Law and Our Rights

The Rule of Law

Are the Fundamentals too Difficult to Comprehend?

by Dr Shahdeen Malik

If one were to expand such examples, one must also include the prime minister's recent inauguration of one type of special courts in Dhaka. The rule of law also includes simple proposition that one organ of the state is separate from the other. How would the prime minister feel if the Chief Justice were to occasionally preside over the cabinet meetings or how about the Speaker sitting in as the Chief Justice of the Supreme Court? If these are not acceptable then why did she had to inaugurate a court which, constitutionally, is under the jurisdiction of the Chief Justice (will reading articles 114 to 116 of the Constitution I have counted, four short sentences in all be too much to ask for?).

GEORGE Bernard Shaw had asserted in the Preface to his play Arms and the Man that "I am no believer in the worth of any mere taste for art that can not produce what it professes to appreciate."

In the backdrop of continuous assertions that "terrorists have no party' or that 'everything is being done according to law' (in reference to certain murder trials); and so forth, it seems that our rulers are fond of taking stances contrary to what GB Shaw had posited. The rulers are clearly fond of constantly talking about something, i.e., the rule of law, which they can hardly understand, let alone produce. They do seem to have a taste for the rule of law but this taste is not sustained by worthwhile efforts for it's realisation. Hence, the taste is worthless. Or so it would seem to GB Shaw, were he familiar with such pretensions.

The primary onus for creating a society based on the rule of law is clearly with those in whom we have entrusted the executive powers of the state. Hence some reference to the highest executive authority is not uncalled for.

The Daily Star's huge front page picture of a few days ago showing the prime minister's motorcade going through the wrong side of the road has been widely noticed. The prime minister's office hasn't issued any clarification or explanation; for example, whether such a recourse to the wrong side of the road was justified under the Special Security Force Ordinance, 1986 or any other legal dispensation. Lets assume that driving on the wrong side of the road was legally justified (as the rulers may have written a lot of privileges for themselves of which we citizens are not always informed) — fine. If not, has the prime minister taken any action against those who were responsible for violations of laws by her motorcade?

Since there hasn't been any clarification or explanation, shall we assume that the PM's office hasn't found any justification or they have not simply bothered. In many a country such a violation would have, at least, diminished the moral authority of the chief executive to rule the country, since in those countries it is axiomatic that the chief executive governs according to the rule of law.

Another ready example of glossing over the core premises of the rule of law would be the prime minister's suggestion, not so long ago in the parliament, that terrorists be 'shot at sight'. That no such thing can ever be done is very clear as the Constitution provides in Article 33 (3) that "Every person accused of a criminal offence shall have the right to a speedy and public trial by an independent and impartial court or tribunal established by law." When you authorise police to shoot at sight, you turn the police into both the prosecutor and the judge. I wonder whether any one can think of an example as derogative of the rule of law as collapsing the prosecutor and the judge into one person.

Long long time ago, back in the zamindari days, a zamindar used to accuse, determine the guilt, prescribe and inflict the punishment, all by himself. In our present terminology, a zamindar was the prosecutor, the judge and the jailor — all in one. The rule of law, however, is premised upon a complete separation of these three functions as well as the mandatory provision for defence against any accusation (Art. 33 of the Constitution states — "..... nor shall he be denied the right to consult and be defended by a legal practitioner of his choice"). If you go back to the zamindari days of collapsing all into one, you inevitably end up with Rubel kind of situation where police both accused Rubel of committing crimes and also meted out the punishment (brutal killing). Are these premises so difficult to understand?

Then there was the widely reported recent statement implying that it may depend on the decision of the prime minister whether the leader of the Jatiya Party would again end up in jail or not. A large number of advocates have already protested that statement. The central premise of the rule of law that law takes it's own course, irrespective of the wishes of the executive, is probably beyond the realm of understanding of the chief executive. What is more disturbing is that all prosecutions against the leader of the Jatiya Party seem to be at a standstill. He is on bail, pending final determination of his appeals against the numerous convictions. The only explanation for this, one may hazard to venture, is that the office of the Attorney General may be under instruction from the government to 'go slow'. The prime minister's pronouncements can not but lead to such an assumption.

Just a few months ago a lot was made in a BTV programme about the pardoning of the convicted killer of AL leader of Savar, Mr Moizuddin, by the then CMLA General Ershad and the fact that the convicted killer joined General Ershad's bandwagon with a lot of fun fare not far from the killing ground. The saddest part of all these is that we the citizens will continue to suffer because the rulers will not, if it suits them, allow the law to take it's own course.

If one were to expand such examples, one must also include the prime minister's recent inauguration of one type of special courts in Dhaka. The rule of law also includes simple proposition that one organ of the state is separate from the other. How would the prime minister feel if the Chief Justice were to occasionally preside over the cabinet meetings or how about the Speaker sitting in as the Chief Justice of the Supreme Court? If these are not acceptable then why did she had to inaugurate a court which, constitutionally, is under the jurisdiction of the Chief Justice (will reading articles 114 to 116 of the Constitution — I have counted, four short sentences in all — be too much to ask for?).

