Law and Our Rights

The Legal System and the State

by M Harunur Rashid

THE legal system of a country is only one of the three organ of the state and can not usefully be studied in complete isolation from the rest of them. The history of our legal system is the legacy of English legal system and in tracing the history of the English legal system briefly in this article I will try to bear this fact in mind and to bring what I have to say of the growth of the law courts, and of the law administered by them, into relation with the general development of the English state. In this article the relations which subsist to-day between our legal system and the two other chief branches of the constitution — that is to say parliament on the one hand and what is generally called the Executive on the other are discussed briefly.

In some countries the structure of the main organs of state including the Principal law courts is defined in a document known as "The Constitution", which is not capable alteration by ordinary legislative process. Thus, in the United States the existence and some of the functions of the supreme court are provided for in the constitution and these provisions can only be altered by a special process which in effect involves the concurrence of a very substantial majority of the electors. If Congress and the Senate passed an ordinary bill purporting to abolish the Supreme Court it would be nullity and would be declared to be so by the Supreme Court itself. In England, by contrast, the sovereignty of parliament has been for at least the last three centuries unlimited, and even their highest courts of law are subject to it. Parliament could abolish their Supreme Court of Judicature, though there is no existence of supreme court as such, just as easily as it could raise the salary of the metropolitan police magistrates.

Of course, the law courts in England have not always been subject to parliament. Before the thirteen century neither Parliament nor law courts existed as independent bodies. Both were phases of one and the same body — the Curia Regis of their Norman Kings-as they grew into an independent existence in the later middle ages it would not be true to say that the law courts felt themselves to be subject to the sovereignty of parliament. Even as late as the seventeenth century with the activities of the Reformation Parliament to look back upon, Sir Edward Coke seems to have regarded the common law and the common law courts as a sort of "Tertium Quid", independent alike of crown and parliament, and well fitted to hold the balance between them. But the supremacy of parliament over the royal prerogative was finally established in 1688, and by a side wind, as it were, the supremacy of parliament over the courts and the Judges was achieved at the same time. Perhaps the eighteenth century parliaments were hardly conscious of this supremacy. Certainly they seldom tried to exercise it, and accorded the courts almost complete autonomy.

But all this, one may say, is of little practical importance. In fact, our judges do not feel themselves any way galled by this parliamentary supremacy. Parliament only passes statutes affecting the organisation of the courts on the advice or suggestion of the Ministry of Law, Justice and Parliamentary Affairs and the Ministerial committee on the said ministry. The reduction of the salaries of judges of the subordinate judiciary in particular just after the independence of Bangladesh by an administrative measure classed them with ordinary civil servants may perhaps show that courts of Justice and the judges of both the superior and subordinate judiciary have not quite the lustre that they once possessed, and that the active exercise of its supremacy over the legal system for the last quarter century has taught parliament to use a different language towards the judiciary. But broadly speaking one may say that the mere fact that parliament can do as it will with the legal system is not a fact of any great constitutional significance. It is otherwise with the relations between the legal system and the other main organ of our constitution — the Executive. The relations which subsist between them here in Bangladesh are exceedingly unlike those which obtain in other European countries, and from the difference flows consequences of considerable constitutional importance. In the Fourth Part of our constitution the Executive organ of the state is defined while other two organ namely the legislature and the judiciary are specified in our constitution under chapter i, ii & iii of part v and chapter i, ii, & iii of part vi respectively.

