Star LAW *report*

Repealing special powers act

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RECENTLY the Caretaker Government has reanimated section 16 of the Special Powers Act of 1974 which was inactivated by section 3 of Act No. 18 of 1991 (with effect from 20 February 1991). Through such animation freedom of press has been suspended to a considerable extent although some offences have been made punishable. Intellectuals have urged the government to apply this Act in the present form with utmost care and caution. In present situation this S. P. Act seems to be much necessary for the government for arresting the corrupt and other suspects with a view to getting the offenders punished. People are feeling pleased to see the drastic action against the so called leaders and their lankeys devouring people's wealth mostly earned by the sweat and blood of the poor peasants and weavers and workers need of Bangladesh. So at present, during the continuation of 'Emergency', there is understandably an acute for applying the Act in view of paving the path to a free, fair, neutral and credible election.

But the Special Powers Act of 1974 has been condemned since its very inception by every opposition party for its anti-human rights nexus, though the party in power has always cared it less. The opposition promised several times to repeal the Act upon going to power. But when it got majority and formed government it became reluctant to repeal the Act and conversely tried very sincerely to catch and detain their opposition activists under this Act. It forgot its stipulation to repeal the Act.

It is not the task of the government to violate human rights of the people or to snatch their fundamental rights. But in some transitional period, such rights need to be held up for better interest of the nation. For example during the 1st world war England enacted the Defence of Realm Consolidation Act in 1914. The USA enacted in 1950 the Internal Security Act. These two Acts violated human and fundamental rights of the people of the two countries at the said times. In the same line the suspension of human and fundamental rights and arrangement for punishment of the corrupts and other offenders through the Special Powers Act are not only recognized but also praised by the people.

To achieve two purposes the Special Powers Act was passed which have been enumerated in the preamble to the Act, viz. (i) to prevent certain prejudicial acts and (ii) to try speedily some grave offenders and award appropriate punishment therefor and to take special measures for the same.

But none can defy the anti-human rights and fundamental rights characteristics of the S. P. Act of 1974. For this reason in peace time there remains no necessity of sustaining a law like this. We may look on how the Act is ultra vires to human rights instruments like the Universal Declaration of Human Rights of 1948 (UDHR), the International Covenant on Civil and Political Rights of 1966 (ICCPR), the International Covenant on Economic, Social and Cultural Rights of 1966 (ICESCR) and other international instruments that have been ratified by Bangladesh and to uphold and implement which the country is obliged.

Comparison of the Special Powers Act with international human rights norms

(i) Section 3 of the Special Powers Act provides that if a District Magistrate or an Additional District Magistrate becomes satisfied as to any person's intent to do a prejudicial act he may order for arrest of the person. Mere satisfaction of the Magistrate has been made enough for the order of detention. But article 9 of the UDHR has unequivocally declared that no one shall be subjected to arbitrary arrest, detention or exile. Simultaneously article 9 of the ICCPR (ratified on 6 September 2000) provides that everyone has the right to liberty and security of his/her person. No one shall be subjected to arbitrary arrest or detention.

(ii) Section 8 of the Special Powers Act provides that the arresting and detaining authority may inform the detenu the cause of his arrest within 15 days from the arrest. And even for public safety he may not be so informed.

We may follow article 33(1) of the Constitution, which provides that the rights to be given to a person arrested under a general law are not to be allowed for a person arrested under a law providing for preventive detention. These rights not allowed for a person arrested under a law providing for preventive detention like the Special Powers Act, are: (a) right to be informed of the cause of arrest as soon as possible after the arrest and (b) right not be detained if no cause is informed as soon as possible after the arrest. It might be argued here that as the Special Powers Act is a law providing for preventive detention so the detenu has no right to be informed of the cause of his arrest as soon as possible, and therefore not informing him the cause as such is no violation of the Constitution. We also agree with this opinion that it is no such violation of the Constitution but it is undoubtedly admissible that it is a violation of article 9 of the UDHR and article 9 of the ICCPR.

(iii) Section 10 of the S.P. Act is also an infringement of article 9 of the UDHR. For this section 10 provides for that the government can detain a person without trial for a time of 120 days. Not only this, the Act contains the provision of detaining a person firstly from 120 days to 170 days and lastly for an uncertain length of time i. e. lifelong. Such detention is called preventive detention. Lord Atkinson has clearly defined it as the detention of a person without trial in a court of law, by an order of the executive not with a view to bringing a criminal charge against him but with the intention of preventing him from engaging in activities prejudicial to the safety and security of the state (in Rex vs. Halliday, the Law Reports, A.C. 1917, 273). Preventive detention may be called an extra ordinary method; because the detenu is arrested and detained only on the plea and speculation of his doing any act subversive of or against the safety of the security of the state and

without any proof against him.

