

selected articles

by

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Bangladesh Legal Aid and Services Trust

141/1 Segunbagicha, Dhaka 1000, Bangladesh

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Police torture and recent court directives

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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 opposition 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 judgment in *Bangladesh Legal Aid & Services Trust and others Vs Bangladesh* is a pathfinder in the troubled legal arena in Bangladesh. This historical judgment 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 judgment 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 judgment 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 judgment 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 judgment 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 CrPC 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 judgment'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 judgment 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 judgment 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 judgment.

So there would be illegal arrest, followed by torture in remand. Accordingly, the forward looking judgment 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 judgment 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 judgment 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 judgment are followed strictly as a matter of law. Consequently, it seems that there was nothing left untouched in the judgment, allowing the think tanks, intellectuals and talkers to discuss about. And understandably next step should have been to act upon the judgment. Now we will see what have been acted so far upon the judgment.

Truly speaking, after this judgment, 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 judgment, the first act should have been to disseminate the diverse important aspects of the judgment so the public at large, people from all classes, could be aware of their rights, responsibilities as well as the procedure. Necessarily, if public do not 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 judgment; they are not fully aware of the directives or recommendations of the judgment. 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 from govt influence, has not so far selected the judgment 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 judgment. I don't believe that those judges and magistrates are not aware of the judgment, 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 article was published in the Daily Star on 18th August 2005

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Crocodile tears for separation of judiciary

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July 9, 2001. Afternoon. The Paltan Maidan overflowed with mass gathering. I can vividly remember the day, time and scene. It was a meeting of four party alliance. I was waiting to hear Begum Khaleda Zia, then the opposition leader. Suddenly a great cheer blew up in the gathering; I saw her in her bright white sari with her ever-innocent beautiful sacred appearance stood before mouthpieces. Thousands of people seemed full of breathless excitement to hear from the queen of their hearts. At a time she assured that her party and four party alliance, if voted to power, would make the judiciary independent and separate from executive.

This was not just one day's expression. Begum Zia uttered the same thing in her various meetings. It may be noted that in the past Barrister Ishtiaq Ahmed, an adviser to the past caretaker govt., had taken necessary preparation to separate the judiciary. However, he was persuaded by Begum Zia that her govt. would implement it. Thus the present govt came to power strongly pledged, amongst others, separation and independence of the judiciary. But in the last four years after coming to power what it has done is diametrically opposite to its promise.

As a matter of fact, govt's reluctance to separate the judiciary was evidently noticed from the very beginning. For the purpose of realization of the Supreme Court's directives under the judgment of Masdar Hossain lawsuit, the govt. began to take time extension, and passed the time effortlessly. mending the Code of Criminal Procedure in the light of directives was the simplest work for the govt. with vast majority in the parliament , but it did not do so. Conversely, it tried to recruit and appoint the judges of the lower courts through 24th BCS bypassing the judgment, which directed that no appointment for the

judiciary could be made through PSC. However, following a writ petition the HC made an order, which stayed the process. Consequently, it formed a seven-member Judicial Service Commission, which also was formed allegedly in contravention of SC directives. Soon after that, the govt. appointed 10 additional judges in the High Court Division of the Supreme Court. One of those additional judge was a Law Secretary. This appointment was in violation of the said directives of the Supreme Court.

The intention of the govt., however, became more visible when it denied confirming the appointment of the judges of the High Court Division, who were appointed in the previous regime. Some of these judges were really competent and the honourable Chief Justice himself appreciated their contribution and recommended for them, but they were not confirmed only for reasons widely thought to be political. This disrespect for the Chief Justice's recommendation was a serious breach of constitutional convention that created a serious controversy. Controversy again deepened when the govt. appointed some judges in the HC Division whose integrity and competenc were allegedly questionable.

However, the govt. reached the climax of its controversy, when one of HC Division judges was reported to obtain forged certificates of academic qualification, and the govt. did not take any appropriate action against the alleged judge. Conversely, contempt petition as brought against those journalists who published the reports. This incident stirred a shock wave amongst public consciousness . Crossing away the purview of lawyers, it rapidly spread among common people. Citizens became anxious thinking that what would be our future if the integrity of such a judge of our highest judiciary remained questionable.

And now, the situation is leading to a national frustration. The Judiciary and govt. of the state seem going to be entangled with a serious conflict. Last time when the govt. appealed to the Supreme Court for another time extension (21st time) for separation of the Judiciary from the Executive, the court rejected the same, and stayed the hearing of the case until February 1, 2006. What situation may follow henceforward?

Apparently, there are two options before the govt.: either it has to take the necessary steps for the implementation of the judgment before the date of next hearing, or it has to face contempt of court. The petitioner

of Masdar Hossain Case, who had brought the contempt petition almost a year ago, has reportedly said to have submitted some more fresh complaints against the govt. We don't know what will happen next; we do not even want to imagine it.

It is however learnt that the govt. is contemplating to a file review petition. But why move review petition? Why any more delay? It is told that actually there remains no ground why the govt. can validate any time extension to do it. It is obvious that if the judiciary was separated, the govt. would loose its control over lower judiciary and magistracy; it could not use them to serve their ulterior motives. Is this the only reason? When a govt. comes to power with overwhelming public support, how can they think of such unfriendly control over judiciary?

As a matter of fact, not only the present govt. but also all other previously elected governments have shown a little interest to make the judiciary separate and independent. The Awami League is making a lot of hue and cry against the way the govt's dealing with judiciary, but its previous activities show that it never believes in the independence of judiciary. By 4th amendment it hit out against the Constitution for the first time and it was so severe that it, in a word, buried the independence of judiciary. During it's rule from 1996 to 2001, the AL did not take any step to make the judiciary separate; rather despite the directives from the Supreme Court in Masdar Hossain case it spent time in dillydallying. Hence, it may be concluded that the Awami League is also shedding crocodile tears for the independence of judiciary, and nothing more.

The article was published in the Daily Star on 3rd December 2005

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Neither RAB nor any other force can serve the purpose, unless...

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A terrorist does not have any sense of justice. He does not understand anything except what he does for his self-satisfaction or self-interest. Anybody, irrespective of his character, race or opinion, may fall into his pray and suffer hazards that might lead to death. The way to remain secure and protected from his violence is to nab him and hand over to the law enforcing agencies or taking legal proceedings against him. Unlike the shooting a mad dog away, we cannot shoot a terrorist, however dangerous or harmful he be for the society. A terrorist also, as a human being, possesses the right to life. Moreover, he is a citizen of the country. And as a citizen it is his fundamental right i.e. constitutional right, given under Article 31 of the Constitution, to enjoy the protection of the law, and to be treated in accordance with law, and only in accordance with law. Hence, we see no other alternative than taking the resort of the judicature, which is expected to render justice and thus keep healthy atmosphere in the society.

