

Legal Framework for Social Development and Gender Equality: Bangladesh Perspective

The Charter of the United Nations imposes a clear, compelling legal obligation on all member states to promote "economic and social development" and "human rights" through collective and individual effort. These two objectives are set out together in key articles of the Charter. The promotion of social development must be harmonized with, and reinforced by the promotion and protection of human rights of the people.

The relationship between human rights and social development was portrayed long ago by the Universal Declaration of Human Rights. It sets forth as civil, political, economic and social rights those very goals which are central to social development. Thus each member state of the UN was internationally and morally bound to take effective steps to secure the right of all people to: productive work, fair employment conditions, food, economic security, health, educational services, freedom from discrimination and equality through the process of development.

Through the issue of social development has been raised on several occasions and in the aforesaid international document, it first received global attention in Copenhagen during UN summit on social development in 1995.

At the conclusion of the one-week long summit for social development, heads of the state and government adopted a Declaration and Programme of Action which

represents a new consensus on the need to put people at the center of development. Among the groundbreaking agreements made by the world leaders in the

One of the pre-requisites of social development is the achievement of equality and equity between women and men which can be realized through a stable legal framework, writes Zaved Hasan Mahmood.

Gender Inequality In Existing Personal Laws of Bangladesh			
	Muslim Law	Hindu Law	Christian Law
Marriage			
Age	Women are younger than men (21 years for men and 18 years for women)	Women are younger than men (age is not mentioned)	Women are younger than men
Witness	Women have unequal right to witness, but the Evidence Act of 1972 has provision for women to equal right of witness.	no requirement	Women men have equal right to witness (according to the Canon Law of 1096)
Polygamy	It is illegal to be bigamous or polygamous for women, but men have legal right to polygamy but again a second marriage without the permission of the first wife is punishable under MFLO-(Muslim Family Law Ordinance of 1961)	Polygamy is legal for men, whereas a woman cannot have a second marriage	Polygamy is illegal even bigamy is illegal for both women and men.
Women you can marry	Women have unequal right in deciding a partner who comes from a different religious background	Inter-religious marriage is not recognised	Canon 1086 refuses to acknowledge the validity of marriage of a Catholic member with that of a non-Catholic
Judicial Divorce			
Legislation	Women have unequal right to divorce, and divorce right is also conditional for women	Women and men do not have right to judicial divorce	Women have unequal right to divorce
Guardianship and Custody			
Legislation/Enactments	Women have unequal right to guardianship and custody	Women have unequal right to guardianship and custody	Women have unequal right to guardianship and custody
Inheritance			
Legislation/Enactments	Women have unequal right	Women have unequal right	Women have unequal right to guardianship and custody

Source: ASK

Declaration are ten commitments to:

eradicate absolute poverty by a target date to be set by each country;

support full employment as a basic policy goal;

promote social integration based on the enhancement and protection of all human rights;

achieve equality and equity between women and men;

accelerate the development of Africa and the least developed countries;

ensure that structural adjustment programs include social development goals;

increase resources allocated to social development; create an economic, political, social, cultural and legal environment that will enable people to achieve social development;

attain universal and equitable access to education and primary health care; and

strengthen cooperation for social development through the UN.

For today's discussion we will concentrate on the commitment to achieve equality and equity between women and men from our national perspective.

The leaders of the world also committed themselves to take effective measures,

including through the enactment and enforcement of laws, to implement policies to combat and eliminate all forms of discrimination, exploitation, abuse and violence against women.

As a signatory to the Copenhagen Declaration it is clear that our government is also responsible for furnishing the commitments and program of actions. But to achieve equality and equity between men and women we need a new legal framework.

The existing laws relating to women's rights should be amended and modified in the light of equality and equity principles. In our country laws relating to inheritance, marriage, custody and other family matters regulated by personal laws based on religious discrimination deny equal rights between men and women. The attached table shows gender inequality in existing personal laws of Bangladesh.

To remove inequality and discrimination between men and women we should propose the adoption Uniform Family Code. The Program of Action adopted in Copenhagen recognized that the family is the basic unit of society and as such should be

strengthened. It is entitled to receive comprehensive protection and support. But discriminatory laws can never make husband and wife equal partners.

The heads of state have already committed themselves to remove the remaining restriction on women's rights. It is an international obligation of our government to implement Copenhagen Document for social development.

Besides the discriminatory family laws, violence against women is one of the most alarming obstacles to and restrictions on women's rights. Recently, our government passed a new law (Act No.18 of 1995) regarding violence against women and men. However, the new law is not enough to protect women from violence when the implementation of the law exclusively depends on police authority. Moreover, the new law does not say anything about the activities of religious fundamentalist groups who are consistently perpetrating violence against women. Media reports from several villages in Bangladesh have highlighted the incidents of *fatwas*, issued by mosque imams and Madrasah Maulanas which charge women with *zina* (through under Bangladesh's Penal Code women cannot even be charged with adultery). Reports have also been circu-

lated of Imams punishing women engaged in income generation, education and other social development activities.

