Law and Our Rights

A Black Law and its Blatant Use

by Sultana Nahar

IN 1992, an English daily published a letter of appeal to the government from the wife of a very senior government official who was sent on retirement by the government under Public Servants' (Retirement) Act, 1974. I failed to understand why a very senior officer should be sent on compulsory retirement without any notice or without being provided with a reasonable opportunity to defend himself against such arbitrary order. As a lawyer I thought that such order was against the principle of natural justice and fundamental rights. I got hold of a copy of that Act otherwise known as Public Servants' (Retirement) Act, 1974 (Act XII of 74). For the first time I realised that this very act is a veritable black law per excellence.

Bright and meritorious candidates usually opt for government service for prestige and security of service. Security of service by this time has become a misnomer because of the existence of this particular law. Fringe benefits such as transport and accommodation are added attractions. Seniority and good service records go a long way to send a government servant to the next ladder of promotion. He usually plans his life according to his service tenure. By the time he reaches the age of normal retirement, his children are well settled in life or on the verge of being settling down.

But can any one imagine the shock of an officer who has rendered useful service of 25 years or more and was never show caused or proceeded against and was promoted to different higher posts under different governments, one fine morning finds himself retired from service?

Public Servants' (Retirement) Act was enacted in 1974. The Act provides that the Government can send an officer on retirement on completion of 25 years of service. Likewise a government officer can also opt for retirement after 25 years of service but in his case he has to give one month notice to the government. Here we notice that option for both the parties are not equal. It is understood that the government in 1974 brought this enactment to use it as Damocles' Sword to keep the official with divided loyalty on tenter hooks and it was meant for applying sparingly in some extreme cases. Though the Act was enacted during Awami League government, its application at that time was almost nil.

The Martial Law governments of both General Zia and General Ershad sent many officers on retirement under Martial Law Order (Both the Martial Law Authorities granted a hearing to the officers selected for retirement) but when they formed civilian governments they sent less than a dozen officers on retirement under Section 9(2) of the Act XII of 74. The famous casualty under this Act was Dr Nurul Islam of IPGMR during the regime of General Zia. Prof. Nurul Islam moved the Supreme Court and won the case (At that time the victim could seek redress in the highest court with a writ petition). It was revealed in the judgment that the law was applied in his case with malicious intention.

I have stated in the opening para of this article that the Public Servants' (Retirement) Act of 1974 is a black law. With my limited knowledge of law I have no hesitation to reiterate that this Act is a black law as it is violative of the Principle of Natural Justice and Fundamental Rights as provided under Articles 27 and 29 of the Constitution of Bangladesh. This Act also has infringed on Article 135 of our Constitution. Audi Alteram Partem, that is, no one shall be condemned unheard — is one of the cardinal principles of natural justice.

Article 135(1) of our Constitution states, "no person who holds any civil post in the service of the republic shall be dismissed or removed or reduced in rank by an authority subordinate to that by which he was appointed." And sub article 2 of the said article says 'no such person be dismissed or removed or reduced in rank until he has been given a reasonable opportunity of showing cause why that action should not be taken:'

The question thus logically arises whether retirement of a public servant ordered by the government under Section 9(2) of the Act XII of 74 tantamounts to dismissal or removal i.e. an act of punishment with malicious intention. In my humble opinion it is a punishment and such orders more often than not are issued with malicious intention. In my defence I would like to quote from the judgement delivered by the Honourable Supreme Court in the case of Dr. Nurul Islam vs the Government of Bangladesh to highlight the inherent inconsistencies of the Act so far as it relates to different provisions of the Constitution of Bangladesh.

Constitution of Bangladesh, 1972, Article 27: All citizens are equal before law and are entitled to equal protection of law.

The principle on which the doctrine of equal protection of laws is founded is that persons in similar circumstances must be governed by the same laws. The legislative classification by itself does not offend against the principle of equal protection of the laws provided the law operates equally on all members of the said class or group. For a valid legislation, classification must be reasonable for the purpose of legislation, should be based on proper and justifiable distinction, should not be clearly arbitrary, and should have all reasonable relation to the objects and to the public purpose sought to be achieved by legislation. The provisions in Section 9(2) of Act XII of 74 might not in terms enact a discriminatory rule of law but it is fraught with the inherent danger of being unequal or discriminatory to persons similarly placed.

