

FOCUS

Law and Our Rights

The Role of National Commissions on Human Rights

A South Asian Appraisal

by Abul Hasnat Monjurul Kabir

HISTORICALLY, Concern for the protection of human rights found expression almost exclusively at the national or domestic level in accordance with the varying notions of changing times. Even in the national sphere prevailing power structures in many countries resisted acceptance, beyond purely metaphysical or philosophical, of the very notion of human rights, the dignity of human person and the humanity of man. Violations occurred and were ride ranging. As a result, great popular upheaval took place and gave birth to charters in some states e.g. Magna Carta, the French Declaration of the Rights of Man, and of the citizen etc. These instruments were by modern standards, undeniably limited in content and focus and were not perceived and being of universal application though they undoubtedly inspired and influenced reform in many countries in the field of human rights.

Today one can clearly discern in many countries in various regions of the world of establishing national human rights commissions to take care of the promotion and protection of human rights. Infact it is a paradox of the modern state that it has become necessary for the state to create entities to ensure that it (among others) does not violate human rights.

South Asia is the land of one fifth of the mankind, an agglomeration of diverse nationalities, ethnic communities and cultures, which inherited a common legacy from the centuries-old pre-colonial and colonial period. In term of human development index, the countries of South Asia occupy almost the same position. Widespread illiteracy, lower position of women, child malnutrition, low wages, poor health services, heavy incidence of external debt unfinanced agrarian reforms, high military spending, discrimination against the indigenous peoples and the minorities, communal tension, migration gross violation of human rights all these are but some of the problems facing South Asian region as a whole.

Frequent and serious violations of human rights across the South Asian region suggest that there should be suitable machinery and structure to ensure effectiveness of human rights both domestically and internationally. Human rights need protection by national institution which, in turn, can only grow and sustain in atmosphere where fundamental democratic norms are respected. Observance of minimum standard is thus part and parcel of the institutions which can protect and implement them. One can not have right without institution nor can have institution without right. They are both inseparably meshed into one another both stemming from and feeding to each other at the same time.

The states concerned are

principally entrusted with ensuring human rights to people by the international community. However, if the state concerned fails to ensure protection to the people or if it violates the fundamental principles of the Charter of the United Nations and when the states are far from being protectors of individual's fundamental rights and become tormentors, the issue of international action becomes imperative. We are at the fine edge of the 21st century and the authoritarian regimes can not be allowed to advance the concept of sovereignty for undermining the rights guaranteed under the Constitution and by the instruments of the United Nations. Effective mechanisms nationally and regionally are to be evolved and flourished for the sake of protecting, promoting and enforcing human rights specially at the administrative and judicial levels. The possibility of setting up regional court of human rights as has been done in Europe may be debated. A brief look at the European system can be of great help in this regard.

A prominent regional achievement is the European Convention for the Protection of Human Rights and Fundamental Freedoms. The European Convention established a Commission and a Court for handling both state and individual complaints. In some instances individuals are able to assert their human rights in courts or other appropriate forums. For example, the European Convention on Human Rights and the Optional protocol to the Covenant on civil and Political Rights establish specific procedures for the bringing of complaints by private individuals where the nation concerned has agreed to such a procedure. In the law of human rights, it has long been apparent that the mere creation of international standards may be meaningless if it is unaccompanied by appropriate institutional enforcement mechanisms at the transnational level. The European Commission and the Court of Human Rights of the Council of Europe, are generally considered to be the most effective existing enforcement institutions, inspite of their limited geographical scope.

The European Convention on Human Rights represents more than a common standard of achievement. It imposes upon the contracting state parties a certain body of legal principles which they are obliged to conform to. In specific cases compliance with this law is ensured by the integral part of the domestic law of many of the contracting state parties. The Convention's provisions are deemed to maintain great validity whether or not prior legislation on the subject exists at the domestic level. The basic function of this machinery consists primarily of examining and determining whether domestic law as it stands complies with

the provisions of the Convention. Although constructed upon tenets of traditional treaty law, the Convention Law transcends the traditional boundaries drawn between international and domestic law.

