



Law and Our Rights



Spectre of Black Laws Still Looms Large

Lawscape

BANGLADESH won its independence after nine months of bloody war. Before and after 1947, under the colonial rule of the British and Pakistanis, our people had always faced a repressive socio-economic and legal structure. Specifically, after independence from the British empire Bangladesh faced a new colonial social structure which was absolutely repressive in all spheres. The legal system was also repressive and always used for the protection of the ruler in the system of British rule.

To obtain freedom from all ways of suppression, we engaged ourselves in a nine month war. The struggle against colonial rule and for independence was deeply imbued with the aspiration to ensure the right of all women and men to a life of human dignity and to enjoyment of their fundamental human rights and freedoms. After independence, within a year, on 16 December 1972, our Constitution of Bangladesh came into effect. It should be noted that our constitution was written in the light of the principles of our glorious independent war. In the preamble of the constitution (supreme law of land), secularism, nationalism, democracy and socialism, which inspired our heroic people to dedicate themselves to, and our brave martyrs to sacrifice their lives in, the war for national independence, have been recognised as one of the fundamental principles of the constitution.

But after twenty four years, what is the reality? How far we have achieved our goal to establish the main principles of ideologies of the independence war. Twenty four years on, we face a bitter reality. The aspirations of the liberation struggle remain largely unfulfilled, and democratic rights unprotected. More over, certain black laws have been introduced by the parliament and by the executive, which obviously frustrated the aspirations of 1971. The security of the people to survive, to live with dignity, to enjoy access to food, health and education,

cannot be ensured. And yet, in the name of national interest and necessity, Bangladesh continues to deploy several black laws to violate peoples' rights. Such repressive and black laws violate the right to life, to liberty, to equality before law, to security of the person. Moreover, after the independence and still now, we cannot ensure equal treatment and the other constitutional provisions on fundamental rights. Since 1971, we have faced martial law twice, which certainly narrows the scope for the development of rule of law and democracy in the society.

It was previously mentioned that our constitution of 1972 has ensured fundamental human right for the protection of people's right. But within one year, in 1973, through second constitutional amendments some black provisions were incorporated in our constitution. The second amendment inserted a new section, part IXA, in the constitution. This empowers the head of the state and government to proclaim a state of emergency if he/she is satisfied that the security or economic life of Bangladesh or any part thereof, is threatened by war or external aggression or internal disturbance. In the emergency period, almost all fundamental rights and freedoms cannot be freely exercised. Since 1971, we have faced emergency for four times. But it should be mentioned that at all times the emergency was proclaimed to suppress anti-government movement and to protect the party power in the state machinery. Moreover fifth and seventh constitutional amendments were also made to give constitutional legality to black and repressive martial laws. Unfortunately, it should be mentioned that these amendments were made by the people's representatives in the national assembly for national interest!

Amendments to article 33 of the constitution restricted the safeguards available to those under arrest and detention. Article 33 provides that any person may be detained for upto 6 months without charge

Twenty four years after independence, we face a bitter reality, says **Zaved Hasan Mahmood**, as he reflects on the laws that continue to repress the people of Bangladesh.

or trial. This provision further limits the rights of any person in preventive detention. However, this is qualified by a further provision which enables the enforcing authority to refuse to disclose such facts if it considers it to be against the public interest. Effectively then, the detainee will be unable to discover the grounds for her/his detention. Constitution limitation on the right to personal liberty have been supplemented by specific legislation, such as the special Power Act 1974, the special security force Ordinance 1986, the suppression of Terrorist Activities Act 1992 and also some provisions of penal laws of Bangladesh (i.e section 505A penal code). Actually, these repressive and black laws are inconsistent with the spirit of our independence and the struggle against colonial rules.

Here, the indemnity ordinance of 1975 should be mentioned which was against spirit of personal liberty and rule of law.

