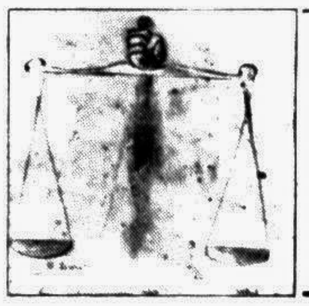
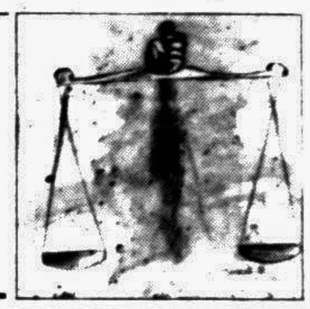


Law and Our Rights



Role of the Judiciary and Human Rights

The judiciary can play an important role in implementing human rights, says Justice A M Mahmudur Rahman

GOD Almighty has proclaimed that mankind is "Asraful Mokluket". As mankind is so declared it must have not only the right to life but rights which are fundamental for its development and glory. In different stages of human civilization it is seen that there has been a quest for effective realisation and enforcement of such rights in different societies. The rights are to be achieved for the existence of mankind and need to be protected.

Among the fundamental human rights, the right to live, equality before law and and equal protection of law, freedom from arbitrary arrest or exile, freedom of movement, right to own property, freedom of thought, conscience and religion, freedom of opinion and expression, freedom of peaceful assembly and association can be called the most significant. The Bangladesh Constitution, in recognising those human rights under Part-III in the form of Fundamental Rights ranging from Article 27 to Article 47A, has incorporated as many as 22 out of the 30 articles in the Universal Declaration on Human Rights, 1948.

In recent years, the concept of human rights has assumed a new dimension especially in South Asian Countries. Talks and seminars are held in different countries of this region by the Judges, Jurists and academics and the scholars in different forums. No doubt such discussions and deliberations are in progress to defend universal human rights and to give a definite and effective shape. But their effectiveness mostly depends on the acceptance by the nations through incorporation of the fundamental human rights in the constitution or the laws of the respective state.

Role of Judicial Activism

The role of judges and the lawyers are of great importance in implementing human rights. It is for the lawyer to create awareness by educating the people about the fundamental human rights available in international instruments as well as in the national Constitution and the laws. To advance these, the lawyers must actively engage them for the simple reason that unless a case involving breach of human rights is brought before a court, it is hardly possible for the judges to mend such breach *suo moto*.

However, judges of our country are not totally unmindful. In *Nazrul Islam*, the High Court Division demonstrated such an attitude in enforcing a fundamental right. Nazrul Islam was thrown into prison for his involvement in certain criminal cases, but even following the expiry of the period of sentence which could be imposed, if it could be done at all legally, he was not released from jail. As no lawyer committed to advance the cause of human right moved the court, the High Court Division *suo motu* issued rule upon the authority and ultimately Nazrul Islam got back his freedom to life and of movement.

In the case of *Dr Kamal Hossain-vs-Sirajul Islam*, 21 D L R 23 (SC) on standing, the Supreme Court of Pakistan spoke "any person not necessarily 'an aggrieved person', can seek redress from the High Court against the usurpation of a public office by a person who is allegedly holding it without lawful authority."

But in order to enforce such rights through the decree of the court, the source of such right is not readily available in our country. When judges interpret the fundamental rights whenever such occasion arises, and when they find that municipal law or the Constitutional provisions are not free from ambiguity, they give interpretation to safeguard those rights in the background of the declaration of human rights by the United Nations and other similar Covenants. It is encouraging to note that recently judges in this respect have shown their tendency to interpret the fundamental human rights through their pronouncements in the light of international human rights norms. I may venture to say that it is for the judges of the different nations, in interpreting the fundamental human rights, to apply the universally recognised human rights norms in their day to day activities in dealing with relevant issues as far as possible to help shape stable human rights jurisprudence. The international human rights instruments are not binding on the Judges of the domestic court and the international conventions are also not enforceable in the national courts without their incorporation in the municipal law. The attitude in the judiciary in interpreting human rights, tends to show the independent role of the judiciary in order to remove uncertainty and ambiguity in the domestic law.