But it seems that government is trying to improve law and order situation overnight and venturing to ensure justice, bypassing the judiciary. Earlier the so called clean heart campaign and recently by Rapid Action Battalion (RAB), Cheetah and Cobra, government is making efforts to eliminate terrorism from society. But all these efforts are resulting in some extra-judicial killings, which are opposed to rule of law and cannot be supported.

It is argued that what govt did by Operation Clean Heart or what is now doing by RAB, Cheetah and Cobra are within the purview of law; and it is neither a bypass of law nor something new in the history of governance. Today's economic giants like the Chinese and the South

Korean leaderships did not hesitate to take drastic actions against petty thieves, muggers, robbers as well as even against the greedy businessmen to get to where they are today. Besides, if the concept of democracy means 'the greatest good for the greatest numbers', these some accidental killings should be well justified.

There seems that the above-mentioned arguments have been accepted by a portion of common public. The reason is obvious. People hardly get satisfactory justice from the judiciary. As a result, people are now very disappointed; day by day they are losing their faith over judiciary and are being less interested in harbouring to the same. Conversely, as a result of operations of joint drive forces, RAB, Cheetah or Cobra, they find some immediate improvement of law and order situation.

During the Operation Clean Heart more than forty people were reportedly killed (though those were explained as deaths from heart attack) and in the ongoing operations by RAB a good number of persons have succumbed to death in so-called crossfire. But the common public do have little time to think about the fundamental rights of those persons yielded to death in those operations. What makes them happy is that in those operations some criminals have been killed. These criminals killed many innocent people, were involved in drug and other unlawful business and extorted money from business houses and individuals, causing damage to national economic growth and development. They should have been actually ruined in long before. But our regular police administrations as well as courts seem failing to capture them. Thank to RAB that it has destroyed them. So this is excellent.

Okay, this public attitude can be respected but should not be appreciated. We know, the deaths (allegedly from heart attack) of those people during the 'Operation Clean Heart' were not properly investigated; kith and kin of those victims were harassed and terrified when they went to file cases in the police stations; and ultimately those joint drive forces were indemnified. At present, the killings during RAB's operations are being reported as killings in crossfire. But so good number of killings in crossfire normally arouses the question: have all those persons got killed in crossfire? Or is this 'crossfire' a synonym of 'heart attack' during Operation Clean Heart?

This is such a question, which will never be answered. But rule of law says there must be no rooms of vagueness and ambiguity in the activities of the govt.

Another thing, which we have experienced, is that the passed 'Operation Clean Heart', however, improved the law and order situation to a good extent. But, as soon as the joint drive forces had gone back to the barracks, the law and order situation recovered its old position as it was before the commencement of the said operation. As per media reports, a good number of top terrors managed successfully to escape the operation's net, and they were threatening residing off the purview of the operation. After the operation was over, they came back in the scene, and restarted their destruction, brutality and heinousness with new vigour, and, thus, made the law and order situation worse than ever before. This time also every prudent citizen can foresee that after RAB, Cheetah and Cobra are withdrawn from scenes, the law and order situation will retake its old shape. This is because what is being done in the name of operations is 'not the right way' to curb criminality.

Indeed, keeping thousands of arrested lawbreakers and accused under the police custody without trial, which is done at times and was done during the Operation Clean Heart, is like the caging of the mad dogs without treatment. Like ways, killing of terrorists or criminals by RAB or forces alike can never provide successful outcome. It is necessary, at first, to find out who or which makes a man terrorist or criminal, and then to try or treat him. Otherwise, no trial or treatment will furnish desirable result. It should not be forgot that everyone is born innocently; some people or some circumstances make him criminal; therefore, those some people should be punished, or those some circumstances should be removed at first. Here comes the question that who will do this job? Shall we never get rid of these mad dog-like terrorists and criminals?

The answer of this question depends wholly on the politicians. (Though the lower judiciary and the police administration are reported to be two most corrupt institutions, these corrupt ones can be easily purged if the politicians do wish.). It becomes very natural and obvious that, those terrorists are brought up by the politicians. And for this an earnest commitment by the parties in power and the opposition to eliminate crimes from their respective folds is enough. But do our leaderships bother public interest? As a matter of fact, we have experienced that our leaderships are made of the same mould.

No leaderships actually have done anything for the public. Our transition from autocratic govt to a democratic one has not in fact changed anything. What all our politicians are doing is just giving us lip services. All the political parties are preaching for terror-free society, and blaming others for patronising terrorism.

But the fact that almost all the top terrors recently killed in so called crossfire did maintain link with any of these political parties confirms a message that all these political parties are harbouring terrorism. Then it appears that we, the voters and the mass people, do not have alternative leadership to choose and improve thereby the law and order situation of the land.

What, therefore, we can do is to pray to the Almighty so that he might gift our leaderships the benevolence, the true will to actually do something for the oppressed countrymen!

The article was published in the Daily Star on 29th March 2005

4

Hartal: When a political right violates some of the fundamental rights

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Theoretically in every normative society there exist some ways and styles to demonstrate grievances collectively. These ways and styles differ from system to system, depending upon the status of the society, upon the differences of the mode of governances. Hartal is such a way to protest in the Indian sub-continent. Unfortunately, the hartal, which once emerged to ventilate grievances to the rulers or government or to the concerned authority regarding the democratic rights and the legitimate claims, has now turned to an absolute political weapon used sometimes to gain even a petty political interest. Now, it appears to be a great part of our political culture. As it proves a completely political issue, we cannot reasonably expect that the nation will come to a single unique decision whether hartal should exist any more in our political culture. Whatever be the decision, one must pay an earnest thought on the hartal issue since day by day it is becoming not only a matter coercive for the common public but also a thing undoubtedly baneful for the national state.

HISTORICAL BACKGROUND OF HARTAL

Protestation is nothing new in the Indian society and history tells us many events where there were agitations for articulating different types of demands. Influenced by European trade unionist movements, the industrial workers of India had been observing occasional strike or dharmaghat from the first quarter of the twentieth century. This industrial strike or dharmaghat was conveniently extended to the political arena and took the name hartal.

Hartal is originally a Gujarati expression, which signifies closing down of shops and warehouses with the object of realising a demand.

Essentially a mercantile practice, it acquires political significance in the 1920s and 1930s when MK Gandhi institutionalises it by organising a series of anti-British general strikes by the name 'hartal'. After that hartal becomes a way to protest in whole Indian sub-continent. In today's India it is popularly known as '*bundh*'. In Bangladesh, hartal is a constitutionally recognised political method for articulating political demand.

A GLIMPSE OF HARTALS IN OUR HISTORY

During the period between the 1920s and 1950s, there were so many hartals called against the British rule.

From the 1960s, political activists were increasingly organising hartal, which by then appeared to them to be a stronger political weapon. There had been hartal for days together on the eve of the Bangladesh War of Liberation. Indeed, politics of hartal had played decisive role in mobilising people on behalf of the Liberation War.

