

HUMAN RIGHTS monitor



Police remand and the need for judicial activism

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INCREASINGLY, the magistracy controlled by the executives becomes insensitive to civil liberties. Denial of bails, indiscriminate granting of police remand, the alleged torture of person(s) arrested in police custody create genuine concerns. What Advocate Mohsin Rashid of Bangladesh Supreme Court told on 04 April 2002 in a Bar Council seminar organised for the new entrants to legal profession clearly reflects the situation. "The Magistracy virtually turns into an extension of the Police. In earlier days, magistracy was not so; magistrates were the real friends of the people whose liberties were at stake. The situation is getting worst." Advocate Rashid quipped.

Widespread torture of detainees is common in criminal investigations in Bangladesh in all regimes, and has become an unmistakable feature of the government's crackdown against independent and political voices. Persons detained by police are routinely subjected to physical and psychological abuse, often from the initial moments of their arrest. The concerned authority often refuses to hold police and security forces accountable for acts of torture, and even tacitly encourages torture through its broadcasting of political prisoners' public "confessions" as tools of political propaganda. Instituting legal and judicial reform to halt torture, and ending impunity for it, should be a matter of priority for the government of Bangladesh and for all parties interested in human rights and the security and stability of the region.

Unqualified use of the qualified power of arrest

A lot have been written on the abuse of the Section 54 of the Code of Criminal Procedure. The Code of Criminal Procedure, 1898 deals with some of the crucial procedural elements of the power and function of the police. Chapter V of the Code particularly deals with procedure and mode of arrest of which section 54 is of utmost importance. It grants police qualified power of arrest any person on reasonable suspicion without warrant on nine grounds. Practically section 54(1) is the most abused section of the Code. The Police, in fact do not comply with the provision in its totality. They bluntly ignore the qualifying terms mentioned in the section e.g., "cognisable offence" "reasonable complaints", "credible information", and "reasonable suspicion". It is being indiscriminately used by the police and as application of this section fraught more with ulterior motives than prevention of crimes and arrest of persons suspected of having committed or about to commit cognisable crimes. Most of the arrests under section 54 are caused on fanciful suspicion and in most cases to fill in the quota allotted to an individual police officer to make an arrest each day. This incredible practice has been going on with impunity for many years.

An arrest under section 54 is often a prelude to issuance of detention order under the Special Powers Act, 1974 (SPA). The SPA allows the authorities to detain any person on eight grounds, vague enough to detain any person according to the whim and caprice of the executives and the party in power. Such detention can extend to six months, and may extend beyond this period, if so sanctioned by the Advisory Board. The use and abuse of the SPA in the name of securing law and order have resulted in steady pattern of human rights violations. Successive governments have supported the continuation of this legal instrument that offer wide discretionary powers of detention

Police Remand

Mounting numbers of torture and deaths in pre- and post-conviction detention facilities over the past three decades attest to the brutality of the treatment meted out against detainees and prisoners. Although the Constitution of Bangladesh prohibits torture, few law enforcement officers are held accountable for it.

Illegal action of the police personnel, in most cases, are either authorised or endorsed by a magistrate. Refusal to grant bail to a person accused of a bailable offence at the instance of police is an example police-magistrate joint collaboration. Section 167 of the Cr.P.C. allows the magistrate to grant police remand in custody beyond 24 hours for a total period of 15 days on request from the police after s/he satisfied that there are grounds for believing that the accusation or information is well founded" (Sec. 167.1 of the Cr.P.C.).

The term 'remand' is practically synonymous with torture for extracting confession. Like refusal of bail, granting of remand is another instance of

and establishing good governance. Keshvanand Bharati Vs. Kesala, Minerva Mills Vs. Union of India, India of Gaudlis Vs. Raj Narain & S.P. Vs. Union of India etc. are few landmark cases that highlight judicial activism.

Using judicial activism as a weapon Supreme Court gives directive through government. In Vineet Narayan Vs. Union of India, the famous Hawala case Supreme Court monitored the risheshgahous, it issued directives for CBI and intelligence services to be present in all hearings. He said that Judicial reforms are needed therefore judicial activism should go hand in hand with judicial restraint.