Restrictions on Human Rights

There is a tendency on the part of the executive authority to curb the fundamental rights in the name of security of the state or for preventing citizen from doing any prejudicial act. I may venture to refer to the Special Power Act, 1974 of our country which is being applied for the purpose of preventing detention on the same accusation for which the criminal cases are pending against the detenu in the ordinary criminal courts. The Bangladesh High Court Division gave many decisions where release orders have been given against arbitrary use of the law. In the case of Polash Chakma (W P No. 3154/91), High Court held that the detention of the detenu without producing him before the Advisory Board (Section 8 of the Special Power Act) and the grounds upon which the authority passed the order of preventing detention were vague, indefinite and lacked in material particular. This law contains provision for preventive detention on the ground of prejudicial act to the state or the public/economic disturbance etc. The law cannot be termed to be bad in its entirety. But our concern is with the misuse of the law at the hands of law enforcing agencies who frequently apply this law by taking away the fundamental human right. To check such misuse, we need to identify the area and evolve suitable and definite procedures so that the court's legitimacy to exercise its power in order to keep the executive organ within its legal bound, cannot erode on the plea of justifiable cause in the name of security of the state in detaining citizens. The court must not forget its commitment to 'constitutionalism', in order to keep the state power within the bounds of its legal frame-work.

But judicial activism for enforcement and implementation of human rights is not always a smooth function, as it is obstructed by the proponents of the doctrine of judicial restraint who believe that it is for the Executive branch of the Government and the Legislature to protect human rights. The proponent of the doctrine of judicial restraint often give warnings. Robert H Jackson of Supreme Court of the USA cautions, "The rule of law is in unsafe hands when courts cease to function as courts and became organs for the central of policy." The doctrine of judicial restraint even reacts in such a manner that sometimes its proponents advance the doctrine as a ground for non-confirmation and impeachment of judges, although the judges 'independence' is guaranteed under the Constitution. Reports of judicial removal in some countries of this region demonstrate that the doctrine of judicial restraint operates against such independence. In spite of such restraint, we must not forget that judicial activism should not be considered as a threat to national security and development of fundamental human rights, but should think that it is imperative for the attainment of such objectives.

The economic plight and social condition of a particular country is another source of discouragement for judicial activism in advancing the universal human rights and invocation of rule of law.

Although there is scope for enforcement of fundamental rights by court decrees on the strength of Article 102 of our Constitution, the court's power is not as wide as that of Article 226 of the Indian Constitution. The limitation of the High Court Division of Bangladesh is for the use of the expression "person aggrieved" relating to writ of *certiorat*. In other words, petitioner has to assert and protect his fundamental rights through decree of the High Court Division. In order to implement the fundamental human rights, the State should act according to its commitment being a member state of United Nations and thus widen the field of judicial activism by suitable amendments of the constitution and other law. The framers of the Constitution of India, seem to be liberal in widening scope of writ jurisdiction, to protect Fundamental Rights, of the High Court under Article 226 High Court. Under this Article, High Court has power to issue to any person or authority, order or writs for enforcement of any of the rights conferred by PART-III or for any other purpose. Absence of the expression "for any other purpose" and inclusion of the expression "person aggrieved" in Article 102 (i) of the Constitution of the People's Republic of Bangladesh, restrict the exercise of power of our High Court Division for enforcement of fundamental rights impaired by its violation.

Similarly, such wide scope is given to the Supreme Court of Sri Lanka. Whatever limitation is put on the judges by the expression "person aggrieved", we the judges of Bangladesh prefer the one of other third world countries, mostly the SAARC countries. We must strive to interpret the fundamental rights against the background of the social and economic conditions and not only confine ourselves to stress the civil and political right.

Sometimes circumstances may arise where domestic municipal law is clear and inconsistent with the international obligations of a member state, the domestic court is to give effect to the domestic law in view of supremacy of the domestic law. In such a situation, it should be the duty of a judge concerned to point this out to the proper authority, so that the municipal law can be amended to bring harmony between the two with the intent help the implementation and enforcement of the human rights and freedom. This no mean job for the judges.