Hartal becomes a very frequently used political tool for agitations from the 1980s. In the face of recurring hartal, called mostly on the issue of legality, the regime of Hussain Mohammad Ershad (1982-1991) collapsed. The government of Khaleda Zia put under tremendous pressure by the calling of relentless hartal by Awami League led opposition. Similarly, the government of Sheikh Hasina was also not free from the politics of hartal. And the present government is facing hartals now and then.

WHY FOR FUNDAMENTAL RIGHTS

A hartal, when called upon for the greater public interest, does not raise any question of fundamental rights of the citizens or economic loss of the nation. Because, public then spontaneously suffer the financial or others losses to make a hartal successful. For example, the hartals called for against the British or the then Pakistani rule in East Pakistan (Bangladesh) were to meet the 'political demand', which was actually the overwhelming public demand of a society or community.

But after the independence, the words 'political demand' encounters the usage of the same in narrow sense. Different political parties begin

to resort hartal to meet their political demand signifying the demand of a particular political party, not of the whole community. So, the other members of the community or the parties against the hartal usually raise the questions of their fundamental rights to be violated and financial loss to be suffered by the observance of hartal. Hence, there comes the question to stop hartal, a political right, allegedly denying some other civil and fundamental rights of the citizens.

HARTAL IN THE EYE OF LAW

However, call for hartal per se is not illegal; rather, it is a historically recognised democratic right. Indeed, where an act is meant to be nothing but an expression of protest such an act cannot be said to violate the fundamental rights of the citizens. The calling for hartal, not accompanied by any threat, will be only an expression guaranteed as a fundamental right under the Constitution. And, therefore, any political organisation may call 'hartal' by extending invitation to the public in general or to a particular class or group of people.

Certainly, the freedoms as enunciated in the constitutional provisions cannot to be construed as a license for illegality or incitement to violence and crime. Hence, any attempt to enforce it or ensure that the hartal is observed makes the call illegal, resulting in interference with the individual right. At the same time, any kind of provocation, instigation, intervention and aggression by anti-hartal activists to foil the hartal is also unlawful. In a word, hartal, as a democratic right, should be observed as well as should be allowed to be observed peacefully without resorting to any illegal activities. (*Khondoker Modarresh Elahi Vs The Govt of Bangladesh*).

ACTUAL SCENARIO OF HARTALS TODAY

The actual scenario hartals today is that during hartal citizens are prevented from attending to their avocations and the traders are prevented from keeping open their shops or from carrying on their business activities. Also, the workers are prevented from attending to work in the factories and other manufacturing establishments leading to loss in production causing nations loss. And after every hartal, with our painful eyes and heartbreaking sighs, we have to see in the newspapers the pictures of wanton acts of vandalism like destruction

of government and private properties, transport vehicles, private cars and three wheelers as well as rickshaws. These illegal acts in the name of hartal cannot be recognised as political rights protected by the Constitution.

In this respect, High Court of Kerala, in the case of *Bharat Kumar Palicha and another Vs State of Kerala and others*, held that the calling for and holding of bundh (hartal) by political party or organisation involves a threat expressed or implied to citizen not to carry on his activities or to practise his avocation on the day of bundh. It violates the fundamental rights of the citizens. The Supreme Court of India by its judgement reported in AIR 1998 (Supreme Court) 1984 upheld the judgement saying there was no right to call or impose bundh which interfere with the fundamental rights of freedoms of citizen in addition to causing loss in many ways.

WHAT TO DO

Hartal should not be banned enacting law, because it will be a futile exercise for some practical reasons. In fact, it must be allowed to be exercised in the greater context of the nation as a whole for political and social development in democratic culture. What is necessary is to ensure that it is not resorted to unless a genuine cause for the welfare and greater interest of the people, failure to the government to respond to the demands or grievances raised by common public or by the opposition, and overwhelming public support in favour of hartal are present.

Another point is that the rights of assembly, meeting and processions, which nurture the right to call hartal, are not absolute, but rather regulated by law. Reasonable restrictions may be imposed in observance of hartal in the interest of public order. Again, when a call for hartal is accompanied by threat, it amounts to intimidation, for which any aggrieved person or party may take legal action against the caller for hartal under the ordinary law of the land. Besides, citizens, who think their fundamental rights are encountering threat due to hartal, can take the resort of article 44(1) and 102 of the Constitution to have their fundamental rights protected, and can thus restrict destructive mood of hartals to some extent.

CONCLUDING REMARKS

Most important thing, therefore, is that our political parties have to be self-motivated that except a grave cause they will never indulge a hartal causing so much of sufferings to the national life. Hopefully, in the recent time we see there has been an auspicious start to the way of civilised political culture. Human wall, human chain, silent procession or procession with black scarf on faces, burning the party or organisation flags, burning effigy of the person being protested, arrangement for music on streets where protesters sing those songs containing fighting spirit, staging drama or play in public places, public assembly in the premises of Shaheed Minar are symbols signifying that our political culture is taking a positive turn. We, therefore, can expect that all concerned will realise that hartal in the way it is exercised now-a- days can never be a way to protest the activities of government or other organisations in a democratic and civilised society.

The article was published in the Daily Star on 20th February 2005

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An earnest thought for the innocent family members of the outlaws

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If you see into the newspapers today you will certainly find out some pieces of news that police have arrested some family members of some outlaws or extremists. In fact, it has become a regular phenomenon after the increase of outrageous activities of different terrorist groups. The bloody terror actions of these groups have led the nation to an unprecedented panic and anxiety that what will happen to the country in the coming days. Consequently, the whole nation, except a few religious fanatic diehards, is now totally unsympathetic to these terrorists and they want these extremists be given exemplary punishment. The authority also seems desperate than ever before to nab those terrorists and everyday they are arresting the accused and suspicious members of those groups. But with a great concern it is being noticed that some innocent family members of those extremists are being arrested and harassed thereby. Hence, the write-up highlights the issue, observes the laws relating police power to arrest the family members of an accused, its abuses and prevention.

‘Arrest’ simply means the taking or detaining of a person in custody by authority of law. The purpose of arrest, in criminal proceedings, is to hold the person for answer to a criminal charge or to prevent him from committing an offence. By arrest the arrestee is deprived of his personal liberty, which is probably the most valuable human right after the right to life. This is why arrest should be made with proper

caution, taking into consideration all prevailing circumstances and obviously in accordance with law.

What usually happens in most of the cases is that after arresting the family members of the accused police show that the same has been made under section 54 of CrPC. The section vests the police with vast power to arrest any person without order of Magistrate or without any warrant, 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. But after the historic judgement in *Bangladesh Legal Aid & Services Trust and others Vs Bangladesh 55 DLR 363* the way of abusing the terms 'reasonable suspicion' has been blocked forever. The judgement clearly lays 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...'

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.

But, regrettably, it has become a commonplace that police go to accused person's residence to apprehend him, they find him absent and become very angry, then without any reasonable ground they begin suspecting the family members that they know whereabouts of the accused, and following this baseless suspicion they pressurise all the family members to provide information about it; in this way when they fail to extract any information from them, they arrest them claiming that it has been made under section 54 of the CrPC. Such type of arrest is in any sense absolutely illegal.

