

Law and Our Rights

INTERVIEW

"Bangladesh can be Proud of its Judiciary"

— Dr David Bennett

Dr David Bennett a QC for all states and internal territories in Australia is the immediate past President of Australian Bar Association. Currently he is the President of the New South Wales Bar Association. An expert in the field of appellate advocacy, Dr Bennett holds the position of the Council Member of the Australian section of the International Commission of Jurists. He has been the President of the Medico Legal Society of NSW and Vice President of the International Academy of Estate and Trust Law. During a visit to Dhaka this week, in an exclusive interview, Dr Bennett who led the team of twelve distinguished senior Barristers in Bangladesh spoke with The Daily Star's A H Monjurul Kabir on different aspects of legal system and trial advocacy workshop.

Daily Star (DS): What is your agenda for action this time?

David Bennett (DB): I along with my eleven other colleagues have come to Dhaka this time to conduct the 'Intensive Trial Advocacy Workshop' (BP-CLE/97) jointly organised by Bangladesh Bar Council and Australian Bar Association held from 15-19 December 1997.

DS: Is it your first visit in Bangladesh?

DB: This is my second visit to your country. But this is the third year in which the Australian Bar Association has sent a team to Bangladesh to help with CLEP's (Continuing Legal Education Programme) advocacy training programme. It is done as part of the 'twinning' relationship between the Australian Bar Association and the Bangladesh Bar Council and we are delighted to be here again.

DS: General perception about advocacy is that it is a personal skill. In that case what do you want to achieve through such advocacy workshop?

DB: Advocacy, is the art of persuasion. One of the most crucial features of the independence of judiciary upon which I wish to concentrate today is the role of the advocate. Courts can not perform their functions without fearless, independent and competent advocates. We can not and do not need to teach fearlessness; we cannot and do not need to teach independence but we can teach competence. Traditional thinking told us that advocates were born not made and that one only achieved excellence by natural ability or long experience. We have learned in Australia that this is not true. One can teach it just as one can teach mathematics or a language but the essential principles are so simple that one can teach much of what one needs to know in a very short time. What we and CLEP have achieved together (this week) is the importing of the essential skills of advocacy in a five-day intensive course.

By learning and practising advocacy as a subject at least as important as Contract or Tort one can immeasurably improve one's ability to conduct cases in court and exercise the independence and fearlessness which enables courts efficiently and wisely to exercise their role.

DS: What are the strategies to be followed in such intensive advocacy workshop?

DB: In Australia over the last ten years we have discovered something new about advocacy. When a few people began teaching advocacy, they were laughed at. How could anyone teach what was either innate or acquired by long experience? What emerged was the precise opposite. The use of video technology enabled us to demonstrate with dazzling obviousness how successful advocacy training could be. The Australian Advocacy Institute has videotapes of young barristers at the beginning of a two-day

intensive course fumbling their way through a practice session in a grossly incompetent manner. A companion videotape, taken at the end of the same two-day course, shows the same young advocate confidently and effectively persuading a court of a point of law or fact. Advocacy training is now used not only in the education of young barristers but also in continuing legal education courses generally available to the profession.

Much of what we teach may seem obvious. Like so many things, however, it is only obvious when one has been told. A good advocate orders his or her presentation, keeps the argument interesting and expresses thoughts clearly and precisely. While these propositions are obvious, most of us do not notice their absence in our own presentations. What our courses do is provide the student with a case to argue and make a videotape of the students' argument. It is then comparatively easy, not only for us but also for the student himself or herself to see at once why the presentation is less than perfect. There is nothing so humiliating or so effective as seeing and hearing oneself on videotape.

One of the nice features of courses such as this is that both the students and the teachers learn from them. When I see my own faults in others, I am quick to condemn but I hope that I have the humility to recognise the fault in myself and to endeavour to cure it. All of us have had this experience and will no doubt have it during the coming week.