In article 22 of our Constitution, which is one of the fundamental principles of our state policy, clearly embodied that the state shall ensure the separation of the judiciary from the executive organs of the state. But by a subsequent amendment the whole spirit of article 22 mentioned above was jeopardised and that is why after 26 years of our independence the separation of judiciary remains a far cry. By the implication of provision of article 116 the control of the judicial service is vested in the president who is the head of the Executive and this being delegated to a cabinet minister who holds the Ministry of Law, justice and Parliamentary Affairs though the Rules of Business does not specify this delegation of Power by the President to the Ministry. Moreover article 116 of our constitution contradicts the latent spirit of article 109 of our constitution which says "The High Court Division shall have superintendence and control over all courts subordinate to it?. It is said that in a democracy such as ours, the executive, the legislature and the judiciary constitute the three pillars of the state. What is intended to be conveyed is that the essential functions of the state are entrusted to the three organs of the state and each one of them in turn represents the authority of the state. However, those who exercise the state power are the Council of Ministers, the legislators i.e. Members of Parliament and the Judges and not the members of their staff who implement or assist in implementing their decisions. The council of ministers or the political executive is different from the secretarial staff or the administrative executive which carries out the decisions of the political executives. Similarly, the legislators are different from the legislative staff and so also the judges from judicial staff. The parity is between the political executive, the legislators and the judges and not between the judges and the administrative executive. The judges, at whatever level they may be, represent the state and its authority unlike the administrative executive or the members of the other services. The members of the other services, therefore, can not be placed on at par with the member of the Judiciary, either constitutionally or functionally. Therefore, while determining the service conditions of the members of judiciary, a distinction can be made between them and the members of the other services.

Article 22 of our constitution referred to herein before was not meant for beautifying the constitution as an ornament, but the collective will of the people was intended to be implemented within a reasonable time and this period of 26 years from independence is definitely a reasonable period to implement the cherished will and desire of the people. So, the framers of the constitution had the intention to specify the two services, namely the Defence Service and Judicial Service in the Constitution separately and in general the framers of the constitution dealt with the services of Bangladesh in part-ix of the constitution. In such a situation, the Defence services have been very correctly governed by separate Acts and Rules and in the similar way the Judicial service shall have to be governed by separate provision of part-vi of the constitution and the rules and enactment's made thereunder. Since the constitution itself has dealt with the judicial service separately as in the case of Defence Services, it must be given a specific treatment totally different and distinct from the civil services. Therefore, article 133 of our Constitutions has no manner of application to both Defence Service and Judicial Service. ***So it is crystal clear that in order to give effect, carryout and implement fully the separation of judiciary from the executive organ of state no constitutional amendment will be necessary as the provision for such separation are already there in the constitution itself.***

It is, of course, only when two countries are akin in civilisation and methods of government that any comparison of a single branch of their institutions can be of much value. Thus to compare the legal systems of Bangladesh and Germany would probably be a rather useless task, since the objects to which the two systems are directed are so very different. But when one finds that a country such as India, the forms and ideals of whose government are fundamentally similar to ours, has a legal system which is in many ways very unlike our own, it is by no means useless to compare the two, for it is probable that each will have something to teach the other.

The great merit of our legal system as opposed to even many European countries is that in Bangladesh the administration of justice except the magistracy is to a very great extent immune from the influence of politics. Politics may help a practising lawyer to get on to the Bench, but he has little to hope from them once he is there, for he has, broadly speaking, no promotion to look for. He is practically irremovable. He has an adequate salary and a high position in society, and he is imbued with the traditions of a very proud and independent profession.

It must not, of course, be supposed that the independence of the administration of justice from political control must necessarily be regarded as desirable under any system of government. In those countries, the so-called 'totalitarian' states, in which it is claimed that the life of the people in all its aspects is incarnate in those in power, it may well seem improper for judges and prosecutors to administer the law otherwise than in harmony with the collective will of the people and purpose of the government. In parliamentary democracies, however, such as those of England and India where those for the time being in political power claim to be no more than the temporary representatives of a part of the electorate it is extremely desirable that the legal system should be divorced from politics which, I am sure, would ensure the long cherished separation of judiciary and the fullest independence of judges.

The author is a judicial officer now working as Law Officer to the Parliament Secretariat

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Woman's Right to Transmit Citizenship to Her Children is Denied

by Faustina Pereira

In one of the first cases to raise the issue of sex discrimination, the High Court Division of the Supreme Court of Bangladesh in September 1997 declared that a law that prevents Bangladeshi women from transmitting their citizenship to children born from marriages to foreign husbands is not unconstitutional or in violation of fundamental human rights.

