

RIGHT TO LIBERTY

This chapter outlines legislative development and judicial decisions relevant to the right to liberty. In particular, it focuses on the stresses and strains put on the right to bail during the State of Emergency and highlights the paradoxical approaches of the higher judiciary in granting bail.

The year witnessed unabated human rights violations by law-enforcing agencies and legal battles for restoring the right to liberty amid the continuing state of emergency (SoE). Reinforcing suspension of certain fundamental rights, the Emergency Power Rules (EPR), 2007 prohibited any association, procession, demonstration or rally (except for social or religious purposes) without special permission from the authorities. Many provisions of the Emergency Power Ordinance (EPO) and EPR restricting the right to liberty are inconsistent with constitutional and international human rights norms as well as Articles 31 and 32 of the Constitution. These included curtailment of a number of procedural safeguards on arrest and detention, and vested inordinately wide powers of preventive detention in law enforcement authorities. For example, Rule 16(2) of the EPR provided that individuals could be taken into custody, without right to seek bail, on suspicion of committing or being likely to commit ‘prejudicial’ acts. Rule 19(gha) of EPR prohibited the seeking of bail and purported to oust the jurisdiction of the courts including the Supreme Court to grant bail to the accused. Sections 3 to 8 of EPO created different offences triable under the Rules by special courts and special tribunal for speedy disposal of cases.

Anti-Terrorism Ordinance 2008

This Ordinance, with its overly broad definition of several new offences including terrorism and terrorist financing, has been criticized by human rights advocates as providing a powerful tool to suppress political dissent and right to liberty and permit abuse by the law-enforcing agencies.¹ This Ordinance defines an “act of terrorism” across a broad spectrum, including ‘any act that poses a threat to the sovereignty, unity, integrity or security of Bangladesh or creates panic among the general masses or obstructs official activities’.² It defines a terrorist activity as a person killing another, inflicting serious injuries, detaining or kidnapping, or causing loss of property to any person, as well as using or keeping any explosive and flammable materials, firearms or any kind of chemical substances in his or her possession.³ It also establishes an offence of financing terrorist groups, punishable with a minimum of three and maximum of 20 years’ imprisonment, along with fines.⁴ Sheltering a terrorist is punishable by a maximum of five years’ imprisonment.⁵ Anyone who carries information material or broadcasts in support of an outlawed party can be imprisoned for a minimum of two years and a maximum of seven, along with a financial penalty. The death penalty is applicable for terror financing and staging murder to create panic and jeopardise the country’s sovereignty.⁶

Bail

The anti-corruption drive spearheaded by the CTG until mid 2008 had resulted in the arrest or detention of, among others, many high profile political leaders. Allegations of failure to ensure due process of law were reported in the media in many cases.⁷

¹ See chapter 2 on Legislative and Policy Development.

² Anti Terrorism Ordinance 2008, section 2.

³ *Ibid*, section 6.

⁴ *Ibid*, section 7.

⁵ *Ibid*, section 14.

⁶ *Ibid*, section 12.

⁷ For instance, police had arrested Jubo League General Secretary Mirza Azam on charge of violating the EPR minutes after his release on bail from the Dhaka Central Jail on 18 September 2008. See “Mirza Azam held after release”, *The Daily Star*, 19 September 2008.

The EPR had been amended several times to make the provisions of bail more stringent. On 21 March 2007, the Government amended the EPR, suspending the right to seek bail or redress from any higher court until disposal of a case before the trial court, drawing sharp criticism from the lawyers, litigants and rights activists.⁸ The offences under the EPR include corruption, smuggling, hoarding, black-marketing, money laundering, illegal possession of firearms, explosive substances, foreign currency, and narcotics, tax evasion and other crimes considered a threat to security of the state, people and the economy. The situation got more complex when on the Appellate Division held on 24 April that no one facing charges under EPRs would be eligible for bail. It ruled that no court, including the High Court, has jurisdiction to grant bail to anyone arrested under the EPR except in very limited grounds such as if the case is filed *mala fide* or not by the proper authority, but may do so in respect of cases filed under Rule 16(2). Despite widespread public support for much-belated, and long-obstructed legal action against corruption suspects, the blanket ban on bail in cases under the EPR, as well as the selectivity in filing cases, and the slow progress of investigation of cases against many high-profile corruption suspects drew widespread criticism.⁹