Not only from the above consideration of the European system but also from international as well as national experiences, it seems that considerable progress in securing human rights can be made through the establishment of specialized bodies vested with general or specific responsibilities for enforcing them. The American Human Rights Commission has helped to educate the public in the importance of human rights and exposed systematic violations of them in a number of countries. New Zealand has achieved great success in promoting better racial understanding and relations through the office of the Race Relations Conciliator. India has a commission to watch over the progress in the amelioration of the conditions of members of economically disadvantaged communities. In the UK commissions on Racial and Sexual Equality have played important roles in education, research and enforcement of legislation in these areas.

In the third report (Rights do Matter), the Commonwealth Human Rights Initiative recommends "Traditional approaches to secure human rights through judicial enforcement are inadequate. Human rights commission and economic and social commissions should be set up to make state and non-state entities aware of their responsibilities in the sphere of economic, social and cultural level rights".

In South Asian countries setting up of Human Rights Commissions dominants the agenda for action to enforce human rights. In 1994, India passed the Protection of Human Rights Act, 1994 for better protection of human rights. Recently Sri Lanka has also passed an Act providing for setting up of a Human Rights Commission.

But the Commission is yet to be established. In Bangladesh the present government is planning to set up a Human Rights Commission within a short span of time.

In South Asia the experience of India regarding National Commission of Human Rights can be examined as a brief case study. It was in the wake of criticism of India for suppression of human rights that the President of India promulgated an Ordinance on September 28, 1993 with a view to providing for the setting up of National Human Rights Commission, Human Rights Commissions in states, and Human Rights



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Courts "for better protection of Human Rights and for matters connected therewith or incidentally thereto." Later on Parliament embodied the provision of the Ordinance into the protection of Human Rights Act, 1993 (Act No. 10 of 1994). The Indian National Human Rights Commission does not render decision the way a court of law does.

Nor can its recommendations be enforced like judgments of the Courts. Yet, that does not render the Commission impotent. So far its recommendations have been respected. Much more is the impact that its recommendations are having on the violators of human rights, and the wide publicity are having towards protection of human rights are itself a gain. Its actions, movement and recommendations having a tremendous impact politically and socially. The role played by the commission in the campaign against TADA is worth mentioning. The Union Government had decided to extend the controversial Act, a temporary legislation, beyond 23 May 1995 when it was due to expire. But the bold and positive stand taken by the Commission made it difficult and the Act lapsed. Even a substitute legislation could not be cleared for the Government by Parliament.

The basic objective of a Commission is to promote respect for and observance of human rights in the administration of the province or the state. The desirability of assuming a constructive role in society. It prohibits cruel, inhuman or degrading punishment, including capital punishment or life imprisonment without possibility of release. It stresses that detention should only be a measure of last resort and only for the shortest period of time.

The underlying message is clear: The best interests of the child must be at the heart of any juvenile justice process. For those young people found guilty of criminal behaviour, the emphasis should be on reintegration, not retribution.

Along with the Convention and the Riyadh Guidelines (adopted in 1990), we have guidance from the UN Rules for the Protection of Juveniles Deprived of their Liberty (1990) and the Standard Minimum Rules for the Administration of Juvenile Justice (1985), also known as the 'Beijing Rules'.

The Beijing Rules provide guidance to member states in developing measures to protect the human rights of children in conflict with the law. Under-scoring once again the importance of placing the child's best interests at centre stage, the first of the Fundamental Per-

manent Commission's recommendations for more effective implementation. The National Human Rights Commission of India is playing a constructive role in this regard.

The effectiveness of a commission depends on the process of appointment of the executives of the commission, its strong and independent footing determined by the statutory Act, the willingness of the government and definitely on the role of the Commission people. Its finances should be provided directly by parliament. It should also be able to report directly to parliament and any administrative ministry or agency it thinks appropriate.