The Australian Bar Association and the Bangladesh Bar Council have agreed to a joint relationship described by the International Bar Association as 'twinning'. That word connotes a close and equal relationship. This is the first joint enterprise since the commencement of the relationship and we hope that it will continue for a long time. In fact a durable and effective partnership has already been established between the two organisations over the years.

DS: What are the things in common between the two countries that has established such effective partnership?

DB: Bangladesh and Australia have much in common. First, we are in the same region, that of South East Asia. Secondly, we share extremes of climate from which we both suffer from time to time — in your case flooding, in our case drought. Would that we could put your floods and our droughts together and reach a happy medium. Thirdly, and most importantly for present purposes, we share a common law tradition and a Westminster system of government.

It is this last feature which brings us together today. The system of government which we share depends upon an independent judiciary and fearless and competent advocates. These two

institutions between them are the greatest guarantors of freedom and democracy.

The importance of an independent judiciary cannot be overstated. But, in a sense, it is obvious. Few people in your country or mine would denigrate its importance. The significance of fearless and independent advocates and a system of oral rather than written advocacy is less apparent but no less real. We hear people from civil law systems complaining that they never had their day in court. Their lawyers file documents, the judges occasionally ask questions of witnesses and the clients hope that the judges read the documents filed by the lawyers. They do not know or understand why they lost. We see in the United States a system where, at least at the appellate level, there is a decline in the significance of oral advocacy. This is tragic. Again clients and lawyers have to take on trust that what they file is read and, more importantly, that it is absorbed. Under our system judges are forced to confront all the arguments for the parties who are going to lose. Vigorous debate between the Bar table and the Bench enables every proposition to be tested to the full, and ensures that a judge cannot determine a case against a party unless that judge fully understands the arguments her or she is rejecting. This is a feature of your system and ours of which we can both be proud.

DS: But what are the differences between the legal systems of the two countries...?

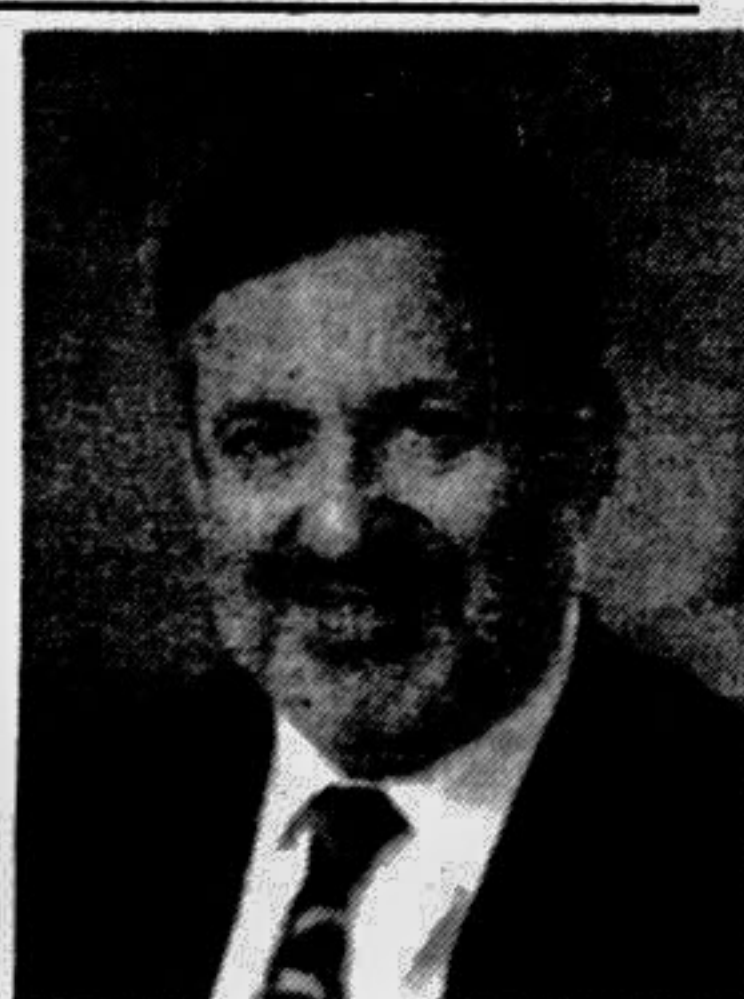
DB: One major distinction is that we have a federal system of six states which have a very high degree of autonomy. And that means that a great deal of the work of lawyers is to worry about whether a state has power to do something or only the federal government has. So that aspect of constitutional law is something you don't have to worry about.