Over 200 cases filed by the Anti-Corruption Commission (ACC) and National Board of Revenue (NBR) against some high-profile politicians and businessmen were challenged in the High Court Division (HCD) of the Supreme Court of Bangladesh, many on procedural grounds. But most of the accused and co-accused, charged with abetting the prime accused in committing corruption, were ultimately able to secure bail in a reportedly extraordinarily hurried manner. Such measures adopted in granting bail and staying proceedings against corruption suspects can partly be attributed to the loopholes in the Anti-Corruption Commission (ACC) laws and rules and partly to reasons of political expediency - namely the compulsions generated by political pressure domestically and internationally for holding parliamentary elections in December 2008 - which effectively influenced the legal process. It was reported that one of the benches of the High Court, in an unprecedented move, granted bail to large numbers of persons accused under the EPR. Seventy six persons accused of corruption were granted bail by a single High Court bench between 14 July and 14 August 2008. The same bench reportedly took 63 seconds on average to pass orders in a total of 298 cases in a single day on 28 August 2008. It also passed orders in 202 cases on 25 August, 129 cases on 26 August and 126 cases on 27 August. That is, in four days (25-28 August) the Court passed orders in 593 cases, most of which involved corruption-related offences.¹⁰

The loopholes include the ACC officials' failure to submit enquiry reports within 30 days of being tasked with gathering information about a corruption suspect and the investigation officers' failure to submit reports within 60 days of filing of the cases as per the rules; the ACC's failure to issue gazette notifications on appointing investigating officers or to serve notices for submitting wealth statements upon women and children charged with aiding and abetting the principal accused in committing corruption.

Impunity

The legal requirement for issuing prior sanction for prosecution of public servants allows law enforcement agencies accused of arbitrary arrests or detentions to escape liability and this partly explains why such actions continue. The key legal provisions are sections 132 and 197 of CrPC, which require prior sanction by the Government for the courts to take cognizance of any offence by a public servant on official duty, including members of the police and other security forces. The reluctance of the Government to provide such sanctions in practice inhibits effective prosecutions from taking place.

8 "Regardless of whatever is stated in sections 497 and 498 of the Criminal Procedure Code or any other law, an accused under the Emergency Powers Ordinance will not be released on bail during the enquiry, investigation and trial of the case against that person." Section 19 Gha of EPR.

9 For instance, charge-sheet submitted against former Prime Minister Khaleda Zia after eight month's of her arrest. See, report of *Prothom Alo*, 6 May 2008.

10 See BOX I.1: 315 minutes, 298 cases, p. 21.

The EPO, supplemented by the EPR further embeds legal immunities for law-enforcement agencies for any action done under the authority of these laws. Thus, section 5(1) of the Ordinance declares that: “*No question shall be raised before any court regarding the orders passed on the basis of this ordinance or by the authority of this ordinance.*” Section 2(3) of the EPR defines law enforcement agencies more expansively than in ordinary criminal laws, as including the Bangladesh Police, the Armed Police Battalion, the Rapid Action Battalion (RAB), Ansar, Battalion Ansar, the Bangladesh Rifles (BDR), the Coast Guards, the National Security Intelligence Service, the Directorate General of Forces Intelligence, and the Armed Forces.

Judgments on Right to Liberty

The apex court handed down several judgments pertaining to the right to liberty, relating to the issue of detention of women in ‘safe custody’, the issue of speedy trial, the detention of persons on grounds of mistaken identity, and concerning the application of the Emergency Powers Rules. These are discussed in turn below.

In *Sumana Afroza Sumi vs. The State*, the High Court re-affirmed that no woman should be kept in judicial custody against her will under section 20 of the Nari o Shishu Nirijatan Daman Ain, 2003, if proved that she is eighteen years old.¹¹ This judgment is an important potential safeguard for women from abuse of safe custody provisions.

The right to speedy trial is one of the constitutional guarantees for the protection of the accused. The imperative of judicial intervention can hardly be overemphasized for protection of rights of under-trial prisoners. In *Abul Kalam vs. State*, the High Court held that given the inordinate delay of five years in holding a trial of a non-bailable offence, the Court may enlarge the appellant on bail.¹² In this case, the accused had been arrested in August 2002 under section 54 of the CrPC and charged for the offence under the Arms Act. The accused was held in custody until August 2007 as the trial had not been concluded due to the failure to produce prosecution witnesses. Similarly, in *Farid Hossain vs. State*, the High Court Division held that bail should be granted to an accused in a non-bailable case when the trial cannot be concluded within the statutory time limit,¹³ and where the accused had been in pre-trial custody for about three years from arrest.