(iv) Section 11 of the Act, in this modern day of civilization, provides that the detenu shall have no right to defend himself through a lawyer and not only that, our sacred Constitution has supported this view. But this provision of not allowing to defend oneself and to produce one's statement is ultra vires to the principle of natural justice, for one of the preconditions of natural justice is Audi Alterum Partem -- none shall be condemned unheard. This provision of the Act is also against article 11(1) of the UDHR which provides that everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence.

(v) Section 16 of the Act has created much obstacle to the freedom of expression through the banishment of many newspapers. It violates the right of the people to freedom of thought, expression and conscience. Section 16 also violates articles 18 and 19 of the UDHR and simultaneously article 39 of the Constitution. Article 18 of the UDHR says, everyone has the right to freedom of thought, conscience …, and article 19 says, everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers. Again article 39(1) of our Constitution provides that freedom of thought and conscience is guaranteed. But the honourable Court in Mujaffar Khan v. the State (PLD 1959) observed: Press is the mouth-piece of public opinion… It has to work as a link between the parliament which frames the legislation and the public which express their hope and aspirations through it.

(vi) Section 20 of the Act has made hindrance to form political party based on religion. whereas article 20(1) of the UDHR has provided that everyone has the right to freedom of peaceful assembly and association. It is to be mentioned that political parties are generally formed on ground of any particular spirit or for the achievement of any particular aim and target. Article 20(1) of the UDHR did not say that no party should be formed on ground of any particular ideal, spirit or aim. The only precondition imposed by article 20(1) on the formation of an assembly or association is that it should be peaceful. Therefore section 20 has also infringed article 20(1) of the UDHR.

(vii) Whenever the question arises as to whether a person has to be detained for more than 6 months, the positive opinion of the Advisory becomes necessary. That means without such opinion the government may detain him for an uncertain time which is less than 6 months, as per its sweet-will. This provision also is against article 9 of the UDHR. Of course, many people like Justice Kayani has opined on the necessity of the opinion of the Advisory Board when one has to be detained for more than 3 months [in Ghulam Muhammad Khan Loondkor v. the State, PLD (WP) 1957, Lah., 497].

But people think that a person should not be detained without trial even for 3 days. Of course 24 hours might be so allowed for the purpose of arresting and producing a person to the nearest Magistrate as provided by article 33 of the Constitution.

Concluding remark

It is proved and undisputed that the Special Powers Act of 1974 is ultra vires to human rights norms and instruments. Different governments of Bangladesh have manipulated it. Almost all the parties in power have harassed the opponent through the Act. In the regime of Awami League government during 1974-'75, of Ziaur Rahman government during 1975-'81 and of Ershad government during 1982-'90 a number of more than two lakh people were arrested and detained under this Act. During 1992 only in the month of July a number of 4,500 persons were detained under this Act. According to a report of the US State Department in 1997 a number of 3,498 persons were detained under this Act. Detention is still going on.

In the developed countries any preventive detention law may be enacted during emergency like war or foreign attack but as soon as the necessity is over the law is banned, even in some cases its duration is mentioned. The Special Powers Act of 1974 was enacted after the Indian Maintenance of Internal Security Act of 1971. But section 13 of that Indian law was not incorporated in our Act for according to that section 13 no person could be detained for more than one year, but there is no such limitation in our Act.

The worst Acts in India commonly named as TADA Acts (a) The Terrorist Affected Areas (Special Courts) Act, 1984, (b) The Terrorists and Disruptive Activities (Prevention) Act, 1985 and (c) The Terrorists and Disruptive Activities (Prevention Act), 1987 were enacted for the purpose of containing the separatist-movement of the Sikhs of Punjab. In view of containing the freedom movement of Muslims of Jammu and Kashmir some further provisions were added thereto. But the Indian government was compelled by the criticism and pressure of the people to withdraw the Acts on 23 May 1995. Therefore the Special Powers Act may also be repealed.

The present Caretaker Government is successfully moving ahead towards holding a free and fair general election. It has already done a lot of admirable works. Its success in bringing tremendous changes in the social and political life of Bangladesh has raised the hope of actualizing many tasks undone by the previous governments. Therefore it is also very eagerly hoped that it shall positively take necessary action to repeal the Special Powers Act of 1974 just before handing over power to the elected government. Because it is well proved that no party-government will be willing to do it. If any government undergoes any necessity in future it might enact it again, but during peace-time this law should not prevail for it goes against human rights. If the Caretaker Government repeals the Act before handing over power to elected government the international community will know that such a law has been abolished in Bangladesh and our international relations with other countries and international organizations shall be strengthened and it would be in line with article 25(1) the Constitution of Bangladesh which provides: the State shall base its international relations on the principles of respect for international law and the principles enunciated in the United Nations Charter.

