

Law and Our Rights

A Milestone in Judicial Activism

'The Calling for a Bandh is Illegal and Unconstitutional'

by AG Noorani

On 28 July 1997, the High Court of Kerala made a declaration that the calling for a bandh by any association, organisation or political party and the enforcing of that call by it is illegal and unconstitutional. We direct the state and its officials, including the law enforcement agencies, to do all that is necessary to give effect to this declaration.

lence or threat of violence is an integral, inseparable part. The Court said: "When the organisers of a bandh call for a bandh they clearly express their intention that they expect all activities to come to a standstill on the day of the bandh. A call for a bandh is obviously distinct and different from the call for a general strike or the call for a hartal. The intention of the callers of the bandh, to ensure that no activity either public or private is carried on that day, is also clear from their further statements sometimes made that newspapers, hospitals and the milk supply are excluded from the bandh. This clarification obviously implies that otherwise the intention is that those services are also to be affected."

The implication is all too obvious — such movement as takes place that day does so by leave and licence from the bandh's organisers. The state withers away for the day. The citizen's fundamental rights "to assemble peacefully," "to move freely" and "to practice any profession, or to carry on any occupation, trade or business — all embodied in Article 19 (1) on the Constitution — are suspended. So, truly is the right to freedom of speech and expression. No one will be allowed to hold a meeting to denounce the bandh, that day.

The Court sternly rejected

the invitation to adopt "an ostrich like" approach: "It is no doubt true that while calling for a bandh it is not also announced that any citizen not participating in the bandh will be physically prevented or attacked. But experience has shown that when any attempt is made either to ply vehicles on the day of the bandh or to attend to one's own work, or to open one's shop to carry on trade, it has resulted in the concerned person being threatened with consequences if he took out his vehicle, if he went for his work or if he kept his shop open. The leaders of the political parties who call for the bandh cannot escape by saying that they are not directly telling the citizens not to do these things under threat but if some of the participants in the bandh indulge in such activities, they cannot be held responsible. Obviously, they can with reasonable intelligence foresee the consequences of their action in calling for the bandh."

The petitioners produced newspaper cuttings to establish that bandhs were invariably backed by threat or use of violence. No serious attempt was made to controvert the charge. All transport systems are affected. Even the working of the High Courts is affected. "Even if there is no express or implied threat of physical violence to those who are not in sympathy

with the bandh, there is clearly a menacing psychological fear instilled into the citizen by a call for a bandh which precludes him from enjoying his fundamental freedoms or exercising his fundamental rights."

GHERAO

On 29 September 1967, a Special Bench of the Calcutta High Court ruled that a gherao invariably, inescapably involves offences under the Penal Code. The police was bound in law to prevent commission of the offences and to apprehend and prosecute the guilty. It struck down as illegal two circulars issued by the West Bengal Government to the police restraining them in the performance of their duties under the Criminal Procedure Code and the Police Act.

Referring to that ruling, the Kerala High Court observed: "We think that whereas gherao is limited to a particular industrial house or its officers and its workers, a bandh in a sense involves the gherao of the citizenry if not by actual physical prevention but by holding out in unmistakable terms a threat of consequences on failure to obey the call for the bandh."

Violation of the citizen's rights is grave and obvious. It is pointless to say that the injury is not by an "state action" but by private bodies. The state becomes an accomplice when it fails, consciously or otherwise, to enforce the law. We have even had state-sponsored bandhs.

RIGHT

The Court said that political parties "may have a right to call for non-cooperation or to call for a general strike" provided it is "unaccompanied by express or implied threat of violence to enforce it."

The state's culpability cannot be denied. Come to think of it, in the famous Bandhua Mukti Morcha Case (1984) the bonded labourers worked in stone quarries run by private individuals. The state's culpability lay in not enforcing the law against them.

These observations apply with yet greater force to bandhs.

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Activist Power: A Tale of Alternative Force

by Abul Hasnat Monjurul Kabir

The NGOs and activists took the path that many of us hesitate to take for want of time or caring. The road to change, as they found out is strewn with thorns. It is long and winding one, always uphill. But their journey has already made a remarkable difference to the lives of the people they wanted to help.

LIFE is suffering, the Buddha said, enunciating the first of his four Noble truths. In South Asia it is a reality that troubles us wherever we go. Homeless children imploring motorists at traffic lights for a few penny even as their tender lungs breathe in noxious fumes. The sick dying for want of medical care. The poor are deprived of their legal and fundamental rights as they can't seek justice from the judiciary due to huge expenses and for want of legal aid, the helpless people are generally harassed by the law enforcing agencies. The opposition groups or activists of the government or party in power are often treated cruelly, ruthlessly. For millions in this region, the flame of hope is but a flicker.

