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



The Daily Star

LAW *alter views*

# Withdrawal of cases against Ershad: Legal implications

**SHEIKH HAFIZUR RAHMAN KARZON**

RECENTLY leaders of the party in power met Hussain Mohammad Ershad, a former President of Bangladesh. After discussion he agreed to join the four-party alliance on the demands of fulfilment of certain conditions including withdrawal of criminal cases against him.

But to withdraw the criminal cases must have so much of legal implications. The lawyers, legal experts and members of civil society have raised a number of questions. Can the government withdraw criminal cases by executive order? Does this act of government violate Article 27 of Bangladesh Constitution? Is this act tantamount to interfering with the functions of judiciary? Does it hold good future for democracy and legal regime? Will it jeopardise the rule of law?

The erstwhile Bureau of Anti-Corruption got 28 separate allegations against Ershad. Officers of the Bureau investigated the allegations and gave final report in eight cases because they did not get sufficient evidence in support of the allegations.

Two allegations are now investigated by the newly established Anti-Corruption Commission. In one of the two cases Ershad is alleged to have transferred 100 crore taka unlawfully through a bank of Hongkong. The other case is related to corruption involving two hundred crore taka.

The Bureau gave charge-sheets in 18 cases. Among these 14 cases are under trial in different courts of Dhaka and Chittagong. Court is taking witnesses in the murder case of General Monjur Hossain. In the Janata Tower case the Appellate Division of the Supreme Court finally approved penalty for Ershad. He was given five years sentence and fined five crore taka and another two years sentence in case of non-payment of the fine. Ershad served a sentence of 3 years 7 months gave 26 days in this case, so, the Appellate Division remitted the rest of the sentence. The court maintained the amount of fine and another six months sentence. After serving four months, Ershad came out of the prison without giving the remaining amount of fine. Bangladesh Legal Aid and Services Trust filed a writ petition against the unlawful release order of Ershad that compelled the government to file a suit for realising the amount of fine. This case is under trial.

During the proceedings of the Janata Tower case Ershad tried to influence one Judge of the Supreme Court and thereby involved in cassette scam case, in which the court gave him a sentence of six months. Ershad was also given three years sentence and fined 10 thousand taka and another 4 months sentence in case of non-payment of the fine in the suit relating to the corruption in buying a Japanese boat. In the above two cases appeal is pending with the High Court Division.

Ershad was shown arrested from December 6, 1991 on charges of corruption, tax evasion, abuse of power and conspiracy of murder. After arrest cases were filed against him in different courts of Dhaka and Chittagong between 1991 and 1993 on different grounds including different charges of corruption. All the cases were filed by the Bureau of Anti-corruption, except one, which was filed by Hasanul Haque Inu against Ershad for usurping state power.

The recent assurance of government to withdraw cases has sparked huge repercussions among the people including the legal community. The people are apprehensive of such a wholesale withdrawal of corruption cases against a notorious usurper. Here an attempt has been made to enquire into the matter how far the government can exploit the legal provisions in its favour, how lower court can safeguard its independence by exercising its lawful jurisdiction, how higher judiciary can come forward to minimise the abuse of power by the government and unscrupulous exercise of jurisdiction by the lower courts.

Sub-section (4) of section 10 of the Criminal Law Amendment Act, 1958 authorises withdrawal of prosecution in respect of any offence or offences against any accused with the order of the government in writing. A Public Prosecutor can seek withdrawal of the prosecution only when instructed by the government in writing. Section 494 of the Code of Criminal Procedure is the relevant provision regarding withdrawal of prosecution which runs as -- Any Public Prosecutor may, with the consent of the Court before the judgment is pronounced, withdraw from the prosecution any person either generally or in respect of any one or more of the offences for which he is tried; and upon such withdrawal (a) if it is made before a charge has been framed, the accused shall be discharged in respect of such offence or offences; (b) if it is made after a charge has been framed, or when under this Code no charge is required , he shall be acquitted in respect of such offence or offences.

