Star JUDGEMENT *review*

Judgement on Sections 54 and 167

The onus is on civil society now

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(Continue from the last issue)

The police and the government will implement this new charter of liberty if only we all -- the civil society, political parties, lawyers and other professionals, citizens' groups, NGOs and all others -- immediately begin to demand implementation of the directives forthwith. .....An appeal by the Government against any of the 15 directives or propositions of law such as the power of High Court Division to order payment of compensation for violation of fundamental rights and other similar issues would only indicate that this government, similar to all other governments in the past, is not interested in the rights of us, the citizens of the country, if these rights are perceived by the government to curtail the power of the government to harass and oppress us.

THE first instalment of this write-up on the judgement dated 7th April, 2003 in Writ Petition No. 3806 of 1998 in the case of Bangladesh Legal Aid and Services Trust (BLAST) and others vs Bangladesh (in these pages last week) I drew attention to

(a) the enlightened interpretation of section 54 of the Code of Criminal Procedure to prevent arbitrary and whimsical arrest by the police,

(b) re-iteration of the authority of the High Court Division to direct payment of compensation in instances of illegal arrest followed by torture or death power,

(c) the illegality of preventive detention order under the Special Powers Act, 1974 on persons arrested under section 54,

(d) the right to consult a lawyer immediately upon arrest,

and other related matters.

Now this follow-up takes up other important aspects of the judgement including the limits set by the Court on the exercise of section 167 of the Code of Criminal Procedure, direction of the Court for amendment of the relevant sections and other related matters.

Safeguards for remand under section 167

Section 167 of the Code of Criminal Procedure comes into play when the police, after arresting a person and producing him before the Magistrate within 24 hours, ask the Magistrate to return the arrested person to the police custody (remand) on the ground that the police believe that the arrested person should be further interrogated for information about crimes.

It is a common knowledge that Magistrates routinely allow this request for remand the word 'remand' is not mentioned in the section but has to come to mean this taking back of the arrested person to the police thana, instead of sending him to jail. After bringing the arrested person back to the thana on remand "the police tries to extort information or confession from the person arrested by physical or mental torture and in the process sometimes also causes death."

Needless to say, we all have the constitutional guarantee of freedom from torture. Under Article 35 of the Constitution, no one can be tortured or subjected to cruel or inhuman or degrading punishment or even treatment and none can be compelled to be a witness against himself, i.e., no one can be compelled to confess to a crime, even if he has committed that crime. If someone voluntarily confesses to a crime, that is a different matter.

In many ways, the power conferred to the police by section 167 to ask the Magistrate for remand for further investigation is an exceptional power to be applied only in exceptional instances. In ordinary course of things, police must have enough credible and justifiable information implicating the arrested person in the commission of a crime. However, to say, as the police often seem to do, that a person may be connected with a crime, so lets arrest him first and then find out whether he is actually connected with any crime or not is obviously a travesty of the most fundamental of our fundamental rights, i.e., right to liberty. One of the most fundamental premise of the rule of law and governance under the constitution is that the right to liberty is the most cherished right and it can be curtailed only when it is absolutely necessary to prevent a person from committing another crime by keeping him confined in jail during the process of his trial for a crime and to imprison him only if he is convicted of a crime. Instead, what we have is the whimsical arrest, and request for remand to find out whether the person has committed any crime. This is surely a notion of the feudal era when the powerful could do anything as they were not bound by any law.

The judgement points out that before asking for remand, "the police officer must state the reasons as to why the investigation could not be completed within 24 hours and what are the grounds for believing that the accusation or the information received against the person well founded."

Besides, the judgement also points out, there is a third requirement to be fulfilled before asking for remand. Police Regulations require the arresting police officer to record the relevant information about the involvement of the arrested person in the commission of a crime, what investigation has been undertaken by the police, the places visited, the person asked, and so forth. However, police hardly ever produce these records to the Magistrates when asking for remand. But Magistrates without being satisfied of these legal requirements, routinely grants remand. Such practice is illegal. The judgement very forcefully held that:

"So we do not understand how a police officer or a Magistrate allowing 'remand' can act in violation of the Constitution and provisions of other laws including this Code and can legalise the practice of remand. … . Such interrogation may be made while the accused is in jail custody if interrogation is necessary.

