

# FOCUS

## Law and Our Rights

Independence of Judiciary, Rather Independence of People and Law

# Towards Creating A Caring Society

by Barrister Omar Faruque

*The people are so volatile, credulous and undisciplined and where the top political leaders of the country agitate and lead the people to civil disobedience and allude to disorder and take to the street on slightest political disagreement, then what chance does the rule of law, or for that matter the Parliament and other democratic institutions have in this country.*

written constitution in Britain the British independence of judiciary is inviolable and immutable for their own need to keep the society at an even keel. There the strict adherence to the rule of law is fundamental to their democratic state policy.

There the executive and the legislative organs of the government are ever vigil and keen to assist and complement judiciary to administer justice and failure of which make them accountable in law. Their back-up forces of very efficient Crown Prosecution Service headed by the DPP (Directorate of Public Prosecution) and answerable to Parliament through the Attorney General, police and detectives, scientific bodies and forensic experts and all other relevant civil institutions are active round the clock to assist and enforce the judicial process and decrees at the instance of the executive organ of the government.

Globally this is called their freedom within law and it is preserved zealously by the or-

the last conservative government there had been some tension between the executive and the judiciary when Lord Taylor the Lord Chief Justice since deceased for the first time came in the open to speak about judiciary and then the then Lord Chancellor and the former Lord Chancellor Lord Halesham all spoke about this highly sensitive, subtle conceptual aspects of the independence of judiciary.

Since then judges are now speaking publicly to give their points of views albeit with extreme discretion and caution, all in the interest of the rule of law.

As opposed to this the concept of freedom in the East, say in Bangladesh, is merely conceptual and never institutionalised as "liberty within law." Hence moral values, ethical values and various religious values mould and manipulate the society and its total administrative structure which includes the administration of justice.

organs of the state i.e. the copy cat introduction of the executive, the legislature and the judiciary are very loudly featured in all these constitutions with separation guaranteed and yet the powerful forces with muscles in the country including the armed forces do tend to usurp all powers of the state to become dictatorial irrespective of whether the constitution has defined the separation of powers with the checks and balances between the different organs of the state or not.

Ours is a society which is by and large an oppressive society and never a caring society. The culture of oppression and intolerance starts at home, then to schools and colleges and then in every walk of life.

Again if the slogan mongers think by giving the Chief Justice the power to appoint the lower court judges and the magistrates to accomplish the judicial independence, it only points to their conceptual naiveté.

Of course all judicial ap-

ment, then what chance does the rule of law, or for that matter the Parliament and other democratic institutions have in this country.

Imagine where both the party in power and the parties in opposition hold their party political public meetings by building rostrum on the main thoroughfares of the metropolis totally blocking the highway and disrupting the civil amenities and creating noise pollution — what chance has the rule of law here.

Here all the institutions starting from the schools, colleges, government offices and even in the street everybody has the freedom of the jungle — no serious study, no positive work and no obedience to law. Everybody is above the law. Here everybody tries to show power and muscle and get away with even "murder". Here the culture to express 'regret' for wrongdoing and 'apology' or 'thanks giving' is unknown. Here education system has been held in ransom by the socio-political 'thugs and

merely on the basis of an FIR.

So imagine the plight of the judiciary in the context of the insanity of the society, going it alone further backward with a community of at least a sizeable proportion of ill educated lawyers without being helped at all by the other organs of the government and the people at large who are equally helpless and desperately crying for help from the arrogance, incompetence and inhumanity of the society.

The trend must be changed to bring about sanity to the society and for that the hearts and attitudes of the politicians of all sizes and shades as well as the organs of the government must be changed.

A culture of accountability in all aspects of public and private life in keeping with the spirit and the norms of 21st Century and thereafter must be brought about. The strict adherence to 'rule of law' through the long arms of law must be nurtured and helped.

Executives must be encouraged to honour and execute any recommendation, order and judgement of the Judiciary even if it is unpalatable to them when of course they can alter it by legislative enactments if need be later on.

