Law and Our Rights

"There Can be no Democracy without the Rule of Law..."

Dr. Kamal Hossain, Vice-President of the Bar Council and eminent lawyer, speaks to **Lamis Hossain** about the legal profession, an independent judiciary and the Constitution.

The Daily Star (D.S): Do you think that lawyers' prestige as professionals and the people's image of the law as an institution is on the decline?

Dr. Kamal Hossain (K.H.): At one level we do hear criticism, and I think our profession has also engaged in some self-criticism in noting the falling of standards. But I believe that society as a whole is more keenly conscious than ever of the need for the rule of law as a necessary condition for overall development. As you find a general decline in law and order, in violence on campuses and on the streets, pervasive corruption at different levels of administration, I think that more than ever before, more sections of people recognise the need for the rule of law and significant improvement in observance of the law and effective and fair enforcement of the law.

We are caught up in two transitions in moving from an authoritarian political system towards establishing a working democracy, and from a bureaucratically regulated economy to a market economy. The role of lawyers then assumes an even greater importance. There can be no democracy without the rule of law, which in turn requires an independent judiciary and legal profession.

Market forces and the market economy must function within a framework of rules which are to be observed by those who compete in the marketplace. If the market economy is to remain competitive and not reduced to a state of anarchy and free for all, it must ensure that a level playing field is maintained for all players. It must also ensure compliance with rules to ensure fair competition, consumer protection as well as regulation of different financial institutions in the public interest.

D.S: Do you feel that the Constitution is still regarded as the supreme law of the land in spite of the various amendments made?

K.H: By and large, respect for the Constitution as the fundamental law has still prevailed in that those who assail the Constitution have had to yield to the demands of the majority for restoration of the Constitution. This has sometimes involved long drawn out popular movements.

D.S: All except for one of the amendments remain unchallenged. Does this indicate the people's acquiescence?

K.H: Certain controversial amendments do remain unchallenged. The facts are complex. Some of the reasons why the amendments, which though they weren't brought with wide public support, still manage to survive is because of political realities and the inclination to acquiesce in *fait accompli* and not to reopen past conflicts or to rock the boat.

D.S: There also seems to be a general reluctance to use the legal system. How do you think it can be made more people-oriented?

K.H: Law is seen by people as essentially a matter of litigation, going to court, substantial cost and delay. This experience makes it unattractive, even for those with means, to seek recourse to the law. The majority are also below the poverty line. They have no access to justice and no access to courts and there is very little in the form of legal aid. The Bar has made initiatives to set up legal aid trusts in six Bar associations. The government has made some allocation of funds.

D.S: What is the role of the Bar Council?

K.H: The Bar Council, being an elected body which regulates the profession, including entry and maintenance of professional standards and entrusted with the statutory responsibility of regulating the legal

profession, has been greatly concerned with ensuring that lawyers can play an effective role in enabling ordinary men and women to enjoy the equal protection of law and the rights guaranteed by the Constitution.

The legal profession has a tradition of providing legal aid and assistance to the poor and disadvantaged. But the conditions in which many lawyers find themselves today, especially younger lawyers, they find it more and more difficult to allocate time. Earning a living today means that because of costs, you have to spend much more time keeping yourself viable. So you have very little time for anything else.

The standards of legal education have also tended to deteriorate over the years. Entry qualifications have been made more lenient. There's also been an extensive growth of law colleges, all of which are not able to maintain the requisite standards of teachers and teaching and to cope with the very large number of students enrolled.

There's an initiative underway to deal with this problem at different levels: to undertake comprehensive reform of the curriculum and teaching methods, so that you move away from memorisation to the case method and towards clinical legal education. The Bar Council has already introduced a programme of Continuing Legal Education Programme and initiated courses on human rights for lawyers.

D.S: What about hastening the disposal of cases?

K.H: We have to increase the number of courts and judges, give greater budgetary allocation, have quality of personnel, and better emoluments. We also need to move towards the establishment of a judicial training institute. There is an initiative currently underway--the Chief Justice has already allocated space in the old High Court building. There is a need for procedural reform side by side with substantive reform.

