

FOCUS

Law and Our Rights

Bangladesh Supreme Court (1972-1997)

A Historical Overview

by Dr M Zahir

WITH the liberation of the country in December 1971 a new era started in the history of the judiciary in this country. The High Court of Bangladesh Order, 1972 promulgated on 17 January 1972 provided that the High Court of Judicature at Dhaka in East Pakistan shall be deemed to have ceased to exist on 26 March 1971. It created the High Court of Bangladesh which consisted of the Chief Justice and so many other judges as may be appointed from time to time by the President 'may determine'. The High Court was to be a court of record and had all such original, appellate, special, revisional, review, procedural and all other powers as was exercised by the High Court at Dhaka but it was specifically provided that the High Court of Bangladesh shall have no power to issue writ, order or direction in the nature of habeas corpus, mandamus, prohibition, quo warrant or certiorari or any order, direction, declaration which the High Court at Dhaka had power to issue before 26 March 1971. Curiously, although the High Court at Dhaka would be deemed to have ceased to exist on 26 March 1971, all proceedings which were pending in the High Court at Dhaka were to be proceedings pending before the High Court of Bangladesh and any judgment, decree or decision passed made or given by the High Court at Dhaka before the commencement of the Order (i.e., 17 January 1972) were to be enforceable. Thus the High Court at Dhaka was not in existence between 26 March 1971 and 17 January 1972 but its judgments etc. given up to that date would be enforceable!

a caretaker government during general elections. Many of the amendments touched the Supreme Court and its jurisdictions. Article 102 (1) which enabled the High Court Division to issue writs for enforcement of the fundamental rights was repealed and Article 44 was amended to establish by law a constitutional court, tribunal or commission for enforcement of fundamental rights by the

ment Order) on 11 April 1982 which provided that the Chief Justice shall retire on reaching the age of sixty two or completing three years as Chief Justice. As a result the sitting Chief Justice automatically vacated his office without any forewarning - another instance of direct interference with the judiciary and the working of the Supreme Court. More so when this provision was repealed by

ment) Order was passed whereby the permanent benches of the High Court Division were renamed Circuit Benches and then again reclassified as Sessions of the High Court Division.

Right from the beginning the lawyers of the Supreme Court were critical of the trampling of the rights of the citizens and the working of the judiciary and interference by the Martial Law Authorities and this mood did not subside even after eleven members of the Bar Association were arrested. In fact this steered the determination of the lawyers to oppose Martial Law. The Martial Law Authorities tried to divide the lawyers by bifurcating the Court hoping that vested quarters in the places where sessions of the High Court Division would be held would oppose the members of the Supreme Court Bar Association. But the lawyers, by their training opposed to the imposition of Martial Law, did not rest and movements continued sometimes by boycotting the courts indefinitely. The Constitution (Eighth Amendment) Act 1988 amended Article 100 of the Constitution setting up six permanent Benches of the High Court Division outside the capital and authorizing the President to fix by notification the territorial jurisdiction of the permanent Benches. The lawyers continued their movements against the Martial Law Authorities and ultimately the situation was challenged in Court.

the time the next Chief Justice was to complete three years in office. The Martial Law Proclamation (Second Amendment) Order of 1982 was issued to insert a new paragraph in the Schedule of the Proclamation of 24 March 1982 providing that the Chief Martial Law Administrator might establish permanent benches of the High Court Division at such places as may be fixed by him. Obvious that the perpetrators of the Martial Law in this country considered the institution of the Supreme Court as being an impediment to their designs to rule the country arbitrarily and they were content not only with removing the Head of the Judiciary but were now determined to bifurcate the Supreme Court and destroy the fundamentals of this sacred institution. Initially the permanent benches of the High Court Division were set up in four places but then this number was increased to seven places. In June, 1986 the Proclamation (Third Amend-

The struggle between the Martial Law Authorities and the Supreme Court Bar Association was the best period of the Association. The lawyers were boycotting Courts thereby diminishing their own income when other citizens and professionals although silently supporting the lawyers against the Martial Law Authorities were busy making money. All the sufferings of the members of the Bar Association became fruitful when the Eighth Amendment was struck off the statute book and the ball started rolling for the inevitable process of restoring democracy in the country. This was indeed the finest hour of the lawyers and the Supreme Court Bar Association.

