

# FOCUS

## Law and Our Rights

### Asma: A Question of Fate

by Sheikh Nasir Ahmed and Md Tipu Sultan

ZAHURA Begum is the mother of Asma (18) a patient at Dhaka Medical College Hospital (DMCH) who has been struggling for her life. Zahura Begum has claimed that doctors of DMCH had stolen both of Asma's kidneys while operating upon her. A news item on this effect was published on August 30, in Bangla Bazaar Patrika. Only a day after this report, the surgeons stated that since both of Asma's kidneys were damaged, they had to remove the one more far gone, and therefore put the other on dialysis. Zahura Begum's claim may create a climate of panic and anxiety among other patient. Again, it is highly embarrassing if doctors who perform negligently in their duties try to cover up their misdeeds.

On August 9, Asma was admitted under the supervision of Professor Mahmuda Khatun, of the Gynecological Department (Ward No. 18, Bed No 4). A report of that same day, by former Clinical Sonologist, Nuclear Medical Centre, Dhaka Medical College, Dr Mohiuddin Ahmad, reads as follows:

(i) A Case of about 22 weeks of viable pregnancy.

(ii) Large soft tissue mass in abdomen (R ovarian).

On August 11, at 11 a.m Professor Mahmuda Khatun and Dr Shah Alam operated upon Asma (through laparotomy) to determine whether there were any other abdominal complications in order to remove the right ovarian tumor according to the report. In the course of the operation, Asma's right kidney was cut off and removed, due to hydro nephrosis. Professor

Mahmuda Khatun's written report to the heads of the urology and nephrology departments records that removal of the right kidney was due to hydro nephrosis. On August 13, while undergoing the DMSA test (to determine the location/positioning of the kidney) at the Nuclear Medical Centre, no kidney in Asma's body could be found. On August 19, Professor Mahmuda Khatun wrote to the Professors of the urology and

be made to survive without a kidney or on damaged kidneys: (a) haemodialysis (thrice a week, until death) (b) CAPD (every six hours, until death) (c) Kidney transplant

Of these, the first two processes cost up to Tk 25 to 30 thousand a month, while the last could cost a minimum of Tk 2 lakh. In each of these cases, the patients' life is rendered very painful and difficult.



Courtesy: Weekly 2000

nephrology departments, seeking advise on necessary measures to be taken. Asma was advised to be put on hemodialysis. On August 23, Asma's mother signed a bond stating that she agreed for her daughter to be put on haemodialysis through femoral catheter.

Without a kidney, it is obvious to see how a person's life could hang in the balance between life and death. There are about three ways a person could

After what has occurred in Asma's life, some obvious questions arise:

1. Does hydro nephrosis (huge cystic mass) by itself necessitate removal of kidney?
2. Could it have happened that the ureter was accidentally severed while operating on the ovarian tumor? Reattachment of the severed part is an extremely difficult process. Even if the part is reattached, uncontrolled urinary discharge is a

certainty. Perhaps in order to avoid this series of complications the surgeons had removed the kidney. We know that it is possible for people to survive on one good kidney. But what will happen to Asma, who now has no kidney at all?

3. Dhaka Medical College Hospital has a urology and nephrology department where there are several experts on the subject. Can a professor of gynecology remove a kidney without the expert opinion of such doctors?

4. Was it not only logical and medically imperative to check the position and condition of one kidney before proceeding to remove the other?

Should we place any credibility on the statement of the Doctors (according to a news item in the Bhorer Kagoj) that "the patient is uneducated and uninformed and therefore easily vulnerable to wrong information being spread by a vicious circle." Or should we rather focus on the pathetic fate of a patient who has suffered from her over educated doctor's negligence? Who is going to take responsibility for Asma's present condition? What steps should we now take? Who will bear responsibility for the life of Asma who is the eldest among is in her family, who has lost her father to death, and a husband who left her when things got rough? Will Asma get lost in the labyrinth of all these questions?

The writers work for Investigation Unit of Ain O Salish Kendra. Translated from Bangla by Faustina Pereira, member, ASK.