Non-availability of material is a remarkable impediment for development of universal human rights jurisprudence in this country. The vacuum can be filled up by providing information to the judges and the lawyers. This can be achieved through occasional meeting to exchange information and experience of the members of the Bench and the legal profession in their respective country. In other words, the implementation can be achieved through bilateral diplomacy. Secondly, this can be achieved through access to International Commission or Tribunal which again depends on the permission of the state of the petitioner. An individual, if so permitted, can petition to the European Commission and the European Court of Human Rights and in our region to such Commission or Tribunal. Thirdly, it can be implemented through an international body by adopting publicity and persuasive policy. These approaches are no doubt weak. But it seems that development of human rights law depends to a great extent on the monitoring through mass media by flashing instantaneously any violation of human rights creating sensation which calls for world body or any regional organisation to take its stand that human rights are no more to be treated as international affairs that are unenforceable in such Commission or Tribunal.

Conclusion

Before I conclude, I echo the voice of Mr Justice Mohammad Haleem, the former Chief Justice of Pakistan, who says : "In my view, courts should be viewed not in isolation but as a coordinated source of governmental power, as an integral part of the larger political system. In the present context of the world society, the legitimacy of the domestic courts and the powers that judges exercise in human rights litigation, are funded on the unique competence of the judiciary to perform a distinctive social function which is to give concrete meaning and application to the public values embodied in any authoritative legal text such as the chapters on fundamental human rights in the national constitutions. The capacity of judges to give meaning to public values inherent in the concept of fundamental human rights turns not on some personal moral expertise, but on the method which a public morality at the domestic level must be construed. The foremost task of judges of domestic courts which as assumed prominence in the domain of human rights is to weigh their fundamental commitment to individual rights and group rights against the competing sentiments of nationality, the prejudices of race, the interests of ethnic groups, the demands of justice, the cultivation virtue, the impulse of compassion, the higher callings of truth and salvation, and the allure of prosperity."

Before I part, I should caution that in expanding the writ jurisdiction, the High Court must not forget to apply the universal human rights norms in keeping view of the economic, social and other distinctive features of the particular state as what is applicable to the context of Europe and America may not be applicable to country of the region.

The writer is a Justice of the Supreme Court of Bangladesh, High Court Division. This paper was presented at the Bar Council's Conference on Human Rights and the Role of the Judiciary from January 22-23

Lawscape

Drug Cases Pile Up

There are more than 1500 cases pending trial in Dhaka's Chief Metropolitan Magistrates Court since the promulgation of the Drug Control Ordinance 1990.

A source informs that the majority of cases are delayed due to witness and forensic test reports which are not handed in on time. Those reports that are completed contain many discrepancies. The majority of those listed as witnesses cannot usually be found. Even when found, they are reluctant to testify in court. Accused individuals, who obtain their release easily, return to set up their flourishing trades once again.

In the majority of the cases under trial, the defendants released on bail are either on the run of subsequently fail to show up in court. A source informs that the authorities of the case management division remain indifferent to this. After instituting a case, division authorities establish an unholy alliance with the drug dealers.

It should be pointed out that there is a separate office at the Chief Metropolitan Magistrate's Court to handle all cases under the Drug Control Ordinance. However, the office lacks adequate manpower. Vacant posts remain unoccupied for a long time. Furthermore, the office is quite far from the magistrate's court. This distance stands as an obstacle to the conduct of cases. Defendants who cannot find the Drug Control Ordinance office on time are unable to present themselves in court. Warrants of arrest are issued against many of these defendants. Others languish in custody without trial.

Court Correspondent

Recommendation from Human Rights Group

The Coordinating Council of Human Rights (CCHRB) in Bangladesh has recently sent an investigation report and a 12 point recommedation to the Ministry of Home Affairs, the Chief of Police, Sathkira police officers and to selected members of the media.

The investigation report concerns the case of Julekha 17 who was impregnated out of wedlock by Abdul Khalek in Sathkira village, Kaliganj. When certain religious leaders found out about the pregnancy and the subsequent abortion, they pronouced a *fatwa* and sentenced the girl to 101 lashes of the cane on October 3, 1994.

