases travel to court," he said.

In case of unnatural death in hospitals, the on duty doctors notify the nearest police station and send the body to morgue with a death certificate, and then the police submit their spot investigation report to conduct postmortem on it.

About the death certificate, Dr Jaedul Karim said doctors

can't provide death certificate if he/she does not see the patient 24 hours before death.

That's another reason why delays occur.

Among other reasons are not having enough doctors.

The workload is increasing every year.

Doctors at Dhaka Medical College Hospital performed 1632 autopsies in 1990. This increased to 1830 three years later and 1943 in 1994 rising to 2331 in 1995 and 2316 in 1996.

Dr A K M Shamsul Islam, Chairman of the Forensic department, said sometimes dead bodies come in large number, delaying the postmortem.

"But we cannot hold up the autopsy of a body for the following day because we have no refrigerator to preserve it. For lack of which the dead body may lose the symptoms necessary to ascertain the cause of death," he said.

Since there are problems, delays and difficulties, there is corruption too.

Masud Ali, a middle aged man, is one of those victims who had to bribe the morgue staff for favours in the Dhaka Medical College morgue.

— New Network

LAW WATCH

Sexual Harassment Guidelines

A Milestone in Judicial Activism

IN view of the increase of cases reported on sexual harassment of women, the Supreme Court of India, on a writ filed by women's NGOs, has laid down guidelines to obviate such harassment at places of work, and at other institutions including universities, hospitals and other professional bodies. In the absence of any legislation, the court has held that these guidelines shall be legally binding and enforceable. With respect to employment, the guidelines are applicable to the government, public, and private sector, and cover women drawing a salary or an honorarium or working as volunteers. The court has directed all employers and other responsible persons in work-places and other institutions to ensure the prevention of sexual harassment of women and to provide procedures for resolution, settlement and prosecution of acts sexual harassment. Most significant, the Supreme court has brought sexual harassment within the purview of human rights violations.

Definition

Sexual harassment is unwelcome sexually determined behavior, direct or by implication, and includes: physical contact and advances, a demand or request for sexual favours, sexually coloured remarks, showing pornography, any other unwelcome physical, verbal or non-verbal conduct of sexual nature.

Acts of sexual harassment can be humiliating, can create a hostile work environment and may constitute a health and safety problem for women. Employers and responsible persons need to ensure that a woman objecting to harassment is not disadvantaged in respect to her employment and promotion.

Prevention

In order to prevent the occurrence of sexual harassment, the Court has directed employers and persons incharge of the workplace to take the following steps—

(a) Express prohibition of sexual harassment as defined above at the work place should be notified, published and circulated in appropriate ways.

(b) The Rules/regulations of Government and Public Sector bodies relating to conduct and discipline should include rules/regulations prohibiting sexual harassment and provide for appropriate penalties in such rules against the offender.

(c) As regards private employers steps should be taken to include the aforesaid prohibitions in the standing orders under the Industrial Employment (Standing Orders) Act, 1946.

(d) Appropriate work conditions should be provided in respect of work, leisure, health and hygiene to further ensure that there is no hostile environment towards women at work places and no employee women should have reasonable grounds to believe that he is disadvantaged in connection with her employment.

Complaints

Employers are expected to set up within their organisation an appropriate complaints mechanism. The Court has recommended provision for a complaints committee, a special coun-

sellor and other support services for handling complaints. With respect to the committee, the following guidelines have been laid down:

The committee is to be headed by a woman. At least half of the committee members should be women. To prevent undue pressure from within the organisation, the committee should include a third party representative from an NGO or any other body conversant with the issue of sexual harassment. The complaint should be handled confidentially and within a time bound framework. The committee is required to submit an annual report to the concerned Government department. Employers and persons in charge are required to report to the appropriate Government Department regarding compliance with the aforesaid guidelines.

Disciplinary Action

Where such conduct amounts to misconduct in employment as defined by the relevant service rules, appropriate disciplinary action should be initiated by the employer in accordance with those rules.

Other Provisions

In addition to preventive and remedial measures, the Court has also stressed the need for awareness-raising in the workplace. Employers should be allowed to raise issues of sexual harassment at workers' meetings and in other appropriate forums. Sexual harassment should be affirmatively discussed in employer — employee meetings. The guidelines stressing the rights of women workers must be prominently notified.

Criminal Law

In addition to the above the court has also addressed sexual harassment and criminal law remedies.

(a) Where such conduct amounts to a specific offense under the Indian Penal Code or under any other law, the employer shall initiate appropriate action in accordance with law by making a complaint with the appropriate authority.

In particular, the employer should ensure that victims, or witnesses are not victimized or discriminated against while dealing with complaints of sexual harassment. The victims of sexual harassment should have the option to seek transfer of the perpetrator or their own transfer.

Where sexual harassment occurs as a result of an act or omission by any third party or outsider, the employer and person in charge will take all steps necessary and reasonable to assist the affected person in terms of support and preventive action.

These guidelines are binding and enforceable in law until such time as the Government passes appropriate legislation.

This is a summary of the sexual harassment guidelines judgment delivered by the Supreme Court of India on August 13, 1997.