### The Magistracy in Bangladesh

by Fazlul Haque Shabuz

It is after the British rule over there had been a necessity and a feeling among the Judges, Lawyers and conscious litigants to have a judiciary independent and free from executive clutches in the independent homeland. The system in the dispensation of justice in the sub-continent was a course introduced by British rulers as it would suit their interest as occupying power and it is indeed they who framed all laws civil and criminal which are now being followed by us with no fundamental amendments. Litigants in general having won't in the procedural system practiced do not realise any reason why there should be a change in the terms and conditions of the services of the persons who are engaged by the State in dispensing justice. Neither it is a matter for them to raise any objection against the Judge when the judgment is against them, rather, it is the judgment which is to be objected to in appeal while the law provides for such appeal. And for this the question as to independence and separation of judiciary was not triggered by the state power. The victims of injustices suffered unnoticed.

During Pakistan days the new entrants in the judicial arena used to find the Magistrates busy with distribution of relief goods, road, cement, clothes etc. to the applicants and also for sometime sitting with judicial files and sometimes deferring the dates for disposal of cases. And there after certain lawyers,

Magistrates were appointed for dealing with the dispensation of justice only but with no prospects of promotion in judicial hierarchy. And thereby it was understood that some sort of separation of the persons involved in necessary dispensing justice in the criminal cases from persons dealing in administrative and other matters under the administrative control of District Magistrate or Deputy Commissioners and the Magistrate dealing in judicial matters be brought under the District and Sessions Judge. And for the purpose thereof an attempt was made that such Magistrates writing judgments have to obtain remarks on their judgments from the Sessions Judges and such Magistrates used to obtain that mechanically.

After the independence of Bangladesh the people here having independent spirits conscious of the rights fundamental and statutory having a constitution committed to the practice of democracy have been urging upon the question of independence and separation of judiciary from the executive through meetings, seminars and through the programme of almost all the political parties.

But the concept what independence, how independence, what sort of separation from the executive, how such separation possible etc. remained unspelled though the political party in opposition used to urge upon the party in position to materialise such concept through amendment of the constitution of the country. It would not be out of place to remember some news of an arrest of an Editor of "Daily Banglabazar Patrika" in connection with a criminal case for defamation and with some writings in the newspapers following such arrest. It was like that, Mr Matur Rahman Chowdhury, the editor having heard of the warrant went to surrender himself before the court of CMM Dhaka on Thursday and he filed an application for his bail. The offence of defamation being bailable, he was hopeful to get a favourable order. But none of the Magistrate on that Thursday got up to court date to hear his application of surrender and bail. It was in the newspaper that there were also requests from some learned lawyers to the concerned learned Magistrate to hear the applications but of no avail.

On Thursday after dusk while the editor was working in his office he was arrested by police and then was enlarged on bail by a Magistrate working on Friday and then again it was regularised on Saturday. There were grievance from conscious quarters expressed in the writings why the learned Magistrate did not hear the application on Thursday and how did things happen and at the best of whom. It was blatant that from the mechanism of executive power the learned Magistrate discharged the judicial function was not allowed to take the judicial seat but there was no ex-

planation, no respond from any quarter as to why the learned Magistrate did not take the judicial seat on that Thursday nor there was any action from the high ups of the executive against the learned Magistrate in spite of the plethora of anguish and protests. Nowadays the increasing number of anticipatory bail cases rather the pre-arrest bail cases brought before the highest judicial authority the Hon'ble High Court Division of the Supreme Court by the citizens are other examples to understand necessity of the separation of judiciary from the executive and the independence thereof. All the application of pre-arrest bail contain common averments that the petitioner anticipates he may not get fair justice in the matter of bail if he surrenders before the learned Magistrate. Such anticipation does not emerge from lack of confidence upon the competency, prudence, jurisdiction, sense of fair justice of the learned Magistrate but from the wanton exercise of powers by the Magistrates not regulated controlled and supervised by the higher judicial authority, sometime rather aided by higher administrative authority and political authority.

This is how a necessity of separation of subordinate judiciary dealing in criminal matters is felt by the concerned.

The writer is an advocate of the Supreme Court of Bangladesh.