It must also actively assist to make the Judiciary more efficient and fast. The prosecution service including detection must be overhauled and immediate legislative intervention/enactments or rules of the Supreme Court are warranted to streamline the judicial procedures on the question of finality of cases, on cracking down of vexatious litigants including accountability of lawyers; on brevity of case-preparation and to adopt other more efficient methods known elsewhere.

Constructive as opposed to erratic, harmful and irrational criticism of more important judicial decisions should be encouraged with an opportunity for the judges to reply by way of giving his legal explanation and thinking.

Let us make a start by making every organ of the government accountable to the public at large and lift their shrouds of secrecy.

Let there be more open government. Let all the ministries including the Ministry of Justice i.e. law ministry, be monitored on their performance on quarterly basis at least and make them accountable for any action/omission, misplanning or non-planning and for any miscarriages of justice. People must be educated and disciplined and motivated to obey law by showing its benefits. Only then will the independence of Judiciary in its real and objective sense be established in Bangladesh.

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## LAW WATCH

RAPE (1st January to 30th April, 1998)

Nature	Age 05	6-11	11-15	16-20	21-25	26-30	30+	Age Unknown	Total
Rape	11	47	22	15	6	1		5	117
Death after rape		1	2	2					5
Gang rape	1	13	25	32	11	6	7	28	123
Death after gang rape			2	4	1	1	1	2	11
Police rape		2	1	1				1	5
Nature of rape not mentioned			1	2		1		3	6
Total	12	62	53	55	18	9	8	49	267

Courtesy: Odhikar, A Coalition for Human Rights

## Lawscape

### Legal Victory Highlights War Crimes Against Women

by Sanen Marshall

IN A US civil court case, Bosnian Serb leader Radovan Karadzic who was sued for masterminding the rape-genocide of thousands of Bosnian women announced recently that he would not contest the suit any further.

Karadzic's decision follows three years of tedious wrangling in the court room where chief lawyer for the Bosnian women, Catherine MacKinnon, has fought for the women's case *pro bono*. The decision clears the way for an uncontested judgement on Karadzic for the crime of rape as part of genocide. Karadzic will not now be able to step onto US soil and faces arrest if he appears in that country. The legal provision through which the Bosnian women sued Karadzic may be a little errant, though. For it allows US courts to pass judgement and punish a foreign party for injuries inflicted on another foreign party in violation of international law. This legal provision carries with it the assumption that in this case, as in other such cases, the US is an impartial party to all conflicts and has no geo-political interests in them.

Nevertheless, what the 3-year long legal proceedings reveal is that the Bosnian women are determined to be vindicated for their terrible sufferings through any channel of redress that is open to them. The legal victory of the Bosnian women is therefore significant for a number of reasons.

One, it is the victims of war themselves and not their government who have brought the case of war crimes against the leadership of the aggressor state. Two, the case itself emphasises that women are a specific group within humanity that suffer some of the worst atrocities in war. Three, the Bosnian women's triumph comes at a crucial time when similar claims and suits are being taken up by other groups to obtain reparations for wartime atrocities.

There have been over 200 armed conflicts since World War II and a number of them have been genocidal. The Bosnian women have set a great example for the victims of modern warfare by showing that they are able to wrest a measure of justice for themselves by challenging the highest leadership of the transgressor state. Though the victory is more symbolic than substantive — for Karadzic cannot be forced to appear on US soil to

face punishment — it represents a psychological triumph for the women against the horror of rape and torture in wartime. Such grievous suffering almost always leave human beings emotionally, if not physically, scarred for the rest of their lives. For this reason it is encouraging to see civilians determined to hold wayward armies and their chieftains responsible for their crimes and claim compensation for the human catastrophe inflicted. It is one of a number of ways to forever remind the transgressor of his crimes against humanity and to forewarn other military powers against taking the shameful path of victimisation of civilians during war.

It is not good enough that such crimes are clearly denounced in the international laws on warfare. Sometimes the victims have to actually bring forward the gory reality of war crimes to the face of the aggressor and for all the world to see. Such is the courage and determination of the Bosnian women. In their heroic struggle, they had the aid of two non-governmental organisations based in Malaysia — the Bosnian Action Front and the Malaysian Sociological Research Institute — which together contributed about US\$ 85,000 to finance the cost of bringing a number of rape victims to testify at the court hearings.