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LAW *campaign*

Right to information: Towards openness

MAHMUDA AKHTER

NO information is no knowledge, no process of upgrading the life. We must is not that aloof if we don't think about our access to right to information right now. This is the proper time to pass a law on Right To Information (RTI). But right to information is not the need we always feel about. Though we are discussing it but to what extent can we make it a part of our life? The is not only to get access to information, but to the knowledge level of it what to know what to want?

Right to information will ensure empowerment, reduce level of corruption, provide specific direction to the mass that lives under marginal income. The marginal people do not even assess the importance of RTI. A land victim of a small village always gets stuck in a whirlwind of litigation. That person needs an information centre in his village to know where to go for succour. He does not need to come to the city if he is aware that every Thana has a govt. fund to help those who need to file a case to save his right on his own land. Even most of the urban citizens do not know that every upazila hospital has a special ward for emergency abused victims. An illiterate person definitely would believe the 'fatwah' rituals because he does not know that a family court is there to facilitate him in getting justice in household problems. A divorced woman should know the platform to start her resistance. To stop the dowry system, to enhance self-education, to be informed about judiciary and legislation, to provide knowledge about agriculture and health, to make all the sections of the society appear as a team no better tool can be those than information. All the laws have their loopholes. Naturally RTI law may not be an exception. But we need a law to ensure our right. What we deserve is person to person as well as institutional level openness. Professional and corporate bodies should abide by this RTI law along with the govt. ministries.

We are a village-based nation. So we should start our march from there. A look around will give a clear view. The people of different small villages have been bound to undergo many troubles like imprisonment, eviction etc due to land problems. Lack of consciousness makes them handicapped. Either they become the target of

influential officials, landlords or they blame their ill fate to be penniless. But if it was informed that government was there to make their condition stable then it could have been a different experience. Most of the village people don't know that there is a fund supervised by the district judge to support the people who need to file a case to save their neck. Of course, to ask for the fund one has to maintain some criteria. Unfortunately the communication gap does not give them a chance to knock the door. Instead of it, the fund goes back to the relevant ministry without giving support to anyone.

To make the facilities more accessible, the information should be propagated widely. In case of agricultural loan lack of knowledge gives the middle person advantage. The landless people don't know where to go? So they trust the officials which turns into frustration when the loan taken multiplies three times over time. No evidence, no education and no information places them in such a situation when there is no u-turn. If someone wishes to buy a piece of land he has to go through many hazardous levels. Though transparency is mandatory but it's missing somehow for the sake of confidentiality. Sometimes a land changes its owner without informing the original one. In some cases poor peasant does not know when and how his piece of land had been acquired by govt.

Every level has a system of terrorism including a village 'hat'. The toll or tax rises high if the buyer is rich. The seller is bound to pay toll to get a place in the hat and after selling a product also; 2/3 persons will be there to collect the toll who are not bound to show the reason of percentage demanded. Then think about a marginal farmer who needs financial support for seeds. Who will give him a loan? How will he get it? The circle of commission agents will trap him for sure. By hook or by crook these poor people have to surrender to the practice. The right to information could have put a stop to the middlemen. RTI can reduce the proportion of loan and false usury too. 'Fatwah', abuse, acid throwing and dowry any kind of women related problems end without providing justice and leave no option but suicide for the victim. The victims or families cannot gather adequate reports to encounter for justice. Non-supportive attitude of the law enforcing team makes a boundary around the victim. Sometimes help cannot be provided in remote areas. Inadequate knowledge about rituals, religion, customs force them to go through humiliation .Limited education confine them to Imams, Upazila Chairman or Samajpradhan (head of the society).The divorced women have to face many kinds of embarrassment in the name of religion. The acid victims can't get the emergency treatment for not knowing the existence of a special ward in sadar hospital.

Every child needs to have birth registration for education, job, land registration, marriage, passport, driving license etc through his/her life. A few parents know it. The condition of the health sector is simply indescribable. When the urban people are shaken by the physicians then it's quite impossible for a poor person to ask that what medicine is he given to and why? There is no liability of answering. This silence, wrong medicine, unnecessary operation often create panic for many. We share the same kind of experience in case of school too. The parents have no access to know the educational plan or if the school is maintaining the national curriculum or not. Parents even don't know if their kids have any option to change the track or just to follow the given one. There is no option to ask and getting answer about the big amount, which has to be paid in admission process. Where does it go? The parents pay the tuition fee every month still the students have to be admitted each year in the same school! Why? The parents have the right to know.