There is also a need to establish a permanent law commission, which should be made of members of sufficient standing as well as highly experienced and qualified staff. But you have to remember that in every type of improvement, if you don't have the resources, these things are only sort of reforms in name.

D.S: Is there a role for alternative dispute resolution here?

K.H: Yes, a major innovation has been the introduction of methods of ADR. This includes conciliation, mediation and using different types of citizen, civic and other organisations to introduce facilities which could provide ADR mechanisms for people in different sectors.

D.S: What is the situation in the districts?

K.H: In the districts and the countryside, the situation is even more difficult. There is a sense of the person being more vulnerable because of the way rural society is organised. You are vulnerable to having your rights transgressed by powerful groups. You hear of examples where poor peasants are being pushed off the land by those encroaching on the land for cultivation of shrimp and other sea food for export.

There's also pervasive corruption. The abuse of public power for private profit. Police are also afflicted by this social malaise. So in order to get your case registered you will be called to make payments the poor can't afford. Powerful persons can have cases instituted in order to harass their opponents or more vulnerable people.

D.S: Do you think that a neutral court just as important as current demands for a neutral government?

K.H: Yes, demands for an independent judiciary are. But it's not a proper way to juxtapose them. That (neutral government) is something to do with free and fair elections, whereas an independent judiciary is a very fundamental principle. It is not just for a particular operation. Independent judiciary is one of the basic conditions for a constitutional democratic government.

D.S: Why then in your opinion, have original articles 115-116 of the Constitution guaranteeing independence of the judiciary not been restored yet?

K.H: This is due to the unenlightened view taken by successive governments. Executive branches of government are led to believe that an independent judiciary would not be to their advantage. But in fact the opposite is true, since an independent judiciary by effectively dispensing justice would contribute to a greater social stability and promote conditions conducive to overall development and thus facilitate the work of the executive. There could be greater enlightened consensus between both government and opposition to support an independent judiciary.

D.S: Is the demand for a caretaker government unconstitutional?

K.H: That's a moot point, because if you want to, you can make it constitutional. Something like it can only work with political agreement. You don't need a formal constitutional amendment and that's the point people are not understanding. Everyone is formally committed to respect the law and comply with the Constitution, yet not everyone does. You can't constitutionally ensure that people will act in good faith, responsibly and consciously. You're not supposed to squabble and fight and cheat. If you make an agreement in public and stick by it, you can achieve the desired result.

When people ask me, '*Ki hobe?*' (what will happen), I say, well it depends on us. We're not passive. We're a large number of people and they are 330 misguided ones, bar a few honourable exceptions. We should tell them to get back to parliament or we will *gherao* you. What's all this hartals? This isn't democracy. Time has come for all the ordinary people to uphold article 7, (giving all powers of the Republic to the people), while they are talking of article 55 and all sorts of others. We should have an article 7 meeting all over Bangladesh. We should get together and tell parliament to start discharging its duties and deliver what is due to the people.

Fourth Z.I. Chowdhury Memorial Law Lecture

Basic Structure of the Constitution and Constitutional Amendments

"The basic structure of the Constitution has been moved from this side to that like earthquakes," Aminul Huq, Hon'ble Attorney-General of Bangladesh commented in his speech inaugurating the Law Review's fourth Z.I. Chowdhury Memorial Law Lecture on "Basic Structure of the Constitution and Constitutional Amendments".

The Dhaka University students chose a timely topic in light of the the proposals for a caretaker government. The lectures were presented by distinguished lawyers on November 5 and 6, at the British Council Auditorium.

Whereas in nearly two centuries, the U.S. Constitution has only been amended 16 times, in our country's short history, a total of twelve amendments have been made to the Constitution, of which only one has been challenged in the 8th Amendment case. *Anwar Hossain Chowdhury v Bangladesh and ORS*, (1989, BLD 1) On this occasion, the Supreme Court struck down the amendment to Article 100 of the Constitution which following Martial Law Proclamation Order No. 11, purported to set up six permanent benches of the High Court outside Dhaka. By creating mutually exclusive jurisdictions, the High Court division was in effect denied power over the entire Republic as guaranteed by the Constitution.