The testimonies of these victims serve to highlight that women in particular, though unarmed and non-combatant, bear the brunt of military onslaughts. The Bosnian war, more than any other, shows just why dreadful crimes, especially the crime of rape, are committed against women. Firstly, the atrocities help to depopulate the conquered territory and surrounding areas of the enemy's people. Rape in all its savagery instils terror in the non-combatant civilian population among whom many are women. Terror within the civilian population and fear of such savagery during the Bosnian war assisted the Serbs in ethnic cleansing, thus establishing a firm foothold in newly-won territories. Secondly, raping women of the enemy community is aimed at destroying the community's identity. The horrific treatment of the Bosnian women serves as a method of dehumanisation. Humiliation and torture are perpetrated to a point where the victim herself is treated with total contempt devoid of any human feeling. Her trauma becomes the trauma of her community. Her honour is violated as a way of violating the honour of her community. The obsession of the Serbs with destroying the identity of the Bosnian Muslims, in particular, found its expression in more than just rape. The Serbs often held the Bosnian women who they raped captive until their pregnancies were too far advanced for abortion — so that 'Serbs' may grow in the wombs of the women and be born into the heart of the Bosnian Muslim community. Thirdly, the rape of women creates an unbridgeable chasm between the attacking army and the assailed community. Since the attacker does not have the slightest feeling for the victim, he can carry out war in the most unrestrained fashion to obtain victory at all costs, unhampered by humanitarian concerns. It is true that the Bosnian war is an extreme example of the persecution of women, but such crimes against women do tend to occur whenever armed conflict breaks out.

This is why the Bosnian women are not alone today in their demand for justice for the crimes committed during war. Their counterparts, the 'comfort women' of South Korea and the victims of the 'Rape of Nanking' in China, are suing the Japanese government for rape and sexual slavery in connection with the Second World War. In the case of the former, compensation has already been agreed to but the amount of money and whether it is the Japanese government or Japanese private foundations which should compensate the women, is still under dispute. For the latter, a case has already been filed in Japan and will probably take several years to resolve. Regardless of the final outcome, the efforts of these women who are the victims of war have served to highlight a moral position that is severely critical of the conduct of the military in wartime. Thanks to their effort and the efforts of compassionate individuals, organisations and governments who have supported them, the ravages of the military upon the civilian population are coming under increasing condemnation.

The crimes of the military, like rape and torture of women, whether in bilateral armed conflict or in civil war, should never be tolerated as "just one of the things that happens". Realising the horror of this war crime, every human being, whether man or woman, regardless of race and religion, should empathise with the struggle of the victims and condemn the cruelty of the aggressors. Governments and international humanitarian organisations should always be alert to the fact that when the situation on the ground becomes unstable and the all-male military moves in, the potential for the persecution of women is tremendous. They should be prepared to intervene to prevent this particular kind of carnage. Today it is the women in far away Bosnia, but no country or community is safe forever from the scourge of war.

mentally competing forms of national, regional, ethnic, or religious identities; their ability to tolerate and work together with others who are different from themselves; their desire to participate in the political process in order to promote the public good and hold political authorities accountable; their willingness to show self-restraint and exercise personal responsibility in their economic demands and in personal choices which affect their health and environment. Thus, a theory of citizenship should focus on the identity and conduct of the individual citizen, including their responsibilities, loyalties, and roles and participation in that community.

### Concluding Remark

As the High Court Division decides the fate of the writ petition and interprets Article 66 of the Constitution, the meaning of citizenship should encompass all other elements, recognise the changing nature of the concept, that an individual has multiple identity in a modern multi-ethnic and multi-cultural society. In a global society, it is very much possible for a person to be an American as well as an Irish, or for a Bangladeshi to be British, an Arabic speaking Algerian to be a French, or a Turkish Muslim to be a German, thus, a person's identity cuts across State boundaries as one plays various effective roles. The institutions of the society should acknowledge and facilitate this reality.