As citizens of this country, there is much that each of us can do to prevent that flame from being snuffed out. Or to help it burn more brightly. Yet those of us who are better off appear paralyzed by the enormity of the problems confronting the region. We inure ourselves to the surrounding misery. It does twinge our conscience occasionally. But we soothe it by writing a cheque to a local charity or throwing a few coins into battered tiffin carriers. Usually we do nothing more. Let someone else pick the dying of the roads. Let orphans fend for themselves. Let the Government look after the poor helpless people. After all are we not paying our taxes?

Even if we did want to do something we ask ourselves where do I begin: can I really be of much help? In his poem 'Road Not Taken' Robert Frost hints at the answer: "Two roads diverged in a wood, and I took the one less travelled by And that has made all the difference".

Since the end of the Second World War and most especially

since the end of the 1970s, there has been explosive emergence of local, national and international voluntary organizations working for the promotion and protection of human rights on every continent and almost every country in the world. Hundreds of such organizations now exist in the South Asian region. In fact things are changing dramatically. Various Non-governmental Organizations (NGOs) and groups of activists are now emerging as a bold new social force for change. Many of the groups are increasingly keeping South Asian governments on edge. Their goals are often lofty. They want to reduce poverty, improve women's status and empower them, safeguard the environment, protect workers from abuse and consumers from fraud, expose corruption, bolster human rights and defend democracy. They work in Asia's villages and slums, they offer credit, vaccines, job training and legal aid. In some countries these NGOs provide services that governments do not. They wield banners when necessary and wheedle officials when possible. Atrocities caused by the law enforcing agencies, death in police custody, rape committed by law enforcers etc. sort of brutal violation of human rights now can't pass on without NGOs' timely intervention.

These NGOs, in all their diversity comprise a human rights movement that has taken us from a world in which governments are free to treat their citizens as brutally, callously or arbitrarily as they pleased to one in which political authorities are now accountable to internationally defined standard of human rights. NGOs have been the dynamo that has driven the struggle for self-determination, the struggle for democratic pluralism, and the struggle for a more just economic order.

NGOs in the human rights arena perform a wide variety of functions. These will vary with

the differing political, social, economic and cultural situations in which NGOs find themselves. The issues that absorb human rights NGOs in the developed western democracies and the strategies and tactics they will employ, will be very different from the issues of political repression, or of NGOs in Third World countries facing such multiple crises as famine, ecological degradation, foreign debt, ethnic violence, lawlessness and corruption.

In a report by a Non-governmental Advisory Group (Put Our World to Rights) published by the Commonwealth Human Rights Initiative, the functions of the NGOs regarding the protection promotion and enforcement of human rights are summarized under the following nine heads:

- 1. Information Gathering, Evaluation and Dissemination (of information).
2. Advocacy to Stop Abuses and Secure Redress.
3. Legal Aid, Scientific Expertise and Humanitarian Assistance.
4. Lobbying National and International Authorities.
5. Legislation to Incorporate or Develop Human Rights Standards.
6. Education, Socialization or Empowerment.
7. Building Solidarity Among the Differing Sections and Classes.
8. Delivery of Various Social and Technical Services.
9. Keeping Open the Political System.

Sadly, there is still a tendency on the part of the governments of the South Asian countries to regard human rights NGOs with suspicion, to equate their criticism with treason or subversion. Thus, human rights defenders in the forefront of the struggle are very much at risk in many areas of the world. The United Nations Commission on Human Rights has established a Working Group on Defenders with a view

to drafting a declaration for the better protection of human rights organizations and advocates.

Human Rights NGOs are now also playing crucial role in shaping and flourishing the concept of public interest law. Besides activism, they go to court and take help of the formal justice system. No doubt the whole South Asia will be seeing more NGOs in the near future because they do make a difference and for that millions of Asians are thankful.

Along with the genuine Human Rights agencies, official or non-governmental, the Human Rights movement in South Asia is slowly advancing in the right direction. One should not forget that the road towards reaching the destination of Human Rights is very long, full of detours and pathos. Yet humanity has to reach the destination. One great stumbling block on this road is poverty and tendency and temptation to exploit poverty is rampant all over the world. Human Rights has no meaning to persons with empty stomachs, with no shelter on their head, and nothing, practically nothing, to cover their shame.

