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"ALL CITIZENS ARE EQUAL BEFORE LAW AND ARE ENTITLED TO EQUAL PROTECTION OF LAW"-*Article 27 of the Constitution of the People's Republic of Bangladesh*

The Daily Star

LAW *alter views*

Bangabandhu Murder case and the issue of "Embarrassment of the judges"

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ARTICLE 32 of the Constitution of Bangladesh clearly provides that no one shall be deprived of life or personal liberty save in accordance with law. Only state can deprive a person of his right to life or liberty in accordance with due process of law. When doing so state has to fulfil both substantive and procedural due process. Substantive due process means the law, by which a person will be deprived of his right to life or liberty, must be reasonable and specific. Procedural due process means the person whom the law seeks to deprive of his right to life or liberty must be given notice of the accusations brought against him and that person should be given an opportunity to defend himself by a competent lawyer of his choice.

When any person is accused of committing a murder, that person usually is prosecuted as per the provisions of the Penal Code, the Criminal Procedure Code, the Evidence Act etc. On completion of the trial if any person/persons are proved to have committed murder without any reasonable doubt, that person/persons are punished with capital punishment or life imprisonment or any other sentence. Judgement of the trial court requires confirmation by the High Court Division of the Supreme Court. There is compelling legal necessity that all sentences of death are automatically appealed to the High Court Division of the Supreme Court. If the convict prefers not to file any appeal or can not afford to file it, then the appeal is filed by the government. The trial Judge has to forward his/her judgement and sentence of death to the High Court Division.

Present condition of Bangabandhu murder case

District and Sessions Court of Dhaka pronounced its verdict on November 8, 1998 by which capital punishment was awarded to 15 convicts and 4 were acquitted. The judgement was sent to the High Court Division on November 11 for its confirmation. The then Chief Justice constituted a bench of High Court Division comprising Justice Amirul Kabir Chowdhury and Justice Abdul Aziz on March 30, 1999 to hear the death reference. Justice Amirul Kabir Chowdhury expressed his embarrassment on April 10, 1999 to hear the case. On April 24, 1999 Chief Justice assigned Justice M.M. Ruhul Amin and M.A. Matin to hear the case and they expressed their embarrassment in writing on the same date. This prompted the Chief Justice to constitute a new bench comprised of Justice Ruhul Amin and ABM Khairul Huq who finally heard the death reference and they gave split verdict on December 14, 2000. One of them upheld the judgement of the trial court while other confirmed death penalty of 10 and acquitted 5. On January 15, 2001, third bench of the High Court Division was constituted with Justice Fazlul Karim to dispose of the split verdict. Third judge gave death penalty to 12 convicts. Four of them filed a leave to appeal petition to the Appellate Division against the verdict of High Court Division. On August 16, 2001, Justice Kazi Golam Rabbani expressed his embarrassment to hear leave to appeal. From that time Bangabandhu murder case is pending.

Now there are seven judges in the Appellate Division of the Supreme Court, among whom two heard the case in the High Court Division. Three judges including Chief Justice J. R. Modassir felt embarrassed to hear the case. Justice M.A. Aziz has

PHOTO: FILE

been appointed Chief Election Commissioner. Among the judges of the Appellate Division only Justice Tafazzal Islam can hear the leave to appeal. But as per rules a bench of three judges will be required to hear a leave to appeal. If the situation remains as it is, a bench of three judges cannot be constituted until March, 2007. The government needs to appoint ad hoc judges to dispose of the case finally.

Dilemma of judges

Very rarely did we hear of judge's embarrassment over hearing a case. However embarrassment of judges has become so frequent on the occasion of hearing death reference and leave to appeal (of Bangabandhu murder case) that people have started to feel embarrassed when they hear judges of the highest court are expressing their embarrassment one after another. Once the highest court of Bangladesh had six 'Embarrassed judges' out of seven.

The judges have the right to feel embarrassed for any justifiable ground. There is no written law regarding the embarrassment of judges. It is an undefined discretion and convention to be exercised judiciously. The cause behind the embarrassments is just to avoid being dragged into political controversy. On judges part, they have very valid reason and argument not to be involved in any political controversy. But the whole situation put the judges in a position of dilemma. They have to think of their security. At the same time they have to consider the legal, moral, social, and political implications of their embarrassment.