Next, the use of force to extort information can never be justified. Use of force is totally prohibited by the Constitution. ….. So we find that even if the accused is taken in police custody for the purpose of interrogation for extortion of information from him, neither any law of the country nor the Constitution gives any authority to the police to torture that person or to subject him to cruel, inhuman and degrading treatment. Thus, it is clear to us that the very system of taking an accused on 'remand' for the purpose of interrogation and extortion of information by application of force on such person is totally against the spirit and explicit provisions of the Constitution."

It must be recognised that police may need to further interrogate an arrested person. It seems that the Hon'ble Justices delivering this landmark judgement were aware that it may not be practically possible to monitor whether the police is continuing with their illegal practice of torture in police thana hazat or not when the arrested person is brought back there on 'remand'. To eliminate the possibility of torture the Court directed that such interrogation can take place only in the jail. By implication, it seems that the judgement has totally prohibited 'remand' of the accused to the thana hazat. This is a most remarkable aspect of this extraordinarily forward-looking judgement. Development, advancement and civilisation are all about expanding and safeguarding rights of citizens and this principle of the centrality of rights has most explicitly enunciated in this judgement.

Punishment of police officers for torture and death

The Writ Petition provided detailed accounts of deaths in police custody over a number of years and these numbers, as we all know, are large and horrific. Over the years many people have been allegedly killed in Thana hazat or jails, but there has hardly been any prosecution of the persons responsible for these murders and tortures in custody. The judgement points out that: "If a person dies in custody either in jail or in police custody, the relations are reluctant to lodge any FIR or formal complaint due to apprehension of further harassment."

Under our present laws, a Magistrate can initiate legal proceeding upon a complaint lodged by a complainant. For deaths in police custody, as indicated in the judgement, the relatives are reluctant to lodge any complaint and police does not do so to implicate themselves in the crime of murder in police custody. Hence, the judgement recommended that in cases of death in police or jail custody, where post mortem indicates foul play, a Magistrate should be empowered to initiate legal proceedings against the suspect police, without waiting for a complaint from the relatives of the murdered person.

Also the Penal Code provides for punishment for extorting confession or information from any person and for confinement to extort such information. But these sections of the Penal Code do not provide for any specific crime of extortion of confession in police custody. The judgement, therefore, recommends that the relevant sections be modified to include a new crime of hurt in police or jail custody for extorting confession and such a crime be punished with imprisonment of upto ten years, with a minimum sentence of seven years of imprisonment as well as compensation.

Recommendations for amendment of laws

Another most important aspect of the judgement is the detailed recommendations for the necessary amendments to the relevant sections of the Code of Criminal Procedure, the Penal Code and the Evidence Act to ensure that the directions, guidelines and safeguards enunciated in the judgement are strictly followed as matter of law. Obviously, judge-made laws through precedents often suffice to change the meaning and application of laws and these are done routinely by judgments of both the Divisions of the Supreme Court. However, the Hon'ble Justices clearly recognised that their interpretation of sections 54, 167 and some sections of the Penal Code and Evidence Act are so far reaching that the goal of safeguarding rights and liberties of the citizens would best be serviced by amendments of the relevant provisions of the laws.

The judgement made a total of seven sets of recommendations (Recommendations A through G in the judgment). For most of these recommendations about amendment of laws, the judgement quoted the relevant sections as they now stand and side by side formulated the recommended amendments. The judgement suggested amendments to sections 54, 167, 176, and 202 of the Code of Criminal Procedure; section 302, 330 and 348 of the Penal Code; section 106 of the Evidence Act (or in the alternative section 114 of the Evidence Act); and section 44 of the Police Act.

The amendments proposed indicate the painstaking exercise undertaken by the Hon'ble Justices. Needless to say, as the judgment itself reaffirms, the High Court Division, under Article 102 of the Constitution, does have the power to recommend amendments of laws. However, whether the amendments would be accepted verbatim is a completely different issue.

Until the sections are suitably amended, as recommended by the judgement, the 15 directives at the end of the judgment should protect and safeguards the rights and liberties of citizens from misuse and abuse by the police.

It needs to be recognised though that the legislature is not limited by the recommendations for amendment of law. The legislature is free to amend the relevant laws as it deems fit, keeping in view the concerns of the Court and the safeguards of rights of people which the Court has directed to be implemented.