You have a specific bill of rights (list of fundamental rights) in your constitution which we do not have. To some extent, our courts guarantee such people's rights.

We have the divided profession of barristers and solicitors but your legal profession is uniform. I have a clear bias for such division because it enables people to take the advantage of specialisation and so on.

DS: The Government of Bangladesh has decided to set up a National Human Rights Commission with a view to securing institutional protection of human rights. Considering the performance of Australian Human Rights Commission how do you evaluate such endeavour to protect human rights through institutional mechanism?

DB: First of all, the concept of protection of human rights through institutional mechanism is a global phenomena. Australia is very much accustomed with such trend. It



should be mentioned in this regard that the protection of human rights of the people is much more difficult than either defining them or adopting declarations, bills and covenants concerning human rights. In absence of institutional mechanism either to protect or to implement them, those standards and rights could be rights in paper only. In fact one can not have right without institution nor can have institution without right. In this context, besides Judiciary, Human Rights Commission is a prominent addition.

In my observation one of the problems that such human rights commissions often face is with regard to governmental violation of human rights. Such case certainly deserve different approach than the case where both the parties are belonging to public domain. Certainly both aspects are important and the Australian Human Rights Commission deals with the both. It often hears cases which are very like the cases before courts. It has no enforcement power. But it has effective directory role. In state level, there are some specific commissions e.g., Equal Opportunity Commission which have enforcement power and they are doing a commendable job. So the decision taken by your government is in the right direction but its paper implementation can alone justify the decision.

DS: What is your impression about the present state of legal system of Bangladesh?

DB: Frankly speaking your judiciary is one of the best justice delivery systems in the world. Bangladesh can be proud of its judiciary. The legal fraternity is committed to justice and the rule of law. What you need to do is to maintain the standard and try to develop it gradually to meet the demands of the next century.

You have ensured the active and efficient participation of the young generation in the profession. In this regard I particularly want to mention the role played by the legal education committee of Bangladesh Bar Council. They are doing a very effective job with feat for the new entrants in the profession. I am really proud to be associated with their noble venture.

The Namibian Experience
Fighting Corruption Through the Office of Ombudsman

by Bience Gawans

CHAPTER 10 of the Constitution of Namibia (Act 1 of 1990) provides for the setting up of the Ombudsman Institution. Article 89 provides that the Ombudsman shall be independent and subject only to the Constitution and the law. The independence of the Office is further guaranteed by the constitutional requirement that no member of the Cabinet or legislature or any other person shall interfere with the Ombudsman in the exercise of his/her functions. The Ombudsman is appointed by the President on recommendation of the Judicial Service Commission in terms of the Constitution and reports annually to Parliament and submits special reports as and when necessary. The Ombudsman Act (Act 7 of 1990) further defines the powers, duties and functions of the Ombudsman and provides for related matters.

The Office has a constitutional and statutory duty to receive complaints arising from maladministration, human rights violations, and corruption by officials. Complaints may be brought by aggrieved individuals or entities or can be referred to it by government or parliament. Officials are defined in the Constitution as any elected or appointed official or employee of any organ of central or local government, any official of a para-statal enter-

existence and functions. To remedy this situation, the Office has embarked on an outreach program to raise awareness on the role and functions of the Office, what to complain about and how to complain. It is imperative that people must also know that they can complain to the Office and that their complaints will be treated confidentially. The Office is situated in the capital city with no regional offices. Therefore, we need to visit the regions and bring the Office closer to the most vulnerable people who live in the rural areas.