As the report prepared by Ain-O-Salish Kendro indicates, 41 *fatwa* incidents have taken place during the last three years. But legal actions were taken in only a few cases. Under our penal laws and special criminal laws, pronouncement of *fatwa* is not defined as a crime. But the implementation of *fatwa* verdicts (I) violates our constitutional and municipal laws. But law enforcing agencies do not take preventive measures against the *fatwas*. Their excuse is that *fatwa* is not defined as a crime in our domestic laws. For the last three years we have seen how these groups used *fatwa* against women and development activists. It is high time to define *fatwa* as a crime and make special provision for punishment, either in a new law or as an amendment to Act 18 of 1995. The Copenhagen Declaration urges governments to frame proper legal mechanism for social development. The issues regarding women's equal rights need to be recommended in order to establish gender equality for social development. We hope that the government will consider the issues for social development as articulated in the Copenhagen Summit.

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Justice Remains a Myth

THE quest for justice, and equality are cherished dream of every nation from the very beginning of civilization to build up a just and civil society. In fact, all the modern states feel proud by inserting these two eternal principles in their constitution. In any country, justice and equality become the end of the court.

Constitution of Bangladesh which is the manifestation of the spirit of liberation struggle, commits social justice and equality to materialise the dream of martyrs and build up a truly democratic society. However, justice can only be answered in an egalitarian society free from exploitation. Thus, justice and equality are inter-dependent and inter-related philosophical ideas. Justice means what is due to an individual or group or the collective community and shall be rendered. It denotes the equal opportunity of every individual to develop his personality to the fullest extent. This embraces both material and spiritual aspects of life. It is one of our visions that inspired the framers of our constitution that justice should be the fundamental aim of the government. But, as a reality, after the independence, this cherished goal remains an illusion and hollow promise. Abject poverty, concomitant darkness of illiteracy make national emancipation merely a myth.

Apart from the broad concept of justice which is used in both political and social sense, the narrow concept of justice e.g., legal justice also becomes unreal to the poverty ridden and down trodden people. Much talk about independence of judiciary has been heard. But in-

Equal protection of law needs equal opportunity to access to the course of law, otherwise justice remains a myth, says Abdullah-Al-Faruque

dependence of judiciary bears no significance unless and until the equal access to justice is ensured. Constitution affirms the equal protection of law as a fundamental right. So if any body is denied to access to justice merely, because of poverty, it virtually amounts to negation of the spirit of the said Article.

As a matter of fact, in our country most of the people cannot vindicate their legal right due to poverty as litigation entails huge financial burdens. The age-old proposition that "justice is always advantageous to the rich," is applicable in Bangladesh. Even when they continue with the proceeding somehow, the stronger opposition manages the better lawyer, buys the witness or causes unnecessary delay forcing them to surrender on compromise. However, provision of pauper suit exists in our Code of Civil Procedure — so that a pauper may initiate suit without court fee. When he does not possess sufficient means to enable him to pay such fees or when no such court fee is prescribed, he may institute suit only if he is not entitled to property worth Tk 100 other than his necessary wearing apparel and subject matter of the suit. This provision, in fact becomes ineffective and does not provide any sort of relief to the poor litigants. Because procedure to determine by the test of a "sufficient means" is too rigid and formal. In fact, it gives rise to a

preceding remitting in technicalities, delay and frustration and eventually does not substantiate the real justice. Another reason behind futility of their provisions is to consider Tk 100 as a yardstick to measure poverty. It is totally unsatisfactory in view of the present socio-economic context. Therefore, wholesale modification of the provision relating to pauper suit is essential to afford poor litigants to realise their right.

Another problem that eventually leads to denial of justice is delay in the administration of civil justice. An essential requirement of justice is that it should be dispensed as quickly as possible. It is a well-known dictum that "justice delayed is justice denied." One of the main reasons that causes delay is procedural puzzlements. Procedure is the handmaid of justice. It is to be used so as to advance the cause of justice and not to thwart it. But in our country, justice is often handicapped by procedural complacency. The attitude of some of the lawyers is also to some extent responsible for delay. They apply for frequent adjournment on flimsy grounds. When a particular ground, such as his sickness or personal affair is advanced by the advocate, it is usually not possible for a judge to examine whether the ground is genuine or not and it is the fitness of things that he should normally accept as true.