Premature retirement (i.e. retirement on completion of 25 years service) is per se a punishment and is sustainable only when proceedings are drawn and the man found guilty.

Normally a government servant can not be removed from service unless he is found guilty of misconduct, negligence, inefficiency or any other disqualification enumerated under the service rules, in an appropriate proceeding drawn against him. Premature retirement is per se a retirement because the government servant is deprived of his right to continue in his service until he attains the age of superannuation. Termination of service before his superannuation is undoubtedly removal, if not termed as dismissal.

Retiring a public servant on his completion of 25 years service amounts to punishment. Such termination is 'removal' under Article 135.

It is true that the order does not contain any stigma, but the fact is that the appellant was selected out of number of persons similarly placed, makes out a case of punishment, for it not only destroys his right to his post held by him, but also invariably carried with a stigma. Such a termination is 'removal' within the meaning of Article 135 of the Constitution. Therefore the statute or rule providing a mode of terminating service at the discretion without complying with Article 135 is unconstitutional.

Government or the Legislature can not over-ride Article 135

Article 135 provides the constitutional protection to the government servants, who have title to the offence, against arbitrary and summary dismissal or removal. From this it can be safely held that the Government or the Legislature can not by framing a rule or by enacting a law evade the guarantees provided under Fundamental Rights and the protection provided under Article 135 of the Constitution.

Retiring a public servant before superannuation must be on the ground of 'public interest'. S 9(2) of Act XII of 74 does not say so.

Any law or rule dealing with termination of service by retirement before the age of superannuation must be so framed as to safeguard the protection to the government servant guaranteed under the Constitution, that is, under the Fundamental Rights as well as under Article 135 of the Constitution. The power of government to retire a Government servant before the age of superannuation is only on the ground of 'Public interest'. That is to say, there must be a case that the Government servant concerned suffers from incompetence. The safety value has been provided in all service rules, one thing in common in the matter of causing premature retirement, that, "the service of the public servant is considered not necessary in the interest of public service" D. L. R. 1981-VOL. 33

If we look closely at the Articles 27, 29 and 135 of the Constitution and analyse the observations of the Honourable Supreme Court in the case of Dr. Nurul Islam vs Government of Bangladesh, we can safely term the Public Servants' (Retirement) Act, 1974 a black law. It is interesting to note that after losing the case in the Supreme Court the then B.N.P. Government brought an amendment to the said act by incorporating the proviso 'in public interest'. It is strange that while bringing the amendment the government did not care to define as to what constitute 'public interest' in the Act, whether it was intentionally done or it was an inadvertent lapse is now difficult to determine. But in absence of a definition, provisions of a black law may become a very lethal weapon in the hands of an unscrupulous and undemocratic authority. And it has already become so in the hands of the government of Begum Khaleda Zia.

A press release in different dailies on March 29, 1996 of many senior government officials who were retired under this Act states that more than hundred such very senior officers were retired by B.N.P. government from 1991 to 1996.

On my query as to the exact number of government servants retired under this Act by BNP government one of the retired officials connected with the press release of 29th March told me that they have documentary proof that number would exceed more than three hundred as retirement of junior officers were not publicised by the government lest it could create an unpleasant commotion in the civil service..

If an officer is corrupt, he should be investigated, charged and proceeded against for trial in a court of law. The government has numerous acts and rules to bring a corrupt public servant to book. Why should a corrupt officer be retired under this Act XII of 74 and be given all benefits? There are other rules such as Government Servants (Discipline and Appeal) Rule, 1985, Government Servants' Conduct Rule, 1979. The Act XII of 74 was enacted at a time when a large number of repatriated officers with divided loyalty were absorbed in the service of Bangladesh. The Act was meant to be used as a threat and applied in very special cases. This very Act along with Special Powers Act were identified as black and repressive acts by both Awami League and BNP after the fall of General Ershad. Both the parties agreed to repeal those acts whoever would go to power. BNP did not keep its promise. To the contrary BNP used both the Acts to the hilt to achieve its partisan purpose.