### January 1997 to July 1998 Death by Doctor's Negligence or Wrong Treatment

Sl No.	Patients name	Place or concerned hospital	Cause of death	Accused doctor	Date of death	Source
1.	Abdul Halim (26)	Dhaka Medical College Hospital	Negligence	Dr. Naiz Dr. Mizan	26.3.97	JK, 29.3.97
2.	Asaduzzaman	Niribili Clinic Mymensing	Negligence	D. Kajol Kanti, Dr. Ilias & Dr MZ Tuhin	9.5.97	BB, 11.5.97
3.	Amar Ali (55)	Jessore General Hospital	Negligence	Not Known		BK, 4.8.97
4.	Aukaddar Chowdhury	Poli clinic	Wrong treatment	Dr. Aziz Uddin	8.8.97	JK, 19.8.97
5.	15 months boy		Wrong treatment	Dr. B. Karmaker		JK, 31.8.97
6.	4 Patient	Pabna Mental clinic	Food poisoning			AK, 28.11.97
7.	Azim (25)	Thana Sadar hospital, Takerhut, Madaripur	Negligence	Dr. Mutaleb Mia	8.1.98	IF, 11.1.98
8.	Sathi (15 months)	Kalapara Patuakhali	Wrong treatment	Dr. Belaet Hossain		BB, 15.2.98
9.	Rahima Khatun (32 & her unborn child)	Sathkhira Adhuni hospital	Negligence	Dr. Iqbal Hossain	18.1.98	BK, 20.1.98
10.	Dulali Akhter	PG hospital, Dhaka	Wrong treatment	Duty doctor	20.1.98	JK, 21.1.98
11.	Jannatunnesa (30)	Adamdighi thana health centre, Naogaon	Negligence		15.2.98	SB, 16.2.98
12.	Julekha (22)	Agargaon, Dhaka	Wrong treatment	A local quake	17.2.98	BB, 20.2.98
13.	Tashkia (1 month)	Dhaka Children Hospital, Dhaka	Negligence	Dr. Salahuddin	23.2.98	IF, 25.2.98
14.	Hafia Khatun (35)	Kaira, Khulna	Wrong treatment	A lady Kabiraj	17.2.98	AK, 11.3.98
15.	Jamal Hossain	Harun pharmacy, Begumganj	Wrong treatment	Rabin Chandra De. (fraud)	11.3.98	AK, 12.3.98
16.	Priya (3)	Sallimullah Medical College Hospital, Dhaka	Negligence		22.3.98	BB, 23.3.98
17.	Mukul (15) & her unborn child	Kalapara, Patuakhali	Negligence	Local Kader Mia & Mobarok Mia	4.4.98	Mk, 12.4.98
18.	Hossain Munishi (50)	An unknown doctor's chamber, Takerhut, Madaripur	Wrong treatment	Badol, compounder of the doctor	21.5.98	IF, 6.6.98
19.	Mithun (2 months)	DMCH, Dhaka	negligence	Prof. Samsunnahar	11.6.98	BB, 12.6.98
20.	Abdul Manaf (46)	Chatock, Sylhet	Wrong treatment	Humayun Kabir, a local quake	7.6.98	SB, 16.6.98
21.	Shahanara Ruby	Nowgaon nursing home, Nowgaon	Negligence	Dr. Maleka Khatun	7.6.98	SB, 20.6.98
22.	Jafor Wazedul Sarker Arzu (48)	Rangpur Medical College Hospital, Rangpur	Negligence		23.6.98	SB, 24.6.98
23.	New born child	Dhaka Medical College Hospital, Dhaka	Wrong treatment	Dr. Akhil Ranjan Biswas, A doctor of local clinic of Nowgaon Sadar.	14.6.98	BB, 3.7.98
24.	Abdul Majid (22)	Adamdighi Thana Health Centre, Bogra	Negligence	Duty doctor	6.7.98	Mk, 10.7.98
25.	Rupashi Rani (25)	Chayan Clinic, Kaliganj, Jhainada	Negligence	Dr. Nurunnabi	2.7.98	BB, 12.7.98
26.	Amena Begum (45)	Jamalpur Sadar thana Health Complex, Jamalpur	Negligence	Duty doctor	7.7.98	BB, 7.8.98
27.	Samapti (12)	Sadar, Bogra	Wrong treatment	Not Known	5.8.98	IF, 14.8.98