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 abovementioned 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.

There is another provision for arrest without warrant by police under Rule 316 of the PRB. But this provision too does not provide sufficient opportunity to arrest and take into custody the family members of the accused without reasonable grounds or complaints. Rather, Rule 317 counsels police to avoid unnecessary arrest; it also advises the police to be cautious during investigation and not to arrest anyone relying upon their own justification.

Of course, there are some other scopes of arrest of family members of an accused under the Penal Code for the offence of harbouring of the accused offender. According to section 52A of the Code the word 'harbour' includes the supplying a person with shelter, food, drink, money, cloths, arms, ammunition, or means of conveyance, or the assisting a person in any way to evade apprehension. However, a family member of an accused cannot be arrested for the offence of harbouring the accused just because he or she is a member of the accused person's family. Moreover, section 212 of the Penal Code provides an exception that if a husband commits an offence, the wife is allowed to harbour him and vice versa. Neither can be prosecuted for the offence of harbouring offender. Therefore, before apprehension of any family member, there must present a legal ground or any convincing accusation or reliable proof of such offence in the hands of police.

Rationally, we may be unfeeling to a member of a family who has joined a militant group, but we cannot be rude to the other members of his family who don't have control over that misguided member of the family. There is no scope for being emotional here. We must think the things logically. When a poor family sends its son to a madrasha or other educational institutions, it does not want to see him as a terrorist, but the circumstances makes him terrorist where the family does not play any role. Again when such a son study in a residential

madrasha, school or college his family loses almost all control over him. So in such cases the family cannot be held responsible. Rather, we should understand the fact that it is the failure of the state authority to oversee what type of activities are being conducted in these institutions; that it is the failure of our administration and intelligence agency who have failed to detect the linkage of these institutions to militant groups. For this failure of the state, the innocent family members of an outlaw cannot be made liable. But irony is that we are to see the police to arrest and take into custody the elderly father or younger unmarried sister or brother or children or wife or any other person of the accused persons.

Undoubtedly, such type of arrest is not only illegal but also a gross violation of fundamental rights under the Constitution. Article 31 of the Constitution declares that no action detrimental to the life, liberty, body, reputation or property of any person shall be taken except in accordance with law. Again article 32 clearly expresses that no person shall be deprived of life or personal liberty save in accordance with law. Authority cannot deny these rights as no proclamation of emergency has been issued so far.

Once more, if you see the matter beyond the purview of the Constitution, the arrest of family members of an accused without just cause is similar to the false imprisonment or wrongful confinement, which is a criminal offence punishable under penal law. Sections 340 to 348 of the Penal Code relate to such offences. In *Paothing Tangkhul V State of Nagaland*, 1993 CrLJ 2514, a detention without lawful authority was held to be wrongful confinement. In the case of *Shamlal, 4 Bom LR, 79*, too, where a police constable detained some persons as suspects, it was held that offence of wrongful confinement was committed by the police. Again, in *Dhamru 1978, CrLJ 864 (Orissa)*, we see, a police officer arrested and detained a person in the thana lock up despite production of a bail order from the court; it was held that the officer was clearly guilty of offence of wrongful confinement.

Now come safeguards against such arbitrary arrest or imprisonment. The most famous safeguard against arbitrary imprisonment is the writ of habeas corpus. It is addressed to one who detains or imprisons another, and commands him to 'have the body' of the person before the court directing on a certain day, together with the cause of his detention. If the court decides that the cause shown does not justify the detention or arrest, it orders his release. A citizen can invoke the

writ of habeas corpus under article 44 & 102 of the Constitution. A very important as well as interesting matter is that an application for habeas corpus can be made by any person irrespective of his being aggrieved or not. However, this is not the people friendly way of getting remedy; poor citizens cannot afford invocation of the writ. Moreover, it is not easily accessible to the citizen countrywide as only the Supreme Court exercises the jurisdiction.

Next comes 'Suo motu rule' meaning 'rule upon own initiative'. In this regard no petition is filed; the court upon its own initiative proceeds against the person or authority illegally treating a citizen. The basis of such initiative may be a piece of news or information, no matter how it reaches the court. The High Court Division has power to issue suo motu rule under section 491 of the CrPC, and it has a good record of using this power. Through issuance more of the same the honourable Supreme Court can dispirit the abuse of laws relating to arrest and detention.

Finally, it must be reminded that social obligations include not only uniting against terror to bring peace in the society but also ensuring that no member of the society is deprived of his rights. In fact, only the citizens who are aware of these rights and obligations can prevent the lawlessness in the society. Here is a reminder that an application for habeas corpus can be made by any person, who need not be a 'person aggrieved'. We can hope that the conscious and high-spirited citizen will avail this noble action and must inform the High Court Division about any illegal arrest or detention so that it can take initiative. We cannot in any way avoid our moral and social responsibility to ensure that no one suffers for the wrong of others.

The article was published in the Bangladesh Observer on 17 December, 2005.

6

Police reforms in Bangladesh: Some issues

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Some months ago the ministry of Home Affairs launches the far-reaching police reform project titled 'Strengthening Bangladesh Police' to improve the law and order situation. The project is launched in an inauspicious moment when the police is going to loose almost all its public confidence, and when public have begun thinking that providing police force is just wastage of public money. It is, therefore, a piece of good news for both the police and the countrymen, and surely a very timely decision.

As per media revelation, this is a three-year project, which aims at improving performance and professionalism at all levels of the police force. It involves US 13 million and will run in cooperation with the United Nations Development programme (UNDP) and the UK department for international development (DFID). However, it could not be appropriately learnt that how these aims will be achieved. But it is almost certain that the project will focus as usual on crime prevention through better investigation, operation and prosecution, human resource management, training and strategy, use of information technology etc. These are the fixed set of points focused on every time. But this time the concerned authority should be more cautious to plan their reform project, taking lessons from earlier

reform actions experience. First of all they should look into the true causes of the failure to achieve success and win public confidence. Otherwise the expensive project will also go in vain like the earlier ones.

It is undeniable that the existing training and strategy for investigation, operation or prosecution, human resource management in our police department are not sufficient to curb the criminality in the country and maintain the law and order situation. Moreover, there are legal loopholes, as for example anticipatory bail, writ petition seeking injunction etc, helping the criminals to evade police net. But the true fact is that even if the police were with sophisticated trainings, strategies, arms and IT facilities, and laws were up-to-date, it would not be possible to curb the criminality to an extent greater than that is now done. Because the actual problems causing repeated failure of police and destroying all the positive efforts are elsewhere. Among those problems, at least three can be mentioned as root causes. Firstly, political interference; secondly, lack of human rights education; and finally, lack of moral education and patriotic feelings.

It is undisputed that major portion of criminals are involved with any of the political parties of the country. Though we may not be able to produce evidence in every case, but we have experienced that almost 100% cases, where party men are connected, are more or less influenced by political parties or leaders. This is the very political influence, not the lack of strategy or training in police, which hampers the proper investigation of crimes in most cases.