Enacting and amending laws is the domain of the legislature and Article 112 of the Constitution recognises that, albeit indirectly, when it provides that "All authorities, executive and judicial, in the Republic shall act in the aid of the Supreme Court". By omitting the legislature from the list of authorities which shall act in the aid of the Supreme Court, the framers of the Constitution clearly reinforced the separate, independent and sovereign law making role and authority of the Parliament. Needless to say, laws enacted by the Parliament are subject to the scrutiny of the Supreme Court and the Supreme Court may declare any law enacted by the Parliament invalid, i.e., unconstitutional and void. Though the recommendations of the Court are not binding in terms of the exact words and forms, it is a natural expectation that the Parliament will amend the recommended sections of the laws, as suggested by the Court.

The 15 directives of the judgements, though, are certainly mandatory for the executive, i.e., police and magistrates. They must begin to act in terms of the directives of the judgments. However, as I had indicated in the first part of this write-up last week, the executive organ of the State would be reluctant to immediately implement these directives.

Concluding remarks

The police and the government will implement this new charter of liberty if only we all -- the civil society, political parties, lawyers and other professionals, citizens' groups, NGOs and all others -- immediately begin to demand implementation of the directives forthwith.

The first step would be to disseminate the directives of the judgements among the citizens as well as the police as the police would not immediately know of the limits of their power imposed by the High Court Division. NGOs can surely take the leading role in disseminating the directives, along with the media. Secondly, it would be up to the advocates to bring any violations of the directives to the notice of the court and have actions of the police in violation of the directives declared illegal. An enterprising advocate may even publish a booklet explaining the salient features, including the procedure the police must now follow to arrest under section 54 and in seeking remand under section 167, as laid down in the judgement; the right to consultation with lawyers immediately after arrest; and other related issues. One would like to think that such a booklet would be widely used by advocates in trial courts. Thirdly, there must be instructions by the police authorities to their personnel to follow the directives. Fourthly, the media can take upon itself the task of reporting police actions in violations of the directives of the judgments. Fifthly, the law reports, and now there are six regular monthly law reports, should publish this judgement immediately to facilitate dissemination. Sixthly, the Judicial Administrative Training Institute (JATI) may want to include this judgement in it's training courses for subordinate judges and other relevant training institutes for magistrates may also do so forthwith.

Needless to say, there can be other avenues for disseminating this new charter of liberty. The judgement of the Indian Supreme Court on similar issues also contained a directive upon the government to broadcast and telecast the principle directives which were immediately complied with by the Indian Government. Though this judgment did not contain any such directive, the dissemination must be undertaken immediately.

Lastly, there remains the issue of appeal against this judgment by the Government in the Appellate Division of the Supreme Court of Bangladesh. It is likely, as it seems to me, that the government would take issue with the recommendations regarding amendment of laws in the judgement. As already indicated, I don't see these recommendations as binding upon the legislature and this nature of the recommendations was amply recognised by the judgement as it formulated these amendments under the heading of 'Recommendations'.

An appeal by the Government against any of the 15 directives or propositions of law such as the power of High Court Division to order payment of compensation for violation of fundamental rights and other similar issues would only indicate that this government, similar to all other governments in the past, is not interested in the rights of us, the citizens of the country, if these rights are perceived by the government to curtail the power of the government to harass and oppress us.

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CONSUMER *corner*

Effects of the TRIPs agreement in developing countries

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THE Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPs) has been called the most ambitious international intellectual property convention ever attempted. TRIPs established the protection of intellectual property as an integral part of the multilateral trading system embodied in the World Trade Organisation (WTO). Non-compliance with TRIPs regulations can lead to trade sanctions under WTO rules. It is the first time that regulations in the area of Intellectual Property happen on such high political level.

The arguments that were used to adopt TRIPs as put forward by developed nations were based on the assumption that stronger Intellectual Property Rights (IPR), by creating an incentive for innovation, would stimulate development of new technologies in the industrialised nations. On the other hand most of the developing countries argue that western-made IP regulations are unsuitable for the ethos and cultures of developing countries. And the existence of collective rights and informal innovators in developing countries are overlooked by TRIPs as well as the tradition of keeping knowledge built over the years by farmers and communities in the public domain is endangered.

Effects of TRIPs in developing countries

The TRIPs agreement was the brainchild of an industry coalition made up of people from the United States, the European Union and Japan. The first initiative was taken by the Intellectual Property Committee, which brings together 13 major US corporations including Bristol Myers Squibb, Du Pont, Monsantu and General Motors. The committee was created during the Uruguay Round negotiations with the goal of putting TRIPs firmly on the agenda. As argued by developing countries, TRIPs undermines sustainable development objectives, including eradicating poverty, meeting public health needs, conserving bio-diversity, protecting the environment and the realisation of economic, social and cultural rights.