Also, any denial of exercise of political rights by a Bangladeshi who lawfully acquired a foreign citizenship, both under Bangladesh and the foreign country, will hit Constitution's more fundamental equality provisions, ensuring equalities between the citizen of Bangladesh.

In fine, it is inconceivable that first or second generation Bangladeshis with foreign citizenship would face discrimination, should they opt for political life in Bangladesh. The oath of allegiance of a citizen, however significant, remains merely a declaration; it is the commitment to the country that should matter most.

The writer is the President of the Centre for Genocide Studies, Brussels, Belgium.

## Divided Loyalties: Members of Parliament and Foreign Citizenship

by Ahmed Ziauddin

*In fine, it is inconceivable that first or second generation Bangladeshis with foreign citizenship would face discrimination, should they opt for political life in Bangladesh. The oath of allegiance of a citizen, however significant, remains merely a declaration; it is the commitment to the country that should matter most.*

A Division Bench of the High Court Division of the Supreme Court of Bangladesh has recently issued a "rule nisi" upon the State Minister for Foreign Affairs, Mr. Abul Hasan Chowdhury Kaiser, asking him to explain on what grounds he was continuing as Member of Parliament (MP).

The High Court issued the rule in a writ petition filed by one Md. Abdul Halim challenging the Parliament membership of the State Minister Mr. Chowdhury on the grounds of his British citizenship and receiving of a British passport in 1995.

The petitioner relied on Article 66 of Bangladesh Constitution which enumerates provisions for "Qualifications and disqualifications for election to Parliament". Sub-Article (1) of Article 66 declares that "A person shall, subject to the provisions of clause (2), be qualified to be elected as, and to be, a member of Parliament if he is a citizen of Bangladesh and has attained the age of twenty-five years". Clause (2) accordingly describes the disqualifications, namely, "A person shall be disqualified for election as, or for being, a member of Parliament who: (a) is declared by a competent court to be of unsound mind; (b) is an undischarged insolvent; (c) acquires the citizenship of, or affirms or acknowledges allegiances to, a foreign state; (d) has been, on conviction for a criminal offence involving moral turpitude, sentenced to imprisonment for a term of not less than two years, unless a period of five years has elapsed since his release; (e) holds any office of profit in the service of the Republic other than an office which is declared by law not to disqualify its holders; (f) is disqualified for such election by or under any law".

For the purpose of this writ petition Article 66 (1) and (2)(c) are more relevant, that to be a Member of Parliament, a person must be a citizen of Bangladesh and shall be disqualified for election, or for being a Member of Parliament if he acquires the citizenship of a foreign country.

According to various press reports, one opposition Member of Parliament having foreign citizenship allegedly received

letter from the Prime Minister's Office back in 1996 about his citizenship, whereas, the ruling party Members of Parliament with more than one citizenship remained beyond scrutiny.

It has been reported that at least four Members of Parliament have foreign citizenship; they are, Dr. Mohammad Selim, Mr. Syed Ashrafur Islam and Mr. Abul Hasan Chowdhury of Awami League and Mr. A N M Ehsanul Haq Milon of Bangladesh Nationalist Party.

Though politics, of party variety form, may have been immediate motivation of the petitioner to raise the issue, the matters are, nevertheless, questions of law and interpretations of Bangladesh Constitution.

In fact, such questions were not new. During General Ershad's period, he appointed one expatriate Bangladeshi British citizen Mr. Tozammel Haq, also known as Tony Haq, as Bangladesh Ambassador to France. Mr. Haq was awarded MBE by the British Queen for his contribution in education in 1987. The French government raised questions about his British citizenship and to represent Bangladesh. However, in the end, the French government accepted Mr. Haq's credentials.

**Petitioner's Locus Standi**  
The first question the High Court Division is likely to address is the status of the applicant, Mr. Md. Abdul Halim. He claims to be a voter of Modhupur within the Modhupur constituency under Tangail district, the constituency of Mr. Abul Hasan Chowdhury. Thus, it can be argued that the petitioner has a rightful claim in seeking to examine factors of disqualification of his constituency MP, since, his right to representation by a duly elected MP may have been jeopardised.