This rule is applicable where there is little hope of punishment of the accused because of insufficient evidence, or where the case has been compromised between the parties, or any other reasonable ground exists. The legislators did not enact this law to promote the wholesale release of an usurper, who is accused of corruption, non-payment of tax, abuse of power, conspiracy of killing, and usurpation of state power. Here law casts heavy duty on court and it has to exercise its power judiciously. Court has to look into the case minutely and decide whether to agree to the application of withdrawal made by the Public Prosecutor. The court in its order must state the reasons behind its agreement to the withdrawal so that High Court Division will understand that the order of withdrawal has been given lawfully. [ PLD 1959 Pesh. 186]

The court concerned must give its consent to the withdrawal of case by applying its sound judgment. This consent must be free and without any pressure on the court. As the one, of withdrawal is a judicial order, so it should be made on strong ground. Any whimsical or capricious order is not desirable. [ 28 DLR 386, 20 DLR 518] The consent of the court under section 494 means free consent. If the order of withdrawal is capricious and if the court gives the order without judicious consideration and reasonable ground, the High Court Division can inquire into the matter by its revisional jurisdiction.

The present government can instruct the Public Prosecutors concerned to apply to the court for withdrawal of cases filed against Ershad. But the government cannot put pressure on the courts to agree to the withdrawal of cases. If government pressurises the courts, it will be clear interference in the activities of judiciary. Independence of judiciary is the hallmark of democratic polity and the key to proper functioning of the rule of law. Violation of this independence will have serious repercussions that can jeopardise the smooth functioning of democracy.

If the cases are withdrawn, any citizen can file a writ petition under Article 27, which provides that all citizens are equal before law and are entitled to equal protection of law. It combines the American concept of equal protection of law and English concept of equality before law.

The equality provision of the Constitution connotes that among equals law shall be equal and shall be administered equally. All citizens in the like circumstances should be treated equally and no discrimination should be made in conferment of privileges and imposition of liabilities. Article 27 entrenched the rule of law, which was the prime objective of establishing Bangladesh and also enacting a democratic and secular Constitution of Bangladesh. Moreover, one can invoke Article 31 of the Constitution, which provides that the citizens and the residents of Bangladesh have the inalienable right to be treated in accordance with law, a law that must fulfil the tests of both substantive and procedural due process.

The present government cannot withdraw the cases filed against Ershad, because those were filed according to their instruction when they formed government in 1991. Once they instructed to file the cases for penalising the 'worst usurper', now if they try to withdraw the cases, it would easily bad one to assume malafide intention. It will be clear violation of democratic morality.

Under the provision of law the government can only instruct the Public Prosecutors to apply to the courts to withdraw the cases, but cannot put pressure on the courts to consent to the withdrawal. By manipulating the legal process if the government withdraws the corruption cases that will violate equal rights of citizens and the independence of judiciary. That will, certainly, not bring any good to democracy and rule of law.

The writer is an Assistant Professor, Department of Law, University of Dhaka.

LAW *education*

# *Legal education in Bangladesh*

**DR. M. ASHRAFUZZAMAN**

I think knowledgeable persons from the society should come forward to discuss the problems in legal education and possible solutions of the problems. I would like to look into the matter from a different perspective and I believe threat of cancellation of affiliation of a university is just not a proper solution; rather there should be supportive measures from government and non-government sectors.

## Need for private universities

Establishment of a university is a tough job. Lots of sacrifices, dedication and tolerance are needed. There is no doubt that we need

universities. However, there is doubt amongst us that whether the public universities are sufficient to cope with the growing number of students seeking higher education. If we concentrate our attention to the faculty of law, we see that there are four public universities in our country with law as a regular subject of teaching. Besides, the National University imparts teaching of law through law colleges in the country. All four universities together could accommodate less than five hundred students per annum. If we take that all of them eventually complete the courses then we get 500 regular law graduates in a year. A country with 150 million people this figure is unacceptable. On the other hand National University's role in making lawyers is limited to a certificate awarding body rather than a law institution. So, the quality of graduates from National University varies enormously within them, let alone any possible comparison with others.