The moment a judge feels embarrassed, he makes himself controversial. Because the victim's family, the party and people demanding the punishment of the killers of Bangabandhu may consider this action as unbecoming of a judge. They may consider it as delaying and hindering the cause of justice. On the other hand, a judge hears a case the other side may considered it as not serving their purpose. This party though does not say directly that they do not want successful completion of the Bangabandhu murder case and they do not let the killers to be punished, but their activities amount to total obstruction of the case. Their malafide intention is clear from their protracted policy. Here lies the real dilemma of judges--whether to feel embarrassed or hear the case. Their embarrassment pleases one party and their hearing of the case pleases another party. Most of the judges have failed to come out of this dilemma. But their main concern should have been promotion of justice and commitment to their oath. If the judges hear the case beyond any political consideration or any apprehension or fear that appears to be more rational and consistent with their oath. That is also expected for proper dispensation of justice.

Implications of embarrassment

Justice seekers and the living members of Bangabandhu family can rightly consider that they have not been given due protection of equality before law. Because Bangabandhu murder case has become derailed due to the successive embarrassments of judges. Now they have to wait till March, 2007 for a three judges' bench for disposal of the leave to appeal.

Some might consider the successive embarrassments of judges as violative of their oath and their commitment to promote the cause of justice. An individual judge has right to feel embarrassed and if one or two judges felt embarrassed that would have been quite usual. But the way the judges felt embarrassed one after another that has given rise to all sorts of questions.

Concluding remarks

Final disposal of the Bangabandhu murder case has been delayed due to the embarrassment of the judges and government's inaction to resolve the stalemate. The government should immediately appoint ad hoc judges to dispose of the case. The judiciary should show boldness in relieving us from the agony of residing in a country where killers remained unpunished for long 30 years and enjoyed all the facilities of the state. The judges have the right to feel embarrassed, but at the same time a citizen possesses the right to get justice. Now the question is--should the judges feel embarrassed at the cost of justice? Will it contribute positively to build a strong justice system?

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FACT *file*

India: Victims of anti-Sikh riots face further delays

Amnesty International urges the Government of India to fulfil its promises to hold to account with speed and earnest commitment any individual, including police or government officials, found responsible for human rights violations during the violence against Sikhs in Delhi in 1984. The organisation is concerned about further delays in the pursuit of justice for these victims and continuing impunity for its perpetrators.

Twenty-one years after the violence against Sikhs in 1984, virtually no one has been held to account. Eight inquiry commissions concerning the anti-Sikh riots have preceded the Nanavati Commission, but victims have yet to see justice. According to local media, some victims see the latest government move to open new investigations as a tactic to "waste more time". NDTV, "Tytler's resignation an eyewash say riot victims", 11 August 2005.

After the Nanavati Commission report and the Government's Action Taken Report were tabled in Parliament last week, Prime Minister Manmohan Singh condemned the violence against Sikhs in 1984 and said criminal cases against individuals named in the latest report would be re-opened and re-examined "within the ambit of law." The Defence Minister, Pranab Mukherjee, clarified that there would be no further commissions of inquiry but investigations by the appropriate authority into specific findings against persons named in the report. While Amnesty International welcomes these steps, the organisation is concerned about ongoing delays and urges the Government of India to hold any perpetrators to account in a speedy and transparent manner.

A similar pattern of delays to justice and impunity for perpetrators exists for other large scale incidents of human rights violations in the country.

During the period of militancy in the state of Punjab - mid 1980s to mid 1990s - Amnesty International received reports of torture, deaths in custody, extrajudicial executions and 'disappearances'. While there have been a small number of prosecutions and despite the recommendations of specially established judicial inquiries and commissions, impunity has prevailed in many cases.

Amnesty International is also concerned about the ongoing impunity for perpetrators of human rights abuses against Muslims in Gujarat in 2002. Over 2,000 people, mostly Muslims, were killed in targeted violence, including hundreds of girls and women who were publicly stripped, raped and gang raped, following a fire in a train in which 59 Hindu activists had died. While some cases are being tried outside Gujarat State and the Supreme Court has directed that over 2,000 previously closed complaints be reviewed with a view to possible remedies, few perpetrators have been held to account. Amnesty International urges the Government of India and particularly the Government of Gujarat to take urgent steps to end impunity in the state.

Source: Amnesty International.