When due to this political influence some criminals are getting immunity from trial by discarding their names from charge sheets, the opposite scenarios are also frequent. Unfortunately in some cases, the accused persons, not proved criminals, face illegal and inhuman treatments at the inquiry, investigation or remand stage. This is the place, where there is a thread of causes. Police many times forget that 'accused' and 'convict' do not possess the same meaning. A very very innocent person may be implicated in a crime or crimes. But, regrettably, experiences show that whenever police get an accused, they begin to treat him or her as criminal and start to use all possible measures including worst type of mental and physical torture to extract evidence or information.

But what is logical is that if police do not keep some clear and unambiguous evidence or authentic information of the accused's being

involved in the crimes, the accused should not be put under any torture just for digging out information. Even if one is found evidently to be linked with any crime, police should not use excessive force or any tortuous way to pull out more information. Because, with the exception in certain cases, the information extracted forcefully by the police are not accepted in the court of law.

Police, therefore, should be well taught the extent of their power and procedures for investigation, enquiry or remand. The tendency of a fraction of enthusiastic police to prove by hook or by crook an accused a criminal must be put an end to. Most importantly, police should be educated that their duty is not only to explore criminal activities of the accused, but also to help the accused to get justice in the court of law. Hence, all out caution should be taken so that in no way police violate the human rights and specifically the right to get justice of the suspect or accused.

After the political influence and procedural pitfalls comes corruption in the police department. Shamefully, the police whose job is to make people obey the law and to prevent and solve crime is one of the topmost corrupt organisation in the country. Situation proves worse when we see the policemen become entangled with the criminal activities. However, corruption in the police department should not be treated separately. As a matter of fact, corruption has become an overwhelming social problem. Every section of our society has been hit by corruption. Police department understandably was not able to resist it.

There may be differing opinions as to causes of corruption. But certainly the lack of morality in society is the central cause. Morality connotes the principle concerning right and wrong or good and bad behaviour. No doubt, morality develops in a society through religious education. In fact, every religion is based on some moralities practice of those keeps the society healthy. For example, if a Muslim strongly believes in the core lesson of Islam that one day every person will be accountable to God for his/ her every action, or that patriotism is a part and parcel of one's belief (imaan) in Islam, he can never indulge in corruption.

Here comes a question that apparently the western society is not so much religious minded, rather they seem somewhat oblivious of religious activities; then what is the force that keeps them corruption-free? Yes, this is the Patriotism the feelings and love for one's own

country and the willingness to defend it against anything bad. Unfortunately, there is scarcity of this patriotic feeling in our whole society, where the police are a dominant part.

It is finally suggested that whatever be the reform plan, the concerned authority must pay an earnest thought on the above-mentioned matters.

The article was published in the Daily Star on 18th June 2005

7

Access to justice: A simple explanation

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The literal meaning of 'access to justice' is 'the scope or opportunity for seeking justice'. In this sense, there is 'access to justice' in almost all the countries where there exists a legal system or justice system. But what does the expression 'access to justice' actually mean? Before proceeding further please notice the following two examples.

a. Mohammad Ali is a poor cultivator living in a remote village. He possesses only two acres of cultivable land situated beside acres of land of a influential village landlord or Zamindar. Recently this Zamindar has taken a plan to make a big farm on this land. But the land the Zamindar possesses seems inadequate. So he Mohammad Ali's land. Consequently, he proposes to buy Mohammad Ali's land. This land is the sole property of Ali, so he refuses to sale it. Now, finally, the Zamindar is forcing Ali to sale his land. Mohammad Ali wants to protect his property. He knows that there are court, Judge, law, lawyers to help him. But he does not know where to go, how much money he needs to spend for a remedy, whether he can afford a suit. He does not have money enough to engage a good lawyer. Now there is only a vacant look in his eyes. He finds no one to stand by him.

b. Akhi is a fourteen years old beautiful girl passing her dreamy adolescence. A meritorious student of class nine, Akhi is the eyeball of her parents. Her teachers in the school are very much

hopeful about Akhi that she will give a good name to the school by securing an excellent result. Akhi is also studying a lot and trying to make their dream come true. One day on the way to her school some Selim, a vagabond son of the Union Chairman, stops her, tries to imply something, and finally offers love to Akhi. Not surprisingly, Akhi refuses to accept the offer. Selim awaits several weeks for a response. Having no response from Akhi, he becomes revengeful. One afternoon on the way back from school Akhi is encountered by Selim. Before understanding anything, Akhi sees Selim throwing something liquid (acid) on her. Whole face of Akhi gets burnt and the beautiful Akhi turns the ugliest!

Akhi's father, a little shop-owner Abdul Alim, knows clearly that it is a crime, there is law to curb these crimes, there is court to provide justice. But he does not know what he can do. The Chairman is threatening not to file any case. Experiencing her dear daughter's fate, he is now like a mad man.

In the meantime some one advised him to go to thana to file a case. He goes to the thana accordingly, but to his great surprise, he experiences the thana refusing to take the case. He comes back home with an ocean of frustration.

In the examples, can we say that these poor helpless people do have access to justice? The answer will be somewhere between yes and no. In fact, it is not possible to answer the question by clear-cut yes or no. Because, the concept 'access to justice' does not mean merely 'the scope or opportunity for seeking justice'. In other words, access to justice does not involve only legal system, courts, other legal procedures and forums to seek redress. In fact, if the access is entangled in constraints like harassment, unfairness, threat, formidable cost etc., the access cannot be told true access. Likewise, if the opportunity or scope for seeking justice becomes inaccessible to poor and common public, it cannot be said 'access to justice'. Hence, 'access to justice' connotes the true and actual access to justice which is curative, cost-effective, corrective as well as remedial for all types of people, rich or poor, elite or common.

Unfortunately, access to justice in this true sense is very rare in most of the countries of the world, especially in the countries of third world. That is why this has become a topic being discussed widely. But why

is this so important a topic to be discussed? What is the problem with 'no access to justice'?

The answer is simple. Access to justice remains in the climax of all human development. And the ultimate aim of all human social endeavours and initiatives is to ensure true access to justice.

ENSURING ACCESS TO JUSTICE

Undoubtedly, the existence of an efficient justice system is in the core to ensure access to justice. However, access to justice is no less importantly linked with the rule of law, poverty eradication or human rights. Rather, rule of law, poverty reduction and protection of human rights are the fundamental factors in this respect. This is because if rule of law is not ensured, poverty is not reduced, human rights are not respected, it is impossible to ensure true access to justice.