Before I conclude I would like to mention a few words about the Administrative Tribunal. The right of an aggrieved officer to move the highest court against such order was taken away by the constitution of the Administrative Tribunal by Administrative Tribunal Ordinance. The Tribunal is headed by a junior officer of the judicial service, who works under the administrative control of the Ministry of Law. It becomes difficult and most of the time embarrassing for him to hold fair trial antagonising the government.

Consequently, despite his earnest wish, most of the cases of the senior officers are dragged for years. Most of the senior officers who became victim of the BNP government have preferred to wait for a just, fair and democratic government to come to power to seek redress. I have been told that not a single decision has been given by the tribunal in the cases filed by the very senior public servants. In endless waiting some of them will reach the age of superannuation and some will die to seek justice in heaven. For God's sake repeal this black law so that none suffers such ignominy in future.

Sultana Nahar
— Advocate, Supreme Court

Prioritising People

by Sumita Dasgupta

PEOPLE must be consulted in projects that affect them. This is the lesson the World Bank and the Bangladesh government have been forced to learn from the people of Bangladesh.

The people's verdict to their jointly developed Flood Action Plan (FAP), launched in 1988 and their subsequent plans, to tame Bangladesh's turbulent rivers and protect the country from the devastating annual floods, has been unequivocal : they will oppose it until the knowledge and active participation of people are taken into consideration.

Shrill and persistent public opinion has pushed the World Bank and the Bangladesh government to rework their flood management strategies, make them people-oriented, and even hold debates with people's representatives so that they can argue their case before the government.

The people are primarily upset that the common people, whose lives are intricately linked with these rivers, have been completely ignored by the FAP. The farmers, fisherpeople, and the landless poor, who have the best first-hand knowledge about floods and their repercussions, were simply not consulted by the World Bank at any stage of the FAP.

The people's anger is also directed toward the FAP's "unsuitable hi-tech solutions like building embankments and barrages, which could cause irreparable damage to the standing crops, agricultural lands and the nation's environment on the whole."

Bangladesh experiences floods every year. Last year, it saw on of the worst floods in living memory when 53 out of its 64 districts were deluged by water. The World Bank and the Bangladesh government were confident that their FAP report would remedy the situation.

The people were not so sure. In November, last year, three thousand of them who called themselves the "victims" of the FAP-20 Compartmentalisation Pilot Project which has "caused severe waterlogging and spelt doom for Bangladesh's farmers," raised protest slogans against the FAP in the town of Tangail.

The protest was taken seriously. It was organised on the eve of the fourth and final FAP conference in Dhaka held to discuss carry-forward measures to the FAP, where the donors were present.

The agitators questioned the fundamental premises of the FAP proposal. Having increased its support base to include, besides farmers, the Coalition of Environmental NGOs (CEN) a conglomeration of frontrunning environmental organisations like the Bangladesh Center for Advanced Studies (BCAS) and prominent peasants' associations, their claims grew shriller. Bangladesh does not need "flood control" programmes, but requires a well-integrated and farsighted water management policy, they jointly insisted.

Shaken by the swelling ranks of anti-FAP activists, the World Bank was compelled to retrace its steps. It had to prepare itself to listen to recommendations of consultants who suggested that the FAP report be reviewed, and debates be held with people's representatives.

Thus, the final draft of the FAP, called the Strategy Paper which came into being in March 1995 talks of the need to prepare an integrated water management plan for Bangladesh and the establishment of environmental and research centres in FAP regions for conducting intensive research on biodiversity conservation and surface and ground water management : a radical departure from the original intentions of the FAP.

It has also come up with some concrete schemes to develop people's participation through "regular interface with beneficiaries and the other interested public in the thanas or sub-districts". "It is a victory of the advocacy campaigns of the NGO's", raved Saleemul Huq, executive director of the BCAS.