In *Md. Rashel Uddin vs. Secretary, Ministry of Home Affairs*,¹⁴ the arrest and detention of a person for over twenty months on the basis of mistaken identity was questioned. Md. Alam, a migrant worker recently returned from Saudi Arabia, was arrested from *Ukhiya Bazar*, Cox’s Bazar in January 2007, when police claimed that he was the accused in a trafficking case under the *Nari o Shishu Nirjaton Daman Ain*. In fact his own brother Syed Alam had been convicted in absentia and sentenced to life imprisonment in 2005 after his initial arrest in 2002 when he falsely identified himself to the police using the name of his brother, Md. Alam. Syed Alam, who was released on bail, absconded, and the trial concluded against an accused named Md. Alam. After his arrest in January 2007, Md. Alam was produced before the Court as a convicted accused and given no opportunity to identify himself or explain that he was not the actual accused. Despite information having been brought to the attention of the police and prison authorities, no action was taken to determine the actual identity of the accused, as a result of which an innocent person was wrongfully compelled to serve the sentence of another and to lose his liberty for over twenty months. The Court directed that Alam be released and that the Inspector General of Police take departmental action against the Sub-Inspector of Police who had shown negligence in conducting proper investigations. No action had been taken to date against the police officer responsible for his arrest.

11 16 BLT(HCD) (2008) 291, judgment dated 24 April 2008.

12 60 DLR (2008) 254, judgment dated 5 August 2007 (judgment published in 2008).

13 28 BLD(HCD) (2008) 209, 13 MLR (HCD) (2008) 152, date of judgment 26 September 2007 (judgment published in 2008). Section 339(4) of the CrPC. provides for granting bail to the accused in case of non-bailable offence when trial is inordinately delayed and can not be concluded within the prescribed time limit.

14 Unreported, judgment delivered on 3 December 2008.

In another *habeas corpus* petition, ASK filed a writ petition regarding the alleged disappearance of Md. Hasan Khan after his arrest by RAB. The Court issued a *Rule Nisi* on 26 October on the Government to produce him in order to identify whether he was being held without lawful authority.¹⁵

During 2008, the Supreme Court passed several judgments on the constitutional validity of the provisions of the EPO and EPR. In *Sheikh Hasina vs. Govt. of Bangladesh*,¹⁶ the High Court considered the validity of a sanction by the Home Ministry under Rule 19(2) of EPR to commence legal proceedings against the former Prime Minister Sheikh Hasina under sections 385/109 of the Penal Code for offences allegedly committed in 2000. The High Court held that if any law or rule made during the Emergency is found to be inconsistent with Articles 27 to 35 of the Constitution, it shall be held to be void *ab-initio* and cannot be applied in any proceedings in any court of law. The Court further held that in view of Articles 31, 32, 33 and 35 of the Constitution, the power and authority of the Court as conferred under the Code of Criminal Procedure cannot be curtailed by making any law or rule during the Emergency. It accordingly held that any part of the Emergency Powers Rules if given retrospective effect would be void and therefore any offence committed prior to the promulgation of Emergency on 11 January 2007 could not be tried under such rules.¹⁷ However, later in the year, the Appellate Division reversed the High Court's judgment regarding the retrospective application of the Emergency Powers Rules. It held that the constitutional bar on retrospective application of law under Article 35(1) only relates to conviction or sentence being imposed under an *ex post facto* law (ie a law made after the actual offence had been committed) and did not affect the actual trial process and therefore that the Emergency Powers Rules were validly applied.¹⁸

In several cases, the High Court granted bail to accused persons arrested or detained under the EPR. In *Md. Bakhtiar Alam Bappi vs. the State*,¹⁹ the High Court held that any person arrested or detained under Rule 16(2) of the EPR which confers power of arrest on the members of the combined forces, cannot be so held for an indefinite period. In *Yeasir Arafat vs. Government of Bangladesh*,²⁰ where the detenu was arrested by the joint forces under Rule 16(2) of EPR without any specific charges and without complying with the procedural requirements of section 61 and 167 of the CrPC, the High Court held that such detention is without lawful authority. The Court further observed that Rule 16(2) of the EPR only provides authority to arrest but not to detain any person.