Restrainted judges respect the political process, whether they agree with its results or not, until it clearly crosses a clear constitutional line. Activist judges feel free to re-write statutes or the Constitution, to use extra-legal factors in their decisions, to ignore limits on their power in the search for desirable results. However, in an established and well-balanced democratic system, judicial activism rarely adventures beyond certain limits. Because ultimately it is the Legislature, and the Executive created and sustained by the Legislature, that is accountable to the people whose will, after all, is sovereign.

The last hope?

The alarming trend of torture of the hands of the law enforcers in Bangladesh exposes once again its inherent tendency of being viewed with a philosophy of paramilitarism associated with the mechanism of awe, threat and coercion. The culture of impunity endorses the existing trend and protects the culprits from being prosecuted. It encourages others to follow the suit, as the criminal justice system is open to manipulation by the agencies.

The Supreme Court, as usual, remains the key institution for the protection of human rights of the bewildered. The traditional conservative doctrine of judicial restraint poses a serious threat to liberty, and is therefore not consistent with the fundamental objective of the framers of the Constitution of the People's Republic of Bangladesh. The purpose of the desired judicial activism, in the words of Justice V. R. Krishna

is to obliterate procedural anfractuositites, to broaden the idea of locus standi, to enable the penurious many to exercise their right of access to judicial justice, to abolish expensive nuances and pachydermic chaos of interpretation so popular in British Indian lawyering practices and to establish free legal aid and public interest litigation these were forensic urgencies and jural necessities if the democracy of judicial remedies were to reach the indigent, illiterate and alienated Indians who would otherwise find the complicated court system "untouchable" and even not "approachable".

The need of the hour is an organisational culture that condemns abuse of power and misuse of force and encourages pro people policing. All those who are concerned with the arrest, detention, and custody of the people, particularly of the poor and vulnerable sections of the society, must strictly implement the constitutional and legal protections and safeguards. It is necessary that the guardians of law and the custodians of lock-ups and prison houses should be made aware of the constitutional and legal rights of the people. For Bangladesh, an activist, goal oriented judiciary can limit the scope of executive arbitrariness ensure the implementation of its dictates. The long-awaited separation of judiciary from the executives by 30 May 2002 as per the dictates of the Appellate Division of the Supreme Court of Bangladesh may change the situation significantly.



police-magistrate joint solidarity, which at the end inspires the law enforcers to flout the legal safeguards more easily. In most cases, the magistrate does not ask for copy of the entries in the diary of the police officer making the investigation (Sec. 167.1 of the Cr.P.C). The magistrate in majority cases does not record his reasons with substance and clarity for allowing detention in the custody of the Police.

The criminal justice system lacks adequate procedural safeguards against police abuse, as it grants the prosecution wide powers concerning pre-trial custody, accesses to lawyers, and access to forensic evidence. Against the backdrop of such flagrant violations of the letter of the colonial law, the role of an assertive, pro-active higher judiciary becomes more important to break the unfortunate nexus between police and magistracy.

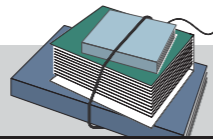
What is judicial activism?

The terms "judicial restraint" and "judicial activism" describe how a judge judges, that is, how he applies the law to facts in the cases before him. The difference is that restrained judges take the law as it is and activist judges make up the law as they go along. Judicial activism does not find any mention in the Constitution of Bangladesh, it is not defined anywhere but is widely talked about in all section of society, NGOs and bureaucrats. Assertion of Judiciary and its power is judicial activism, many people label it as over active judiciary. In South Asia, the Judiciary of India has created classic precedents of judicial activism for protecting human rights, human dignity

WANT TO BE A PART OF LAW DESK TEAM?

Law Desk is a fast developing specialised section of *The Daily Star* and is committed towards a people-friendly legal system in Bangladesh. Promoting culture of 'peace, tolerance and human rights' is one of the prime objectives of Law Desk. Recently, it initiates the Star Law Network for establishing a strong link among the 'doers' in legal and human rights community. Law Desk is looking for pro-active young lawyers/researchers/law students/students of other disciplines with strong English writing and editing skill who will be interested to contribute full-time/part-time to 'Law and Our Rights' section and the proposed 'Star Law Network'. If you are interested, please send your resume along with a 200-word write-up on "What do you think of the present human rights situation in Bangladesh" to Law Desk, *The Daily Star*, 19 Karwan Bazar, Dhaka-1215 on or before 30 April 2002. You may also mail us at lawdesk20@hotmail.com

REVIEWING the views



Lawyers must help improve judicial image

H.L. KAPOOR

THIS is an age of unprecedented judicial activism. This activism has, at times, curbed executive actions, earning popular approbation. In a democratic set-up nobody, however influential, can act arbitrarily. The rule of law must be respected so that the citizen knows where he stands. To ensure this courts have to uphold and protect citizens' rights and interests. People approach the courts anticipating speedy dispensation of justice. Delays in the judicial process causes them frustration and disappointment.