If we compare the situation with UK, where the population is about 1/3 of ours there are 53 public and one private university with law faculty. From those universities every year come out about 8,000 graduates. Moreover the external programme of London University or Open University also produces about 1,000 law graduates every year.

## Major problems in our legal education

a. Role of Bangladesh Bar Council: The Bar Council is the regulatory authority for the legal profession in this country. It has changed few times its procedure of enrolment. However, its role as a quality controller may not be beyond question. The Bar Council through its Legal Education and Training Institute has attempted to establish itself also as an educational institute, although it does not have such expertise. It however could arrange re-educating seminar for the practitioners rather than trying to establish courses for the new admitants. Bangladesh Bar Council could follow examples UK, Australia or USA. Their Bar Councils have given permission to several universities to conduct pre-admission training for the legal practitioners. Also, the Bar Council could set a detailed guideline regarding the syllabuses. At present all universities follow their unique syllabuses and sometimes there is lack of minimum similarities. Also, there are institutions teaching law without a proper library or even a proper teacher. The Bar Council must ensure the teaching environments not only in universities but also other institutions producing larger number of lawyers.

b. Role of government: The government does not have any control over the legal education in Bangladesh. There are cases where a law graduate never attended any formal class. This is the only profession in the country where there is no realistic professional conduct rules. Everyone seems concerned that the standard of legal profession has fallen but there is no initiative from government to maintain the standard let alone raise is.

c. Role of universities: Universities having law faculties are like individual islands. They do not have real co-ordination with one another. There is almost a hostile relationship between public and private universities. Also, the universities do not have minimum connection needed with other legal institutions i.e. judiciary, bar council. In UK the Bar, the bench and the universities act together for the legal education as this is very much a practical subject. There is no medical college in this country without a hospital and so in the legal profession a student could never become a lawyer without having a real courtroom experience. Some private universities deserve an applaud for the efforts that are being made to raise the standard of teaching in legal education and to reward excellence in teaching. Everyone should welcome the emphasis being placed upon the development of close links between universities in the country and outside.

We note the emphasis being placed upon a new qualification, "the collaboration degree". We can see ways in which such degrees can play an important role in providing a new opening for higher education to those who could not afford to go to UK to become a Barrister to raise standards in respect of provision of legal services. However, we believe that the development of these degrees must not lead to any diminution of standards in respect of the undergraduate honours degree as we note the government's commitment to safeguarding the standards of traditional honours degree.

The problems have been very carefully identified and its solutions have been collected from other countries that faced similar problems in establishing university to teach law. All proper legal education systems cited above have a long history behind their establishment. We are lucky that we can follow the good things from their examples. Now, this is time to consider and act.

The author is Asst Professor and Head, Department of Law,
Northern University, Bangladesh

HUMAN RIGHTS *advocacy*

# *Indigenous peoples land and life under threat*

*"Indigenous peoples the world over continue to be among the most marginalized and dispossessed sectors of society, the victims of perennial prejudice and discrimination"*-- Louise Arbour, UN High Commissioner for Human Rights.

An estimated 370 million Indigenous women, men and children worldwide face racism, discriminatory laws and eviction from lands central to their cultures and livelihoods. After more than two decades of negotiation and debate, the United Nations is moving forward with global human rights standards to protect the rights of Indigenous peoples.

The draft UN Declaration on the Rights of Indigenous Peoples was adopted by the UN Human Rights Council at its historic first meeting in June. The Declaration must now be adopted by the UN General Assembly in order to become part of the body of international human rights standards.

The draft Declaration is intended to inspire and inform measures to address the widespread discrimination and deeply entrenched racism faced by Indigenous peoples in every region of the world. The Declaration affirms the right of Indigenous peoples to have meaningful control over their own lives, to maintain their distinct cultural identities for future generations, and to have secure access to the lands and natural resources essential to their ways of life.