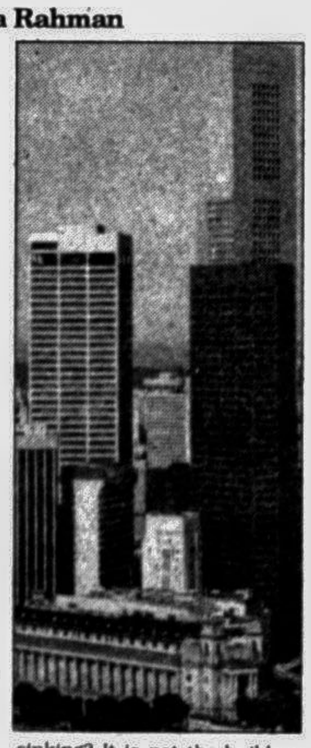
CSE/Down To Earth Features

Living Next to a Bit of Stonehenge

by Saira Rahman

HOW would you like to live in a two storied house next to a fourteen storied block of flats which looks like one of the huge upright blocks of stone atop England's Salisbury Plane? I sympathise with those who already do-and with those who are soon to find themselves in a similar (Lilliputian) situation, like the 'A' and 'X' families who live in a quite, quaint residential area in the middle of horizontally and perpendicularly expanding Dhaka city.

The two families live on both sides of a construction site, the site of a fourteen storied apartment complex which has already caught the eye and itchy palms of several reknown people and even the prominent law firm of 'Ill, Eagle and Co.' The site was given over to developers by one Ms. Y (a former resident of the area, no longer interested in staying on) and soon crawled with builders and construction workers of the 'Jump Around Stollen Sites' building firm. The present two storied house on the site was demolished and a huge foundation dug. The A and X families, once good neighbours of Ms. Y, were up in arms ! Their light and air would be cut off, their right to privacy violated and the introduction of fourteen new families to the small area would cause chaos !! What could they do? An urgent dispatch was sent to the Local Municipal Corporation, but Ms. Y had been there before them and had charmed her way into getting permission to build fourteen stories in an area where no building was taller than five. What next? The ministry for Environment? Foiled again !! Ms. Y was using every trick in the book to get the job done despite the imminent discomfort to her former close neighbours. The families fretted and fumed ! What would happen to their water supply? There is a shortage of the precious liquid in the city as its is. Mrs. A was especially upset. How could she enjoy the privacy of her lovely roof garden with strangers literally breathing down her a neck and the fumes from twenty eight different kitchens poisoning the air around her? Mr X was livid. He was scared that the fumes from so many cars in one place would corrode his lungs and damage the health of his young grandson. How could Y do this to them? Unfortunately, Ms. Y and her family refused to answer any questions and began turning down invitations to social gatherings in the neighbourhood.



Many families in Dhaka city today suffer the same emotions and the same insults to privacy. One wonders how people get the permission and the money to construct such monoliths. Even the effect these buildings will have on the environment will soon be felt. lakes and ponds and lowland are filled with soil on which these buildings are constructed. What if these sink into their foundations, like the buildings of Milan are now sinking? It is not the builders and developers who must worry about this, it is the buyers and residents of the apartment blocks. Will we never be able to have an almost pollution-free city where we can go out of our homes and not see open rubbish dumps, leaking sewerage pipes, black clouds of carbon monoxide from car exhausts and other signs of overcrowding and neglect? What do we leave for the next generation? A legacy of damaged lungs, the lost lessons of civic duty and a concrete jungle? Trees are being cut down to make space for apartment blocks, gardens are being demolished and birds frightened away.

Instead of developing a single city in Bangladesh what is needed is the environment friendly development of all the other towns in the district and thana levels under autonomous authorities and free from a central breaucratic system, which is also upheld in the Fundamental Principles enshrined in our Constitution, so that people need not settle in Dhaka. The improvement of the public transport system is also urgently required so that people from all walks of life can travel faster and not wait in endless traffic jams poisoning the air with their million exhaust fumes.

It is becoming increasingly necessary for the Environment concious activists, politicians, lawyers and all those who wish to live a long and healthy life (and want their coming generations to undergo the same) to campaign against such abuses and hazards and campaign for the concious improvement of the country as a whole and also its epvironment.

