

LAW watch

A gravy train and 'shackled' kids in Bangladesh

ACHR FEATURES

HUNDREDS of juveniles are illegally detained in Bangladeshi prisons in violation of the Children Act of 1974 and Bangladesh's obligation as a party to the United Nations Convention on the Rights of the Child. According to a list prepared by the Dhaka Central jail authorities in December 2003, there were at least 108 juvenile delinquents being held in Dhaka Central Jail instead of correction centres. Of the 108 children, at least eight have been in the jail for more than one year including Al Amin, a boy of 14 who has been held since 7 October 2000. At the National Juvenile Correction Centre at Tongi, at least 99 seats are lying vacant. Earlier the government of Bangladesh in a report to the United Nations Committee on the Rights of the Child in September 2003 unabashedly stated that a total of 1041 juveniles are reported to be in different prisons as of August 2003. Of them, 959 were male and 82 were female.

Section 2(f) of the Children Act of 1974 provides that any person below 16 years is a juvenile and must be sent to a "certified home or approved home or to the custody of a relative or other fit person". However, age verification has never been taken seriously in the administration of juvenile justice. Often, police increase the age of a juvenile while producing before a court to avoid so called legal complications. The magistrates are supposed to order age verification if a suspect seems less than 18 years involving scrutiny of birth or school certificates and bone ossification tests. But most magistrates don't even look up from their paperwork and in a routine exercise often send juveniles to jail. Even when the court orders to send the juveniles in correction centres, court orders are ignored and children continue to be detained in prison. There were five cases in January 2003 where the accused children were still inside the Dhaka Central jail even after the court ordered them to be sent to the correction centre. Thirteen-year-old Rafique has been in central jail since 19 November 2003 though the court ordered to send him to the National Correction Centre at Tongi.

The mal-treatment of the juveniles in Bangladesh are in contravention of international standards on administration of juvenile justice and in particular articles 37, 40 and 39 of the United Nations Convention on the Rights of the Child and other United Nations standards in the field of juvenile justice, including the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (the Beijing Rules) and the United Nations Guidelines for the Prevention of Juvenile Delinquency (the Riyadh Guidelines), the United Nations Rules for the Protection of Juveniles Deprived of Their Liberty and the Vienna Guidelines for Action on Children in the Criminal Justice System.

The minimum age of criminal responsibility is determined at 7 years under section 83 of the Bangladesh Penal Code an affront to civilised society's treatment of children. The United Nations Committee on the Rights of the Child while examining the periodic report of the government of Bangladesh at its 35th session in September 2003 expressed concerns about (a) the minimum age of criminal responsibility (7 years); (b) the sentencing to life imprisonment of children from the age of 7 years and to death penalty of children from the age of 16 years; (c) the absence of juvenile courts and judges in some parts of Bangladesh; (d) the extensive discretion-



ary powers of the police, reportedly resulting in incarceration of street children and child prostitutes; (e) the use of caning and whipping as a sentence for juvenile offenders; (f) the failure to fully ensure respect for the right to fair trial, including legal assistance for alleged children offenders and the very long periods of pre-trial detention; and (g) the detention of children with adults and in very poor conditions, without access to basic services.

Consequently, the Committee on the Rights of the Child recommended to the government of Bangladesh to (a) raise the minimum age of criminal responsibility to an internationally acceptable standard; (b) ensure that the imposition of the death penalty, of life imprisonment without possibility of release, and of caning and whipping as sanctions for crimes committed by persons while under 18 are explicitly prohibited by law; (c) ensure the full implementation of the right to fair trial, including the right to legal or other appropriate assistance; (d) protect the rights of children deprived of their liberty and improve their conditions of detention and imprisonment, including by guaranteeing separation of children from adults in prisons and in pre-trial detention places all over the country; (e) establish an independent child-sensitive and accessible system for the reception and processing of complaints by children. The report prepared by the Central jail authorities of

Dhaka in December 2003 shows that government has little respect for the recommendations made by the UN bodies.