Facts

The petitioner, Ms. Sayeeda Rahman Malkani, Bangladeshi national, lived in Paris where she was pursuing doctoral research at Sorbonne University and working for the United Nations. She married an Indian citizen during the course of her stay in Paris. Ms. Malkani had visited Bangladesh several times with her children, using her Bangladeshi passport on which the two minor son's names were endorsed.

In 1992, an official at the Bangladeshi Embassy in Paris cancelled the names of the two boys from Ms. Malkani's passport on the ground that since she had married an Indian citizen, her children could not be Bangladeshi citizens, and therefore their names could not be endorsed in her passport.

Legal Issues

The case raised the issue of whether the cancellation of endorsement of the names of the two boys in Ms. Malkani's passport had been made under lawful authority or not. It also raised the issue of constitutionality of legislation which prevents Bangladeshi women from transferring their citizenship to their children.

a) Citizenship Laws

Matters of citizenship in Bangladesh are governed under the Citizenship Act of 1951 ("the Act") and the Bangladesh Citizenship (Temporary Provisions) Order, 1972 ("the Order"). Section 5 of the act provides that a person will be a citizen of Bangladesh by descent if "his father is a citizen of Bangladesh at the time of his birth." Article 2 of the Order provides that a person is a citizen of Bangladesh if that person's "father or grandfather was born in the territories now comprised in Bangladesh and who was a permanent resident of such territories on the 25th day of March, 1971, and continues to be so resident."

b) The tight to Equality

The Constitution of Bangladesh in Article 152 (1) defines a citizen as "a person who is a citizen of Bangladesh according to the law relating to citizenship." However, Article 26 of the Constitution specifically states that any law which is inconsistent with the fundamental rights as provided by the Constitution would be void to the extent of that inconsistency.

In the chapter on fundamental rights, the Constitution also provides, under Articles 27 and 28, for equality between citizens of Bangladesh. Article 27 provides that all citizens of Bangladesh are equal before the law and are entitled to equal protection of law. Article 28 (1) provides that the State will not discriminate against any citizen on the grounds only of religion, race, caste, sex or place of birth. Article 28 (2) provide that women shall have equal rights with men in all spheres of the State and of public life.

Legal Submissions

Lawyers for Ms. Malkani argued that the relevant provisions of the Act and Order were discriminatory in that they deny women the right to transmit their citizenship to their children and are violative of fundamental rights as guaranteed by articles 27, 28 and 29 of the Constitution. They also argued that Section 13 of the General Clauses Act of Bangladesh clearly states that words importing the masculine gender be taken to include females, and therefore the word "father" in Section 5 of the Act and Article 2 of the Order includes the "mother."

The petitioners also relied on the well known Unity Dow judgment of the Botswana Supreme Court as a persuasive precedent. The lawyers further referred to the judgments of the European Court of Human Rights and pointed out the provisions on nationality in the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), to which Bangladesh is a signatory.

It was argued as well that the government of Bangladesh in its Combined Third and Fourth Periodic Report before the United Nations Committee for Elimination of All Forms of Discrimination Against Women had specifically stated that "measures are being taken by the Government to ensure equality between men and women with regard to citizenship and rights."

The Court appointed three senior lawyers as amicus curiae, of whom one stated that the statutory provisions were violative of the fundamental rights of women, while two others stated that no fundamental right had been infringed and that the cancellation of the endorsement therefore had not been carried out without lawful authority.

INTERIGHTS, a London-based human rights organisation, provided a memorandum on comparative case law relating to women's citizenship rights which was made available to the Court through counsel for the petitioner and one of the amicus curiae.

Judgment

The High Court held that the cancellation of the endorsement had been made without legal authority and that the mother being the legal and natural guardian of her minor children was entitled to visit the country with her children and to have their names endorsed in her passport. The Court however held that despite the guarantees provided in the Constitution the statutory provisions would prevail and that children could only receive citizenship through the male line.

An appeal from this judgement to the apex court, the Appellate Division of the Supreme Court, is currently under consideration.