The case gave the court the opportunity to ponder the merits of the doctrine of basic structure, first entertained in the Indian case of *Keshavananda Bhavati v State of Kerala*, (AIR, 1973, S.C). Justice S. Ahmed noted that, "...the Constitution stands on certain fundamental principles which are its structural pillars and if those pillars are demolished or damaged the whole constitutional edifice will fall down." He also proceeded to identify some of the basic structures: Sovereignty belongs to the people, Supremacy of the Constitution, Democracy, Republican form of government, Unitary State, Separation of Powers, Independence of the Judiciary and Fundamental Rights.

The 8th amendment case served as the background for the speeches delivered at the Z.I Chowdhury Memorial Law Lecture. The first lecture was given by Dr. Shahdeen Malik, coordinator of the Bar Council's Human Rights Programme, who waxed eloquently in a discourse on classifications. Dr. Malik argued that Article 7, which proclaims that "All powers of the Republic belong to the people" is the foundation of the Constitution. "The rest of the Constitution is about how this power belonging to the people is to be exercised," he commented. He also added that there should be more appreciation of the substantive method of interpretation which draws on the spirit of a statute.

The other speakers were Advocate Mahbubey Alam, Justice K.E. Hoque, Deputy Attorney-General Hassan Arif, and Barrister Lutfur Rahman Shahjahan.

The second day was started off by Sudhangshu Shekhor Halder, M.P., followed by Advocate Nizamul Hoque Nasim, and Barrister Lutfur Rahman Shahjahan. Barrister Shafique Ahmed spoke on the position of martial law. He noted that unlike Pakistani and Indian Constitutions, there is no provision to indemnify acts done under martial law in Article 46 of our Constitution. Advocate Zakir Ahmed and distinguished Barrister Syed Ishtiaq Ahmed also spoke on the occasion.

This (the 8th amendment case) was an extension of the horizon of the judicial review and an example of judicial activism," Justice Naimuddin Ahmed said. Former Attorney-General, Mohammed Nurullah, concluded, "The 8th amendment case has reestablished the dissipating faith of the people in the judicial system we follow."

Ignoring Law has Dire Effects

by Dr. Mohiuddin Farooque

BANGLADESH is a land created and transformed through a process of continuous natural calamity. Our civilization and culture grew out of a close bond with the vagaries, treasures and blessings of the deltaic ecology, as a unique habitat. Before the advent of the so called modern state, usually implying the absence of the colonial power, life and the management of life supporting systems were governed by the regime of intergenerational wisdom acquired through a long process of repeated trial and error, piloting experiments, the evaluation of successes and sufferings and observation.

An abundance of knowledge, norms and values in our conduct in concord with the dictates of nature, evolved from our bond with the environment. These agrarian and fluvial realities were reflected in the laws introduced in various resource sectors like forests, fisheries, and flood control. Among the examples of the laws passed are the Bengal Irrigation Act, 1876; the Bengal Tenancy Act 1888; Canals Act, 1864; the Forests Act, 1864, 1886 & 1927; and the Bengal Embankment Act, 1882. The earlier (pre-1947) regulatory regimes on these and other conservation and hazard mitigation areas, closely reflected the natural realities in harmony with the growing wisdom shared by the community. Some regulations went further to protect the resources as well as human health as intergenerational trust like the earliest regulation on forests, 1864, the Animals and Birds Act, 1912, the Water Hyacinth Act, 1936, and the Juvenile Smoking Act, 1919.

The "foreign rulers" of our land were probably more after movable property that could be carried back to the parent country from the colony, but the "territorially compatriot rulers" of today have not discriminated between the movable and immovable resources available around. Hence, things within the territory are vested either to private entities or to the "Government", although Article 13 of the Constitution sanctions "state ownership" only as ownership by the State on behalf of the people. In practice, resources are vested in various bodies and officials, who manage them devoid of the public, and consequently the public agencies themselves become a competing vested group.

