

## 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.**

THESE days together with 'thousand and one' other slogans we also hear the slogan for "Independence of Judiciary."

But if you ask the very people who are making these slogans, what do they mean by it, you will only encounter a blank face for they do not know what they are shouting for, or perhaps they believe that the strength of their loud speaker will bring about their brand of independence of Judiciary.

We do not hear though the slogans like "free law and the society from the shackles of corruption and incompetence."

Independence of Judiciary is a conceptual state of affairs which connotes democracy a constitution with Judiciary as one of the 3 organs of the government with guaranteed Human Rights and a Judicial System to enforce them and the codes of law to administer justice i.e. the rule of law.

Hence it will somewhat bewilder any constitutional expert as to what do they really mean by this when the Constitution of Bangladesh enshrines all the prerequisites aforesaid of its judicial independence.

If they think that independence of judiciary will mean its total separation from the other organs of the government i.e. the Executive and the Legislature then they do not understand how a democratic government is run through checks and balances. It will then be suggesting severance of one part of the body from the whole when in reality the 3 organs must be working complementing each other.

Independence of judiciary is a western concept based on their socio-political ideals of freedom. Again the concept of freedom there was borne out of economic freedom which gave rise to individualism for whose protection there came into being the institution of democracy with all its different organs of administration.

It is essentially a secular institution of a secular society. Here Judiciary is more complementary to the supportive organs of the government.

It is not cosmetic but real and its growth is monolithic and solidly based on the concept of rule of law and administration of justice free of any fear and interference by other organs of the government.

Here the judicial pronouncements and orders are obediently supported by the ministerial organs i.e. the executive, and the legislative body makes law for the judiciary to administer it as per the law or change it by enactments.

Now the extent of interference or non-interference in the administration of justice varies from society to society depending on its attitude, culture, democratic tradition, economic freedom and socio-political stability and discipline.

Thus even though there is no

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.

Then 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 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 organs of the state i.e. the judiciary, the legislature and the executive. 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.

Of course all judicial ap-

tive 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 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 naivete. 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

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

**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 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.**

gains of the government, and aided by their responsible press and media and many other human and voluntary bodies.

There the Lord Chancellor (i.e. more akin to Justice Minister), who must be a Barrister, is also the President of the House of Lords which partakes his functions in judicial administrations as well as of the legislator. He also appoints the judges in consultation with the Lord Chief Justice who is the head of the Administration of Criminal Justice and perhaps with the Master of the Rolls, the highest civil judge.

Therefore his role is complementary to each other. There if the executives try to interfere with Judiciary then the Executive is put in place in as much as the judiciary is put in place if the judges try to usurp the ministerial duties in the garb of judicial process by the legislative enactments and constructive criticism by the alert press, jurists and other social institutions.

Nevertheless freedom within law needs to be constantly ensured even in the UK, the mother of all modern democracies.

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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.

These values whatever be their virtues are overbearing and intolerant of other socio-political values and institutions. Liberty within law and individualism have no chance here in such dogmatic societies.

Although Western concepts have been tried to introduce here and constant "lip service" is given through Western education and political transformations secularism was never practised here in earnest except for a few spans of history, and economic reorganisations and transformation never took place to give rise to economic freedom and individualism through freedom of thought, action and tradition that we inherited from the UK.

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.

The man-made administra-

tion

This show of power tends to make some judges equally ubiquitous like the executives to give judgement in unworthy cases. Thus it is heard, as for example, that judges often grant interlocutory injunctions to stop the ongoing development projects without considering the question of the balance of convenience and without any undertaking as to damages.

The judges also tend to assume the ministerial responsibilities and executive duties and any constructive criticism is frowned upon by the equally arrogant and ubiquitous judiciary by issuing "suo moto" rule for contempt of court.

For the administration of criminal justice the judges also act as the court of morals when deciding the criminal cases. The inefficient and corrupt police and the prosecution service can hardly ever prove a case "beyond any reasonable doubt" which is the standard of proof of the criminal cases.

Yet the judges do convict the accused on flimsy and tenuous circumstantial evidence. I know of cases where convictions were given and upheld

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 and for any miscarriages of justice. People must be educated 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)										Age	Total
Nature	0-6	6-11	11-15	16-20	21-25	26-30	30+	Age	Unknown	Total	
Rape	11	47	22	15	6	1			15	117	
Death after rape		1	2	2						5	
Gang rape	1	13	25	32	11	6	7	28	123		
Death after gang			2	4	1	1	1	2	11		
Police rape		2	1	1					1	5	
Nature of rape not mentioned			1	2		1	3	3	6		
Total	12	62	53	55	18	9	8	49	267		

Courtesy: Odhikar, A Coalition for Human Rights

## Law Scape

## Legal Victory Highlights War Crimes Against Women

by Sanan Marshall

**I**N 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 erratic, though.

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 witness it.

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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 instills 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