Against communalism, we have decided in 1971 that we have to establish a secular state, where no discrimination against any citizen on grounds of religion, race, sex, etc. But unfortunately we have failed to uphold this spirit. After the change of political scenario in 1975, we have lost our secular constitution. Secularism — one of the constitutional state fundamental principle — has been destroyed by the Martial Law Junta. By incorporating "Bismillah Rahman Rahim" and "absolute trust and faith in the almighty Allah" in preamble through Martial law proclamation in the constitution we have changed the character of our constitution

from secular to Islamic. In 1988, eighth amendment has also supported the anti-secular concept and spirit of 1971, for it incorporates the provision of state religion. Muslims, Hindus, Christians, Buddhists and tribal people — all communities have participated in the liberation war to establish a non-discriminatory secular state, but we have failed to achieve this spirit.

Moreover, some of the special legislation is also discriminatory and used against the minority people in Bangladesh, such as the vested and Non resident Property Act of 1974. In 1965, following the India-Pakistan war, the Enemy Property Act was passed. Nearly a decade later, in 1974, in the secular state of Bangladesh, the Enemy Property Act was repealed. It was however, immediately replaced by the Vested Property Act 1974, which has served to perpetuate discrimination against one community. This law discriminates against citizens on the grounds of their religion. In the name of protecting national security, it vio-

lates the rights to equality, to equal treatment under the law, the right to property and the right to profession of members of the Hindu community. This law clearly contravenes the spirit of our great liberation war and independence. Moreover, other previously mentioned repressive laws are always used against the indigenous people of our country. In 1974, the Special Powers Act was introduced to meet the "terrorist" activist and to save the national economy, but now this draconian law is frequently used against the hill peoples, who are a minority community of our country. According to reports of human rights organisations hundreds of hill people in the Chittagong Hill Tracts continue to be subjected to torture, illegal detention under special power Act 1974. By using these repressive laws, state authorities tried to solve political crisis, but this has yet not given any solution. After the independence, it was hoped that the Hill Tracts issue could be resolved peacefully to achieve a democratic and modern country, but we failed.

In 1971, we have also participated in liberation war to achieve a society where people will be free from all forms of exploitation, no discrimination against any citizen on grounds of religion, sex etc. Till now we cannot eliminate the social and legal discrimination against women. For a long time, women groups proposed a non-discriminatory family law - Uniform Family code, but we have also failed to accomplish that.

In the next year, we are going to observe the 25th anniversary of our independence. But it should be kept in mind how far we can achieve our dream. Several repressive and black law incorporated after 1971 are obviously in contravention with our spirit of independence. To make a modern and progressive society as our dream of 1971, black and repressive laws should be repealed.

The writer is an advocate, founder member of the Law Review and member of Ain O Salish Kendra



Still tied despite twenty four years of freedom

—Star photo

Legal Framework for Investment in Bangladesh-II

Balancing of Interests in the New Companies Act 1994

The new Companies Act will hopefully lead to greater confidence in our corporate culture, writes **Barrister Syed Ishtiaq Ahmed**

ONLY on 1 January 1995 has the new Companies Act, 1994 come into effect. This long awaited piece of legislation is not an entirely new piece of legislation. Companies in the subcontinent had been functioning under the Companies Act 1913 until the partition and even thereafter. However, that Act was subjected to major amendments in India in 1956, and thereafter has continued to be amended from time to time.

In Pakistan the Company Law Ordinance was enacted in 1984. These changes were enacted to take into account the new business and corporate environments.

Similar needs were felt in Bangladesh, and the Company Law Reforms Committee (incidentally, under my Chairmanship) was formed in 1977. After a detailed study of the subject, the Committee handed in its Report in 1981.

The 1994 Act embodies many of the recommendations of the committee. The recommendations were made taking into account the need for constantly balancing several conflicting interests and considerations. The need for statutory protection of shareholders, creditors and investors requires to be balanced against the need for freedom of operation of the company's business and those responsible for its management. The need and desirability of statutory obligation to disclose more information to shareholders, creditors and intended investors needs to be balanced against the consideration whether disclosure or publication of additional information will be prejudicial or detrimental to the interest of the company's business, and hence indirectly to its shareholders and creditors.

Desirable through it is that the shareholders, who were in effect the ultimate proprietors, should have more effective control over the management

Mixed Picture in World Drug Report

WASHINGTON — Last year "was not a banner year for global counternarcotics cooperation and progress," according to the State Department's annual report on international drug control efforts.