Therefore TRIPs requires the adoption of an entire new body of law for the developing countries, together with a framework to effectively enforce these new rights. Some key issues related to the interest of developing countries are discussed below-

Bio-diversity and food security

The biological diversity is needed to guarantee food security. Most farmers, lacking financial resources to afford pesticides and/or fertilisers, thus rely on the diversity within species, to be able to produce more diverse crops, which require low external input. Again, diversity is vital for food and health purposes; they also provide humanity of other primary needs, such as livestock breeds, clothes, shelter and fuels.

Farmers using patented seeds are deprived of their right to use, save, plant and sell their seeds. Thus the biological resources and agricultural practices of the developing countries are neglected in the TRIPs agreement.

In fact, it is said that TRIPs has been designed as a copy of the already existing protection system in developed countries. Therefore effort should be taken to serve the interest of developing countries agriculture otherwise, it may turned into a major threat against food security in developing countries.

Biotechnology

Biotechnology is highly patent sensitive, in that a single patent can dominate a marketed product. As such, patent protection may result in pricing above competitive levels. If the patented technologies become too expensive, developing countries may not be able to afford them. Similarly, there are specific objections to patenting and manipulation of human genes in the absence of any moral guidelines for their commercial application. The TRIPs Agreement, by allowing countries the option to patent life forms, contributes to the risks -- risks that do not respect national boundaries.

Private rights and collective rights

TRIPs negate collective rights, by stating in the preamble "Intellectual Property Rights are private rights". This is according to critics of TRIPs, a major shortcoming and shows disrespect for the situation of developing countries. Indeed, many communities share their resources, knowledge and cultures among themselves.

Indigenous intellectual property

At this juncture of modernisation, we tend to forget contributions of the Indigenous Peoples. They possess knowledge of the medicinal and nutritional uses of plants, herbs and other natural substances based on their continuing relationship to the natural world.

Since current intellectual property laws recognises individual or corporation based ownership but do not acknowledge indigenous forms of community based ownership. Therefore, indigenous peoples have no intellectual property rights under the TRIPs agreement. Indigenous communities and developing nations should stand together to ensure adequate protection of their intellectual property right

Medicine and public health

Around the world, public concern is mounting at how the introduction of strict patent regimes. The effective monopolies granted by TRIPs allow pharmaceutical giants to suppress the competitor, low-cost producers and to charge prices far above what is reasonable. This is done at the expense of the poor consumers.

For most basic drugs available in developing countries, the patents have expired in any case. But the concern is that new drugs, such as AZT, used in treating HIV and AIDS victims will not be available at an affordable price. In parts of Asia and Africa, where AIDS is reaching epidemic proportions, this is a very grave concern.

Measures such as compulsory licensing parallel imports and other exceptions to patent rights are allowed under TRIPS. Despite this, and the clear need for developing countries to exercise their rights for compulsory licensing and parallel imports to enable access to affordable medicines, bilateral pressures and bullying tactics have been used to prevent developing countries from implementing TRIPS provisions on compulsory licensing or parallel imports. Such bullying is outrageous and unacceptable.

Copyright materials

The effects of TRIPs in this area for most developing countries will be a sharp rise in the price of such materials. Therefore it will hinder free access to information, academic materials and more limited and restricted access to software, databases, and other information-based tools used by industry and academia, which is worrying.

Civil society's resistance

A very significant final strategy may be the mobilisations of civil society to resist and challenge the inequitable and destructive trend of current IPR regimes. In a number of countries, farmers' groups, NGOs, and scientists have led the struggle against the "piracy" of indigenous and local community knowledge, and the imposition of IPRs on life forms and related knowledge.

Another form of significant resistance is the revival of farming and medicinal systems that allow communities and citizens to be largely self-reliant. This would reduce the dependence on corporate and State-controlled seeds and drugs, amongst other things, and therefore escape the IPR trap altogether.

Concluding remarks

The developing Countries will definitely fail if divided. It might be difficult to fight many of the unjust situations single-handed. The developing countries first needs to take capacity building programs of its own involving all relevant stakeholders in defining and protecting its sovereign resources and then go hand in hand with other Afro-Asian developing countries to ensure maximum interest within the TRIPs Agreement.

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