The writer is working as a Legal Intern in the INTERRIGHTS, the international centre for the legal protection of human rights

Aid and Civil Wars

*If the world's aid donors are serious about tackling the causes and consequences of war in the developing world, they will have to look more carefully at how they disburse their funds, write **Angeline Oyog** and **Dipankar de Sarkar** in this Inter Press Service special report.*

EMERGENCY aid to countries torn by civil wars is on the rise, sucking away shrinking aid resources.

With this in mind, ministers and officials from the world's economically developed countries agreed on a set of guidelines on how development assistance can help in preventing conflicts, restoring peace and rebuilding war-ravaged nations.

Analysts and NGOs generally welcomed the move, but urged a still deeper view of how aid is disbursed, before, during and after conflicts.

"If they are serious about conflict prevention and addressing the root causes of conflict — that is, economic decline and unequal opportunities in society," said Ian Bray of the British-based crisis aid NGO Oxfam, "then they will have to look at the way they are disbursing their aid."

The fruit of two years of work, the guidelines were endorsed by members of the Development Assistance Committee (DAC) of the Organisation for Economic Cooperation and Development (OECD) at the end of a high-level meeting in Paris in early May.

Violent conflicts, said DAC Chairman James Michel, can no longer be regarded as exceptional but as part of reality, setting back development in many countries, including some of the poorest. He said he hoped that DAC member countries would "learn more" from the effort. There has been more information, he said, about rebuilding societies after war. But less is known about peace-building efforts that must be undertaken before conflicts flare up.

DAC member countries said they were committed to finding better ways to help prevent conflicts at their roots, before the toll of human and material cost spirals and before a vastly more difficult and costly international response becomes necessary. The British NGO Action Aid notes that bilateral aid in the form of emergency assistance over the past ten years has increased dramatically as overall aid levels decline.

Emergency aid as a percentage of bilateral aid from the DAC membership rose from 1.6 percent in 1983-84 to 8.4 per cent in 1994, but over the same period, total overseas development assistance (ODA) fell from 0.34 percent of GNP to 0.3 percent. ODA that might have been allocated to long-term sustainable development use was instead diverted to humanitarian relief, bringing short-term help without halting the cycle of under development, crisis and crisis aid.

"The current donor policy paradigm of providing humanitarian band aids, although temporarily life-sustaining, are inadequate and at times exacerbate the roots of war," writes John Prendergast, director of the Horn of Africa project at the Washington-based Centre of Concern in his latest book, *Crisis Response*.

The DAC does say it recognises that humanitarian assistance alone cannot be the sole response of the international community to complex crises. They are aware that humanitarian agencies have encountered moral dilemmas while trying to come to the aid of populations caught in conflict situations.

While its members know that prolonged economic decline can be a source of conflict, economic growth alone does not prevent or resolve violent conflict. It can sometimes even intensify tensions in society.

Factors that can precipitate countries into war may include unequal opportunities in society, lack of an effective and legitimate government or the absence of mechanisms for peaceful resolutions of different interests.

Development cooperation efforts therefore should aim at building an environment of "structural stability" set up on social peace, respect for human rights, accountable military forces and broad-based social and economic development, the DAC members agreed.

"Unless DAC countries can increase the percentage of aid towards poverty reduction — and we (Oxfam) suggest 20 percent — we can't really see them dealing with the root causes of poverty." Currently, DAC countries allocate only four percent of their total overseas development budget to providing clean water and sanitation.

REVIEW

Manual On Human Rights Law

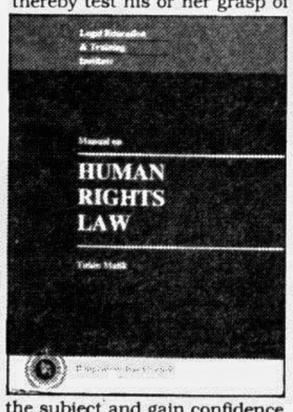
A Committed Companion to Human Rights Education