Canada, United States, Russia, New Zealand and Australia have opposed the adoption of the Declaration. It's feared that the small group of states that have opposed the Declaration will put pressure on other governments to join them in voting against the Declaration when it comes before the General Assembly later this year.

We cannot really say that we are fully implementing human rights if we find groups of people… who are systematically denied these human rights." Rodolfo Stavenhagan, UN Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people

On this year's International Day of the World's Indigenous People (9 August), we're calling on states around the world to support the adoption of the UN Declaration on the Rights of Indigenous Peoples at the UN General Assembly in 2006.

Source: Amnesty International.

RIGHTS *investigation*

CHT:

# *Protect the rights of the internally displaced person*

**R M FAIZUR RAHMAN**

THE indigenous internally displaced person (IDPs) are among the most disadvantaged and vulnerable people in the Chittagong Hill Tracts. So far humanitarian responses have fallen far short of adequate protection and rehabilitation of this group of people. These IDPs are vulnerable because they are neither supported by the Government nor fall under any defined international protection mechanism. They have experienced endless development obstacles caused by conflict, violence, human rights violations, political exclusion and displacement itself; contributing to their situation of impoverishment and marginalisation.

These were some of the observation made by Jessica Skinner, a former RMMRU-DRC fellow, at a presentation of her paper on Internal Displacement of Indigenous Communities in the CHT and Rights-based Approaches to Rehabilitation at the two day symposium on Learning from the Marginalised, organised by Young Researchers' Forum of Refugee and Migratory Movements Research Unit of the University of Dhaka. The study was conducted and the symposium was held recently under the auspices of the Development Research Centre on Migration, Globalisation and Poverty based at the University of Sussex.

Skinner pointed out that human rights and displacement are quite related issues. So in rehabilitating displaced people rights based approach should be taken into account. Policies articulated must also be sensitive to the differences that exist between and within communities and settlements. In Babu para, Malachara, the IDPs are all Chakmas and the original occupants are all Marmas. At these sites only the Marmas own cultivatable land, but most of the internally displaced Chakmas are government workers, two were headmen and three owned their own business, while an unspecified number of families were homeless. The distinction between IDPs and the host population in terms of socio-economic needs are clearly different and these differences need to be recognised in any rehabilitation programmes, the presenter argued.

In order to effectively implement sustainable rehabilitation Skinner also recommended some measures for implementing rights based approach to IDP rehabilitation in the CHT. These include identifying the profiles, localities, needs and desires of the IDPs and their experiences of rights violations. Rations in the region need to be provided to members of all communities. IDP communities living in reserved forests are also to be recognised. Training sessions should be given to government officers, politicians, non-state actors, army personnel, international donors, NGOs and IDPs on not only the Guiding Principles on Internal Displacement, but also the situation of internal displacement in Bangladesh to counter the gaps and misinformation.

The problem of internal displacement is not simply a problem that is confined to the CHT, but is rife throughout Bangladesh especially in the remoter areas, where economically marginalised and minority communities are often the victims of human rights abuse and discrimination.

Although many, including local and national NGOs still believe that the situation cannot be settled without the removal of the Bengali settlers from the region, it also has to be recognised that the majority of the Bengali settlers are there to stay, the study reckoned. Despite international offers of financial and logistical assistance for the resettlement of all Bengali settlers brought to the CHT under government settlement programmes, the Government has not acted to carry out its obligation as defined in the 1997 peace accord. Based on a comprehensive and independent study of the Bengali settler's needs and desires, a compromise needs to be worked out between the Government and the PCJSS on resettlement outside of the CHT. The physical, political, economic and cultural marginalisation of the indigenous communities and particularly those displaced within the region need to be addressed and as part of the long process towards peace; and cross-community participation and understanding needs to be encouraged, the study noted.

The author is working with RMMRU.

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