### Dual Citizenship

Since 1978, with the change of citizenship law, a Bangla-

deshi can acquire citizenship of foreign countries "specified" in law. Prior to that, Bangladesh citizens could not obtain citizenship of another country, obviously, without losing the citizenship of Bangladesh. Thus, the amendment of citizenship law in 1978, which allows acquiring foreign citizenship by a Bangladeshi, apparently contradicts Article 66 of the Constitution, if the person chooses to exercise his right to be elected as a Member of Parliament.

The author of lone treatise on Bangladesh Constitution, "Constitutional Law of Bangladesh", Mr. Mahmudul Islam writes that, "a Bangladeshi acquiring citizenship of such specified State shall be disqualified to be or continue as member of Parliament because the disqualification is not predicated upon loss of citizenship, but on acquisition of citizenship and as such a person acquiring the citizenship of a foreign State shall, whether or not he loses the citizenship of Bangladesh thereby, incur the disqualification."

Mr. Islam also argues, "acquisition of citizenship of a foreign State involves affirmation or acknowledgment of allegiance to a foreign State and a person affirming or acknowledging allegiance to a foreign State cannot become or continue as a member of Parliament." According to the author, the reasons for such disqualifications are clear, that "a person who is to discharge the high duty of a member of Parliament must have allegiance only to Bangladesh and the disqualification is not predicated upon loss of citizenship, but on acquisition of citizenship and as such a person acquiring the citizenship of a foreign State shall, whether or not he loses the citizenship of Bangladesh thereby, incur the disqualification."

**What is Citizenship?**  
The concept of citizenship has undergone enormous changes because of several factors; migration, immigration and globalisation. Webster's New Collegiate Dictionary provides the following definition of citizenship: "citizenship means the status of being a citizen; the quality of an individual's response to membership in a community". Citizenship however differs from nationality. Nationality has ramifications under international law. In other words, nationality determines the civil rights of a person, natural or artificial, particularly with reference to international law, but citizenship is intimately connected with civic rights under the municipal law and essentially a legal concept.

### Citizenship of Convenience

Acquisition of foreign citizenship by a citizen of Bangladesh was allowed out of recognition migration of scores of Bangladeshis abroad. Bangladeshis began migrating in large numbers mainly after independence for various reasons. Bangladeshis migrants settled in countries around the world and started contributing to the host as well as Bangladesh economy. Some acquired citizenship of the new adopted countries to make life easier. Also, children of the migrant workers born in the new country, on occasions, were became citizen because of birth or by operation of law. In this sense, acquiring of foreign citizenship, specially by the first generation Bangladeshis, could be described as citizenship of convenience. However, acquiring of citizenship usually entails some sort of oath of allegiance to the adopted country and depending on the country, requires formal abandonment of other or root citizenship. An immigrant thus may suffer from conflict of loyalties.

### Differentiated Citizenship and Multiple Identities

If one extends the concept of citizenship from a legal to a social science perspective, it makes much more sense. Citizenship is nothing but community membership, specially in a multi-ethnic and multi-cultural society, where citizenship for citizens are their sense of identity and how they view po-

points should necessarily be done by or in consultation with the Chief Justice of the country which can be achieved just by an order of the Supreme Court or by minor amendment of procedure codes of the country.

But will that alone cure the malaise existing in all the organs of the government, the inefficient/corrupt magistrates, insipid, corrupt and oppressive police force, incompetent prosecution service and the inordinate delay in disposing of the pending cases without any accountability whatsoever.

In fact the prime duty of the government is to preserve the law and order and to protect the life and limb of the people in an orderly manner through the rule of law. Again it points to a democratic, fair and tolerant culture.

But look at the Bangladesh society. The people are so volatile, credulous and undisciplined and where the top political leaders of the country agitate and lead the people to civil disobedience and allude to disorder and take to the street on slightest political disagreement, then what chance does the rule of law, or for that matter the Parliament and other democratic institutions have in this country.