Any kind of institution whether it's govt. or non govt. should have a flexibility to keep and pass the information where it's needed. RTI would ensure the empowerment and consumer right in a consumer society like ours. The influential nature of products is so normal in our daily life that we forget that there is a price chart in front of the market. The buyers have a platform to face the retailers. But the practice of ignoring these 'minor problems' has been established as a social culture.

The handicrafts get higher price tags while traveling from hindrance. The craftsmen, fishermen or the farmers don't have a way to know the price of their hard work. They can't even think of the difference in pricing for the very same product. If the farmers could have known that their vegetables start journey at 7/8 taka per kg, but end up at 20/30 taka per kg; if the stitching lady could have known that her craft earns her 200 taka but ends up at 5000/6000 taka at the out let; if the consumers could have known what makes the utility bill higher every year or what are the procedures to avoid the ghost bills, definitely they could have made their life better.

RTI is often confused with liberty of the press. Of course they both are interrelated factors. If we cannot ensure the rightness in our daily life then how come the mass media will be free enough to play its role consciously? After a tragedy the ultimate loss is not publicised for the sake of govt. secrecy. The total loss is not available to the media also. But people have the right to know the consequence of these unavoidable circumstances. They have a right to know about the national budget or tax payment. These small pieces of information which we like to ignore in everyday life makes a total knowledge gap between the general people, working group and the policy makers. It has been nearly one and a half years that civil society and some NGO like MJ and MMC and the journalist union along with other organisations are trying to create awareness regarding this issue. But it's not an effort an organisation or a social group to undertake; the need is for the whole society, so the effort should be everyone's.

It is inevitably true that in a poor country where 80% people live from hand to mouth establishing human right is a romantic thought, RTI awareness forming there is like a sweet dream to fulfil. It's really tuff to make the mass conscious abut RTI. But still we have to try. If our neighbour can do it, why can't we?

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FACT*file*

US: Stop the Guantanamo Circus

Two defence lawyers for Guantanamo detainee David Hicks were barred from representing their client yesterday, highlighting the failure of US military commissions to meet fair trial standards, Human Rights Watch said today. Hicks, the first person to be charged before the military commissions authorized by Congress in 2006, pleaded guilty to a single criminal charge.

Hicks' plea came as the Defence Department announced the transfer of a new detainee to Guantanamo. The Kenyan detainee, taken into custody in Kenya, appears to be a criminal suspect who belongs in civilian criminal court.

"The antics at the Hicks hearing underline the illegitimacy of the Guantanamo tribunals," said Jennifer Daskal, advocacy director of the US Program at Human Rights Watch and an observer at the hearing.

Hicks' two civilian defence counsel were prevented from representing him as his hearing got underway on March 26. The presiding judge provisionally dismissed the assistant defence counsel, stating that the government was precluded from assigning civilian government employees to represent defendants, even though military commission rules allow the Department of Justice to assign its civilian lawyers to the prosecution. The judge then removed Joshua Dratel, Hicks' long time civilian counsel, because he agreed to abide by all "existent" rules, but refused to agree to "all" rules for the tribunal without first knowing what those rules stated. According to the judge, this ran afoul of civilian counsel's obligations to agree to military regulations governing representation regulations which have not yet been issued.

"Those who doubted these tribunals would be fair have been proved right," said Daskal. "The commission can't even establish basic rules for lawyers representing the defendant. There's little reason to think that if Hicks had gone to trial he would have received a fair hearing."

Hicks' sole remaining lawyer, Major Michael Mori, had recently been threatened by the chief prosecutor of the military commission, Col. Morris Davis, who warned that Mori could be held criminally liable under Article 88 of the Uniform Code of Military Justice because he made public criticisms of President Bush's detainee policies. Mori filed a prosecutorial misconduct motion about this matter, but because Hicks pleaded guilty the motion will likely never be heard.

Originally the US government had charged Hicks with attempted murder, among other offences. Hicks pleaded guilty yesterday to one count of material support for terrorism a crime typically prosecuted in civilian courts. Hicks will appear before the military commission for sentencing later this week and could receive a sentence of up to life imprisonment. He is expected to serve most of his term in Australia.

Human Rights Watch called again for the Bush administration to close the Guantanamo Bay detention facility, stating that the remaining detainees should either be charged and tried in federal court, or released. More than 380 detainees at Guantanamo have not been charged with crimes or held in accordance with the laws of war, and have been denied any opportunity for a meaningful review of the basis for their detention in an independent court.

Source: Human Rights Watch.