Fourth Amendment in January 1975. After the appointment of Chief Justice Sayem as Chief Martial Law Administrator by the Second Proclamation (Seventh Amendment) Order 1976 Article 44 was amended to enable the High Court to enforce the fundamental rights. A new Article 64A was inserted to provide for the appointment of an Advocate General. There was to be a Supreme Court and a High Court of Bangladesh. The Supreme Court was thus bifurcated.

The Law Reforms Ordinance 1978 introduced certain amendments relating to the exercise of powers of civil revision and repealed the provision of filing second appeals. It also repealed the Letters Patent 1865 and with it went the High Court Division's Original Side Jurisdiction. *Maqbool Ahmed and anr. vs Ahmed Impex (Pvt) Ltd.* (1996) DLR (AD) 82.

After General Ershad took over power by declaring Martial Law in 1982 he issued the Proclamation (First Amend-

ment) Order of 1982 which provided that the Chief Justice shall retire on reaching the age of sixty two or completing three years as Chief Justice. As a result the sitting Chief Justice automatically vacated his office without any forewarning - another instance of direct interference with the judiciary and the working of the Supreme Court. More so when this provision was repealed by

LAW WATCH

Lawyers' Concern

A statement given by Mr A H M Lutfur Rahman Shahjahan and Adilur Rahman Khan, President and Secretary of Jatiyo Ainjibi Porishod on the ensuing Bar Council election.

Recently the President of Bangladesh Mr Justice Shahabuddin Ahmed, Chief Justice Mr. A.T.M. Afzal, Minister of Law, Justice and Parliamentary Affairs Mr. Abdul Matin Khasru, the Bar Council and various Bar Associations of Bangladesh have expressed grave anxiety at the malfunctioning of the judiciary, justice delivery system and the issues related to access to justice in Bangladesh.

Recently the Law Reform Commission and Judicial Training Institute have been established. Bar Council have initiated Clinical Legal Education Programme including Human Rights Training for the young lawyers. Human Rights Commission Bill has been published, the appointment of the Ombudsman is being discussed. The Ministry of Law, Justice and Parliamentary Affairs are discussing various initiatives including legal and judicial capacity building projects. The law related to repression against women and children are being promulgated.

In this environment of newly found awareness a national debate about the status of justice in Bangladesh has started. The election of the Supreme Court Bar Association and the ensuing election of the Bar Council has already heightened the issues involved.

We on behalf of the concerned lawyers demand an accessible, efficient, corruption free, transparent legal system.

- To achieve this we urge upon all concerns to uphold:
 1. Full independence of judiciary.
 2. Abolition of all repressive laws including Special Powers Act of 1974 and Vested and Non-Resident Properties Act of 1974.
 3. Repeal of all obsolete colonial laws and promulgate adjective laws in conformity with the ideals of the Constitution of Bangladesh.
 4. To take immediate steps for expeditious disposal of cases and corruption free efficient judicial system.
 5. Effective implementation of the lawyers ethical code of conduct by the Bar Council.
 6. Immediate removal of the terrorist repression clauses from the protection of women and children's Act.

Under these circumstances we implore on all the members of the legal profession to launch a campaign for materializing the above demands and we appeal to all lawyers for implementation of the above programmes.

The Constitution of the People's Republic of Bangladesh was passed by the Constituent Assembly of Bangladesh on 4 November 1972 and authenticated by the Speaker on 14 December 1972. Article 94 provided that there shall be a Supreme Court for Bangladesh comprising the Appellate Division and the High Court Division. Initially Article 95 provided that the Chief Justice shall be appointed by the President and the other judges shall be appointed by the President after consultation with the Chief Justice. The underlined words requiring the Chief Justice to be consulted before other judges were deleted in 1975 by the Fourth Amendment. Now although the judges are appointed by the President, the practice is that the Chief Justice is consulted. A person cannot be appointed a judge unless he has completed at least ten years of law practice or judicial service or attained such other qualifications as may be prescribed by law. It is customary however for a person to have both sufficient experience in law practice as well as to attain a reasonable age (an undefinable term). Article 96 initially provided that a judge could only be removed by an order of the President passed pursuant to a resolution of the Parliament by a majority of not less than two-thirds of the total number of members of the Parliament on the ground of proved misbehaviour or incapacity. By an amendment in 1975 the judges were made removable by the President on the ground of misbehaviour or incapacity. This article as it stands now provides for the removal of a judge by the President after enquiry and a report by the Supreme Judicial Council that in its opinion the judge has ceased to be capable of performing the functions of his office or has been guilty of gross misconduct. Article 98 provides for appointment of an additional judge of either Division of the Supreme Court for a period not exceeding two years. Article 99 debars a judge not being a certain judge from holding certain offices or practicing before courts of law. A retired judge of the High Court Division may however appear before the Appellate Division after retirement.