Therefore, for the speedy

disposal of cases, legislative initiative should be taken and attitude of the lawyer must be changed. Besides, more judges should be appointed to fill in the existing vacancies and creation of additional posts in sufficient number would go a long way to solve the problem of delay.

To ensure equal access to justice, legal aid may be given to the poor litigants. In view of article 27 of our constitution which ensures equality before law, legal aid cannot be considered as a matter of charity or of grace or of discretion, but it is a matter of right. The concept of legal aid is now a popular movement in some developed countries like USA and UK and even in Sri Lanka. In these countries, legal aid has got recognition by necessary legislations.

In Bangladesh, however, some enlightened lawyers and NGOs render legal service to the poor. But their efforts are not sufficient. A legislative recognition of legal aid is a must for Bangladesh to give effect to the true spirit of "equality before law and equal protection of law." Because inequality does not only result in pampering one class but also in depressing another. The dynamics of social justice is the key to human progress and just society. The hopes and aspirations of the constitution will be achieved in an egalitarian society only through ensuring social justice. It is imperative that our legal systems should be reformed so as to ensure maximum welfare of the people. We should strive to improve the legal system while relentless effort to improve the lot of the people through legislative enactments can facilitate the true progress of society.



Abolishing Death Penalty through Constitutional Guarantees

ON 5 June 1995, the South African constitutional court declared death penalties unconstitutional by a unanimous judgement in the case of State vs Makuranyange & Mchunu. Human rights organisations and activists in different countries are keeping pressure on their respective governments for abolishing death penalties from the criminal statute books. From this point of view the judgement in South Africa represents an important landmark not only in South African law but also in international human rights jurisprudence.

Unlike most of the constitutions of the world, the right to life is unqualified in the Interim South Africa Constitution. Section 9 of the Interim Constitution guarantees right to life while section 11 (2) prohibits cruel, inhuman or degrading treatment or punishment. The court found the death penalties unconstitutional as they destroy life, which has been protected without reservation in Section 9.

One of the objects of the above reference to South African Criminal Jurisprudence is to have a comparative analysis of our legal system. Capital punishment may not be unconstitutional in Bangladesh in as much as the Bangladesh constitution guarantees right to life in a very qualified form. Under the constitution of Bangladesh

Capital punishment may be unconstitutional in a constitutional framework where right to life is an unqualified right, writes Isaac Robinson.

right to life can be limited only in accordance with law, meaning only in accordance with reasonable and fair law.

Question often arises as to how far a law can limit a fundamental right. In Bangladesh a law can limit a right entrenched in the fundamental rights chapter of the constitution so far such law is allowed within the scheme of the respective rights. But in South Africa a law of general application can limit a right laid down in chapter 3 only if it does not negate the "essential content" of that right.

Whether the death penalty negates the "essential content" of the right to life was the question upon which depended the constitutionalities of the law containing death penalty as a competent sentence in certain cases. The court considered whether the question as to the "essential content" of the right should be approached subjectively or objectively. Viewed subjectively from the perspective of the convicted person, the court held that the death penalty clearly negates the essential content of the right not to be subjected to cruel, inhuman

and degrading punishment. Objectively, however, it was argued that one of the purposes of capital punishment is to protect the life and hence the dignity of innocent members of the public and therefore the punishment will not negate the constitutional norm requiring life and dignity to be protected. The court, however, didn't rely on this contention.

The court found no proof that the death sentence was a greater deterrent than life imprisonment and that the attorney general had failed to convince the court that the death penalty was reasonably necessary. The attorney general relied on public opinion stating that public opinion was in favour of the death penalty, but the court held that public opinion "is no substitute for the duty rested in the courts to interpret the constitution."

To have a comparative analysis of case law the court took particular notice of a Hungarian decision. It is pertinent to mention that death penalty was also declared unconstitutional in Hungary. Though the Hungarian constitution contains comparative more qualified right to

life clause than the interim South African Constitution.

Interestingly, the court found that capital punishment was not prohibited in international law. Under the scheme of section 23 of the Interim Constitution, international instruments ratified by South Africa are binding on South Africa. Though South Africa has not yet ratified the major international human rights treaties, the court specially referred to Article 6 of the International Covenant on Civil and Political Rights and Article 2 of the European Convention on Human Rights and found capital punishment not prohibited in international law, but found support in comparative case law for the contention that capital punishment is cruel, inhuman and degrading.

The constitutional court's judgement of South Africa shall inspire the human rights organisations and activists throughout the world who are lobbying for abolition of death penalty. However, it should be borne in mind that the court arrived at that judgement being heavily relied on the interpretation of specific terms of the South African Interim Constitution. It might not be possible in the light of the constitution of many other countries like Bangladesh.

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