The NGOs and activists took the path that many of us hesitate to take for want of time or caring. The road to change, as they found out is strewn with thorns. It is long and winding one, always uphill. But their journey has already made a remarkable difference to the lives of the people they wanted to help.

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 Generation' organised by World Future Studies Federation in cooperation with UNESCO on 2nd October 1997 in Brisbane, Australia.

LAW WATCH

Legal Notice Against Grameen Phone

A legal notice was served upon the Grameen Phone Limited under instructions of certain subscribers from the chambers of Dr M Zahir, Barrister-at-Law, Senior Advocate, Supreme Court. It was alleged in the notice that due to Grameen Phone's inefficiency and negligence in providing adequate base stations, the subscribers are unable to get proper signals; that it has become nearly impossible to make calls from Grameen Phone mobile to land-line due to insufficient networking Grameen Phone totally useless. The notice alleges that the Grameen Phone Limited has defrauded thousands of people by luscious advertisements and are indifferent towards any service. Any complaint goes unheeded. The notice servers feel that Grameen Phone should not be allowed to continue to take any more subscriptions or charge the monthly rentals. The notice calls upon Grameen Phone Ltd to take immediate steps so that the subscribers can make outgoing local phone calls with reasonable ease failing which legal steps shall be taken to protect the interest of the subscribers in the proper forum in due course.

Justice for Children: An Agenda for Action

by Arafat Amin

OUR future is lying in the heart of our children. One day these children will be the helm of the nation. So to create a world of peace and prosperity, we must ensure social security for our children. Juvenile crime is now one of the major problems that each and every country is facing. Man has been facing this problem from the very beginning of its civilization.

the probation officer. But to do justice to the juveniles one should have proper knowledge about child psychology. Without this knowledge steps taken by the judge will not be immaculate. In this matter if we go through the Indian system we will see that there is a Child Welfare Board composed of a Chairman and other members who will be appointed by the administrator. One of the members will be a woman. About the eligibility of the magistrate and other officials it has been said in the Indian Juvenile Act that they should have adequate knowledge about child psychology and child welfare. But in our system no such things have been provided. Specially the probation officer whose duty is to collect reports and the judges should have the knowledge of child psychology. In USA the juveniles are referred in the juvenile court by the police who have arrested them.

In some cases, private citizens or the child's parents can refer the child to the jurisdiction of the court. A petition is submitted with the juvenile to the court specifying the particular statutory violation, and it usually includes some additional information such as the name, age, and residence of the child; the names and residences of the child's parent or guardian; and a brief description of the circumstances surrounding the commission of the offence. Then an intake interview of the juvenile is taken. Usually the intake process is presided over by a referee. The qualification of the referee is that he should have a background in social work or knows about behavioural sciences or in some cases may also be an attorney.

Punishment If the crime is proved then the juvenile court may send the juvenile to a certified centre, remand home or in some special cases where the offence is grievous, to imprisonment. The ultimate object of the juvenile justice is to reform the child. For the reformation of the juveniles in Bangladesh we have only one institute situated at Tongi. In this institute the juveniles have the opportunity to get both technical and normal education. This institute is not enough to meet the problem. We need more reformatory institutes in our country. On the other hand the institutes should be modernized and it should have some special features. The juveniles should be given psychological assistance in these institutes. But here we don't provide such assistance which is essential for the reformation of the juveniles. The juveniles need proper guidance and assistance for their recovery. Instead of sending them to any rehabilitation centre if they are sent to the jail, there will be no hope for

them to recover. We know it very well that how woeful the situation in the jail is! There they will get the chance to mix with the professional criminals, which will make them prone to criminality.

Juvenile crime and police department

It is the prime duty of the police to maintain the law and order situation in the country. So the police department has a key role in preventing juvenile crime in the country. When a juvenile is arrested for any offence the first thing that the police has to do is to determine the age of the offender. If he is under 16 years of age then the police will inform the probation officer to make an investigation into the matter and will present the juvenile before the court within 24 hours. This is a normal procedure, but how far it is followed is a question of fact. A probation officer or police officer can arrest a juvenile without any offence if they think that he might commit an offence. But the duration of the detention will not be more than 24 hours. A juvenile is no longer in the police custody as we have seen many deaths occurred in the police custody. In police custody the juvenile gets no special assistance which he actually needs. When the trial will be over? What punishment he will get? When he will be freed? For these uncertainties he will go through a mental trauma. At this stage he needs some mental support to recover from this situation. But recovery in this matter will not get these opportunities.