In the short span of twenty five years from 1972 to 1997 the constitution has been amended as many as thirteen times the last being in 1996 to provide for

Young Lawyers Speak Out

Make Procedures User-friendly

THERE is an age old saying that "justice delayed is justice denied". Even if a judgement is appropriate or the substantial issues involved, delay in reaching verdict risks frustration of the whole venture. There has been much discussion regarding the establishment of the rule of law and providing justice. However, little has been said about the means of achieving that end and the issues pertaining to it. Bearing this in mind we would like to propose an agenda for discussion for the reform of procedural rules in Bangladesh. We believe that however much we concentrate on awareness of rights amongst people, unless we are able to ensure expedient resolution of disputes they will not feel encouraged to avail the recourse of justice through courts of law. The areas of reform are discussed in turn.

Service
One of the first steps in initiating civil legal proceedings is the service of summons on the defendant or respondent informing him of the case against him and the date on which he has to appear before the court to represent his side of the case. In Bangladesh the responsibility of effecting service is on the Nazir.

Often there is delay in the issue and service of summons giving rise to time consuming proceedings for setting aside decrees or orders. Furthermore, the courts are inclined to give orders for the issue of fresh summons without ascertaining the cause of failure of service. Thus, greater scrutiny of the discharge of responsibilities by the office of the Nazir is required.

The Cause List
The cause list, which lists the cases which will be heard by the court in a given day, and in which order, is unscientifically arranged. Often too much cases is fixed by the court for one day. This has the effect of compelling the court to allow adjournment or time petitions as a matter of course without scrutiny. Thus cases are unnecessarily prolonged. Also, cause lists are not chronologically arranged. This means that while some cases may be disposed of quickly, others continue indefinitely. The reasons for this situation must be identified and addressed. The use of information technology in this context may also be considered. The short term cost of such an investment would be adequately compensated in the long run through savings of court time.

Adjournments
The discretionary power of the court of adjourn proceedings given under the Code of Civil Procedure is used too frequently and with undue leniency. It is exercised as a matter of course and without much scrutiny as to whether or not the party seeking adjournment is actually abusing the process. Payment of adjournment costs by the party to whom adjournment has been granted is rarely ordered. Even where such orders are made, they are rarely enforced. In this context the use of interim cost orders, regardless of the party who ultimately wins the case, can be considered. Also, such orders should much more

earlier reflect the costs incurred by both the parties as well as the court system. If parties are faced with the burden of onerous cost orders they will be much more inclined to prosecute their case much efficiently.

General Trend of Cases
Number of cases which require extensive scrutiny of the court is comparatively few. Most of the cases can be disposed off without detailed hearing of the cases. Sometimes scrupulous defendants matter in their control. Repeated adjournment of the hearing dates is used as a means of oppressing the plaintiff. If a system of summary judgment in appropriate cases is introduced a substantial number of cases currently pending before the courts can be disposed off quickly. Speedy disposal of straight forward cases will give the courts a breathing space to concentrate on the complex cases.

However, the Act also provides that the Code of Civil Procedure will be observed. Given the dilatory manner in which the Code is currently applied this has rendered the six months time limit ineffective and meaningless. This is only one example where special provisions for quicker disposal of cases have been frustrated by the insistence that the Code of Civil Procedure be adhered to. Such legislative pot-holes must be avoided in case of future reforms.