The establishment of a National Human Rights Commission consistent with the Paris Principles relating to the status of National Human Rights Institutions for the promotion and protection of human rights could have served as an effective mechanism to address such gross and systematic human rights violations. After examining the first periodic report of the government of Bangladesh, the UN Committee on the Rights of the Child in its concluding observations on 6 June 1997 welcomed "the recent law to establish the post of Ombudsperson as well as the fact that a National Human Rights Commission is being set up." More than six years later on 3 October 2003, the CRC Committee after examining the second periodic report once again welcomed "the information from the delegation concerning the intention to establish a National Human Rights Commission and an Ombudsperson". Since start of the project to establish a National Human Rights Commission by then Bangladesh Nationalist Party government in April 1995 three governments have changed, many draconian laws such as the Public Security (Special Provision) Act of 2000 and Joint Drive Indemnity Act of 2003 were passed; and the officials and project officers took a de tour of all the countries in the world having NHRIs. Yet, the establishment of the NHRC remains a pipe dream. The process of establishing the National Human Rights Commission in Bangladesh has been all but a gravy train.

The Asian Coalition for Housing Rights (ACHR) is a regional network of grassroots community organisations, NGO's and professionals actively involved with urban poor development processes in Asian cities.

Courtesy: LAW WATCH, a Centre for Studies on Human Rights & Law.

LAW campaign

Violation of human rights within nations Global forum to hear individual grievances is to be set up

BARRISTER HASSAN FARUK AL IMRAN

AFTER the Second World War's experience, world community established the UN to protect and promote human rights. UN's preamble states its purposes are "to reaffirm faith in fundamental human rights in the dignity and worth of the human person, in equal rights of men and women and of nations large and small." One of the basic principles of the UN is to achieve international co-operation in promoting and encouraging respect for human rights and fundamental freedom (Article 1(3) of UN charter). Moreover, Article 55 calls on the United Nations to promote 'universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion,' and Article 56 provides: All members pledged themselves to take joint and separate action in cooperation with the Organization for the achievement of the purposes set forth in Article 55.

But surprisingly, the UN Charter does not define the human rights; as a result Universal Declaration of Human Rights (UDHR) was adopted in 1948. Its main aim was to ensure minimum standard of human rights all over the world. Specially, Article 8 of UDHR provides: Everyone has the right to an effective remedy by competent national tribunals for acts violating the fundamental rights granted to him by the constitution or by law. Later various international human rights Conventions were adopted to ensure the human

human rights Conventions. Significantly, the Universal Declaration not only urges the recognition of human rights but expects nations to provide a remedy when those rights have been denied. When an individual is a victim of human rights violations, that person has a 'right to an effective remedy by the competent national tribunals' responsible for protecting those rights (Article 8 of UDHR). The Universal Declaration likewise requires access to foreign courts when the domestic conditions merit it -i.e., when the individual is unable to avail himself or herself of governmental protection- by asserting that every individual is entitled to seek legal remedy, without qualification.

In Bangladesh 46 people were reported to have died from torture in custody of army and police in 2002 (Amnesty International Magazine, 2003, Issue 120, page-6). Moreover, Bangladesh government passed the law by which the victims and their family had been restricted to get justice for that incident from the domestic courts. Now the question is: what is the consequence of the violation of international human rights? Where the victims will go for justice? Where the victims will go for remedy? Is there any specific International Human Rights Court?

The reality is- still there is no international human rights court or international tribunal for the violation of Universal Declaration of Human Rights. Here I would like to mention the three international courts but none of them have any jurisdiction to consider violation of individual's human rights.

First, although International Court of Justice is an UN court, but its jurisdiction is only limited between the States, which settle the legal disputes (Article 92 of UN charter). An individual who is victim of violation of human rights has no right to bring any case before the court. Second, although International Tribunals were established for Former Yugoslavia and Rwanda for the violation of human rights, notwithstanding it deals only the specific event of those particular countries. Third, most recently, International Criminal Court has been established under the Rome Statute (1998). But the main problem is the court does not purport to codify international criminal law relating to abuses of human rights.