The above, I must concede, are rather pedantic examples. Nevertheless, these have to be mentioned from the simple supposition that if one doesn't understand such simple fundamentals of the rule of law, it may not be wise, nay pointless, to write or elaborate on more serious aspects of the rule of law.

Will it be too much to ask of our leaders to read at least Article 7 of the Constitution and hope that they understand it? "All powers in the republic belong to the people ...." Power does not belong to the executive. The executive only exercises those powers which the people have permitted them to exercise, within the limits laid down in the Constitution.

One more digression into Shaw. He was baptised in the faith of England (he was an Irish) and he grew up believing that "God was a Protestant and that Roman Catholics went to hell."

Will it be too wrong to suggest that the central premise of our politics is strongly influenced by such visions of right and wrong; hell and heaven. I and my party are Protestants and the rest will go to hell. Hartals are good examples of such stark black and white perceptions.

The Constitution states that all citizens have the right to freedom of movement (Art. 36), freedom of profession or occupation (Art. 40) and right to property (Art. 42). A citizen can not be deprived of these fundamental rights. There is, however, one exception — Proclamation of Emergency. During the time when the Proclamation of Emergency is in force, these above rights, along with some others, can be suspended.

Now we are threatened with a series of hartals in the coming weeks. Hartal virtually means suspenson of these rights. A citizen is denied his right to movement, can not exercise his profession or occupation and his right to property is at peril if he defies the orders issued by the hartal authorities. All these, therefore, virtually amount to a Proclamation of Emergency with the difference that the Proclamation is made not by the President but by the hartaling political parties.

Thus, the fundamentals of the rule of law that no one can exercise power beyond what is authorised by the constitution is cast aside. A virtual proclamation of emergency is made to, ostensibly, facilitate the rule of law (for proper election, voting or whatever) by totalling losing sight of the fundamentals of the rule of law. Again, I can not but infer that it is very difficult for such persons to comprehend the very fundamentals of the rule of law. The hartalwallas will graciously exempt, for example, ambulances, journalists, pharmacies, hospitals and some others from the ambit of hartals. In other words, freedoms of movement, profession or property of some selected persons or bodies are most kindly recognised.

Do they understand that it is not for them to determine which of my freedoms or rights I can exercise and which I can not. If they did, surely we would be living in a different country where 70% of the under-five children are not malnourished and, consequently, whose physical and mental growth are stunted for the rest of their lives (no amount of voting or political rights will ever enable these children to regain their lost health and intelligence and grow up to their full human potentials); where everyone at least the three square meals a day; and where the government makes at least half-decent efforts to provide education, health and employment for the citizens, irrespective of their political opinions.

In the meantime all we, the citizens of this country, can hope that some day they will grow up and begin to comprehend the fundamentals of the rule of law and then, may be, we shall have better days. And until then we don't have much of an option but to continue to listen to their sermons about law, order, morality, development, bridges and culverts, and what not.

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Lawscape

Religion in Our Constitution

Past and Present

	Constitution in 1972	Constitution in 1999
Begins with	Preamble	In the name of Allah, the Beneficent, the Merciful (Inserted by Ziaur Rahman's Proclamation Order in 1977) Preamble
Preamble (Second Paragraph)	Pledging that the high ideals of nationalism, socialism, democracy and secularism .... Shall be the fundamental principles of the Constitution;	Pledging that the high ideals of absolute trust and faith in the Almighty Allah, nationalism, democracy and socialism meaning economic and social justice ... shall be the fundamental principles of the Constitution; (Inserted by Ziaur Rahman's Proclamation Order in 1977)
Article 2A	There wasn't any Article 2A	The state religion of the Republic is Islam, but other religions may be practised in peace and harmony in the Republic. (Inserted by H M Ershad's Constitutional Amendment, 1988)
Article 8	(1) The principles of nationalism, socialism, democracy and secularism, together with the principles derived from them as set out in the Part, shall constitute the fundamental principles of state policy. There was no clause (1A) to Article 8	(1) The principles of absolute trust and faith in the Almighty Allah, nationalism, democracy and socialism meaning economic and social justice, together with the principles derived from them as set out in the Part, shall constitute the fundamental principles of state policy. (1A) Absolute trust and faith in the Almighty Allah shall be the basis of all actions. (Inserted by Ziaur Rahman's Proclamation Order in 1977)
Article 12	The principle of secularism shall be realised by the elimination of — (a) communalism in all its forms; (b) the granting by the State of political status in favour of any religion; (c) the abuse of religion for political purposes; (d) any discrimination against, or persecution of, persons practising a particular religion.	Article 12 omitted and the Constitution does not have an Article 12 now (Omitted by Ziaur Rahman's Proclamation Order in 1977)
Article 25	There was no clause (2) to Article 25	(2) The State shall endeavour to consolidate, preserve and strengthen fraternal relations among Muslim countries based on Islamic solidarity. (Inserted by Ziaur Rahman's Proclamation Order in 1977)
Article 38	[Right to Freedom of Association (Proviso)] Provided that no person shall have the right to form, or be a member or otherwise take part in the activities of, any communal or other association or union which in the name or on the basis of any religion has for its object, or pursues, a political purpose.	Omitted (Omitted by Ziaur Rahman's Proclamation Order in 1976)
Article 142	There was no clause (1A) to Article 142	(1A) ... when a Bill ... for the amendment of the Preamble.... is presented to the President for assent, the President, shall, ... Cause to be referred to a referendum the question whether the Bill should or should not be assented to. (Inserted by Ziaur Rahman's Proclamation Order in 1978)