Moreover the worst thing happens when the children are beaten by the police. For an example it is not an unusual scene to us that a "Tokai" is beaten by the police. Though our constitution provides that no one shall be tortured or beaten, it is not actually followed. Specially when the police beats a child, it leaves a bad impact in his mind and creates hatred for the police and leads him towards disrespect for the law. So the police should deal with them carefully. They should not be harsh on them. To deal with this matter the police should be specially trained and be given adequate knowledge about child psychology.

Last but not the Least

A crimeless society may not be feasible but we can try to reduce its number. Measures taken for preventing crime can be applied to prevent juvenile crime. Various steps have been taken by many countries to prevent juvenile crime. In the four cities of Morocco there are clubs for children to provide entertaining program for them. In Philippine a program has been taken to give assistance to the juveniles. In Israel, Belgium and Netherlands there are shops for children where they

can demand legal assistance. In New Zealand an Act related to children and juvenile was passed in 1989. This Act provides special protection for the children. The object of this Act is to simplify the trial procedure of the juveniles and to attach the family members of them in the trial procedure. In 1996 Tawesia adopted a children protection Act. According to this Act the juvenile offenders should be consulted before trial and their trial will be held in the juvenile court by a specially trained judge. Sweden has achieved tremendous success in juvenile justice system. In Sweden a juvenile less than 15 years cannot be punished under penal code. And without some exceptional cases a juvenile under 18 years cannot be punished to imprisonment. Again a juvenile less than 21 years cannot be sent to life imprisonment in Sweden.

The juvenile justice system should be upgraded in our country. We have to take steps to modify our juvenile justice system to make it more humane. Some suggestions are discussed as follows:

- 1. The definition of child should be changed and the age limit of a child should be 18 years.
2. Liability should be imposed upon a child after the age of 12 years and not before.
3. The judges should be specially trained in child psychology while conducting their trials.
4. The qualification of a probation officer should be mentioned in the Children Act.
5. More rehabilitation center for the juveniles should be established in the country.
6. During their trial the juveniles should be kept in some special place but not in police custody so that they can get proper assistance.
7. The police department should be given adequate training to deal with the juveniles. Police must be child-sensitized.

It is submitted that we cannot stop crimes. But at least we can try to keep peace in the society. Many measures have been taken by different countries to prevent juvenile crime, which could not be taken in our country due to our incapacity. But we can give our children a better Act, which will ensure their rights and give proper assistance. We hope that the Government will look into the matter and take necessary steps to enact a new law, which will give our children a better tomorrow.

The writer is the Investigation Secretary of Law Watch, an alternative platform for legal and human rights studies and action. This is the revised version of the paper presented in a Round Table Organised by Law Watch in collaboration with UNICEF on 14th August 1997.

BANGABANDHU MURDER CASE

Verbatim Text of Cross Examination of Twenty-fourth Prosecution Witness

Continued from Friday

Following are the excerpts from the cross-examination by Advocate Khan Saifur Rahman, defence counsel for Lt Col (dismissed) Syed Farooq Rahman:

Q: Did you go to any other house before going to the radio station from Serniabad's house?

A: No.

Q: When the radio announcement was made by Major Dalim, before or after you reached the radio station?

A: After I reached the radio station.

Q: Did you get any hints that a preparation was underway for making a radio announcement?

A: I didn't get any hints as I was on duty at the gate.

Q: Why did you go to the radio station from Serniabad's house instead of the cantonment?

A: Battery Commander can say that.

Q: Did you see any tank going to the radio station?

A: After reaching there we did not see any tank, but later we saw two tanks.

Q: Tank crews were wearing black dresses.

A: I didn't see what dresses they were wearing who were inside the tank.

Q: Did they come out of the tanks?

A: I didn't see.

Q: Was there any annual joint exercise?

A: I have seen separate exercises. I don't know anything about joint exercise.

Q: Gun fire takes place during exercise.

A: I don't know.

Q: What type of exercise you had?

A: We followed the order of the seniors.

Q: Exercise took place on that night.

A: We had night training, road march and march up on that night.

Q: The personal arms of Lancer was G-3 Rifle.

A: I don't know.

Q: During your service life, had you ever seen any lancer soldier carrying personal weapon?

A: Yes.

Q: Is there any practice ammunition during night training?

A: I don't know.

Internal Security (IS) duty.

Q: You had been placed under the civil administration at Manikganj.

A: I was placed with the police station for arms recovery.

Q: You were to help the police.