Note: JK = Janakantha, BB= Bangla Bazar, BK=Bhorer Kagoj, AK = Ajker Kagoj MK = Mukthakantha, IF = Ittefaq, SB=Sanbad  
Source: Universal Blood Donor Chain, a blood donors coalition

### The Ombudsman Act, 1980

## A Critical Review

by A H Monjurul Kabir

WE have taken stock of governance in the last 27 years. In theory the democratic rights and aspirations of the people are embodied in the constitution but in practice they are thwarted by a long history of colonial and independent non-democracy. Unless there is an urgent focused and clearly scheduled cultural shift in both bureaucratic thinking and political doing, Bangladesh will neither be able to avail economic development assistance nor be able to vindicate its independence as the means to economic success because the operative environment is altering drastically.

With this note of caution, it is necessary to continue to do whatever is possible to control the overt and covert powers of bureaucracy and to make it accountable to the people. The efforts to check the excess and inadequacy of bureaucracy have to be many-sided in view of its widespread ramifications. The growing interest in Bangladesh in the institution of Ombudsman, which is essentially the citizen's watchdog should, therefore, be welcome. And this can be an effective way to turn the concept of good governance from dream to our perspective.

#### Ombudsman: Perspective Bangladesh

It shall be a fundamental aim of the state to realise through the democratic process a socialist society, free from exploitation — a society in which the rule of law, funda-

force on such date as the government may, by notification in the official gazette, decide.

#### A Glimpse of the Act

The salient provisions of the Act are:

- (1) There shall be an Ombudsman who shall be appointed by the President on the recommendation of the Parliament. [Sec. 3 (10)]
- (2) Parliament shall recommend for appointment a person of known legal or administrative ability and conspicuous integrity. [Sec. 2]
- (3) The Ombudsman shall hold office for a term of three years and shall be eligible for reappointment for one further term. [Sec. 4 (1)]
- (4) The Ombudsman shall not be removed from his office except by an order of the President passed pursuant to a resolution of Parliament supported by a majority of not less than two-thirds of the total number of members of the Parliament on the ground of proved misconduct or physical incapacity and, in that case, the Ombudsman shall be given a reasonable opportunity of being heard in person. [Sec. 4 (2)]
- (5) The remuneration, privileges and other conditions of service of the Ombudsman shall be same as are admissible or applicable to a judge of the Appellate Division of the Supreme Court of Bangladesh. [Sec. 3(5)]
- (6) The Ombudsman may investigate any action taken by a ministry, a statutory public authority, or a public officer in a case where there is a complaint in respect of such person who

report, intimate to the Ombudsman the action taken or proposed to be taken on the basis of his report. If the Ombudsman is satisfied with the action taken or proposed to be taken he shall close the case but where he is not satisfied and if he considers that the case so serves, he may make a special report to the President. [Sec. 9 (9)]

- (11) The Ombudsman shall prepare an annual report concerning his discharge of functions and submit it to the President who shall cause it, together with an explanatory memorandum to be laid before Parliament. [Sec. 9 (6)]
- (12) If, during any investigation, the Ombudsman finds any defect in any law, he may report such defect to the government and recommend such reform of the law as, in his opinion, will remove such defect. [Sec. 9 (7)]
- (13) The Ombudsman may appoint officers and other employees to assist him in the discharge of his functions. The categories of officers and other employees who may be appointed by the Ombudsman and their terms and conditions of service shall be such as may be prescribed after consultation with the Ombudsman. The Ombudsman may with previous sanction of the government, utilise the services of any officer, employees or agency of the Government, if such services are required by him for the purpose of discharging his functions. [Sec. 10 (1)]

#### Some Observations about the Act

In a country like Bangladesh where the instances of such influences are said to be rampant. The Government should allow the Ombudsman the right to demand information hedged by the rules of secrecy about official manners. Secretary, who himself is an integral part of the bureaucracy, provision should be reflected in the Act. In that case the word "or" should be replaced by the word "and". Besides the term conspicuous integrity should be defined precisely and may include several elements.