by A H Monjurul Kabir

THE quest for human rights and human dignity is a phenomenon of contemporary life of universal dimension and immense significance. Beginning from 1995, the United Nations proclaimed the following ten years as the decade for human rights education. Infact there is no alternative of human rights education for effective protection and promotion of human rights as the former is a sin-qua-non for the proper realization of the latter. And if human rights is the matter of life and culture then it can only flourish in knowledge and education. The General Assembly of the United Nations while adopting the Universal Declaration of Human Rights (UDHR) in 1948 proclaimed in the operative paragraph in the preamble that "keeping this declaration constantly in mind, shall strive by teaching and education to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance, both among the peoples of Member States themselves and among the people of territories under their Jurisdiction." And the recent publication of Legal Education and Training Institute of Bangladesh Bar Council on Human Rights Law (Manual on Human Rights Law) edited and compiled by a young advocate Mr. Tuhin Malik is, no doubt a notable contribution in the strive of promoting human rights.

This manual is aimed to impart training for lawyers on human rights with special reference to its enforcement mechanism which led to the development of a new 'Human Rights Lawyering' in Bangladesh. It is also a compilation of 'Humane Law' and their application in various domestic constitutions and laws. Really this is the maiden work of its kind to incorporate therein such a wealth of ready information to be helpful to a human rights activist lawyer.

As to the arrangement, the manual has 20 parts. It can be viewed in 4 chapters. In each part of this Manual, a few suggested discussion questions have been raised. By answering this questions independently, a reader will get a kind of mental exercise or equipment and thereby test his or her grasp of



the subject and gain confidence to participate in the classroom discussion. To serve the purpose of quick and easy reference, the index with a brief comparison of rights discourse at the end has been amplified.

The important characteristic of this Manual is that it is not just a compilation of relevant provisions, articles, cases, and reading materials on the themes. But it is specially written on the basis of the subject and the needs of the trainee lawyers for whom this materials are specifically assembled.

The first chapter of the Manual contains chapters on Training Method, the role of the resource persons, training assessment and the preparation of models and training modules. History and evolution of human rights, international human rights instruments, regional instruments and the national laws and remedies with relevant provisions of Bangladesh Constitution etc. are placed in the second chapter.

The third chapter deals with the concept of equality and the case laws and reading materials on the subject such as, right to life and liberty, torture, right of the prisoners, family rights. Childrights and juvenile justice, women and family law, right to work, association, assembly and trade union, freedom of movement, freedom of thought, religion and expression, rights to minorities, art and culture and right to property.

The fourth chapter is quite interesting as it deals with some of the new development of law e.g., election law, refugee law, environment law and public interest litigation.

Commenting on such endeavour of Bangladesh Bar Council, Chairman of the Legal Education Committee, Barrister Amir-Ul-Islam pointed out, "we are also now in the decade of human rights education in which all the international and national NGOs were called upon including the social justice group, human rights workers, to increase their involvement in formal and non formal education in human rights. Bangladesh Bar Council in this context made a very humble start by initiating a Human Rights Training Programme for Lawyers (HRTP). This course became extremely popular among lawyers. While the result of our training programme yielded the result more than we expected, we also become aware of the need for compiling the relevant and necessary literature and information on human rights which can be made available to lawyers and others members of the community who are interested to learn more on the subject. *We therefore constituted a small team and researchers who have successfully accomplished the task in the shortest possible time".*

Basically the manual is a compilation of relevant international, regional and national human rights instruments and articles. *The valued contributions made by Justice Kemaluddin Hossain, Dr Kamal Hossain, Dr ABM Mafizul Islam Patwari, Dr Thomas M Buchsbaum, Justice AM Mahmudur Rahman, Justice Naimuddin Ahmad, Justice M Mozammel Huq, Dr M Enamul Huq, Nirmalendu Roy, Barrister Luthfor Rahman Shahjahan Naeela K Sattar, Dr Naima Huq, Dr Saad Al Attar, Dr Mohiuddin Farooque, and Barrister M Amir-ul-Islam enrich the manual and make it effective and useful.*

Except a few printing and binding lapses, the overall quality of publication is very good. Mr Tuhin Malik who has gained considerable experience as Acting Coordinator of Human Rights Training Programme for lawyers (HRTP) edited and compiled the manual with precision. Such commendable outcome of two and half years long laborious effort testifies Mr Malik's commitment towards human rights education and training. Congratulations Mr Tuhin Malik, please keep it up.