The public institutions began "neo-feudalism" in dealing with the people by acquiring their resources in the name of State through the State Acquisition and Tenancy Act, 1950, and thus stepping into the shoes of the *Zamindars*.

... reality indicates that people exist for the law and not the opposite. That situation is further aggravated when the government and public authorities become "project hungry" for foreign money ...

In a "hunger-ridden" society, the legal system often faces embarrassment for being an expensive and evasive process for the common people. The unfortunate reality indicates that people exist for the law and not the opposite. That situation is further aggravated when the government and public authorities become "project hungry" for foreign money and technology which reinstates "neo-colonialism" by disempowering the recipient country. One may be horrified to imagine the synergistic effect of neo-feudalism and neo-colonialism which have resulted in a de facto "deregularized-legal system" for the common people who are already judicially nonexistent through their lack of sufficient access to the system. The two "hungers" are eating into the system and its allied components indiscriminately.

Free aid and the "benevolence" of loans granted from overseas sources, provide a free for all to entrust the so called "development" projects to a vested group who arrogantly defy the process of law--due process remaining an illusion. This abuse and misuse of the law deprives people of its protection, the benefits and compensation for loss of their rights and their legitimate interests. Time and again it is found that the only law which prevails in case of an investment development project is not the poor man's law, but the TOR (Terms of Reference) between the financier and the recipient public agency. Millions of people have so far been uprooted from their ancestral homes, and their intergenerational wisdom has been destroyed by the overdosed changes in the natural and traditional regime. Therefore, there may be free aid coming to the government, but to the local people, where such "development" have been undertaken, nothing comes "free."

The alien developments have changed and often destroyed the natural and human resource bases. On the one hand, these developments hardly took cognizance of the intergenerational wisdom of the local people but rather imposed projects without their participation (defying the law and all development ethics), and then left the implemented projects (meaning end of construction) at the mercy of the people without even educating them about the coping or readjustment methods necessary in the changed scenario, let alone sustainable development. On the other hand, the development planners ignorance of local wisdom has rendered most of the "development" projects destructive and unsuccessful from economic, environmental and ecological perspectives. One has to remember that most of the people may be illiterate in Bangladesh but not ignorant.

People who have been displaced or have suffered damage or injuries due to various projects have hardly received compensation (not to mention "adequate") that they were legally entitled to. The reasons for such a tragic deprivation is "ignorance of law" which is "no excuse" as a judicial principle. In a country with an 80 per cent illiterate population, the principle sounds utterly unsound. Even for a literate, it may not be that easy to understand the law by reading it because the Victorian technical drafting continues as the model today. Every lawyer and court has its own way of reading and interpreting the law which varies from lawyer to lawyer, court to court and generation to generation with the changing time and values.

If there is so much uncertainty in the law, then who is ignorant and who is knowledgeable? Or is everyone a little less than ignorant? The public institutions which undertook development projects without complying with the law, also showed utter ignorance of the law and in some cases defiance of it.

Regrettably, things go unchallenged as the law sleeps in the sleeves of ignorance. Unused and misused laws are not laws in real sense, although we often term them "obsolete" without testing their efficacy. However, if one attempts to depict an environmental audit of the legal system considering the cost of "ignorance," perhaps "ignorance of the law" and "ignorance of wisdom" would be equal evils or one worse than the other. Bangladesh is a classic example of both even after the victories of "double independence."

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Update Family Laws to Stop Bias

A uniform family code is needed to end the current confusion and religious discrimination in the system, say

Zaved Hasan Mahmood and **Saira Rahman**

ONCE upon an eon, settlers in different parts of the world had more or less uniform religions, societies and cultures, within which they developed themselves.

With the advent of different religions, people travelling from one area of the world of another took with them novel and interesting religious laws, and slowly found converts.

During the colonization period, the imperial countries were responsible for spreading their own laws throughout the globe. France introduced the Code de Civile or the Civil Law System in Vietnam, Laos and Cambodia, while England introduced the Common Law System to the Indian Sub Continent. Next to these laws, however, personal laws stayed in existence, and family matters were run per religious laws. To this day this is evident in India, Pakistan and Bangladesh.