The report also notes that a similar incident ended in suicide in a nearby village last year. This has had no apparent impact on the people of the area.

The CCHRB's demands include, among others:

*Speedy and neutral investigation of such cases by the police, submission of complaint files in court, finding the responsible and meting out appropriate punishment.

*The Religious Affairs Ministry should inform and warn madrasa teachers and imams about such cases.

*No particular religion or religious group should be given preference over another and the State should take a neutral stance on religion.

*Basic education should include teaching the universality of human rights.

*Citizens should be made aware of the law and that the equality of all before the law and the right of access to the law.

—I.H.

Laws Needed to Curb Trade in Endangered Species

Laws to protect endangered plant and animal species are still lacking in many Asian and Pacific countries.

This was revealed by a survey of 81 countries which are parties or signatories to the 20-year-old Convention on the International Trade in Endangered Species of Wild Fauna and Flora (CITES). Parties to the Convention held their ninth meeting in Fort Lauderdale, Florida, United States, in December last year.

CITES, also known as the Washington Convention, is an inter governmental treaty that provides the necessary framework for controlling trade in endangered plants and animals.

International trade has been identified as one of the major threats to the survival of wild species after that posed by the destruction of natural habitat.

Countries were ranked from one to four depending on the effectiveness of their legislation. Most of the 16 Asia-Pacific countries in the survey fell within the last three levels. Only Australia and New Zealand were found to have legislation which generally "meets the requirements for the implementation of CITES."

Japan was ranked third having legislation which meets some requirements for CITES implementation while still needing additional laws in many areas.

Ranked second were India, mainland Malaysia, Papua New Guinea, Singapore, Thailand and Hong Kong. In the third category were Bangladesh, Malaysia-Sarawak, and China while fourth were Indonesia, Malaysia-Sabah, Nepal, Pakistan, Philippines and Sri Lanka.

The survey focused only on whether national legislation to implement CITES existed in a country. It did not look into whether or not laws are implemented properly.

TRAFFIC noted that some 25 per cent of CITES Parties or signatories, which now total 126, still have to pass laws for the implementation of the Convention's provisions.

—Depthnews Young Asia.

Archaic Traditions and a Quagmire of Complexities

The Lighter Side

Lamis Hossain

AS a law graduate taking the first hesitant steps towards the legal profession, you will find yourself sucked into a field rooted in archaic traditions and a quagmire of complexities.

The first obstacle is a morass of rules and exceptions compiled in a booklet sold for Tk 25. Sub-rule (3)II of rule 60 refers you to a pupilage contract form to be signed as a condition of eligibility for the exams. The language of the pupilage agreement is a little disturbing:

"That the said Mr X (pupil) doth covenant and agree with the said Mr Y, (the Senior lawyer) and those of his clients and readily and cheerfully obey and execute his lawful and reasonable commands and shall not depart or absent himself from the said service and employ of the said Mr Y any time during the said term without his consent first had and obtained and shall honestly and faithfully behave himself in all respects as a good and faithful pupil..."

Is it a medieval master-servant oath or a twentieth century document? Very confusing indeed for the future advocate.

Not surprisingly, the law graduate will look for ways to worm out of this perilous obligation. This exercise is likely to perplex the prospective candidate even further. Barristers who have done their Bar exams in England need to take the written Dhaka exam while those who have an LLM do not. In fact, those with an LLM are even exempted from practicing in the District Court for two years, whereas Barristers are not. The naive scholar realises that there is absolutely no advantage in completing the Bar at Law in England other than the social status attached to the title of "BARRISTER". Master-servant contracts and the importance of titles hardly make law the ideal profession for any hot-blooded believer in a classless society.

You only need to visit the Supreme Court premises to confirm this. King penguins with their black coats and white bellies waft along the court corridors with their briefs in hand. They cut an impressive figure next to the natives scurrying along meekly in their lungis and cheap suits.

But despite the ivory tower image surrounding the law, the profession is very much in tune with the rest of Bangladeshi society. When you visit the Bar Council for information, you may be surprised by the staff's obliging manner. "We can type out the pupilage agreement form for you if its too confusing," they offer amicably. Naturally, you are glad to be rid of this headache and agree immediately until informed of the "small" administrative charge which accompanies the favour.