Manual On
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Bangladesh Bar Council
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LAW WATCH

LEGISLATIVE LANDMARKS

FROM the first international child labour convention (1919), which saw working children in terms of wage employment in formal-sector manufacturing, the world's position on child labour has evolved and expanded over the years. It has come to address non-industrial work by children, and most recently, to prohibit any kind of work, paid or unpaid, that is injurious to children, and to set out safe guards and protections for children who work. States parties to the Convention on the Rights of the Child, for example, are required to provide for a minimum age or minimum ages for admission to employment "having regard to the relevant provisions of other international instruments" (Article 32). The laws outlined below are international landmarks in protecting children.

1919: Minimum Age (Industry) Convention No 5. Adopted at the first session of the International Labour Organisation (ILO) and ratified by 72 countries, the Convention established 14 years as the minimum age for children to be employed in industry. It was the first international effort to regulate children's participation in the workplace and was followed by numerous ILO instruments applicable to other economic sectors.

1930: ILO Forced Labour Convention No 29 provides for the suppression of the use of forced or compulsory labour in all its forms. The term "forced or compulsory labour" is considered to mean all work or service exacted from any people under the threat of penalty and for which they have not offered themselves voluntarily. Ratifications: 139 States as of mid-September 1996.

1966: International Covenant on Civil and Political Rights. Adopted by the UN General Assembly in 1966 and entered into force in 1976, it reaffirms the principles of the Universal Declaration of Human Rights (1948) with regard to civil and political rights and commits States parties to take action to realise these rights. Article 8 states that no one should be kept in slavery or servitude or be required to perform forced or compulsory labour. Ratifications: 135 States as of mid-September 1996.

1966: International Covenant on Economic, Social and Cultural Rights. Adopted by the UN General Assembly in 1966 and entered into force in 1976, it reaffirms the principles of the Universal Declaration of Human Rights with regard to economic, social and cultural rights. Article 10 enjoins States parties to protect young people from economic exploitation and from employment in work harmful to their morals, their health or their lives, or likely to hamper their normal development. It also commits States parties to set age limits below which the paid employment of child labour should be prohibited and punishable by law. Ratifications: 135 States as of mid-September 1996.

1973: ILO Minimum Age Convention No 138 supersedes prior instruments applicable to limited economic sectors. The Convention obliges member States to pursue a national policy designed to ensure the effective abolition of child labour. In this connection, it establishes that no child can be employed in any economic sector below the age designated for the completion of compulsory schooling — and not less than 15 years. The minimum age for admission to any work likely to jeopardize health, safety or morals is 18 years. Ratifications: 49 States as of mid-September 1996.

Minimum Age Recommendation No 146 calls on States to raise the minimum age of employment to 16 years, while not legally obligating, it nonetheless is a strong call to action on the part of member States. Convention No 138 and this Recommendation are regarded as the most comprehensive international instruments and statements on child labour.

1989: Convention on the Rights of the Child. Enshrines as interdependent and indivisible the full range of the civil, political, economic, social and cultural rights of all children that are vital to their survival, development, protection and participation in the lives of their societies. Because of this connection between children's rights and their survival and development, virtually all the Convention's articles address issues — such as education, health, nutrition, rest and relaxation, social security, the responsibilities of parents — that are related to child labour and its effects on children. One of the tenets of the Convention is that in all actions concerning children, their best interests should be taken fully into account. Article 32 recognizes children's right to be protected from work that threatens their health, education or development and enjoins States parties to set minimum ages for employment and to regulate working conditions. Ratifications: 187 States as of mid-September 1996.

1996: ILO proposes for discussion a new convention on hazardous child labour or the elimination of the most intolerable forms of child labour.

Source: The State of World's Children 1997