The writers also observed that "year after year we see countries begin to make progress against the drug trade, only to lose ground when governments fail to carry through on antidrug initiatives."

The report noted that at the end of 1994, 105 countries were parties to the UN Convention, nine having ratified or acceded to it during the year.

through close control over their directors, this has to be balanced against the very fundamental and basic principle recognised by company legislation everywhere that no company's affairs can be managed at all otherwise than through its board of directors and if it has to manage well it must have a reasonably free hand to do what it thinks is best in the interest of the company.

The trichotomy of needs, namely, legislation to meet the growing and changing conditions, to lessen the opportunities for abuse while maintaining interests were reflected in the recommendations and are reflected in the provisions of the new Act.

The company law enforcement regime in Bangladesh was felt to be weak. Corporate disclosure requirements were not adequate to keep investors and creditors properly informed. Observance of what-ever requirements there were, was lax. Minority shareholders had the dubious protection of being able to apply to the Court for winding up of the company on just and equitable grounds.

We set out with a brief to ensure adequate and proper disclosure, accountability of the management and proper managements protection of minority interests, proper auditing of accounts in accordance with principles accepted worldwide, and importantly, the enforcement of the provisions of company law. The new Act will, it is hoped provide more accountability and

openness in the management of companies, leading to greater confidence in our corporate culture.

Incorporation of Companies
The Companies Act, 1994 provides for the incorporation of companies. Bangladesh companies wishing to be incorporated are required to apply to the Registrar of Joint Stock Companies with copies of their proposed Memorandum and Articles of Association, the former duly subscribed, together with the required fees and the Registrar upon satisfaction that the requirements of the Act have been fulfilled will issue a Certificate of Incorporation. A private company must have a minimum of two members, and may have upto fifty members, a public company must have a minimum of seven members. No company can be registered with a name similar to that of a company already in existence. The government has been given the power to prohibit registration of undesirable names.

Shareholders and the Board of Directors
Under the Act of 1913 only shareholders could be proxies in meetings of a company. This restrictive requirement has been removed and now any person can be a proxy, and the instrument appointing the proxy needs to be delivered to the company 48 hours instead of 72 hours before the meeting.

The 1994 Act spells out that private companies must have at least 2 directors and public companies at least 3. Under this Act only individual persons, and not corporate entities can be appointed directors. In order to ensure that no person is held out to be a director who is not willing

to assume such a responsibility obtaining the written consent of persons wanting to be directors has been made mandatory. Such consent has to be filed with the company before appointment or election and with the Registrar thereafter. The Board of Directors must meet at least once in every 3 months, and at least 4 such meetings must be held in each calendar year. Minors, persons of unsound mind, undischarged insolvents, persons who have petitioned for bankruptcy and persons who have failed to pay a call within 180 days of its having been made are ineligible to be directors.

The term managing director has been defined for the first time in this Act as a persons entrusted with the main powers of management of a company under a contract with the company, or any decision of the general meeting or Board of the company or by the provisions of its Memorandum or Articles, which powers he would otherwise have been unable to exercise. However, the powers of attaching the company seal to any document, endorsing or endorsing cheques made out to the company, collecting or endorsing any negotiable instrument, signing any share certificate or ordering the registration of any transfer of shares which may have been delegated by the directors will not be considered to be a part of the main management powers of the company.

The appointment of managing directors is regulated for the first time in the Act. In case of public companies, a person cannot be appointed as a managing director if he is the managing director of more than one other company. Even then such appointment requires the consent of the

company in general meeting. The government, however, is empowered to relax this prohibition if it is satisfied that the companies should for their proper working be operated as a single unit and have a common managing director. The term of office of a managing director of all companies cannot exceed 5 years at a time, and the office of persons who are managing directors shall stand vacated 5 years after the commencement of the Act. Stringent prohibitions have been introduced prohibiting compensation to directors for loss of office, so as to prevent collusive arrangements between companies and individuals resulting in unjust enrichment of the latter.