If you take the case of Bangladesh as an example, you will see it does have a nice court system, a large scale of legislation dealing with almost all matters; but access to justice seems not only insufficient but also very poor in the country. And unfortunately, in some cases there seems no access to justice. The reasons are obvious. Given the allegation of widespread corruption in judiciary, administration and politics, the significant factor is that Bangladesh is a developing country where the vast majority of its population live in abject poverty. The usual expenses incurred in litigation are far beyond the reach of the mass population. Many petitions fail mid-way for non-prosecution because the petitioner is simply unable to afford to continue the action. While on the one hand there is limited scope for state-funded legal aid, on the other hand there are only a small number of non-governmental organisations who are actively involved in providing such legal aid and services. Again insecurity of the person also limits opportunities to obtain effective remedies through courts. Illiteracy and lack of awareness is another root social cause. Vast majority of the population is still illiterate, while the limited literate population are unable to comprehend the provisions of law described in complicated language. Hence, so long these causes are correctly detected and rooted out, ensuring true access to justice will be a dream.

IMPROVING ACCESS TO JUSTICE

Needless to say that ensuring access to justice is the toughest job for

any nation. It requires thoughtful initiatives, strong commitment, effective actions and above all a lot of time.

However, improving access to justice involves a total process of

- Reforming justice sector;
- Simplifying and streamlining legal system;
- Strengthening national public defence system and improving legal aid for the poor;
- Providing legal information for judges, lawyers, prosecutors and public defenders;
- Increasing the availability of legal information to the public;
- Promoting alternative dispute resolution techniques and reforming informal mechanisms;
- Strengthening the active participation of civil society in justice sector reform;
- Promoting international human rights instruments;
- Integrating human rights with development programming;
- Reducing institutional and cultural barriers etc.

Consequently, access to justice relates not only courts, judge, legal process, but also government and administration, political leaders, influential local leaders, social activists, development organisations etc.

In this sense, all the development organisations, legal organisations, human rights organisations, who are working for poverty reduction, upholding human rights, empowerment of poor etc., are working to ensure the access to justice. As earnest they will be in their activities, as expeditious the access to justice will be.

The write-up was published in the Daily Star on 19th November 2005.

8

Guaranteeing the rights of the slum dwellers

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If you have ever been to passport office of Agargaon or adjacent areas, surely you have noticed a slum near the passport office. It is familiar to most of the people as Agargaon Old Market Basti or Passport Office Basti. It covers almost one and half acres of land sheltering about two hundred families -- more than one thousand uprooted, displaced helpless people. These people have been living here for more than 25 years. Most of them took shelter here after they had lost their homestead and belongings to river erosion. The others are basically landless cultivators coming from different nooks and corners of the country. They maintain their lives by running various valid jobs. Some of them are small shop-owners on the road adjacent to the Basti, some of them day labourers, rickshaw-pullers as well garments workers. In fact, through their consistent effort, they all have been struggling to lead a good life.

This write-up is, however, not just to state their life struggle, but to focus on the most grave situation awaiting for those slum dwellers. They are again going to be uprooted or displaced from their shelters. And it is very ironical that this time they are going to be displaced not by river erosion, flood or drought, but by the human authorities. Yes, the government is going to evict the slum on any day now. And it is going to be done lawfully. You may ask how?

Hence, a brief mention of the background of abovementioned story seems quite pertinent. More than one year ago the inhabitants of the said slum came to know from a reliable source that Housing and Public Works Department of Bangladesh Government has decided to

evict the slum dwellers. On query they obtained two letters one requiring deployment of police force and the other requiring the cutting of electricity line. The letters also indicated that the slum dwellers would be evicted and all the structures therein and belongings of the residents will be bulldozed.

After obtaining the letters, Nurul Islam Mistry and Parveen Akhter, on be-half of the residents of the slum approached Bangladesh Legal Aid and Services Trust (BLAST) and Ain O Salish Kendra (ASK) for legal aid. Considering the nature of the public cause and state of the slum dwellers BLAST and ASK came to give legal assistance to them so that their fundamental human rights are not violated.

On 26.09.2004 BLAST and ASK jointly filed a writ petition before a vacation bench invoking the Article 102 of the Constitution which was registered as Writ Petition No.5588/2004. After motion hearing the vacation bench stayed the eviction order, and ordered the authority not to disturb the dwellers for next three months, although the slum was partly evicted before the stay order. However, after the order the authority stopped the eviction process. The slum dwellers then took a sigh of relief that they were now under the protection of legal arms.

Following this High Court order the slum dwellers have passed the last one year with a hope that better days would come. But unfortunately no better days have ultimately come for them. Conversely, the legal arms have refused to protect their rights.

The fact is that on 29th August 2005, after full-length hearing, the learned Judges of the High Court Division delivered the judgment discharging the Rule and directing the respondents to start the eviction process after 30th September 2005, and thereby vacated the stay. Thereafter the petitioners preferred a Provisional Civil Petition For Leave to Appeal along with stay application against the said judgment which has also been refused. Eventually it goes that now there remain no obstacles before government to evict them any time after 30th September 2005.

However, while writing this I have not got any copy of the judgment as it is yet to be signed. So, it is not possible to see on which grounds the Honourable Court has refused the Rule. Hence, as an alternative means I talked to the petitioners of the case from where I learned some arguments on behalf of eviction of the slum, submitted by government parties. According to government assertion, huts shown by the

petitioners as slums are actually so many shops remaining on the government acquired land from where various illegal and unauthorised businesses are run in the shadow of slums. So, in fact, they are illegal occupiers of government land. And these illegal occupiers, involved in illegal activities, need to be evicted to keep law and order situation under control. Furthermore, they are threat to safety and security of the VVIP participating in the upcoming SAARC conference. In a word, government tries to prove that the slum is not really a slum but a place for conducting illegal and subversive activities.

Whatever may be government's arguments, it is clear like daylight that Agargaon Basti is a slum recognised by the government itself, as various programmes e.g. informal education programme, primary health care and family planning programme, sanitation and micro credit programme etc have been undertaken here with the prior knowledge, awareness and cooperation of various ministries and departments like NGO Affairs Bureau, Ministry of Women and Children Affairs etc. Again, as per safety and security matter, the government fails to show that actually there exists any insecurity due to the existence of the slum. In the same way, government fails to link any slum, let alone the Agargaon Basti, with the recent bomb blasts or terrorist attacks.

Before writing this article, I talked to the secretary of the Daridra Bimochon Baboshai Bohumukhi Smabay Samity Ltd, a registered organisation of the slum-dwellers. He tells that there is no record of illegal activities or drug business or smuggling in the Basti. He informs that police frequently visits the slum but there is no bad record in police book. Of course, he admits that there have been some arrests on false accusation of those who protest government initiative to evict the slum. Finally he adds that if government has any proof that the slum dwellers are engaged in any subversive activity, then it should take specific action against those so-called culprits. He asks, is the eviction all solution?

I don't know what will be government's answer to this question. But the government must consider the fact that the eviction of the slum may eliminate the anticipated threat to security, but it will simultaneously violate the fundamental rights of equality under law and equal protection of the law and the right to life as guaranteed by the Constitution. Is not the government responsible to uphold these

rights of poor helpless law-abiding slum dwellers who have been denied the blessings of nature?