Given the restriction on granting bail to persons accused of offences under the EPR, the High Court also took recourse to its extraordinary and inherent powers under section 561A of the CrPC to secure the ends of justice, by staying proceedings and granting bail to those accused in such cases. In *AKM Reazul Islam vs. State*,²¹ where the investigation had not been completed within the period specified in the EPR, the High Court held that the Rule 19g of the EPR can not operate as a bar for an detention of the accused persons for an indefinite period., and that when there is no remedy in any law, it can invoke its inherent jurisdiction to intervene. It further observed that while the EPR prohibits making a bail application, it also provides for speedy investigation and trial and, thus, indirectly gives an implicit right to seek bail after the expiry of the specified period. In particular, the Court highlighted an ambiguity in the EPR under Rule 15 (Ga) which specified a maximum time limit of 60 days for conclusion of investigation, but the Rules were silent as to what happens when the time limit is exceeded while a person is in custody.²²

15 *Ain o Shalish Kendra vs. Govt. of Bangladesh*, unreported.

16 16 BLT (HCD) (2008) 153; 13 BLC (2008) 121; 28 BLD (HCD) (2008) 161, judgment 5 and 6 February 2008.

17 *Ibid.*

18 *Government of Bangladesh vs. Sheikh Hasina and Another*, 28 BLD(AD)(2008)28, judgment dated on 29 April 2008.

19 16BLT(HCD)(2008) 54, judgment dated 14 November 2007 (published in 2008).

20 13BLC (HCD) (2008) 183, judgment dated 15 January 2008.

21 13 BLC (HCD) (2008) 111, judgment dated 3 December 2007 (published in 2008).

22 *Ibid.*

However, many of the High Court's rulings on granting bail in EPR cases were reversed by the Appellate Division. In *State vs. Moyez Uddin Sikder and others*,²³ a key case on the interpretation of Rule 19(Gha) of the EPR, the Appellate Division sounded a note of caution against frequent applications for anticipatory bail under section 498 of the CrPC. The Court held that anticipatory bail can be granted very sparingly in certain cases of an exceptional nature. In this case, the accused had been arrested for committing offences under the schedule to the Special Powers Act, 1974, which have also been included in Rule 14 of the EPR, but obtained anticipatory bail from the High Court on surrendering before it. The Appellate Division held that in view of the language used in Rule 19(gha) of the EPR with a non-obstante clause, the ouster of jurisdiction is manifestly clear and therefore, such an application for anticipatory bail was not maintainable under section 498 of the CrPC by the High Court Division. The Court observed that anticipatory bail as an extraordinary remedy must be justified by the circumstances which should disclose that the criminal proceedings have been launched against the accused with an ulterior or political motive for harassing him/her and not for securing justice in a particular case. But in the present case, no such circumstances exist to justify the anticipatory bail. In *Anti Corruption Commission vs. Syed Tanveer Ahmed*²⁴ where the accused obtained bail from the High Court after being arrested under the EPR, the Appellate Division reversed the decision holding that Rule 19(gha) prohibits any applications for bail being made in cases brought under the EPR.

Draft Police Ordinance 2008

Criminal investigations in Bangladesh are performed by the police often in disregard of procedural rules resulting in curtailing individual liberty. Recent policy reforms have sought to address the century-old Police Act of 1861, and also to open service delivery centres in police stations with a view to enhancing police-community relations, introduce new investigating wings relating to offences of human trafficking, and introducing gender guidelines for police stations to make the police more gender sensitive, among others.²⁵

The colonial-era Police Act is entirely focused on the maintenance of law and order and encourages repressive policing. The draft Police Ordinance expressly provides for the police to respect human rights in the performance of their duties; establishment of an independent police commission to oversee the activities of the police force and to recommend legal and regulatory reform; establishment of an independent police complaint authority to investigate serious allegations against members of the police force, and to receive written complaints from any person aggrieved by police excess, negligence and misconduct. Despite protracted delays in its preparation, reportedly due to tensions between civil servants and police officials involved with the process and with the issue of the administration ceding controls over the force, the draft Police Ordinance was published on the Government website in December 2008.²⁶

Compensation to Victims

Although a right to compensation for arbitrary arrest and detention is guaranteed under international law, and indeed awards for compensation have been made by the Bangladesh courts, no compensation awards were made in 2008 due to the suspension of fundamental rights until mid December.

23 13 MLR(AD)(2008) 208.

24 16 BLT (AD) (2008) 220; judgment dated 29 April 2008.

25 Police Reform Programme, Bangladesh Police, Ministry of Home Affairs, see, <http://www.prp.org.bd/>.

26 The draft ordinance available at <http://mha.gov.bd/pdf/policeord08.pdf>. See Chapter 2 on Legislative and Policy Developments also.