An independent judiciary is a prerequisite for upholding the rule of law and protecting the rights of citizens that are guaranteed by the Constitution. That may not be easy. Judges alone cannot dispense speedy justice. They must have the co-operation of the legal community and the government. A further complication for judges is that they cannot publicly comment on their judgments. They also have to ensure that the judiciary is not affected by political interference, especially the machinations of corrupt politicians. The judiciary has to ensure that its credibility remains intact in the public perception. If it is to be successful in doing so it needs all the help it can get - especially because good judges usually do not go public to defend themselves.

The legal fraternity has to play a prominent role in building the image of judiciary by following, if necessary, self-imposed codes of conduct. Lawyers, for instance, should not cast aspersions on the impartial conduct of presiding officers of courts. They should also not misuse safeguards provided by a plethora of legal codes, which help them protect the interests of their clients. They must ensure that their clients are not allowed to delay legal proceedings and subvert the ends of justice. Lawyers must assist judges to dispose cases fast. It is common in landlord-tenant disputes, for instance, to ask for 'stays' and delay judicial proceedings. If lawyers refuse to be complicit in such dilatory tactics they would gain in terms of public estimation and enhance the reputation of the judiciary.

In a place like Delhi, for instance, courts are spread over all over the city and it is difficult for lawyers to shuttle between them. As a result, they tend to seek adjournments on various pretexts. A section of the legal community feels, however, that there should be a "time limit" for arguing the cases to ensure speedy disposal of cases.

But other lawyers argue the opposite case. They say that in some cases the witnesses may be willing to appear in court in courts but could be prevented from doing so to benefit the accused so that the proposed time limit lapses.

Senior lawyers, with their vast and varied experience, can also guide new judges to ensure, sincerely, that there is no miscarriage of justice. There are also cases in which government advocates or standing counsels delay cases because they do not take much interest in expediting judicial proceedings. Of course, private lawyers are also guilty of delaying proceedings, bringing disrepute to themselves and their profession.

There is another problem. While the crime rate is increasing, the number of courts has not increased significantly. Cases are, thus, piling up. Speedy justice can be provided only if the ratio of cases to courts is improved. Serious concern was voiced by no less a person than former Supreme Court Chief Justice A.S. Anand over the large number of cases pending in courts. He said that the judiciary was overburdened and pointed out that in there is less than 20 per cent of the recommended number of judges, going by the Law Commission's suggestion that there should be 50 judges for every million people. Lawyers in the Capital have sometimes gone on strike, adding to the miseries of the litigants. They should refrain from doing anything that undermines the image of the legal community.

Lawyers raise their voice when they feel they have been wronged. We must remember that judges don't have this option. Though judges are the in some senses the most powerful people, 'no one is more defenceless'.

RIGHTS corner



Human rights practices in Bangladesh 2001 Freedom of peaceful assembly and association

BUREAU OF DEMOCRACY, HUMAN RIGHTS, AND LABOR

THE Government generally respects academic freedom. Although teachers and students at all levels largely are free to pursue academic assignments, research on extremely sensitive religious and political topics is forbidden.

The situation on public university campuses remains volatile, seriously inhibiting the ability of students to receive a university education and of teachers to teach. Armed clashes between student groups of different parties or of different factions within a particular party resulted in temporary closures of colleges and universities in Chittagong, Sylhet, and other localities. A woman on the Dhaka University campus was partially stripped during New Year's Eve celebrations on December 31, 1999. After a week of heavy criticism by the press, three members of the student wing of the ruling party were arrested but later freed on bail.