HUMAN RIGHTS *advocacy*

Police torture and recent court directives

MD. ZAHIDUL ISLAM

ARREST, detention and remand are regular phenomena in our police activities. Sometimes these arrest, detention and remand are lawful, but in most of cases these are proved or felt to be illegal. This illegality is, however, not an obsession with the police today, rather it was phenomenally present in the past and there is no sign that the scenario will change shortly. As a matter of fact, if one looks into news reports of one day's newspapers one will find a good number of examples of polices' illegal activities relating to arrest, detentions and remand. Obviously, these newspapers do not cover all the incidents happening in the nook and corners of the country, hence are not depicting the total scenario, which is rather horrific. Nevertheless from these reports one can have a good picture of the situation that police atrocities and illegalities are not diminishing at all.

However, these repeated and continuous illegal acts of police do not mean that their acts are unopposed, not protested.

The parties in oppositions, are disparate to extricate the people from the misrule of govt and its pet-police (in their words). Consequently, every thing seems positive; there is no shortage of good will. So, ongoing illegal practice relating to arrest and remand should have been controlled to a large extent. But surprisingly the actual scenario is diametrically opposite. Though there are a lot of seminar, symposia, discussion, writings, political speeches in this regard seems failing even to scratch the body of police, let alone to change their mindsets. This clearly sends a message that such type of lip services (in civilised word advocacy) will not serve the real purpose. What is necessary is to do take some effective initiatives.

Admittedly, the judgement in *Bangladesh Legal Aid & Services Trust and others Vs Bangladesh* is a pathfinder in the troubled legal arena in Bangladesh. This historical judgement ends all confusions and ambiguity about police power on arrest, detention and remand.

Section 54 of the Code of Criminal Procedure provides, among others, that the police can arrest a person if there is a reasonable suspicion about his involvement in a crime. As the expression 'reasonable suspicion' is not defined in the Code, police could arrest anyone on this suspicion, implicating him in a crime, and thus could harass innocent peoples. The crux was that there was no authoritative interpretation, providing scopes for different explanations facilitating the police. This historic judgement blocked the way of abusing the terms 'reasonable suspicion' laying down that if a person is arrested,' the police officer shall record the reasons for the arrest including the knowledge which he has about the involvement of the person in a cognisable offence, particulars of the offence, circumstances under which arrest was made, the source of information and the reasons for believing the information…'

Thus, this judgement not only closes the ways for vague and ungrounded 'suspicion' but also puts guidelines to deal with such reasonably suspected and arrested person. Accordingly, now not only that the arrested person has to be produced before magistrate within 24 hours but also that: (a) the arrested person has to be informed of the reasons for his arrest; (b) the police will have to inform a friend or relative of the person arrested, unless he is arrested from his home or workplace; and (c) the arrested person must be allowed to consult a lawyer, if he so chooses.

The judgement also emphasises that if this guideline is not maintained, the arrest will amount to confining the arrestee in custody beyond the authority of the Constitution, indicating a way of remedy through writ petition.

Another wide spread abuse of section 54 was that police arrested a person on suspicion and then detained them under the Special Powers Act, 1974. The judgement clearly addresses the issue as ' A person is detained under preventive detention law not for his involvement in any offence but for the purpose of preventing him from doing any prejudicial act.

So there is no doubt in our mind that a police officer cannot arrest a person under section 54 of the Code with a view to detain him under section 3 of the Special Powers Act, 1974. Such arrest is neither lawful nor permissible under section 54.' So if any person is to detain under the Special Powers Act, a detention order under the provisions of that Act must be made at first.

Here comes remand with which section 167 of the Cr.PC deals. After producing the arrested person before Magistrate within 24 hours, if the police believe that the arrested person should be further interrogated for information about crimes, it may ask for remand meaning return the arrested person to the police custody. On this issue, the judgement's direction is very lucid: ' 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 is well founded.'

Besides, the court pronouncing the judgement was aware of the practice of using force in the police custody. So it carefully observes that '… 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 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.'

However, on satisfaction of the requirements mentioned earlier courts will have to grant remand. In that case possibility of torture in custody cannot be ruled out, as there is no monitoring system. The judgement is also alert in this respect. It directs that such interrogation can take place only in the jail, implying a total prohibition of remand of the accused in thana hazat.

The court understood that there would not be any change of the scenario overnight just after pronouncement of the judgement.

So there would be illegal arrest, followed by torture in remand. Accordingly, the forward looking judgement approaches that 'where it is found that the arrest was unlawful and the person was subjected to torture while he was in police custody or in jail, in that case there is scope for awarding compensation to the victim and in case of death of a person to his nearest relation,'

Further, the court had an agony that many persons have been allegedly killed in thana hazat or jails over the years, but there has hardly been any prosecution for those murder or torture. The court knew that reluctance to lodge any FIR or formal complaint due to fear of further harassment is the root cause for this.