4. Although we have a free and vigilant media which reports cases of corruption, our Office cannot become involved as there is no express power to initiate investigations unless a complaint reaches the Office. Although nothing expressly forbids the Office to start an investigation, we are in the process of amending the Ombudsman Act to expressly provide for own motion investigations.

5. Human and financial resources as well as a very wide remit in terms of functions was a major factor in this Office not being able to concentrate solely on corruption. The alleviate the problems experience with resources, we have now installed computers with donor assistance and a computer programmer from Ombudsman Ontario assisted us in installing a caseload management system,

seek a remedy for individual grievances but also to point out deficiencies in the procedures and systems that need improvement. Transparency International points out the need for a reform process that should be forward looking or system oriented rather than retrospective and focused on punishing past offenders.

Maladministration is caused by officials who are either not motivated, inadequately trained or by deliberate action to serve the purpose of camouflaging corrupt practices.

Effectiveness and efficiency in administration are enhanced through good management systems, proper performance appraisal systems, individual accountability and monitoring. Reward for good performance will not only serve as motivation to perform better but also to expose anyone that undermines the performance of the organisation through corrupt practices.

In promoting transparency in all aspects of public administration, corrupt practices can be easily checked. Therefore it is essential that citizens must have a legal right to obtain information in respect of all areas of public service working. An area of concern to me is the extensive discretionary powers given to management or officials. In the exercise of these powers, it is not always clear on what basis a decision has been

4. Encouraging the strengthening of checks and balances. As pointed out earlier, the proliferation of watchdog bodies has been a concern as it leads to duplication, competition for scarce resources, etc. There may be an argument not to have a single entity dealing with corruption as it is a multifaceted problem but coordination and cooperation need to be encouraged. Clear lines must be drawn in terms of jurisdiction and functions.

In the case of the Office of the Ombudsman of Namibia, we can only investigate corruption and make appropriate recommendations to the Auditor General or the Prosecutor General for enforcement or action. The Office does not have enforcement powers and rely on other agencies such as the Prosecutor General or government ministries to take action. Where complaints sustained by the Office are not acted upon, serious doubt is cast on the credibility and effectiveness of our office.

Since lack of resources puts a considerable constraint on the effective functioning of oversight bodies, these institutions must be placed in a position to carry out their mandate effectively and efficiently.

The Namibian Government has shown its commitment to combating corruption by the creation of an ad hoc Ministerial Committee assisted by a Technical Committee on the

If corruption is to be seen as a major threat to our democratic values and economic well being, it must be an issue that everyone must take seriously. As far as the Office of the Ombudsman is concerned, we have committed ourselves to fighting corruption by working out new strategies and approaches and to increase the capacity in terms of recruiting competent and committed staff, training of staff and financial and technological resources.

prise owned or managed or controlled by the State, or in which the State or Government has a substantial interest, or any officer of the defence force, the police force or the prison service.

The Ombudsman has the power to investigate and to take appropriate action to remedy the alleged wrongs complained about. To enable the Ombudsman to perform these functions effectively, Section 4 of the Act gives the following special powers to the Ombudsman:

- (a) to issue subpoenas
- (b) to question any person
- (c) to require any person to co-operate with the Ombudsman and to disclose any information relevant to the investigation
- (d) to enter any buildings or premises
- (e) to seize anything
- (f) to have access to any documents
- (g) to bring proceedings in a court to secure the termination of the offending action or conduct.

Furthermore, it is criminal offence to obstruct the Ombudsman's work and a person can be liable on conviction to a fine not exceeding N\$2000 or to imprisonment not exceeding 12 months or both.

The Constitution and the Ombudsman Act empowers the Ombudsman to investigate vigorously all instances of alleged or suspected corruption and the misappropriation of public monies by officials and to take appropriate steps, including reports to the Prosecutor General and the Auditor General pursuant thereto. This jurisdiction is limited to the public sector. The Office of the Ombudsman

which will ease the work of the staff members and help us in creating a database. We also hope to recruit more staff including investigators.