It is true that the government may evict the slum on any day after 30th September 2005. And the government seems waiting for such an occasion. Unfortunately after this judgement such destruction will be 'lawful'. But it is also true that 'lawful' act does not always mean justice. Example is the present case. Destruction or eviction of Agargaon Basti will no doubt frustrate the natural justice. If the government thinks that the eviction is essential for greater national interest, it can take necessary steps to rehabilitate those slum dwellers.

In fact, government should think deeply before taking further action regarding Agargaon slum. The democratic government should not ignore the matter that future lives of more than one thousand men, women and children are depending on a single decision of it. The time is very limited. Government has to take its decision before the sky of Agargaon becomes heavy with the cries of thousand innocent helpless people.

The article was published in the Daily Star on 8th October 2005

9

The rights of the citizens residing abroad

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Eventually Bangladeshi truck driver Abul Kashem has been freed by Islamic Army of Iraq (IAI). Faruque and his Sri Lankan colleague were picked up en route to a US base 60 km off the Iraqi capital Baghdad on October 28, 2004 while they were transporting supplies to the base for a private Kuwait transport company. Qatar-based private TV Channel Al-Zazeera aired the news of theirs being hostage by the IAI the next day. The Government then started its diplomacy, which was proved successful with the result.

Such a hostage taking is not novel in the anarchic world today. Rather, it has become a pretty regular event nowadays. After the invasion and occupation of Iraq by USA such incidents are being recurring in Iraq and subjects of different nations are falling into the prey of such ill practice. In all these incidents of hostage taking the governments of the victims have taken radical measures to release their citizens. Earlier we have experienced that Jimmy Carter govt of USA at the beginning of 1980s undertook all possible measures including even stern military operation to rescue its citizens made hostage in Iran. Another recent example may be the attack in May 2004 on Mr. Anwar Chowdhury, the British envoy in Bangladesh, at the shrine of Hazrat Shahjalal (R) where the British Govt took prompt action to unmask the real culprits even by sending their own detective hands.

Thus it seems a common practice that when a citizen of a country faces any trouble, his/her govt takes all out measures to make him/her trouble-free or to mitigate the trouble. But is this a generosity of the governments to take such action on behalf of their citizens? The answer seems simple. No, it's not a generosity; rather it is at the core of the govt's duties 'to stand by it citizens in times of need in weal and woe'. However, in this write-up we will investigate the answer of the question in Bangladeshi legal point of view.

Usually, the constitution of a state enumerates the duties and responsibilities of a state to its citizens and vice versa. Our constitution is not an exception. In fact, the preamble of our constitution very lucidly expresses that '... it shall be a fundamental aim of the State to realise through the democratic process a socialist society, free from exploitation a society in which the rule of law, fundamental human rights and freedom, equality and justice, political, economic and social, will be secured for all citizens'.

Not only that our constitution pledges that it will realise fundamental human rights, among others, in the society but also that it specifies some fundamental rights to be guaranteed by the state through state mechanisms. It is, however, unclear from the construction of language of abovementioned part of the preamble what to do in respect of violation of fundamental rights of a citizen who is residing in a foreign society in a foreign country although the constitution promises that fundamental rights will be secured for all citizens.

However, our constitution under article 27 proudly declares - 'all citizens are equal before law and are entitled to equal protection of law'. Accordingly it seems that the expression 'all citizens' does not provide any exceptions, and every citizen, whether he resides in the country or abroad, is entitled to have his fundamental human rights protected by the state.

Fortunately, this is not a question absolutely untouched or undecided. In fact, in the leading case Bangladesh Vs Ghulam Azam 46 DLR (AD) 192, this matter of rights and citizenship is hugely discussed. It is held that a citizen is not required to be rooted to the place of his permanent residence in the country for keeping his citizenship intact, and mere staying abroad does not discontinue citizenship. Besides, a person's residence during course of his employment or for the pursuit of his studies or for other good reasons in a country, which was at war with,

or engaged in military operation against Bangladesh, or from which he is prevented to returned in Bangladesh, does not preclude him from the citizenship, and consequently from citizen's rights.

In this respect the decision in Abdul Gafur Vs Secretary, Ministry of Foreign Affairs, Govt. of Bangladesh 17 (1997) BLD (HCD) 560 seems a pathfinder. It is held that when a citizen of Bangladesh is found to be in distress in a foreign country for no fault of his/her own or due to circumstances beyond his/hmr control, a duty is cast upon the Government to come to his/her rescue for mitigating the plight.

It appears pertinent here to mention the facts of the case briefly. Petitioner's daughter Hasina Begum aged 15 years was lost from her village Arichpur, Tongi in March 1992 and could not be found in spite of best effort by the petitioner. However, in November 1996 he came to know that his daughter is in MMM House in Lilua under police station Bali of district Howra in India. The petitioner then wrote a letter to Chairman, Human Rights Bureau, Dhaka to bring back his daughter. Further, Bangladesh Jatiyo Mahila Aynjibi Samity somehow managed to meet with Hasina. Then the Samity informed the Additional Secretary Ministry of Foreign Affairs through letters about the victim girl, whom Child Traffickers had taken out Bangladesh on false pretext and perpetuated heinous crime upon her, and requested her repatriation. In the meantime the victim sent a letter to get her back from the said home where she is passing hez days in great distress. Later on, The Jatiyo Mahila Aynjibi Samity got accurate information through 'Sanlap', a women's right centre in India. But the govt. did not take any step for repatriation of the victim. Hence the petitioner filed this writ petition for speedy and efficacious relief.

The petitioner argued |hat the victim is a citizen of Bangladesh having been abducted from Bangladesh and taken to Calcutta and now detained in custody is legally entitled to get protection of law under article 31 of the Constitution through the High Commission of Bangladesh in India to provide her legal support. Besides, the victim girl being a citizen of Bangladesh is entitled to be looked after by the government through its appropriate authority India, as article 31 makes an obligation on the part of the government to give protection to its citizens in any part of the world, but she has been denied her right article 27 to get equal protection of law by the govt in spite of their knowledge.

Not surprisingly, govt. fails to refute the arguments. The Supreme Court, accepting the arguments, observes that the govt did not take any step in the matter through state agency, which proves unequal treatment towards its citizen. The principle of fairness in government acting requires that Government functionaries must act according to law and must perform their duties on good faith, public accountability and acceptance. In the instant case, the respondents have flouted the legitimate expectation that the govt would take up the matter in state level in order to bring back the victim, a citizen of the country who is languishing in foreign territory for no fault of her own for more than 5 years. The Respondent ought to have taken steps long ago and kept the petitioner informed about its result. Consequently, Supreme Court directs government to initiate action in the matter through state level for repatriation of the victim.

Thus, it becomes clear that constitution does not draw any distinction between citizens living in the country and those residing abroad. It is expected that whenever a citizen in a foreign territory falls in any trouble, which violates his fundamental right or rights, the govt will take necessary measure with its own accords. But if the govt fails or neglects to do the same, the victim can take resort on the Supreme Court under article 102 of the Constitution, which is also a fundamental right given by article 44 of the same.