According to [Sec. 8 (5)] of the Act, no person shall be required to furnish any such information or answer any such information or answer any such question or produce so much of any documents as might prejudice the security or defence or international relations of Bangladesh, of the council of ministers or any committee thereof and for the purposes stated here a certificate issued by a Secretary to the Government certifying that any information or answer or portion of a document is of such nature as mentioned earlier shall be conclusive and binding.

The authority given to the secretary seems to be ridiculous and inconsistent with the very concept of Ombudsman, who is supposed to protect the citizens from the excesses of bureaucracy. There is every possibility of the Secretary to the Government of being influenced by internal and external factors such as his own interest or political pressure in exercising this authority in a country like Bangladesh where the instances of such influences are said to be rampant. The Government should allow the Ombudsman the right to demand information hedged by the rules of secrecy about official manners. Secretary, who himself is an integral part of the bureaucracy,

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mental human rights and freedom, equality and justice, political, economic and social, will be secured for all citizens. Preamble of the constitution of the People's Republic of Bangladesh.

Article 77 of the Constitution of Bangladesh provides that Parliament may by law establish the office of Ombudsman. Once established the Ombudsman shall have the power to investigate any action taken by a ministry, a public officer or a statutory authority and such other powers and functions as may be prescribed by Parliament. The Ombudsman shall prepare an annual report concerning the discharge of his functions and such report shall be laid before Parliament.

Being convinced by the fact that an institution like the Ombudsman would be essential for safeguarding the interests and rights of the public in Bangladesh from maladministration or administrative excesses, our constitution makers have made such provision for it in the constitution. But up to 1980, no definite attempt was made to establish the office of Ombudsman. In 1980, at the initiative taken by the then government, the Jatiya Sangshad (House of the Nation) passed the necessary Act providing for the establishment of the office of Ombudsman. But the then government did not put the Act into effect and the office of Ombudsman has not been established though more than 18 years have been passed since the passing of the Ombudsman Act. The Act shall come in to

claims to have sustained injustice in consequence of such action; or who affirms that such action has resulted in favour being unduly shown to any person or in accrual of personal benefit or gain to any person; or information has been received by him from any person or source, otherwise than on a complaint, that such action is of nature mentioned before. Ombudsman shall have no right to investigate any civil or criminal proceedings before any court, or the function performed by, or the conduct of, a person acting as a member of a court.

Where the Ombudsman proposes to conduct an investigation, under the Ombudsman Act, 1980, he shall forward a copy of the complaint or, in the case where he proposes to conduct the investigation on his own motion a statement setting out the grounds therefore, to the ministry, statutory public authority or the public officer concerned and afford the ministry, public statutory authority or the public officer concerned an opportunity to offer its or his comments on such complaint or statement. The Ombudsman may obtain information from such persons and in such manner, and make such enquires and in such manner as he thinks fit. Where any action is under investigation by any other person under any other law, the Ombudsman shall not investigate such action unless for reasons to be recorded in writing he is of opinion that an investigation by him is necessary. [Sec. (6.7)]

before, shall be conclusive and binding. No person shall be compelled for the purpose of an investigation under the Ombudsman Act, 1980, to give the evidence or produce any document which he could not be compelled to give or to produce in any proceedings in court. [Sec. (8)]

(10) If, after investigation of any action, it appears to the Ombudsman that injustice has been caused to the complainant or to any other persons in consequence of maladministration in connection with such action, the Ombudsman, shall by a report in writing, recommend to the competent authority concerned that such injustice should be remedied in such manner and within such time as may be specified in the report. The competent authority shall, within one month of the expiry of the time specified in the report, intimate to the Ombudsman of the action taken in compliance with the report. If, after investigation of any action, it appears to the Ombudsman that such action has resulted in favour being unduly shown to any person or in accrual of undue personal benefit given to any person and that this may be substantiated, he shall, by a report in writing, communicate his findings, together with the relevant documents, materials and other evidence, to competent authority and recommend such legal, departmental or disciplinary action as he deems fit. The competent authority shall examine the report and within one month of date of receipt of the

where the political system based on parliamentary system the provision made in the Act "the Ombudsman shall be appointed by the President on the recommendation of the Parliament", sounds logical and rational. But in the Act, there is no mention whether the opposition parties would also share the recommendation or not. In the absence of such specification, the Ombudsman would be naturally recommended by the ruling party and as such his independence, acceptability and impartiality may be seriously questioned by the opposition political parties.