In order to develop effective strategies for the combating of corruption, the local environment must be taken into account. This will involve looking at the role of the press, the police, the law makers, the judiciary, the Office of the Ombudsman, the society and the role of government in order to involve them in creating an environment where corrupt practices become totally unacceptable.

In Namibia, we have a number of oversight bodies such as the Office of the Ombudsman, the Auditor General, the police, the Parliament which are dealing with corruption in one way or the other. This has led to duplication of efforts, problems of coordination, competing for scarce resources and confusion to the public as they do not often know which body to approach with a complaint.

A lack of clear strategic approach in combating corruption has been a serious oversight on our part. Therefore, corruption has not been debated as a public concern and therefore no clarity as to what action or practices amount to corruption and how it affects the social, political and economic development of our society. The media has been at the forefront of exposing corruption but it has not always led to proper investigation on the part of government or offenders being punished. The government has set up various commissions of inquiry to investigate cases of alleged corruption and the

reached as no reasons are at times given for decisions. It leaves much room for corrupt practices as such an official cannot be challenged or held accountable. The need for narrowing the ambit of such discretion is necessary in particular in areas such as the issuing of licenses, tenders, granting of passports as well as a Freedom of Information Act. However, I am also mindful of the fact that bureaucratic rules and regulations have the effect of delays with the result that people have to pay to get 'quick fixes'.

2. The creation of an ethical climate. The creation of an ethical climate is essential and this can be achieved through the introduction of a statutory code of conduct or public officials. The code must set out minimum standards of behaviour expected from officials in so far as they must ensure to achieve a higher level of integrity. These standards must be vigorously implemented and officials who do not live up to them to be adequately dealt with. Such a code however is only effective if it is properly managed and controlled. One way of holding officials individually accountable and to show that such behaviour will not be tolerated is to enforce discipline through a criminal sanction or disciplinary action where allegations of corruption or improper behaviour are sustained.

3. The promotion of a human rights culture. Education is the key in any efforts in combating corruption. By respecting human rights and freedoms, we will create values of honesty and respect for rules and procedures.

Promotion of Ethics and Combating of Corruption in March 1997 for the purpose of developing legislative and administrative proposals for a comprehensive ethics/anti-corruption regime in Namibia. The Office of the Ombudsman is a member of the Technical Committee.

At a seminar organised by the Technical Committee in June this year, the following key issues were addressed:

1. What it takes to fight corruption — it is necessary to have political will, commitment of adequate resources and ongoing public education and community involvement in the creation of an ethical climate.

2. Review of the adequacy of existing laws relating to corruption.

3. Reduction of crimes of corruption not only through punishment of offenders but also through proactive initiatives to detect and prevent criminal activity.

4. Review of codes of conduct for the public, para-statal and private sector because at present there is no comprehensive statutory code of conduct for public officials.

5. Declaration of interest and assets.

6. Review of fairness and transparency in tender and contracting procedures.

7. Review of disciplinary procedures in the public service as laid down in the Public Service Act of 1995.

8. Promotion of open and accountable government — open meetings, freedom of information, etc.

9. Encouragement of whistleblowing and the statutory protection of whistleblowers.

In promoting transparency in all aspects of public administration, corrupt practices can be easily checked. Therefore it is essential that citizens must have a legal right to obtain information in respect of all areas of public service working. An area of concern to me is the extensive discretionary powers given to management or officials. In the exercise of these powers, it is not always clear on what basis a decision has been reached as no reasons are at times given for decisions. It leaves much room for corrupt practices as such an official cannot be challenged or held accountable. The need for narrowing the ambit of such discretion is necessary in particular in areas such as the issuing of licenses, tenders, granting of passports as well as a Freedom of Information Act.

has not dealt with many complaints concerning corruption. This may be due to the following:

1. Corruption is not practiced openly and its exposure depends on the willingness of people to expose those who are involved in corrupt practices. I believe that when people are motivated to perform and are rewarded for good performance that one can expect that they will be willing to expose anyone who undermines the performance of the organisation.