A: To investigate and recover arms.

Q: After you joined the army you had duty in civil areas twice. Once at the radio station for 12 days and the next time at Manikganj.

A: Yes.

Q: Didn't you hear about any trouble in November while in Manikganj?

A: I heard about a trouble.

Q: The tanks near the radio station were within your sight.

First the witness answered in negative, but later he said that he could see those.

Q: On August 14, 1975 Bangabandhu's government was in a power.

A: I was just a sepoy. Officers were our government.

Q: You can't say whether Bangabandhu government or BKSAL government was in power on August 14.

A: I can't say.

Q: You have said that your officers were your government. That means "to topple the government," was to topple the officers.

A: I don't know. The officers said that the government would have to be toppled — what they wanted to mean by that, I can't say.

Q: Did you understand that you will have to topple your officers on that day?

A: I didn't understand anything.

Q: What was the uniform of lancer?

A: Black.

Q: What Farooq was wearing during the night training — black dress or kaki?

A: Black dress.

Q: What was your duty in the radio station?

A: Security duty.

Q: An officer was looking after the coming and going to the radio station.

A: Who ever entered there was supposed to be checked by us.

Q: Cars were also checked while going inside the radio station.

A: I can't remember.

Q: How did Farooq come to the radio station — on foot or by car?

A: I can't remember.

Q: In what dress Farooq was while entering the radio station, was he in black or khaki dress?

A: I can't recall.

A: Yes, in Pakistan.

Q: How many trucks were there during the night training?

A: There was no truck during the night training. Later, six trucks assembled there.

Q: How many people can board on a truck?

A: I can't say.

Q: Did you check Farooq while he was entering into the Radio Station?

A: No officer was checked on that day.

Q: Were the ammunition kept in the armoury?

A: No, there was separate places to keep the ammunition.

Q: How many trucks out of six went to the New Airport from your battery?

A: I don't know.

Q: Ammunition for the soldiers of other batteries were brought there in a truck.

A: I don't know.

Q: Name those who were on duty with you at the radio station.

A: Right now I can't recollect their names.

Q: Your memory has lost many things as the incident took place long time ago.

A: I still can remember the memorable things and talks.

Q: Can you remember your marriage time?

A: Memorable things can still be recollected.

Q: Can you say the sequence of events of 12 days of your duty at the radio station, starting from the night of August?

A: I have said the sequence of events correctly.

Q: Name the officers serially who went into the radio station.

A: At this stage, the prosecution raised objection and asked to pose specific question.

Q: Were you on duty at the radio station constantly?

A: No.

Q: How many officers went inside the radio station who were known to you?

A: Major Khandaker Abdur Rashid, Capt Jobair Siddiqui, Major Muhiuddin Ahmed, Capt Mostafa, Major Shariyar, Capt Mazed, Major Rashed, Major Dalim, Major Farooq and some others.

Q: Name them serially.

A: Major Dalim was the first to enter the Radio station and then Major Rashid. I can't recollect the serial of other officers.

Q: How many unknown officers went inside?

A: I can't say.

Q: All officers were coming on the occasion of the radio announcement.

A: I don't know that.

A: I can't say about the Martial Law and Mustaque becoming CMLA. But I heard about Mustaque that he had become the President.

Q: Did you come to know that President Mustaque was coming to the radio station?

A: No.

Q: The three chiefs of the Armed Forces gave salute to the President.

A: I don't know.

Q: Navy officers came to the radio station in white dress (uniform).

A: I saw the Naval Chief.

Q: How many officers from the Air Force went to the radio station?

A: I saw the Air Chief.

Q: Did you see the infantry officers?

A: Yes, they came later.

Q: Did you see any other military officers?

A: Many unknown officers also went into the radio station.

Q: Officers stayed inside the cantonment.

A: I don't know which officers stayed there.

Q: Did the officers go to the radio station on the order of the CMLA or army authorities?

A: I can't say.

Q: At the radio station, you were on Martial Law duty.

A: I can't say.

Q: You went to Manikganj under martial law order.

A: I can't say under which order I went there.

Q: During your 12-day stay at the radio station food used to come from the cantonment.

A: Yes.

Q: Didn't you tell the IO from where you got the ammunition?

A: I can't remember whether I told him or not.

Q: Do you understand briefing.

A: By briefing I mean order.

Q: There are senior officers over the CO in the army.

A: I know upto my CO.

Q: You did not tell the IO that Farooq left the radio station.

A: I don't remember.

Q: Did you take part in any night training before that day?