Saira Rahman — Advocate, member of Odhikar : A Coalition for Human Rights.

Human Rights Organisations-Need, Role, Restraints

By M A Mutaleb

HUMAN rights organizations (NGOs) are an essential set of actors without which many international bodies would have little to do. Such international, regional or domestic groups have been the source of much of the information and inspiration for international activities in the field of human rights. Amnesty International (AI), International Commission of Jurists (ICJ), and the International League for Human Rights are probably the best-known NGOs with global concerns. All have played an important role in the development of international standards in areas such as torture, states of emergency, the independence of lawyers and the judiciary.

Amnesty International has been working for the release of prisoners of conscience, speedy trial, abolition of death sentence and against torture. Of all groups, the ICJ, through its Centre for the Independence of Judges and Lawyers (CIJL), has been the lead organization in monitoring governmental compliance with existing international legal standards governing the independence of the judicial process. Concerned about the "Increasing erosion both in scale and incidence of the independence of the judiciary and legal profession of many countries," the ICJ established the CIJL in 1978 to promote "World wide the basic need for an independent judiciary and legal profession" and to organize "support for judges and lawyers who are being harassed or prosecuted." Though its mandate is narrower than other NGOs, the CIJL uses similar techniques: case work, investigation, on-site missions, political trial observations, educational programmes, letter, telegram and petition campaigns, filing of individual complaints, studies and publications on the administration of justice in particular countries, and work within the UN system and with other NGO groups.

Since September 1978, International Human Rights Law Group (Washington, DC) has provided *pro-bone* legal services to other non-Governmental Organizations and individuals seeking information and assistance in cases of human rights violations. Among those NGOs established in the past decade or so in the United States is the Lawyers Committee for International Human Rights (New York) which acts as *pro bone* counsel to other groups as well as undertake its own investigations. The Minority Rights Group is a London-based international human rights organization which aims to secure justice for minority and majority groups suffering from prejudice and discrimination. Congressional Friends For Human Rights Monitors (Washington, DC) was set up on December 5, 1983 by a group of US Senators and Representatives who are working together on behalf of endangered human rights monitors around the globe. It has the support of Americas Watch, Helsinki Watch and the Lawyers Committee for International Human Rights.

A new international organization called International Alert was set up in London on 23 April 1985 to deal with mass killing. This organization aims to prevent outbreaks of ethnic , racial and religious violence on a mass scale. A Bangladesh-based international human rights organization, Liberty International was granted consultative status with Economic and Social Council (ECOSOC) of the United Nations in 1987. A regional human rights organization called Asian Human Rights Commission was set up in Hong Kong on December 10, 1984. Most important regional human rights organizations of the Asian region are: Asian Legal Resource Centre (ALRC), Regional Council for Human Rights in Asia (RCHRA), South Asian Association For the Right to Development (SAARD), Asian Cultural Forum on Development (ACFOD) and South Asian Coalition of Legal Action (SACOLA). Many country-oriented human rights organizations with more restricted mandates have sprung up in countries all over the globe in response to particular situations.

In addition to NGOs specifically oriented towards human rights issues, lawyers organisations and Bar Associations also have become more concerned with human rights. LAWASIA, the Law Association for Asia and the Western Pacific, has a Human Rights Standing Committee. Lawasia HR standing Committee since its formation has concentrated on specific aspects of human rights activity. Besides, the American Bar Association (ABA) and the Federal Bar Association (FBA), over two dozen other International and national associations are charged with human rights matters. Like most NGOs, these professional legal organizations operate "on the premise that lawyers can make a difference by assisting individual victims of human rights violations and challenging broader patterns of abuse.