The Company Prospectus
The requirements for disclosure in prospectuses contained in the old Act remained virtually unchanged since 1913. In the meantime, the development of the securities market has seen the prospectus take a central role as a tool for the investing members of the public in making informed investment decisions. The older requirements of disclosure did not adequately protect the interest of the prospective investors against fraudulent or misleading dealings.

The provisions relating to prospectuses have been streamlined in the New Act. The provisions in the body of the Act spell out the responsibilities and liabilities of persons regarding misstatements or omissions in a prospectus, as well as the contents in a broad outline. The details of the information to be included in and reports to be attached to prospectuses are given in Schedules 3, 4 and 5 of the Act. Prospectuses are required to be filed with the Registrar and may not be issued more than 90 days after such filing.

A new requirement is that statements of an expert can only be included with the written consent of the expert to the issues of the prospectus.

No expert's statement can be included in a prospectus if he is or was interested in the formation, promotion or management of the company.

If it is not possible to allot the shares or debentures for which the prospectus was issued, all moneys received from applicants must be returned within 180 days of the issue of the prospectus or 40 days of the closing of the subscription list, whichever is the earlier, and in the event of delay, the directors will be liable to repay the money with interest at a rate 5 per cent above the bank rate for the period of delay. No allotment can be made before the eighth day after the prospectus is first issued and no application can be withdrawn until eight days after the opening of the subscription list.

Special provisions have been made for shares of debentures for the listing of which application has been made or is to be made to a stock exchange. Unless such application is made within ten days of the first issue of the prospectus, or if permission for listing is not received within six weeks of the last date for payment of subscriptions, then any allotment made in pursuance of applications received under that prospectus will be void, and moneys received will have to be refunded within 30 days after either the ten days or the six weeks, as applicable.

Under the previous law, civil and criminal liabilities for misstatements in a prospectus were dealt with very generally, and were virtually limited to actions for fraud which the aggrieved persons had to prove. The new Act has an interpretation clause whereby a statement will be a false statement if the manner and context in which it is included in the prospectus is misleading, and if something is omitted from the prospectus to deliberately mislead, then the prospectus will be treated as containing a false statement regarding the omitted matter.

Criminal liabilities are specified for misleading statements as well as for fraudulently inducing a person to invest money in a company. If the enlarged requirements of truthful and correct disclosure in the new Act are followed strictly the investing public should have enough information to make a sound investment decision.

Common People on SAARCLAW Agenda

The Fourth SAARCLAW conference on "Law and Justice for the Common People" is to be held in Kathmandu, Nepal from 31 March-2 April 1995. Participants from the seven SAARC countries, including Bangladesh, will present papers on several topics related to the main theme such as economic liberalisation and foreign investment, legal aspects of displaced and migrated persons, and the rule of law and representative democracy in the SAARC countries.

Distinguished judges, jurists, lawyers, law teachers and other specialists are expected to discuss problems and opportunities in the three day meet. The conference will be opened by the King of Nepal. — LH

Book on Constitution Launched

"It appears that in our society writing on constitutional matters has been a frustrating affair," Chief Justice M. Habibur Rahman observed as the Chief guest at the launching ceremony of senior advocate Mahmudul Islam's book entitled, "Constitutional Law of Bangladesh" at the Bangladesh Institute of Law and International Affairs on March 20.

The Chief Justice recounted how unfortunate authors witnessed the suspension and abrogation of the Constitution just as they completed a painstaking book on the subject. He hoped that the suffering of our Constitution was over.

The Chief Justice also said that the Constitution of Bangladesh was a great event because it was written in Bangla as well as English. He said the bench found the Bangla version to be clearer for "English is never known for its clarity and precision."

The launching ceremony attended by legal luminaries provided a timely opportunity for a discussion on the constitution.

"After religious text, there is nothing more sacred than the Constitution," Dr. Kamal Hossain said. He added that the Constitution has lived through great ravages which were unfortunately man made. "All people must stand up in defence of the Constitution."

Dr. Kamal Hossain said that the Constitution was a framework but not a "steel framework." The words of the Constitution do not change, he observed, but judges respond to changes in values.

Barrister Amir-ul Islam, the honorary secretary of BILLA and host speaker said that the "Constitution is what the judges say it is," but that problems arise where the judges interpret the Constitution narrowly instead of expounding it.