The article was published in the Daily Star on 2nd January, 2005

10

Public Interest Litigation: An Outline

PIL is a term very frequently uttered, heard or written nowadays when there come words for the implementation of common peoples' rights. But it is still an untraceable idea for many people. Hence, this write-up is made especially for those who have no legal background but want to have an idea about it. Admittedly, it will prove a very little service for any practicing lawyer.

A Public Interest Litigation or PIL, in simple words, means litigation filed in a court of law for the protection of 'public interest'. It has been interpreted by judges to consider the intent of public at large. Although the main and only focus of such litigation is only 'public interest' there are various areas where a PIL can be filed. For example, violation of basic human rights of the poor, content or conduct of government policy, compel municipal authorities to perform a public duty, violation of religious rights or other basic fundamental rights etc.

WHEN A PIL CAN BE FILED

A PIL can be filed only in a case where 'public interest' at large is affected. Merely because, only one person is affected by state inaction is not a ground for a PIL. Following are some of the possible areas where a PIL can be filed.

- I. Where a factory or industrial unit is causing air pollution, and people nearby are getting affected.
- II. Where, in an area or street there are no streetlights, causing inconvenience to commuters.

- III. Where there is regular loud miking in a residential area causing noise pollution.
- IV. Where some construction company is cutting down trees, causing environmental pollution.
- V. Where poor people, are affected, because of state government's arbitrary decision to impose heavy 'tax'.
- VI. For directing the police / Jail authorities to take appropriate decisions in regards to jail reforms, such as segregation of convicts, delay in trial, production of under trial before the court on remand dates.
- VII. For abolishing child labour, and bonded labour.
- VIII. Where rights of working women are affected by sexual harassment.
- IX. For keeping a check on corruption and crime involving holders of high political officer.
- X. For maintaining Roads, Sewer etc in good conditions.
- XI. For removal of Big Hoarding and signboard from the busy road to avoid traffic problem.

WHO CAN FILE A PIL

Earlier it was only a person whose interest was directly affected along with others, whereby his fundamental right is affected, used to file such litigation. Now, the trend has changed, and, any Public-spirited person can file a PIL on behalf of a group of person, whose rights are affected. Hence, it is not necessary that the person filing a case should have a direct interest in that PIL.

For example, a person in Dhaka can file a PIL for that a Cracker factory in Rajshahi is running on child labour; or a citizen can file a PIL challenging government's arbitrary decision to impose heavy 'tax' that is affecting the poor people, though the citizen filing the PIL may not be personally so much affected by that; similarly a lawyer can file a PIL for release of some under trials in a jail, who has spent more number of years in jail than the period prescribed as punishment for offence for which they are being tried.

Hence, it is clear that any person can file a PIL on behalf of a group of affected people. However whether a PIL should be allowed or not will depend on the facts of each.

AGAINST WHOM A PIL CAN BE FILED

A PIL can be filed only against the State, in some cases against municipal authorities, but not against any private party. However a 'private party' can be included in a PIL as a 'Respondent' only after making the concerned state authority or authorities a party or parties.

For example, a tannery factory in Hazaribagh of Dhaka is causing pollution, then people living nearby, or any other person can file a PIL against (a) the govt., (b) the Ministry for Forest and Environment, and also against (c) that particular factory.

However, it is to be mentioned that a PIL is filed in the same manner, as a writ petition is filed. Proceedings in a PIL commence and carry on in the same manner, as in a writ petition. However, in between the proceedings if the judge feels he may appoint a commissioner to inspect allegations of anti- public interest activities etc. After filing of replies by opposite party, and rejoinder by the petitioner, final hearing takes place, and the judge gives his final decision.

A LETTER TO CJ MAY BE TREATED AS A PIL

There have been instances where judges have treated a post card containing facts as a PIL. There are also examples that a letter alleging the illegal limestone quarrying that devastated the fragile environment, or a letter complaining that the national coastline was being sullied by unplanned development that violated the government directive was treated as PIL.

However, in the past, many people have tried to misuse the privilege of PIL and thus now the court generally requires a detailed narration of facts and complaint, & then decides whether to issue notice/s and call the opposite party.

The fact is that so far there is no statute laying down rules and regulations for a PIL, still the court can treat a letter as a PIL. However the letter should bring the true & clear facts, and if the matter is really an urgent one, the court can treat it is a PIL. But still it depends upon facts and circumstances, and court has the entire discretion.

RELIEFS AVAILABLE BY PIL

There are many kinds of remedies, which can be given in a PIL, to secure the public interest. First comes the interim measure. The court can afford an early interim measure to protect the public interest till the final order, for example:

- (a) Release of under trial on personal bonds ordering release of all under trial who have been imprisoned for longer time, than the punishment period, free legal aid to the prisoners, imposing an affirmative duty on magistrates to inform under trial prisoners of their right to bail and legal aid. Or
- (b) Closure of Industrial plant emitting poisonous gas, setting up victim compensation scheme, ordering the plaint reopening subject to extensive directions etc. Or
- (c) Prohibiting cutting of trees or making provisions for discharge of sewerage, till the disposal of final petition.

In fact, relief in most of the PIL is obtained through interim orders. Moreover, the court may appoint a committee or commissioner to look into the matter, and submit its report. Such a committee or commissioner may also be given power to take cognisance of grievances and settle it right in the public intent. And finally comes final order by way of direction to comply within a stipulated time.

WHEN A WRIT PETITION MAY BE TREATED AS A PIL

A writ petition filed by the aggrieved person, whether on behalf of group or together with group can be treated as a PIL. However, the writ petition should involve a question, which affects public at large or group of people, and not a single individual. And there should be a

specific prayer, asking the court to direct the state Authorities to take note of the complaint /allegation. Also, according to some lawyers, the 'representative suit' instituted under Code of Civil Procedure 1908 can also be treated as PIL when it represents the interest of a large fraction of people.

PIL IN BANGLADESH

Attempts to introduce PIL in Bangladesh started in 1992. Hence, it seems that advancement of PIL coincided with the restoration of democracy in the country in 1991. However, it was not easy to convince the judges giving relief through PIL, as it was a new phenomenon in our legal system. But, the legal and social activists were relentless in their efforts and finally enabled the progressive minded judges to interpret the Constitution in line with the public intent. And it was 1996, when the supreme Court discovered that our Constitution not only validates but also mandates a PIL approach. As a consequence, a good number of PIL have been filed over the last few years. These PILs include cases involving illegal arrest and detention, police atrocities, environmental and consumers matters, poverty and health related problems, rights of children and women, rights of minority and indigenous people etc. These PILs have brought about a great change of thought in public mind regarding peoples' rights, government responsibilities, rules and governance. But actually how much the PILs have contributed in safeguarding public interest is still a point to be debated. As a matter of fact, PIL just shows the ways and directions to secure public interest, and so, nothing can be achieved if the ways and directions are not complied with.

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