



LAW opinion



FACT file



A stupendous error?

ANISUR RAHMAN

THE High Court Division of the Supreme Court has again come under fire on the bail scam. The incident of admitting bail defying the stay order of the Appellate Division by the High Court Division created a mist of confusion of the power of High Court Division and the dignity of Appellate Division of the Supreme Court. One 'Mobile Kader', accused in a murder case was granted bail by the High Court Division on 15 December last year. But earlier on 14 December the Appellate Division stayed the bail order issued by another bench of the High Court Division. The Appellate Division had also ordered to hear the rule in the same bench which admitted the bail earlier. Despite the stay order of the AD, another bench of the HCD has granted bail to Mobile Kader.

The bail scam

We became silent spectator when Khaza Habib got bail from the High Court Division few days ago after getting 27 years of imprisonment by a lower court. Saiful Islam who got life term imprisonment in Gopal Krishna Muhuri murder case was released on bail from the HCD on 17 June. AC Akram was admitted to ad interim bail for his ill health by the High Court Division on 19 November. Engineer Kazi Mahubuddin Ahmmed who got life term imprisonment for killing of his wife got bail from HC on 27 November. (Prothom Alo 22 December)

Let us turn to the provisions of bail under the Criminal Procedure Code. An examination of the terms of sections 496, 497 and 498 of the Criminal Procedure code reveals that they constitute a complete code for admission of bail to accused person. Section 496 of the code deals with bailable offences. That means which offences are declared bailable by the code itself in the schedule. Section 497 deals with non bailable offences and authorises the court to release accused person on bail with the qualification that such person shall be released on bail if there are reasonable grounds for believing that they are not guilty of offences punishable with death or transportation for life. An exception has been made in the case of person under the age of sixteen years or any woman or a sick or infirm person. And finally section 498 gives inherent/unfettered power to the High Court Division to admit bail before arrest. That is the anticipatory bail. Let us left the matter of anticipatory bail because there are horde of debate that how a person is admitted to bail who is not in the custody at all.

The plain reading of the provisions reveals that admission of bail is discretionary power of the court. But the court must follow the procedure of sections 496, 497 and 498 of the Criminal Procedure Code while admitting bail. Mobile Kader is an accused of Kader murder case. Therefore his bail petition seems not maintainable under section 498. Moreover his bail order was stayed by the Appellate Division. So how he is admitted to bail? There may be two reasons for this bail scam, a) laxity of the Attorney General's office, b) personal interest of the concerned judges which should not be shelved.

The public prosecutors' office (lower court) and the Attorney Generals' office (Supreme Court) conduct the cases on behalf of the government. This is an institution which should be independent in its works. But successive government has politicised the institution and uses it for political gain. There is allegation that persons loyal to gov-

ernment are appointed in the posts of Public Prosecutor/Attorney General which our law minister concedes recently (Prothom Alo 5/6 January). For the very reason they entrust their service to the person loyal to government. According to some, it is not very hard to win a case bribing the government prosecutor. There is spate of allegations of corruption against them. No procedure have developed here to submit the statement about personal wealth of the person before appointed as the Public Prosecutor/Attorney General. It can conceive that the government prosecutor showed less interest in this case which enable the accused to get bail. The reason behind this reluctance of the concerned law officer should be investigated. As well as how the case was mentioned in the cause list just after one day of the Decision of AD is also should be investigated.

It is alleged that indirect political influence in appointment of Supreme Court judges instigates them to act on behalf of the political party in power (Shahidur Rahman defend himself before the Supreme Judicial Council that the witnesses gave false statement against him to implicate him politically. His statement reveals that he is appointed politically and his opposition is trying to implicate him in a corruption scandal Prothom Alo 8th January). Why the judges of the concerned bench of HCD have showed so much interest in admitting bail to "Mobile Kader" whose bail order issued by another bench was stayed by the Appellate Division? It is reported that the stay order of the AD was mentioned in the record of bail order. So could the judges claim that they were oblivious of the matter?

Whether HCD commits contempt

The High Court Division is obliged to comply with the decision of the Appellate Division under Article 111 of the Constitution. Any deviation from this constitutional obligation may be considered as contempt of court. Here, there are three grounds for which one can accuse the concerned High Court Division Bench for contempt of court, a) disobedience to the order of the Appellate Division, b) interference with the due course of justice and c) violation of dignity as well as the supremacy of the Appellate Division.



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Ignorance of Appellate Division's stay order by the High Court Division is not consistent with its constitutional duty. It is not a nugatory error. Neither the HCD can claim that it was oblivious of the decision of AD nor it should be. How the HCD can decline that it does not violate the dignity and supremacy of the AD? However, the burden of proof lies on the HCD.