These countries have their Penal Code, Criminal Procedure Code, Tax Laws and Land Laws — legacies of the Raj — to regulate a modern society. Unfortunately, even though these laws are being modernised to suit changing times, nothing is being done to update and modernise family laws.

Lawyers dealing with family cases face difficulties due to such lapses. Take, for example, the system of marriage registration. It is ironic that even though marriage registration is totally in the hands of the state, there is no uniformity in the system. Muslims register their marriages with the Kazi, Christians in Church, while there is no regular registration system whatsoever for those of the Hindu faith. Thus marriage registration is not concentrated in one single centre, but spread in three different directions, making registration of marriages difficult to enforce and monitor.

A non-registered marriage is hard to prove and many a man has committed the crime of rape by hoodwinking a woman into believing that they are married. The abandoned woman later on finds herself between a rock and a hard place, since she has no registration certificate proving the marriage. A uniform, centralised registration system would help make the registration of a marriage compulsory regardless of the faith of the parties.

The registration of divorces suffers the same fate. Muslims and Christians have scope to register their divorces since they are allowed to divorce. However, the Hindu community of Bangladesh does not allow divorce.

In rural Bangladesh, husbands still get away with divorce by pronouncing 'talaq' thrice, and there is no one willing or knowledgeable enough to correct that system. Hindu women suffer torture and physical and mental abuse — and have to do so "till death do us part" — since there is no way out of a turbulent marriage. If India can make divorce possible in Hindu marriages, why can't Bangladesh?

Because there are different religions and thus different family laws in Bangladesh, family court cases sometimes result in confusion and bias. After continuous women's movements, a family court was established in Bangladesh as late as 1985. This court is not, however, an independent court. The civil courts are the ones which act as family courts from time to time. Thus, there is a dearth of qualified judges who are experts in family related disputes and since there is no independent, full-time family court, the outcome of a case takes an extremely long time.

Further question has arisen as to the jurisdiction of the court. Can any person, of any faith bring a case to this court? The idea was that the court would be unbiased and non-discriminatory. However, according to some Assistant Judges, the court would only cater to Muslims because section 5 of the Family Courts Ordinance says "Subject to the provisions of the Muslim Family Laws Ordinance, 1961,.....".

Two cases recently appeared in the High Court concerning the above confusion. In the case of *Nirmal Kanti Das v Biwa Rani*, Hon'ble Justice Mahmudur Rahman commented in his judgement that "Any person professing any faith has a right to bring a suit for the purposes mentioned in section 5 of the Family Courts Ordinance. A Hindu wife is therefore entitled to bring a suit for the maintenance against her husband under the Family Courts Ordinance."

However, in the case of *Krisha Pala v Geetasree*, Hon'ble Justice Golam Rabbani was more straightlaced. In his judgment he said, "The family courts have jurisdiction to entertain, try and dispose of any suit relating to the matters mentioned in clauses (a) to (e) of section 5 of the Family Courts Ordinance only between litigants who are Muslims by faith."

The root cause for this kind of confusion is the Family Courts Ordinance itself. In a state which professes that it is non-communal, such discriminatory sections, rules and articles ought to be wiped out, even more because our Constitution, in Article 26 states that, "the state shall not make any law inconsistent with any provisions of this Part (Fundamental Rights) and any law so made shall, to the extent of such inconsistency, be void. Furthermore, Article 27 says, "All citizens are equal before the law and are entitled to equal protection of law."

In matters of marriage, divorce, inheritance and guardianship, the unhelpful interference of religion is hampering the development of society. The discrimination due to disguising private, family matters as 'personal law' must be put to an end if we really want a truly non-communal, non discriminatory society and legal system — and maintain a democratic state of mind.

Social workers, lawyers, intellectuals and the like have, so far, made an attempt to stop religious discrimination by opting for a uniform family code for matters of marriage, divorce, guardianship, inheritance and maintenance applicable to people of all religious faiths. If this code is accepted by the state, it will play a great role in bringing a nation and its men and women into the same warm embrace.