When you return to the Bar Council to submit the papers thinking that all necessary formalities have been completed, you are told that a magistrate's seal is required. (Why didn't you read the small print?) Where will I find a magistrate?", you opine rather foolishly. Once again the Bar Council is ready to oblige. Why don't you give it to us? If you do it by yourself, you will be made to run around," they say.

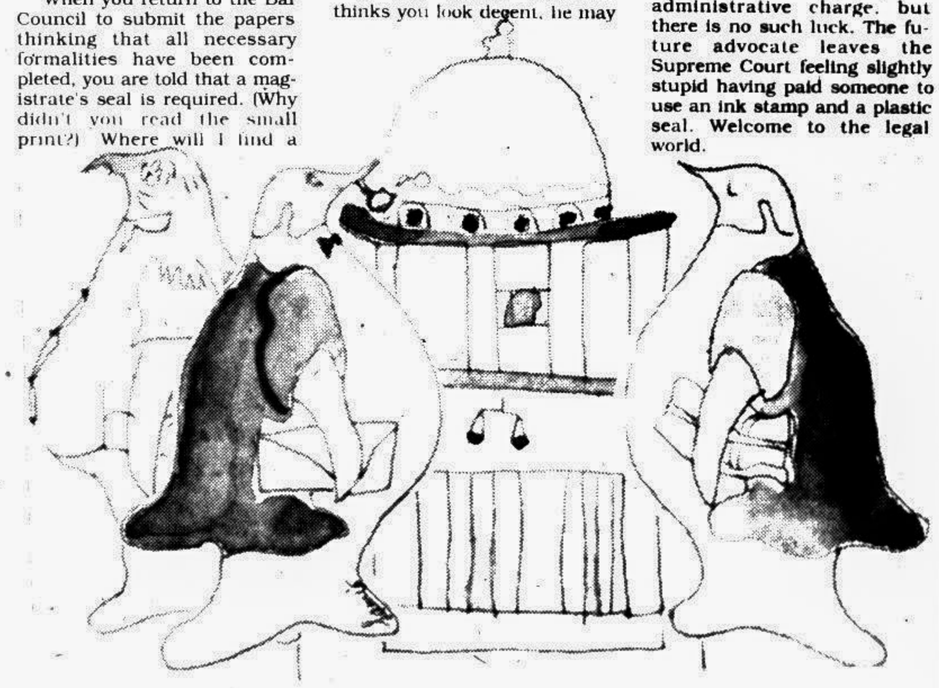
Having caught onto their routine by now, you retort, "How much?" Without hesitation, they will answer, "We can do the job for Tk 120."

Those who decide to be stingy and deprive the clerk of his side income, will discover that getting an affidavit attested by yourself is not so hard after all. The only problem is finding the Public Notarian's office.

If the Public Notarian thinks you look decent, he may decide not to make you wait. If your Senior is a distinguished lawyer, the Notarian may be especially helpful. If you are a woman, he may even be very, very friendly: "Where are you from?", "What does your name mean?", "That's a very nice photo", "What does your father do?" Why don't they just read your affidavit and find out?

To cut the interrogation short, you ask coyly, "Is there an administrative charge?" Unfortunately the answer is yes, but mercifully the Tk 50 required here is less than the Bar Council's "fee". What you will be quite unprepared for however, is the amount of time it can take to affix one seal and two stamps on a piece of paper. Once the painstaking job is performed, you are told to photocopy the form at your own expense (not included in the Tk 50 fee) and hand them a copy for their records.

When all is done, you try to get away without paying the administrative charge, but there is no such luck. The future advocate leaves the Supreme Court feeling slightly stupid having paid someone to use an ink stamp and a plastic seal. Welcome to the legal world.