The quality of procedural justice depends to a great extent upon the authorities who are given the responsibility to discharge it. However, following eight criteria should be generally observed in any legal system:

- i) the degree to which those authorities were motivated to be fair;
 - ii) judgement of their honesty;
 - iii) the degree to which the authorities followed ethical principles of conduct;
 - iv) the extent to which opportunities for representation were provided;
 - v) the quality of the decisions made;
 - vi) the opportunity for error correction;
 - vii) whether the authorities behaved in a biased fashion;
 - viii) the time taken to dispose particular disputes.
- The above discussion has mainly concentrated on the last of the above mentioned factors and the ways of shortening the time which is taken. Neither has this discussion been exhaustive. We are aware the we have discussed problems pertaining only to civil procedure while ignoring the criminal aspect of procedure. We are sure that there are further avenues of reform e.g. in the areas of legal aid and assistance to the poor and distressed people.

Courtesy: Tanjibul Alam, Barrister at Law.
We invite readers' reactions, opinions, reform proposals etc. on this aspect of procedural reform.

A Comparative Review

	The Prevention of Terrorism Ordinance 1992	The Proposed Nari, Shishu O Shantrash Shonkranta Aparadh (Bishesh Bidhan) Ain, 1998
Political Party	BNP	Bangladesh Awami League
Regarding Illegal Subscription	Collection of illegal subscription or help from any person or institution by any kind of intimidation or illegal force. Or collection of money or goods in the name of any other person in the same manner. Section 2(3) (Ka) (a)	Collection of illegal subscription or help from any person or institution by any kind of intimidation or illegal force. Or collection or trying to collection of money or goods in the name of any other person in the same manner. Section 13 (Ka)
Regarding Illegal Obstruction to Transportation	Obstruction of traffic on road, rail, water and air against the will of the driver in order to deviate his course. - Section 12(3) (Ka) (Aa)	Obstruction of traffic on road, rail, water and air against the will of the driver in order to deviate his course. or trying to obstruct traffic on road, rail, water and air against the will of the driver in order to deviate his course. -Section 13 (Kha)
Regarding mischief to vehicles	Doing mischief to any vehicles intentionally. 2(3) (Kha)	There is no such provision
Regarding mischief to Property	Intentionally breaking or... of the moveable or immovable property of the government or its subordinate organization, law enforcing agencies, or any company, firm, non governmental organization or moveable or immovable property of any individual	Intentionally setting fire on or burning, or breaking or attempt to break or by any destructive way any government, its subordinate or cooperative institution, or any high commission or embassy, foreign mission/office or moveable or immovable property of any individual or telephone establishment, electricity establishment
Regarding Hijacking	Hijacking or taking by force any money, ornaments, valuable goods or any other goods or vehicles from a person -Section 2 (3) (Gha)	Hijacking or trying to hijack money, ornaments, any other goods from any person or from the custody of any person -Section 13 (Gha)
Regarding Annoyance to Women	Annoying any girl, teenager, including any minor or adult woman in the roads, vehicles, educational institutions, or in any public place -Section 2(3) (Uma)	Annoying any woman other than the wife of the person accused of on telephone or by any other means in the roads, vehicles, educational institutions, in any public place, or house -Section 11
Regarding Disorderliness	Creating fearful situation, or terror or disorder or chaos in any place, house, shop, market, road, vehicle or any other institution, in a planned way or suddenly either individually or collectively Section 2(3) (Cha)	Creating or trying to create fearful situation or disorder individually or collectively in road, market, any public place, any institution including industrial one, vehicle or place of vehicle, living place, shop or any other place Section 13 (Uma)
Regarding Sale of Tender	Obstructing forcefully or unlawfully obstructing any person in the selling, receiving, submitting of tender -Section 2(3) (Cha)	Obstructing, pressurizing unlawfully either individually or collectively in the bidding, allotting or any other act relating to tender -Section 13 (Cha)
Punishment	Death Penalty or life imprisonment or rigorous imprisonment (which will not be more than 20 years and less than 5 years) along with fine.	Death Penalty or life imprisonment or rigorous imprisonment (which will not be more than 14 years and less than 7 years) along with fine.

It is evident from the above table that there is no fundamental difference between the Ordinance of 1992 and the proposed law. Rather it has inserted some provisions which have violated the norms and principles of Criminology. For example, the Act has not provided any yardstick to define and to prove the crime "attempt to be done". Obviously this gives enormous power in the hands of the Law Enforcing Agencies especially in the Police Administration. By the misuse of this power, an innocent person can be arrested and kept in prison for months without grant of bail.