The Constitution provides for freedom of assembly, subject to restrictions in the interest of public order and public health; however, the Government frequently limits this right. Section 144 of the Criminal Procedure Code allows the Government to ban assemblies of more than four persons. According to one human rights organization, the Government imposed Section 144 bans 33 times during the first 9 months of the year. The Government sometimes uses Section 144 to prohibit rallies for security reasons, but many independent observers believe that such explanations usually are a pretext. Supporters of the ruling party frequently will schedule their own rallies for the same venue and time as scheduled opposition rallies and meetings, thus providing the Government a basis for imposing Section 144 for security reasons. The Krishak Sramik Janata League of former Awami League stalwart and present opposition figure Kader Siddiqi had to cancel a scheduled rally at Karimganj on May 14, because the ruling party's student wing announced a rally at the same time and place, prompting the local administration to impose Section 144. The BNP youth front could not hold its planned rally at Muladi in Barisal on June 29, because the local administration imposed Section 144 following a simultaneous rally by a ruling party organization at the same location.

Authorities also permit ruling party activists to blockade roads and take other steps to disrupt opposition events. During nationwide general strikes called by the opposition, ruling party activists routinely intimidate opposition supporters and seek to coerce shopkeepers and drivers to ignore the strike.

The Constitution provides for the right of every citizen to form associations, subject to "reasonable restrictions" in the interest of morality or public order, and in general the Government respects this right. Individuals are free to join private groups.

The law permits citizens to proselytize. However, strong social resistance to conversion from Islam means that most missionary efforts by Christian groups are aimed at serving communities that have been Christian for several generations or longer. The Government allows various religions to establish places of worship, to train clergy, to travel for religious purposes, and to maintain links with co-religionists abroad. Foreign missionaries may work in the country, but their right to proselytize is not protected by the Constitution. Some missionaries face problems in obtaining visas.

Governmental attitude regarding international and nongovernmental investigation of alleged violations of human rights

The Government generally permits human rights groups to conduct their activities. A wide variety of groups publish reports, hold press conferences, and issue appeals to the Government with regard to specific cases. While human rights groups often are sharply critical of the Government, irrespective of the ruling party, they frequently practice self-censorship, particu-

larly on some politically sensitive cases and subjects. In the past, the Government has consulted with human rights groups on some draft legislation and taken their views into account. In January after discussions between the Government and some women's rights groups and NGO's, Parliament passed the Women and Children Repression Prevention Act. However, the Government continues to refuse to register the Bangladesh Section of Amnesty International, which since 1990 has applied several times for registration under the Societies Registration Act. Without this registration, a voluntary organization cannot receive funding from abroad.

The Government is defensive about international criticism regarding human rights issues. However, the Government has been open to dialog with international organizations and foreign diplomatic missions regarding issues such as trafficking in women and children. Legislation to establish a National Human Rights Commission remained in abeyance for yet another year. Earlier the Government formed a cabinet subcommittee to review the draft legislation.

In the past, the Government has put pressure on individual human rights advocates, including by filing charges that are known to be false. Such pressure also has included long delays in issuing re-entry visas for international human rights activists. Missionaries who advocate human rights have faced similar problems. In the past, human rights organizations have reported that the Government has put pressure on them usually in the form of harassment by the intelligence agencies and threats from activists of the ruling party. During the year, the Government acceded to the U.N. International Covenant on Civil and Political Rights.

This is the last part of an abridged version of the annual State Department Human Rights Report released by the Bureau of Democracy, Human Rights and Labor in Washington.

The World Bank and legal immunity

LAW DESK REPORT

Finally the World Bank appeared before a district court in the capital city recently in response to summon in the case filed by a local officer who was terminated from job in July last year.

The government has earlier rejected the World Bank plea for immunity from legal proceedings and the court started ex- parte hearing of the case that challenged the termination of the officer. A press release issued by counsel of the sacked officer said World Bank's Dhaka office has been desperately claiming immunity of law of the land. They have been trying to coerce the government into signing an agreement granting immunity.

Failing in its endeavour the World Bank finally appeared in the court today in response to summon. "It is now established that the World Bank is not beyond jurisdiction of national courts or above the law of the land," said the press release.

As a specialized agency, the World Bank may be legally bound to uphold the principles of the UN Charter, including articles that ensure the universal protection of human rights. Although article VII of the World Bank charter claims legal immunity for the institution and its employees, recent legal precedents suggest that international law (which prohibits human rights violations such as genocide) takes precedence over these immunities.