Marital Rape is a Misnomer in Islam

Wives cannot complain of marital rape in the absence of physical or mental harm, argues Barrister Salahuddin Ahmed

THIS short article is in response to a report by Joe Fernandez published in The Daily Star of December 14, 1994. It appears that the reporter provided incorrect interpretation of the Qur'an when he wrote : "According to Professor Harun Din of University Kebangsaan Malaysia ... Verse 223 Surah Al-Baqarah in the Qur'an clearly spells out when men may or may not have sex with their wives, one instance of the latter being 'when the wife is not in the mood'."

The clear translation of the relevant portion of the above mentioned verse is: "Your wives are a tilth for you (to cultivate) so go to your tilth as you will." In this verse, a wife has been compared with a arable land. The spirit of this verse is that just as a cultivator goes to arable land to plant seeds, similarly a husband has the right to enjoy normal marital relationship with his wife, keeping in mind the attached obligations which follow from the exercise of that right. In this verse, addressing the husbands, Allah has said that they have right of access to their wives so that the latter cannot withdraw their consent according to their free will and without any justifiable reason.

It appears that under Islamic Law, it is not possible for a wife to bring a complaint of rape against her husband while keeping the marriage.

However, it does not mean that a wife cannot bring a complaint against her husband on the ground of assault or physical violence committed to her in the course of establishing his conjugal rights.

But under the Western legal system, a criminal charge can now be brought against a husband on the ground of raping his wife. The state criminal laws in Australia have been amended removing the immunity of husband from the charge of rape. In 1991 the High Court of Australia declared : "The common law fiction of consent has now been statutorily removed." (see Rv.L 15 Fam LR 122, 135). In this case, the High Court of Australia followed the House of Lord's decision in Rv.R (see [1991] 3 WLR 767) expressing that in view of the changing notion towards the relationship between a husband and his wife, the common law fiction of wife's irrevocable consent to sexual intercourse should be removed. The court rejected "... the proposition .... that by reason of marriage there is an irrevocable consent to sexual intercourse," stating that "this court would be justified in refusing to accept a notion that is so out of keeping with the view society now takes of the relationship between the parties to a marriage. The notion is out of keeping also with recent changes in the criminal law of this country made by statute which draw no distinction between a wife and other woman in defining the offence of rape." (see 15 Fam LR 122, 125).

In Rv.R, the House of Lords "declared that in modern times the supposed marital exception in rape forms no part of the law of England" (see [1991] 3 WLR 767, 776) It further said : "It is our duty," [to] remove [the] common law fiction which has become anachronistic and offensive..." (see at 777) It bluntly expressed "The fact is that it is clearly unlawful to have sexual intercourse with any woman without her consent." (see at 776). "In the light of changing social, economic and cultural developments", (see at 770) in the Western society, the difficulty of preserving sex only in marriage was admitted by the House of Lords stating: "Certainly in modern times sexual intercourse outside marriage would not ordinarily be described as unlawful." (see at 775).

In the light of the above analysis, the concept of marital rape is a misnomer which has no place in Islamic law. Due to the sexual revolution in the West during the past two decades and the consequent breakdown of the sanctity of the institution of marriage, the husband and wife do not any more owe the traditional fidelity to each other as frankly admitted by the House of Lords, the High Court of Australia and Prince Charles.

It is well known throughout the world that under the principles of Islamic Law, extra marital relationship is absolutely unlawful and the observance of fidelity of husband and wife does not change with the changing notions of the society. In the West, in the name of promotion of women's rights, the institution of marriage has been severely downgraded, stripping off its solemnity. It is no wonder that in the West, marital rape is now an offence as there is no more any distinction between a wife and another woman for sexual relationship as admitted by the Highest Courts, like the House of Lords in England and the High Court of Australia.

Free life-style without attached obligations emanating from marriage is not permitted in Islam. The consequences of non-recognition of the Western concept of marital rape under Islamic Law are : (1) marriage is looked upon as a solemn institution for maintaining the purity of sexual relationship between husband and wife, (2) the husband does not have unbridled right to have sexual relationship with his wife causing either physical or mental harm to her, showing failure in the discharge of his marital obligations and (3) the wife does not enjoy her right to withhold her consent to sexual relationships under any flimsy pretext.

The writer is a member of the law faculty, University of New South Wales, Australia. The above article is an excerpt from his proposed book, Fundamentals of Islam.