Working for human rights often means encroachment on vested interests. Some people think that the path of human rights activists is a hazardous one. There are people who think that human rights may not always be politically convenient and acceptable. Its anti-poverty upsurge may sometimes ride the crest of a political wave; on the other hand, it may sometimes appear to accentuate class conflicts and may invite the ire of powerful sections of society. Human rights activities aim to bring about socio-political and economic change. They risk their lives and liberty to aid the imprisoned, the tortured and the families of persons who have disappeared. "They consistently place them in peril in order to get their messages heard. Mrs. Recinos was an active member of the Mothers Committee of El Salvador. She was working for the prisoners and the disappeared." Now she and her daughter have 'disappeared' themselves. Ms Doris Stahl deaconess of the Chilean Lutheran Church of Germany, was beaten and sexually abushed by uniformed policeman. Even though she denounced the incident, the authorities did not investigate or lay charges against those responsible. Instead, she was told that her visa would not be renewed and that she must leave the country by May 23, 1984. Patricio Sobazo, a Chilean member of CODEPU, the committee for the protection of peoples' rights, was killed by the Chilean Secret Police on July 2, 1984. Let us look at some more recent incidents. Antonio Emiliano Hernandez Nino, a leading member of ASFADES, the Colombian organisation of the relatives of the 'disappeared', is believed to have been detained after leaving a human rights meeting on April 8, 1986. Police and Military authorities denied that he had been detained. On April 10, his body, bound hand and foot, was found with four gunshot wounds at Torca, near Bogota. Guillermo Marin, who works in Christian neighbourhood groups in Bogota, is reported to have been seized by armed men shortly after he had seen Antorio Hernandez leave the meeting. Police and Military authorities denied that he had been detained. On April 11, 1986 he was found stuffed into a gunny sack in a Bogota park, where he had apparently been left for dead with four bullet wounds. Nicholas Ndebele, acting Director of the Catholic Commission for Justice and peace in Zimbabwe (CCJPZ), was arrested on May 22, 1986 under Emergency Powers Regulations. Legality of his detention was challenged in the High Court and on courts order he was released on June 4. The next day he was arrested with CCJPZ chairman Michael Auret. That evening the two men were released, apparently on the instructions of Prime Minister Robert Mugabe. Ms. Guadalupe Ccallocunto Olano, secretary of the Association of Relatives of the Abducted, Detained and Disappeared people in Peru, was arrested twice in Lima in May 1986 for interrogation by the counter-insurgency Police DIRCOTE. On May 7, 1986 armed members of Guatemala's Treasury Police are reported to have ransacked the home of a relative of a member of the mutual support group for the appearance alive of our relatives, known as GAM.

There are development-oriented NGOs (human rights organizations) in the Third World Countries, having primary relationship with the poor. They aim to create development from below and work directly with grou poor people. Examples of this type are the widely known Sarvodaya Movement in Sri Lanka and CINEP in Colombia. It appears that governments of Sri Lanka, India and Bangladesh have recognised the necessity of NGOs for rural development. The question of funding is very important in implementing a human rights scheme in a developing country. There is problem of office accommodation, staff and expenses of office administration. Many NGOs in such countries are supported by foreign NGOs or foundations. Relationship of the development- oriented NGOs and the government is a matter of crucial importance. Nitish De of India during discussion on Maharashtra Village Development Programme, says that the NGO concerned decided to work within the politico-legal structure existing in the state. Thus problems of the poorest, the landless Harijans, were overlooked. The policy of a government is very important in this context. NGOs role can be effective if socio-political change in favour of the poor and disadvantaged class is one of the major policies of the government. Some governments interfere with works of NGOs. CINEP in Columbia is watched very closely by the government. In the recent past two directors of CINEP were jailed but later released.

In working for human rights we are often tempted to deal with symptoms rather than root causes. While we must work for the abolition of specific denials of human rights, such as torture, we must remember that unjust social structures expressed through e.g. economic exploitation, political manipulation, military power, class domination, psychological conditioning, create the conditions under which human rights are denied. To work for human rights, therefore, also means to work at the most basic level towards a society without unjust structures.

Corrective action is a joint responsibility of the governments, the NGOs and the people. Together we are responsible for ensuring human rights. In his 1970 Nobel lecture, Solzhenitsyn said: "the salvation of mankind lies only in making everything the concern of all." Our task is to make human rights the concern of all.

MA Mutaleb — Advocate supreme court, president liberty international