Concluding remarks

We do not expect any confrontation between the HCD and AD of the Supreme Court. We expect HCD more cautious and sincere in its works. Any antagonism between the HCD and AD will lead us to lose our hope on the highest judicial organ of the country. The government let not embroil the highest court, the last resort to justice in. However the matter of admission of bail by the HCD should not left in a limbo. The government rightly decided to remit the matter to the Chief Justice. Consequently, we have to wait for the decision of the Chief Justice.

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GUANTÁNAMO BAY A human rights scandal

AMNESTY INTERNATIONAL

Despite a major international outcry and expert condemnation of US government policy, hundreds of people of around 40 different nationalities remain held without charge or trial at the US Naval Base in Guantánamo Bay in Cuba, without access to any court, legal counsel or family visits. Denied their rights under international law and held in conditions which may amount to cruel, inhuman or degrading treatment, the detainees face severe psychological distress. There have been numerous suicide attempts.

Many of those held were captured during the international conflict in Afghanistan, from where transfers to the Naval Base began in January 2002 under harsh conditions of transportation. Others were arrested elsewhere and handed over to the US authorities. Sporadic transfers to, and releases from, the base continue, but the precise numbers, identities and nationalities of those held has never been made public.

Presumption of guilt

None of the detainees have been granted prisoner of war status or brought before a "competent tribunal" to determine his status, as required by Article 5 of the Third Geneva Convention. The US government refuses to clarify their legal status, despite calls from the International Committee of the Red Cross (ICRC) to do so. Instead, the US government labels them "enemy combatants" or "terrorists", flouting their right to be presumed innocent and illegally presuming justification for the denial of many of their most basic human rights.

US Secretary of Defence, Donald Rumsfeld, has repeatedly referred to those held at Guantánamo as "hard core, well-trained terrorists", and "among the most dangerous, best-trained vicious killers on the face of the earth" and has linked them directly to the attacks of 11 September 2001. Vice President Dick Cheney has also labelled the detainees as "the worst of a very bad lot. They are very dangerous. They are devoted to killing millions of Americans." Despite these blanket allegations, several detainees have been released from the base without charge. No compensation has been offered for the many months they were illegally detained at Guantánamo.

Inhuman and illegal detention

In April 2002 the detainees were transferred from the small wire-mesh cages at the temporary Camp X-Ray to the confines of Camp Delta where the majority are held in maximum security blocks in cells even smaller than before, sometimes for up to 24 hours a day and with very little out-of-cell exercise time. The detainees are also subjected to repeated interrogations sometimes for hours at a time and without the presence of a lawyer, raising fears that statements may be extracted under coercion. The ICRC is the only non-governmental organisation allowed access to the detainees.

With no opportunity to challenge the lawfulness of their detention

HUMAN RIGHTS advocacy



Human trafficking in South Asia: Need to revise priorities

HUMAN RIGHTS FEATURES

HUMAN trafficking is big business. And not just for the traffickers. The United States' Comprehensive Anti-Trafficking in Persons Act of 1999 gave a fillip to international funding initiatives to tackle human trafficking, a 150-year old problem in South Asia. The next three years saw a proliferation of proposals, projects, and seminars. And funds, disbursed enthusiastically but indiscriminately by international funding agencies. A number of anti-trafficking "networks" emerged as part of an attempt to link organisations across the South Asian region.

A study of international funding programmes and anti-trafficking initiatives of NGOs would make for a fascinating and lengthy report. A general review of the domain however reveals that most anti-trafficking initiatives by international funding agencies focus on activities such as awareness-building among potential victims and communities and information exchanges. Others support rescue and rehabilitation efforts, training and capacity-building programmes. Few, however, have taken on the difficult but crucial task of supporting efforts aimed at the apprehension and prosecution of traffickers. The root causes of trafficking must undoubtedly be addressed. But, until attempts are made to target the perpetrators and bring them to book, the trade in human beings will continue.

Trafficking persists because judicial and law enforcement institutions have failed to systematically implement and enforce anti-trafficking laws effectively; indeed, they have exacerbated the problem. Few traffickers are apprehended, let alone prosecuted. Police collusion and bribery are often cited by anti-trafficking activists as a major part of the problem. And, despite the existence of a legal framework for combating trafficking networks, the authorities in countries of origin as well as destination countries lack both the capacity and the will to undertake the intensive investigatory and prosecutorial work necessary to have a significant impact on trafficking rings. The lack of sufficient cross-border cooperation compounds the enforcement problem.