According to the Article 5(1) of Rome Statute the crimes within the jurisdiction of the International Criminal Court are categorised as (a) genocide; (b) crimes against humanity; (c) war crimes, and (d) the crimes of aggression, i.e. all are war crime or massive violation of human rights. Moreover, Article 10 of the Statute states: 'Nothing in this Statute shall be interpreted as limiting or prejudicing in any way existing or developing rules of international law for purposes other than this Statute'. This indicates that the Statute is intended to set the minimum rather than optimum standards and that international criminal law can continue to develop with that in mind.

One may ask whether the victims or their family have any right to bring any allegation to the UN Human Rights Commission for the violation of human rights against the State. The answer is it is very difficult to bring any

allegation by the victims or their family for the violation of human rights. Because, under UN Economic and Social Council Resolutions 1215 and 1503 an individual or any NGO can bring any allegation for the violation of human rights, subject to two conditions: i) there should be gross / massive violation of human rights all over the country, and ii) State consent and co-operation is needed before making any investigation or report against that human rights violating State.

Now, if we compare the UDHR with any other regional human rights mechanisms then will find that the situation is totally different. Regional human rights organs have specific human rights courts and the individual has right to bring any allegation against the State for the violation of human rights. In Europe there a human rights court and under Article 34 of European Convention of Human Rights the individual victim has the right to bring any allegation against the human rights violating State.

In Inter-American system of human rights under Article 44 the victims or any NGO can bring any allegation of violation of human rights before the Inter-American human rights court. Article 44 of Inter-American Human Rights Convention provides: Any person or group of persons, or any nongovernmental entity legally recognised in one or more members states of the Organisation, may lodge petitions with the Commission containing denunciations or complaints of violation of this Convention by a State Party. Here I would like to mention as an authority of my argument the 'Guatemala 'Street Children' case, which is the first case dealing with police brutality against street children before any international tribunal, where five street children were killed by the Guatemala police, and the victims of the family did not get any justice from the domestic court. The Inter-American Court of Human Rights held that Guatemala was responsible for the violation of human rights by its agents (police), and the court ordered reparation for the victims and there family.

It is said that the decision is crucial to the development of the international jurisprudence. Not only would it provide justice for the families of the five murdered boy, but it also would encourage States world wide to develop and enforce legal systems that can protect their citizens.

Moreover, under African Charter of People's Rights under Article 47, 55 and 56 individual or NGO has the right to bring any allegation for the violation of human rights. In "SERAC" Case Nigeria Government was held guilty for violation of environmental rights. It is a first case before an international human rights monitoring body that deals with alleged violation of economic, social and cultural rights.

At present, the denial of human rights is flagrant, in nearly all countries of the world. Although Signatory countries have indicated they are committing themselves to observe certain rights and if they fail to enforce them they have subjected themselves to criticism or to court suit with possible penalties. But, only criticisms is not enough, the reality is- still there is no effective enforcement mechanism for the violation of Universal Declaration of Human Rights, still there is no binding machinery to ensure human rights; no clear guidelines of enforcement for the violation of human rights; no specific court of Universal Human Rights; individual complaints depend on optional protocol; moreover, all monitoring depends only on reporting. In contrast, the regional human rights systems are more effective than the Universal Declaration, as there are specific human rights courts, and the rights of individual complaints are ensured by the regional human rights Conventions. Therefore, it is time to re-think how we can ensure the better protection of human rights, how can we ensure justice for the violation of individual's human rights.

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rights, e.g. - the United Nations Convention on the Elimination of All Forms of Racial Discrimination (CERD), the International Covenant on Economic, Social and Cultural Rights (ICESCR) Convention against Torture and Other Cruel, Inhuman or Degrading Treatment, or Punishment (CAT).

Under the human rights declaration the signatory party assured that they would respect and ensure their obligations which are mentioned in the

LAW reform

Fair and speedy trial under the Constitution

MD NUR ISLAM

The notion of "fair and speedy" trial is a constitutional obligation. These two terms have greatly been emphasised by our Constitution, the supreme law of the land. If the court of law, tribunal and the sitting of justice are not fair, impartial and independent, then the whole process in relation to administration of justice becomes a mockery, farce and a means of infliction of injustice through the means of justice. Simultaneously, if the trial system is not speedy as required and expected to expeditious delivery of justice then it also leave the justice seeking people backward and easily oppressed. In all fairness, the judges should be of judi-caring mind by applying the strong sense of judiciary while administering justice, something which goes beyond the domain of law must be avoided.