Secondly, by bringing both the terms "attempt to commit a crime and "committing" a crime under the same umbrella and rendering the same punishment for both the offenses, is totally against the norms and principles of the Penal Code. (Section 307, 393, 511 Penal Code)

Thirdly, the means of determining offences for example, "pressuring, obstructing," [Section 13 (Cha)], "annoying or harassing" [Section 11], "show of intimidation or creation of disorderliness" [Section 13 (Uma)] are not logical and consistent with the norms and principles of Penology. Under these sections innocent people shall be oppressed.

Fourthly, the main criterion to award punishment for crime is to define crimes perfectly so that arbitrary application of penal power may be kept at the minimum level. But, here in this law we find the just opposite picture i.e., the definitions of the crimes are as vague as can be.

Courtesy: Legislative Advocacy and Participation of the Civil Society Project

Metropolitan

S M Hall former students' Eid reunion May 8

Salimullah Hall Prakton Chhatra Samity (Former S M Hall Old Boys' Association) will hold an Eid reunion at Ramna Chinese Restaurant on May 8 at 4 pm, says a press release.

The decision was taken at a meeting of the association held on April 6 in the city. Prof. Yeazuddin Ahmed, Chairman, University Grants Commission (UGC) presided.

The meeting also decided to hold a grand reunion of all old boys in November.

Interested former students have been requested to contact Azad Khan Nantoo or Iqbal Hossain Raza at Ramna Chinese and Thai Food Ltd, phone nos 9660199, 9664555.

Saudi help for economic development assured

Saudi Arabia has assured all possible help for the economic development of Bangladesh and expressed the hope that relations between Bangladesh and the Kingdom will improve further in the coming years, reports BSS.

The Saudi assurance came at a meeting between Foreign Minister Abdus Samad Azad and Crown Prince of Saudi Arabia Abdullah Bin Abdul Aziz at Al-Salam Palace in Jeddha. Azad told newsmen on arrival at Zia International Airport from Jeddha yesterday morning.

The Crown Prince reiterated that Saudi Arabia would widen the existing friendly relations with Bangladesh. He termed the Bangladeshis in Saudi Arabia as pious, hard-working and dedicated.

Protest rally held at Bandarban

A rally of tribal people was held at Bandarban yesterday to protest the acquisition of land for the proposed expansion of cantonments in the district, reports UNB.

Pahari Chhatra Parishad (PCP), Hill Women's Federation (HWF) and Pahari Gano Parishad (PGP) organised the rally in front of the local press club.

The speakers said the government has decided to acquire 183 acres of land in Sadar thana and another 9,560 acres in Ruma to expand the cantonments there.

They strongly protested the decision saying it goes against the spirit of the CHT peace accord.

Student leader Mongchao Ching presided over the rally, which was addressed, among others, by Jali Mong, Ucha Mong and Kaba Mong.



Prof Aminul Islam, Vice-Chancellor of National University recently inaugurated the introduction of honours courses in two subjects at the Chittagong Government Mohila College. Principal of the college Prof Fouzia Ally was also present.

What's on today . . .

Speech: US Permanent Representative to the UN Bill Richardson will deliver a speech on 'Making democracy work in the 21st century'. Venue: Bangladesh Institute of International and Strategic Studies (BISS), 1/46, Elephant Road. Time: 10 am.

Talk: A talk on 'legal aspects of Indo-Nepal relations' will be given by Dr Surya P Subedi, Lecturer, Law School, Hill University, UK. Venue: BISS auditorium, 1/46, Elephant Road. Time: 11:30 am.

Function: Muktokantho Abriti Academy has arranged a function marking *Chaitra Sankranti* 1404. Venue: 78/C, Indira Road. Time: 6 pm.

Film show: 'Nadir Num Madhumoti', a film based on the Liberation War by Tanvir Mokammel, will be screened on the occasion of *Pahela Bishakh*. Venue: Public Library auditorium, Shabagh. Time: 3 pm, 5 pm and 7 pm.

Meeting: A meeting of Mastarda Surya Sen Parishad will be held. Venue: BMA Bhaban (2nd floor). Time: 5:30 pm.

Club meeting: The weekly meeting of Rotary Club of Dhaka North will be held. Guest speaker: Bashirul Haque, Energy specialist, WB Resident Mission, Dhaka. Topic: 'Energy scenario in Bangladesh'. Venue: Sonargaon Hotel. Time: 6 pm.