Former Chief Justice Kemaluddin Hossain said that judges have to write their judgments without fear or favour. Their pronouncements should be properly tested, commented on and criticised, he noted. He said that he would be the happiest if cases like *Halima Khatun* were to be reversed by the high court.

"The Supreme Court in both divisions, I believe, haven't done very badly in interpreting the Constitution," Justice Mustafa Kamal said, keeping in view the assaults on the Constitution, including its suspension during certain periods.

Justice Mustafa Kamal, however, sounded a word of caution when criticising judges. "I was alarmed by the fact that judges were taken to task simply for writing judgments agreeable to some and not to others," he said. He observed that the judiciary should not be the "subject of volatile criticism that politicians throw to each other."

Barrister Moinul Hossain said that "Once we become disrespectful to the sanctity of the Constitution, it becomes mere words."

All present congratulated Mahmudul Islam on a much needed treatise on the Constitution which represented four years of labour.

Sweatshops Still Flourish in the US

"Despite tough laws, sweatshops still flourish," according to a front page story appearing in the New York Times on February 6.

According to the Times, changes in the US apparel industry mean that work has moved back from large factories to small sweatshops. There are 2,000 such sweatshops in New York City alone which generally employ 20-50 workers many of whom are illegal immigrants. Most of these shops are also owned by immigrants.

One of the workers featured in the report is a 44 year old Chinese immigrant in Brooklyn, who works 12 hours a day, 7 days a week to earn \$2.00 an hour, much below the minimum wage of \$4.25 an hour, in a windowless garment shop with a padlocked fire exit.

The resurgence of such sweatshops is attributed to the immigration population desperate for work and living in fear, and also to the economic pressures on local manufacturers to keep prices low because of competition from factories in Asia, and Latin America.

Changes in the structure of the garments industry where large companies contract out cutting and sewing to small shops, make it difficult to investigate violations of wage and safety laws. — LH

Inquiry Team Back from Bandarban

An eleven member inquiry team including journalists, human rights activists and student leaders recently returned from Bandarban to report on the mass arson there.

On March 15, the Marma-dominated residential areas of Madhyam Para and part of Ujani Para of Bandarban town was allegedly set on fire by the members of the Parbatya Bana Parishad (a group of leaders from Islamic Chattrha Shibir, BNP, District Council Members, and new Bengali settlers). 200 to 300 houses were burned down, two were reported killed and 50-100 reported to be injured.

According to the inquiry team the PGP had called a hartal on that day and were picketing to enforce it. It was also the conference day of the Pahari Chattrha Parishad (Hill Student's Council). The Deputy Commissioner had therefore imposed rule 144 throughout the town.

The PCP was apparently stopped by a police barricade and a lathi charge ensued. The group then changed their venue, but the police returned with a large number of men from the PGP.

The police apparently threw shells and fired blanks to create panic. The PGP then reportedly went on a rampage destroying the Marma homes where many of the PCP members were said to reside.

The President of the PCP is said to have approached the Deputy Commissioner because of the meetings of both PCP and PGP were to be held on the same day (PCP announced their first). The D.C. expressed his inability to help but said he would enforce rule 144, even though the President of the PCP informed him that they would proceed with their programme nonetheless.

The inquiry team met with D.C. Abdul Haque on March 17. The D.C. said that he was forced to declare rule 144 to maintain peace and order. He said the police lathi-charged the PCP because they broke rule 144. The D.C. also said that the PCP were present when the fire started and he therefore considered that they had started it.

Six members of the inquiry team also visited Bandarban sub-jail where 22 people were reported to have been detained. The sub-jailor denied that the arrested had any injuries. When the inquiry team met two of the prisoners they were told that there were many injured among the arrested.

No file or bail petition has been put up by the local lawyer, because of the magistrate's refusal.

The inquiry team's report makes three recommendations. (1) the victims of fire should be rehabilitated immediately, (2) it is urgent to ensure the neutrality of the administration, (3) immediate legal steps should be taken against the false allegations. The false cases should be identified and punished and that a judicial inquiry is essential for this.