The tenure of Ombudsman is three years. It seems that three years are not adequate, the President and the House of the Nation who will appoint him will remain in office, unless otherwise for a term of five years. It is therefore desirable that tenure of office should be equal to that of the President and the Parliament and be renewable for a further term depending upon his performance of the previous term.

As regards the qualification of the Ombudsman, the Act only states that "The Ombudsman shall be a person of known legal or administrative ability and conspicuous integrity. A person with legal capability may not have the requisite administrative ability and similarly a person with administrative capability may not have the legal ability which is more essential for the post of Ombudsman. So the Ombudsman must have the legal as well as administrative expertise and experience. Such

should not be the final authority on the matter of secrecy about an information to be applied by the Ombudsman. This sort of provision must go. Moreover terms like security of the state etc. should be precisely and elaborately defined so that no one can take the opportunity of its vagueness.

The remuneration, privileges and other conditions of service of the Ombudsman shall be the same as are admissible to a judge of the Appellate division of the Supreme Court.

The conditions of the service of a Judge of the Supreme Court have been enumerated in the constitution of the People's Republic of Bangladesh. Accordingly, the remuneration, privileges and other conditions of service of a judge will not be varied to his disadvantage during his tenure of office. His salary and remuneration will not be subject to the vote of the Parliament. All these have been provided in our Constitution with a view to making a Judge independent in the discharge of his duty. All these will be essential for safe-guarding the independence of the Ombudsman in the discharge of his duties too. The provisions made in the Act regarding the conditions of his service, specially remuneration and privileges, are in fact, justified.

In the next piece, the writer will discuss an agenda of reform to make the proposed office of Ombudsman effective and meaningful.

## LAW WATCH

### Discussion on "Environmental Law in Business"

Bangladesh Environmental Lawyers Association (BELA) today organised a cross-sectoral discussion on "Environmental Law in Business" at a local hotel in the Hon'ble Minister of Ministry of Environment and Forest (MoEF) was present in the discussion as Chief Guest while the Hon'ble state minister in charge of Ministry of Textile (MoT) was the special guest. The speakers were Mr Rashed Masood Khan, President, DCCI and Mr Md Enamul Haque Chowdhury, Managing Director, Bangladesh Shilpa Bank (BSB). The BSB representative told that the banks were under legal obligation not to sanction any loan till environmental management plan Balancing Modernization Reconstruction Expansion (BMRE) is submitted. However, while the financial institutions are clear in papers, what happens afterwards in implementing the BMRE is not

examined. He called upon everyone to carry the message of the discussion and told that his institution would be more careful while sanctioning loan.

Mr Khan of DCCI told that the business community was being made aware through various DCCI efforts about the risk of their uncontrolled operation. However, the cost in adopting effluent treatment plant is too high which in most instances equal the cost of the industrial plant.

The Hon'ble Minister of MoT said that if the recommendations of the Discussion are forwarded to the MoT in the light of the existing laws, he would take care to ensure that the textile entrepreneurs abide to these laws.

The Hon'ble Minister of MoEF and Chief Guest of the discussion, Syeda Sajeda Chowdhury started her speech with profound respect and remembrance for the founder of

BELA Dr Mohiuddin Farooque who passed away last December. Recommending the relentless effort of Dr Farooque and BELA in implementing the laws, she told the gathering that there was no time to delay and that everyone should act from their respective stands to save this mother earth.

The Chairman of the session informed the gathering that this was not the first effort of BELA on the subject. BELA has moved before the High Court alleging pollution by various industries through Writ Petitions, which are pending. He said since environmental protection is crucial for inter-generational trust, no one can win by avoiding his duty towards environment.

The participants were representative from the financial institute, business community, NGO workers, journalists, lawyers and others.