2. This in turn depends on the extent to which the confidentiality of the complainant can be assured and how to protect such individuals from being victimised. There is no statutory protection for whistleblowers and my task as a member of the Technical Committee on Promotion of Ethics and Combating of Corruption set up by the Government to propose a comprehensive anti-corruption/ethics framework including the drafting of a law that would give statutory protection to whistleblowers. The Office treats all complaints as confidential and anyone who seeks to influence or intimidate a person who has brought a matter to the Office are subject to a penalty.

3. The Office was also not very visible and accessible because few people knew about its

question remains whether these commissions were effective in achieving their objectives.

Existing criminal laws are inadequate and outdated and there are problems with enforcement. Allegations of corrupt practices in the police force and subsequent conviction or dismissals of some police officers have created distrust of the police amongst the people.

Generally, all agencies suffer from a lack of adequate resources.

It is argued that maladministration breeds corruption and that the complaints received by the Office of the Ombudsman are symptomatic of something which has gone wrong in the administration which leaves the door open to corrupt practices.

The institution of the Ombudsman, in its role to oversee administrative fairness and legality, is mostly involve in creating a climate which makes it harder for corruption to take root and flourish by doing the following:

1. Promotion of good governance based on efficiency, transparency, effectiveness and accountability.

I concur with the approach adopted by our institutions that even though we investigate individual complaints, it is incumbent upon us not only to

Our Constitution provides for administrative justice in that it enjoins administrative bodies and officials to act fairly and reasonably and comply with the requirements imposed on them and affords aggrieved citizens the right to seek redress before a competent court or tribunal.

Thus where a person has been subject to the impact of maladministration or has suffered violations of human rights, such a person must know that they have a right to complain and hold officials accountable for their actions. People can only complain if they know what their rights are and what behaviour to expect from officials. They must also be aware that there are institutions where they can bring their complaints. Officials must be made aware that their actions can be scrutinised by independent bodies such as the institution of the Ombudsman. This calls for a proactive role on our part to educate and raise awareness about these issues and to place them squarely in the context of good governance and human rights protection.

I believe that abuse of power, unfair, discourteous or other improper conduct by officials are not only affecting the rights of citizens but are also an indication of the deterioration of ethical standards.

10. The problem of sexual harassment as an ethical issue.

11. The establishment of an independent anti-corruption agency or the strengthening of existing agencies including the Office of the Ombudsman.

The Committee agreed that the strategy to be adopted must be based on prevention, detection and enforcement and this could be carried out by either one agency or several agencies. If corruption is to be seen as a major threat to our democratic values and economic well being, it must be an issue that everyone must take seriously. As far as the Office of the Ombudsman is concerned, we have committed ourselves to fighting corruption by working out new strategies and approaches and to increase the capacity in terms of recruiting competent and committed staff, training of staff and financial and technological resources. I have no doubt that my Office will play a pivotal role in combating corruption. I am eagerly awaiting the outcome of the work of the Technical Committee, as it will assist us in clearly identifying our remit and to provide us with a comprehensive institutional and legislative framework for the twin objects of promoting ethics and combating corruption.

The writer is the Ombudsman of Republic of Namibia.

Three girls rescued: A return to home and hope

THE three girls Deepa, Krishna and Jahanara face the future with uncertainty and trepidation. What will they do now? Can they pick up the threads of their lost years? Will they be able to start their lives anew?

Several years ago, in separate incidents, these three unfortunate girls crossed the border to Calcutta, India. After a series of incidents and misfortune, Deepa and Krishna finally found themselves at the Lilua Home while Jahanara ended up at the Cooch Bihar Home in India. On 20 November this year, the Indian authorities handed them over at the Benapole border checkpoint to Advocate Salma Ali, Executive Director of the Bangladesh National Women Lawyers Association. Since then, the three girls have been staying at the organisation's centre for women.

Deepa's full name is Deepa Gain. She was hardly a year old when her mother died and her father remarried. When she was six years old, her uncle took her to the Nalhati Colony in India. She was handed over to work as a maid in a house at Calcutta. She worked there for three years. Then, while at the market place one day, she lost her way back home. She was eventually picked up by the police and handed over to the Lilua Home. She spent the next four years of her life there. It is here that she learnt to sew. She would earn about 270 taka a month from her sewing. The home still owes her dues for six months' sewing work.