The possibility of a Commission may be able to proceed to litigation, in support of a party. It would usually do so, to assist a party without adequate resources of its own, if the issue raised a question of great importance which had a general application. In this way the Commission can help in the clarification as well as the enforcement of the law. The Commission may also help in the clarification and enforcement of human rights law by establishing codes of conduct to guide various parties (e.g. employers, professionals, trade unions etc.)

The educational programme has been one of the most important tasks of existing Commissions. Material for education in human rights covering both the content of the rights and the procedure for complaints and enforcement have been prepared for the used, including pamphlets, audio and video. A commission may also conduct and publish research on human rights in particular the problems in their realization which may require special legislation. A Commission may be required to report to the government any legislation which it comes across in its work and which it considers is incompatible with the provision for human rights. It may also make suggestions for its repeal or reform.

By far the greatest amount of time of a Commission is taken up by its consideration of

complaints made to it by individuals associations or NGOs of violations of human rights. Such a commission provides a more accessible, informal and cheaper alternative to litigation between the parties, consistent with the observance of human rights provisions. Experience in some instances has been that these efforts are generally successful, but if not, the law may provide for the commission to issue binding directions. If this is the case, the law will also provide for a party dissatisfied with a direction to have it reviewed by the Courts — the ultimate authority.

Sometimes a Commission may be able to proceed to litigation, in support of a party. It would usually do so, to assist a party without adequate resources of its own, if the issue raised a question of great importance which had a general application. In this way the Commission can help in the clarification as well as the enforcement of the law. The Commission may also help in the clarification and enforcement of human rights law by establishing codes of conduct to guide various parties (e.g. employers, professionals, trade unions etc.)

It could be given a general responsibility to oversee the implementation of the provisions of a bill of rights and other specialized human rights type of legislation. It might discharge that responsibility in part by submitting an annual report to the legislature on the state of human rights with its own rec-

ommendations for more effective implementation. The National Human Rights Commission of India is playing a constructive role in this regard. The effectiveness of a commission depends on the process of appointment of the executives of the commission, its strong and independent footing determined by the statutory Act, the willingness of the government and definitely on the role of the Commission people. Its finances should be provided directly by parliament. It should also be able to report directly to parliament and any administrative ministry or agency it thinks appropriate.

The possibility of a Regional Commission for the SAARC countries discharging its duties and obligations, though depends to a large extent on the situation and the composition of members from countries, to oversee the human rights position in the member states and inquire into violations and make necessary recommendations to the concerned states may be another effective mechanism to provide guarantee for the observance of human rights in the region.

No Age of Innocence: Justice for Children

by Lisbet Palme

Continued from 17.08.97

Many programmes have been established to help young people. In the Canadian province of Ontario, a Reasoning and Rehabilitation Project run by probation officers helps juveniles to modify impulsive behaviour and learn alternative responses to interpersonal problems. Recidivism has fallen dramatically among the participants. In the Netherlands, Project HALT requires vandals to personally compensate their victims but in such a way that avoids stigmatizing them with the label of criminal.

In Morocco, children's clubs in four cities offer recreational and cultural activities for urban children aged 7 to 12. The clubs also offer moral support and guidance to help young people remain in school.

The Philippines has a programme, begun in 1986, that focuses on substance abuse, sexual exploitation and children in conflict with the law. Active in 32 cities, it includes a range of activities to support street children and prevent juvenile delinquency. Belgium, Israel and the Netherlands all have a Children's Rights Shop where young people can find help for problems relating to the law and their rights.

Young people who commit offences should bear the responsibility for their actions — but they must be held accountable in a manner appropriate to their level of maturity. Treating the few serious offenders fairly but firmly will take the heat off the many who are unfairly labelled as delinquents or worse.

Those who are found guilty need help to reintegrate into society, to develop opportunities leading to a meaningful life. They also need the best professional help that society can provide. The countries with the best juvenile justice records are those that keep contact between youth and the police, courts and jails to a minimum.