The onus is clearly on States to ensure that their law enforcement agencies are geared to tackle the problem. The thrust of civil society's efforts needs to be on pressuring governments to take action. However, there is a



PHOTO: AFP

general reluctance on part of NGOs to engage with governments and to make effective use of the national and international tools available. Few activists are aware, for example, of the existence of the office of the National Rapporteur on Trafficking, part of the anti-trafficking initiatives of the National Human Rights Commission of Nepal. The first rapporteur resigned, citing lack of support from the NHRC. This is where NGOs could intervene, by monitoring the functioning of the existing mechanisms and ensuring that the mandated tasks are carried out.

Existing international instruments such as UN treaty bodies and special mechanisms have been unequal to the task of monitoring anti-trafficking efforts by governments. A concerted effort to submit information to the special mechanisms and to counter government claims made to human rights treaty bodies would go a long way in pressuring governments to take cognisable action.

International donor agencies have been unimaginative and short-sighted in this regard. This has unwisely shaped the activities of NGOs, which have focused on post-trafficking mop-up operations such as rescue and rehabilitation of victims, and a host of "information exchanges" and "policy dialogues".

It is not as if the policy seminars have resulted in concrete action on the

ground. There was little informed NGO input prior to the drafting of the SAARC Convention Against Trafficking in 1999. The result was a weak, inadequate and moralistic Convention. First, its understanding of trafficking is confined to trafficking of women and children for the purpose of prostitution. It ignores the fact that women and children are often trafficked for use as domestic servants and other kinds of labour. Victims of trafficking include men (and boys) who are used as domestic servants, camel jockeys etc. Its language includes words such as "evil" and "honour of human beings", terms that reflect a moralistic approach, and which are marginal to the effective addressing of the issue.

The Convention fails to draw the attention of SAARC members to the various useful international initiatives and instruments with regard to trafficking. Apart from the few instruments it does cite, no mention is made of the ILO Conventions, the International Convention on Economic, Social and Cultural Rights, the International Convention on Elimination of All Forms of Discrimination Against Women and a host of other instruments. The listing must necessarily be exhaustive if the SAARC Convention is to be a comprehensive and effective guide for governments in the region.

NGOs have also failed where follow-up is concerned. There has been little domestic pressure on the countries that are yet to ratify the Convention. Efforts to prod States towards evolving tangible policies against trafficking have likewise been myopic and delusional. A host of "outcomes" have emerged from policy dialogues, most of them imprecise and badly formulated. The ones that do provide a realistic set of proposals have not managed to reach the desks of policymakers for want of effective lobbying and advocacy.

Attempts to influence the SAARC process have been futile, and will remain so, thanks to the 'carnival' approach to lobbying and advocacy. Visits by 'citizens' groups' armed with 'People's Pledges' are a good exercise in solidarity-building, but are largely symbolic, the equivalent of a candle-light vigil, in itself not a bad thing.

However, if the aim is to influence the SAARC agenda and get governments to take a fresh look at the documents they draft, any alternative text would have to land neatly on the delegates' tables. This would require intensive lobbying, first at the national level in each country long before meetings and summits are held, and later in the run-up to the meetings. Government officials have to be contacted, and alternative texts not fuzzy wish lists submitted to them in advance for their perusal. Press conferences must be called, not during the government meetings when the agenda has already been decided, but prior to the meetings when governments are in the process of giving shape to their positions on various issues.

It is not just governments that lack the will to make a difference. For many in the non-governmental community, it is international funding that decides their priorities for them. Funding agencies, for their part, are yet to draw any conclusions from their "learning process". In any case, it will soon be time to move on to the next big item on the funding agenda.

Human Rights Features, an initiative of SAHRDC, Delhi, is an independent, objective and analytical attempt to look comprehensively at issues behind the headlines from a human rights perspective.



PHOTO: AFP

and the prospect of indefinite detention without trial in such conditions, the potential psychological impact upon those held is a major concern. The ICRC delegation has stated that it has observed a "worrying deterioration" in the mental health of a large number of the detainees, and that their psychological condition has become a "major problem". Efforts to obtain justice in the US courts have so far been unsuccessful, with the courts holding that they do not have jurisdiction over the detainees, because they are foreign nationals held outside US sovereign territory.

Military commissions: A stain on US justice

In November 2001, President Bush signed a Military Order establishing trials by military commission which have the power to hand down death sentences and against whose decisions there will be no right of appeal to any court.

Six foreign nationals held at Guantánamo have since been named as the first to be tried under the Military Order, amid mounting international concern that any trial before the military commissions would be intrinsically unfair. In addition to the lack of right to appeal, the commissions will lack independence and will restrict the right of defendants to choose their own counsel and to an effective defence. The commissions will also accept a lower standard of evidence than in ordinary courts. This could include evidence extracted under torture or coercion. Lord Steyn, a judge from the UK's highest court had said that such trials would be "a stain on United States justice".