Now that she is back in Bangladesh, Deepa is unwilling to return to her parents. She can't seem to shake off the unpleasant memories of her childhood and the mistreatment she would receive from

her parents. She would now like to join a garment factory, but who is going to give her a job? She desperately wants to start life afresh.

Krishna Dutta is from Pirojpur. She is uncertain of her own age, perhaps 18 or 19. She too was tortured by her step-mother so much that she left home for Calcutta with her cousin's husband. But once in

Calcutta, he simply abandoned her on the streets. Thus she roamed the streets, homeless and helpless, until she was picked up by the police. After staying in police custody for eight days, she was finally handed over to the Lilua Home.

Back in Bangladesh, Krishna too is reluctant to return home. She does not want the same life of pain and oppression. She wants to start a new life for herself. However, she would like to visit home once again just to see her father.

Jahanara is about 15 years old. Her father died when she was quite small, leaving her with her mother, three brothers and two sisters. One day a woman named Salma forcefully took her from Jaipurhat over the border to Shilliguri in India by bus. There she was locked up in the kitchen of a house for three days. Eventually she managed to escape and turned up at a police station. The police turned her over to the jail where she spent three months.

She was then sent to the Cooch Bihar Home. She lived at the Cooch Bihar Home for just over four years. She would study in class two at the home. Jahanara fears she may have to work as a servant, just like her mother. She wants to study, to become self-reliant. She would like to meet her mother and then get enrolled at school. That is her only regret about leaving the Cooch Bihar Home. There at least she was getting an education.

The Women Lawyers Association spent two years in their efforts to get these three girls back from India. There are 30 more girls from Bangladesh at the Lilua Home. Efforts continue to bring them back too. Advocate Salma Ali is confident that she can get these 30 girls who were trafficked to India, back to Bangladesh.

About the girls whom the Association rescues, Advocate Salma Ali says that they first give them physical and mental check ups. They release the girls from the centre once they are fit to go ahead on their own. They also arrange employment. Probe News Agency

LAW WATCH

Countries that have enacted legislation against:

| Domestic violence | Malawi | New Zealand | Netherlands |
|-------------------|------------------------|---------------------------|----------------|
| Argentina | Malaysia | Norway | Canada |
| Australia | Mexico | Poland | Panama |
| Bahamas | New Zealand | South Africa | Paraguay |
| Bangladesh | Panama | Spain | Philippines |
| Barbados | Paraguay | Sweden | Spain |
| Belize | Peru | Tobago | Sweden |
| Bolivia | Portugal | United Kingdom | Switzerland |
| Brazil | St Lucia | United States* | United Kingdom |
| Canada | St Vincent/ Grenadines | Sexual harassment | United States |
| Chile | South Africa | Female genital mutilation | |
| China | Spain | Australia | Australia |
| Colombia | Trinidad/Tobago | Bahamas | Burkina Faso |
| Costa Rica | Tunisia | Belgium | Egypt** |
| Cyprus | United Kingdom | Canada | France*** |
| Czech Rep | United States* | Costa Rica | Ghana |
| Denmark | Uruguay | Finland | New Zealand |
| Ecuador | Finland | France | Norway |
| El Salvador | France | Guatemala | Sudan**** |
| England | Guatemala | Barbados | Sweden |
| France | Honduras | Canada | United Kingdom |
| Guatemala | Ireland | Denmark | United States |
| Guyana | Israel | France | |
| Honduras | Germany | Malawi | |
| Ireland | Italy | Namibia | |
| Israel | Jamaica | | |
| Italy | | | |
| Jamaica | | | |

* Legislation enacted by state law.
 ** No criminal law, but a ministerial decree forbids the practice.
 *** By court decision, not specific legislation.
 **** 1946 law only prohibits infibulation.
 Source: The Progress of Nations — 1997.