Many countries have far to go. For example, England sometimes imprisons its young offenders for indeterminate periods. The Russian Federation has no juvenile courts, judges, prosecutors or lawyers. In Yemen, the law allows for the arbitrary detention of children.

Societies may differ as to how they interpret fundamental human values, but in all societies the expectation of responsible behaviour increases as a child grows. We can not legitimately expect a seasoned, mature understanding of the subtleties of right and wrong from adolescents, especially those who have suffered from abuse or neglect. Article 39 of the Convention specifically calls for countries to take measures to promote the recovery and social reintegration of such child victims. We are dealing with human beings who are still developing. Our goal must be to help mend what has gone wrong and prepare them for later success — not simply to punish them.

Real justice for juveniles

Fortunately, we have a useful tool for developing our juvenile justice system: the Convention on the Rights of the Child. It establishes broad rights for children, and ratifying countries pledge to reform their laws to fulfill those rights.

The South African Human Rights Commission is expected to recommend laws incorporating human rights, so as to protect those who suffered discrimination, violence and abuse, under apartheid. Under the democratic system introduced into South Africa all are equal under the law, and no one should be victimised for reasons of race, class or gender.

The functions of the Commission are receive complaints, to investigate and refer complaints of human rights violations. Several enquiries have been instigated as a result of these complaints.

The Secretariat's Chief Executive Officer is assisted by officers in four departments: Finance and Administration; Legal Services; Education, Training and Information; and Research and Documentation. Each department develops its own programmes in accordance with its particular focus.

The Convention, which defines children as people below the age of 18, lays out specific guidelines for the treatment of any child who runs afoul of the law. Among its provisions, children are presumed innocent until proved guilty and are entitled to appropriate legal counsel and fair resolution without delay. It stipulates that children accused of infringing the penal code must be treated in a way that promotes their sense of dignity and takes into account

the desirability of assuming a constructive role in society. It prohibits cruel, inhuman or degrading punishment, including capital punishment or life imprisonment without possibility of release. It stresses that detention should only be a measure of last resort and only for the shortest period of time.

The underlying message is clear: The best interests of the child must be at the heart of any juvenile justice process. For those young people found guilty of criminal behaviour, the emphasis should be on reintegration, not retribution.

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The Beijing Rules provide guidance to member states in developing measures to protect the human rights of children in conflict with the law. Under-scoring once again the importance of placing the child's best interests at centre stage, the first of the Fundamental Principles of Juvenile Justice is:

"Member States shall seek, in conformity with their respective general interests, to further the well-being of the juvenile and her or his family."

Reasoned responses

Produced by the Convention, many countries are beginning the process of making their laws responsive to the needs of juvenile offenders. In Latin America, a remarkable reform of juvenile justice has been under way since 1990, paralleling the region's dramatic democratization process. Brazil led the way with its Statute for Children and Adolescents, adopted following a fervent outcry provoked by widely publicized violence against children who were living on the streets.

The Statute sets out strict guidelines to ensure the rights and freedoms of juveniles in conflict with the law, including a specification that detention be used as a last resort and only for the shortest appropriate period of time. Bolivia, Costa Rica, Dominican Republic, Ecuador, El Salvador, Guatemala and Peru have also enacted such measures, and reform is under consideration in Chile, Colombia, Nicaragua and Paraguay.

Young people must be held accountable for their offences in a manner appropriate to their level of maturity.

In its first step towards more progressive laws, Chile passed a measure in 1994 that prohibits incarceration of juveniles in adult prisons. By 1996, the number of juveniles held in adult institutions had fallen by more than half, to less than 2,000. In Costa Rica, about 140 juveniles were deprived of their liberty before passage of reform legislation in 1996. After its passage, the number dropped

to 40. This is the result of rationalizing the system so that those accused of minor offences receive the help they need for successful reintegration into society, leaving only serious offenders in detention.