Hence, the judgement recommends that in cases of death in police or jail custody, where the post mortem indicates foul play, a Magistrate should be empowered to initiate legal proceedings against the suspect police without wanting for a complaint from the relatives of the murdered person.

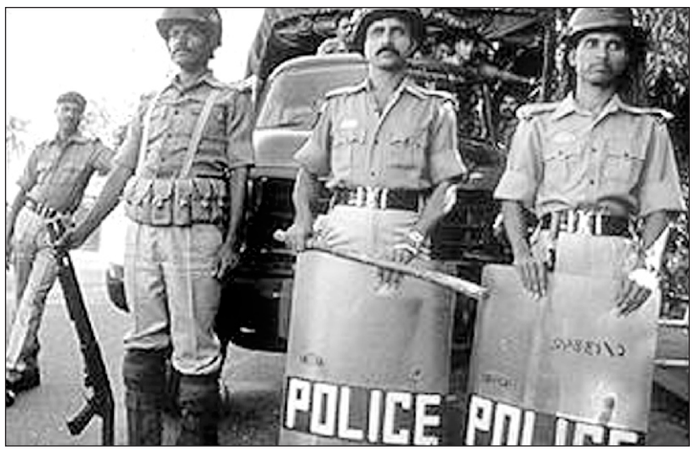
Moreover, the judgement provides detailed recommendations for the necessary amendments to the relevant sections of the Cr.PC, the Penal Code and the Evidence Act so that the directions, guidelines and safeguards enunciated in the judgement are followed strictly as a matter of law. Consequently, it seems that there was nothing left untouched in the judgement, allowing the think tanks, intellectuals and talkers to discuss about. And understandably next step should have been to act upon the judgement. Now we will see what have been acted so far upon the judgement.

Truly speaking, after this judgement, stopping illegal arrest and torture by police was a matter of time only, if the govt wished. But reality is that the govt has appealed against the verdict and the case is still pending in the appellate division. This is unfortunate, but not surprising. Every prudent citizen can realise it.

But my question is, have others the so-called think tanks, lawyers, judges, high police officials, professionals, labour leaders, political leaders, economists, doctors, famous social activist, human rights activists and NGOs performed their duties and responsibilities?

Justifiably, after the judgement, the first act should have been to disseminate the diverse important aspects of the judgement so the public at large, people form all classes, could be aware of their rights, responsibilities as well as the procedure. Necessarily, if public do no know about their rights, how will they claim it? If they do not know the procedure how will they understand that the same is not being followed by the police?

Before making this write-up I talked to some lawyers practising in the Supreme Court and Dhaka District Courts. Really I am very shocked to learn that most of those lawyers even have not read the judgement; they are not fully aware of the directives or recommendations of the judgement. If this be the state of lawyers practising in the Supreme Court, then what about the others lawyers practising in the district levels? The Bar Council, which seems to be free form govt influence, has not so far selected the judgement to be studied by the new lawyers having training there. The judges and magistrates are granting remands routinely without complying with requirements asked by the judgement. I don't believe that those judges and magistrates are not aware of the judgement, then why are they not conforming to it?



The human rights organisations and think-thanks are intermittently arranging discussions on arrest, remand and torture. Opinions and concerns are being exchanged among a few numbers of intellectuals. But what about a common citizen residing in an union or thana level who is facing illegal arrest, threat and torture by police? Have they arranged any programme to arouse awareness, consciousness among the common, poor, illiterate or half-literate people who are frequent victims of police malpractice? Do they think only the advocacy through seminars and symposia is enough?

Police behaviour is a popular issue of the main opposition party to discuss. But what they had done to educate and civilise the police in the time they were in power? And what are they doing now? Our print and electronic media seem very enthusiastic to focus on such police malpractices, illegal arrest and detentions, harassment and torture. But journalists, except a few ones, are not sufficiently knowledgeable of these legal issues. If they were trained and made aware of those, they would be more responsive to focus those issues meaningfully and effectively. Was not it possible for the lawyers cum politicians of the oppositions, who never become tired to speak ill of govt, to arrange regular workshops, seminars, training camps for those journalists working in district levels or remote parts of the country?

So, there are many things to do except speaking. Efforts to arouse awareness among mass people should be the first priority. Aware and conscious citizens are the enlightened citizens who cannot be suppressed by any govt in any way.

The author is a legal researcher currently working for Bangladesh Legal Aid & Services Trust.