Components of fair trial

Components which can be enumerated in respect of fair trial are as follows: The trial system must be free, impartial and independent. It should be open and public; the parties must be subject to the same kind of law; The right to self defence has to be ensured; No enactment of law after commission of crime i.e. no ex-post-facto legislation.

Generally, every court of justice is to remain open to all citizens as publicity is the authentic hall-mark of judicial process as distinct from administrative procedure. Article 35 (3) of the Constitution stresses 'public trial' by an independent and impartial court or tribunal. The essence of the same is to provide a fair trial. Section 352 of the Criminal Procedure Code (CrPC) provides for public trial. In fact, section 352 of the CrPC confers a discretion on the court to restrict admission or hold the trial in the jail premises if the necessity arises.

In the American jurisdiction, an accused has the right guaranteed by the sixth amendment to remain present at the trial (Faretta vs Californica, 422 US 806). The requirement of public hearing in a court of law for a fair trial is, however, subject to the need of the proceeding being held in camera to the extent necessary in the public interest and to avoid prejudice to the accused. In our country, the Family Courts Ordinance, 1985 provides for provision of camera trial in respect of some matters. In a case, where reasonable apprehension of bias of the trial judge or magistrate arises, the provision of transfer of cases has been incorporated into the Cr. P.C. just to make the trial fair.

Speedy trial

Though an accused is guaranteed a speedy trial, it is difficult to set down the notion for time limit for trial in all cases. Delay in our country is systematic and profound. Expeditious trial and freedom from detention are part of human rights and basic freedom and a judicial system which allows incarceration of individuals for long periods without trial must be held to be denying human rights to such under trials prisoners.

In respect of speedy trial in A. R Antulay VRS Nayak, the Indian Supreme Court laid down some propositions considering a large number of decisions:

Right to speedy trial is the right of accused. The fact that speedy trial is also in the public interest does not make it any-the less the right of the accused; the right encompasses all the stages, namely, the stage of investigation, inquiry, trial, appeal, revision and retrial; the accused should not be subjected to unnecessary or unduly long incarceration prior to his conviction. The worry, anxiety, expense and disturbance to his vocation and peace resulting from an unduly prolonged investigation and inquiry or trial should be minimal; Often the accused is interested in delaying the proceedings.

Therefore, when a complaint of violation of the right to speedy trial is made, the first thing to be asked is who is responsible for the delay; while determining whether undue delay has occurred resulting in violation of the right to speedy trial regard must be had to all the attendant circumstance, including the nature of the offence, number of accused and witnesses, the work load of the court concerned, prevailing local conditions and so on; Inordinate delay may be taken as a proof of prejudice.

In this context the fact of incarceration of the accused will be a relevant fact; An accused's plea of denial of the right to speedy trial can not be defeated by saying that he did not at any time demand a speedy trial; It is neither advisable nor practicable to fix any time-limit for trial of offences and it is for the court to balance and weigh the several factors to determine in each case whether the right to speedy trial has been denied; Once the right to speedy trial is found to have been infringed, generally the charge or the conviction shall be quashed. In such a case, it is open to the court to make such other appropriate order as may be deemed just and equitable in the circumstances of the case.

Recent developments

A slow-moving justice system cannot be an effective tool in the fight against crime. In this respect, a good number of speedy trial courts throughout the country have been set up to combat the prevailing situation and the idea of setting up the courts like speedy trial courts can be said to have been based on a correct assessment of our ground reality. In the meantime this type of court has gained a tremendous success with disposal of highly sensational cases. The pattern of speedy trail and deterrent punishment needs to be taken forward.

Concluding remarks

The prime objective of the judiciary/judicial institution is to ensure fair and speedy trial within shortest possible time so that the justice seeking people can get justice expeditiously. The judicial process must possess the genius to do social justice and the judiciary can not be oblivious of this constitutional norm. No man hopes to succeed in a bad cause unless he has reason to believe that it would be determined according to bad laws or by bad judges. Only just decision can prevent unjust cause and restore people's confidence in the justice delivery system. But the norms of fair and speedy trial are the condition precedents.

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