One example of a reasoned approach to juvenile justice is New Zealand's 'The Children, Young Persons and Their Families Act of 1989'. The legislation aims to separate welfare issues from justice issues and to mete out justice through consensus, rather than heavy-handed government intervention. The measure recognizes the special needs of young people by involving family members in the justice process and bringing in outside agencies that can offer real rehabilitation alternatives.

The majority of youth are diverted from criminal courts and confinement institutions.

In addition, New Zealand's process underscores the value of partnerships. By involving non-governmental organizations (NGOs), outside legal counsel and young people and their families, the juvenile justice system remains open. This openness reinforces something that young people need to know: The door into that system

is always open. A child under 18, a child under 18. A prison sentence is allowed for young people between 18 and 21 only if the crime is especially serious, and life imprisonment is not permitted for a crime committed by anyone younger than 21. However, in recent years we have seen a number of heinous crimes committed by young people in Sweden. In these cases the courts have seen no alternative to a prison sentence. A recent government report has proposed new alternatives for these offenders, such as special youth homes.

Some countries have so far faltered in their attempts to reform their juvenile justice systems. India's Juvenile Justice Act of 1986, designed to promote uniform treatment on the basis of minimum UN standards, has faced spotty implementation. The Act supports separate systems for handling delinquent children, promotes humane and non-institutional services and emphasizes NGO participation. But in action it has not proved to be very child-friendly. Officials who deal with children have not been adequately trained, and while the State is empowered to take charge, it is not obligated to care and protect.

In at least 15 countries, 7-year-old children can be held responsible for criminal actions. The Lao People's Democratic Republic has not developed a system of juvenile justice. Eritrea imprisons children from age 12 together with adults. Fiji's Juvenile Act of 1974 establishes separate courts and detention centres for children. But the reform undermined some of the compassionate aspects of the traditional courts, and efforts are under way to re-establish them.

The Committee on the Rights of the Child, to which countries report on their efforts to implement the Convention, has expressed concern about juvenile justice procedures in a number of countries. Based on a review of reports from 51 countries, the Committee explicitly suggested legal reform in 37 countries. Obviously there is much to be done, but I am encouraged by the fact that juvenile justice is finally on the world's agenda.

The path to adulthood is uncharted. As young people travel it, they must negotiate around more obstacles than ever before. Sometimes they stumble. When they come into conflict with the law, they have the right to fair treatment by a justice system designed for rehabilitation, not retribution. The creation of that system is a responsibility that we all must carry on our shoulders. If we do not, who will?

The writer, a psychologist specialising in children, is a member of the Swedish Child and Youth Advisory Committee and the International Network of the Carter Center's Conflict Resolution Program. She is chairperson of the Swedish Committee for UNICEF.

LAW WATCH

BELA threatens legal action against Gulshan Lake fill up

A legal notice was served on the 5th of August '97, by BELA on Environmental Lawyers Association (BELA) upon the Secretary, Ministry of Housing and Public Works, Chairman, RAJUK, Chief Executive Officer, Dhaka City Corporation, Director General, Department of Environment and Indus Valley Investments Pte Ltd. (hereinafter referred to as the Company) of Singapore demanding cancellation/termination of Banani, Gulshan, Baridhara Lake Development Project Agreement signed on 1 December, 1996 between RAJUK and the said Company.

The notice served in the notice that a site having more or less area of 150 acres known as the Banani, Gulshan, Baridhara, Lake and its adjoining areas situated under Gulshan Police Station have been leased out to the Company under the Project for 75 years for commercial and other purposes which would require, among others, partial filling of the Lake and massive constructions on the adjoining areas. The notice has termed the Agreement as unequal, biased towards the Company, bad in law and contains several provisions which are against the law, public interest and the interest of the nation and the people of Bangladesh. It has been alleged that the Project has been undertaken and/or allowed in violation of the laws, rules, regulations etc. and has not obtained any Environmental Clearance as per the law. It undermines and threatens the environment and amounts to failure to protect public property and the benefits and interest of the people of Bangladesh.

The notice served under instructions from Dr Mohiuddin Farooque, Secretary General, BELA, and Mr Jamal U