With respect for Kobi Shamsur Rahman
compiled by Dr Shahdeen Malik

25th Anniversary of Le Médiateur de la République

Mediation: What future?

by A. H Monjurul Kabir

THE 25th anniversary of one of the most interesting and impressing Ombudsman institutions in the world is a good occasion to make some reflections on the future of the Ombudsman concept. This idea seems to be the most successful constitutional project in the modern world. It symbolizes the rule of law and the respect of fundamental freedoms and human rights in the modern states. In the past decades, it has been introduced successfully in Latin America, Africa, Asia and Eastern Europe. Even two countries within the European Union, Greece and Belgium have established Ombudsmen on the national level.

In Sweden, there was a high lawyer at the King's Court dealing with the complaints addressed to the King concerning abuse of power or malpractice by his administrations. In a constitutional reform of 1809, the legislative power called "Ständerna" overtook the election of that high official and declared that this high official would now be called the Parliamentary Ombudsman and would thereby be independent from the King, his government and his administration. The Parliament also underlined that the Ombudsman should also be independent from the Parliament in exercising his functions. That was when the Parliamentary Ombudsman institution was born. When Finland gained independence, it introduced the same institution in its 1919 constitution.

In these two countries, the Parliament elects a highly respected lawyer to supervise, with a constitutional mandate, the public authorities including the judiciary, to ensure that they exercise their duties in accordance with the law. The Ombudsman also has the obligation to regularly inspect all closed public institutions such as prisons, closed mental hospitals or military barracks to make sure that the interns and the conscripts are treated according to the law and the international human rights treaties. In this system, every citizen has the right to complain to the Ombudsman and the Ombudsman has the right to start own initiative investigations. The Ombudsman furthermore has the right to prosecute or decide on the prosecution of a civil servant before the courts. One could call this Ombudsman concept the "classical Ombudsman".

After the establishment of the institutions in Sweden and Finland it wasn't until 1953 that Denmark and until 1962 that Norway followed the example. The Ombudsman institution established in Denmark is a lighter and more flexible model than its predecessors. Its remit is more restricted, the judiciary, for example, is excluded. There is no obligation to regularly inspect closed institutions nor is there any right to prosecute or decide on prosecution. One could say that the Danish Ombudsman has a more conciliatory role than the classical Ombudsman. He can argue recommend and report to undo instances of maladministration and raise the quality of the public administration, but nothing more. His profile is much less repressive than the classical Ombudsman institution. One could call the Danish concept the modern Ombudsman. It has been the basic model for most of the Ombudsman institutions in the world.

Today, there are many versions of the Ombudsman. Each country that creates an Ombudsman institution has the right to establish its own system and the sovereignty of each state must be respected. However, looking at the wide range of institutions lately established using the title Ombudsman, everybody should understand that an international definition of the basic requirements for a trustworthy Ombudsman institution is needed.

Such a definition would prevent the watering down of this important concept or the misuse of it by authoritarian governments. This initiative could also play an important role in introducing new elements to more traditional institutions. The French institution has brought new positive aspects to the development of the Ombudsman concept.

The first one is the seeking for equity which is the very substance of the mediation. It helps soften the negative consequences related to the rigid implementation of law and allows the finding of friendly solutions. The other specificity, introduced by the institution we celebrate today, is the establishment of regional delegates who partially work on a volunteer basis. This has considerably enhanced the relationship between the administration and the citizens and has enabled to solve problems rapidly and with low costs. These two novelties have given the Ombudsman family a more human and social dimension. They could be more widely introduced in the general concept of the Ombudsman and even the classical institutions could benefit from them.

The obligations of international conventions have progressively entered the very work of the Ombudsmen. Many countries have introduced the international conventions in their national law. This development has meant that the Ombudsmen have gradually become protectors of human rights as they have been given the responsibility to supervise the human rights set up in these conventions. This has usually been welcomed by the acting Ombudsmen as an encouraging progress in their daily work for the citizens. In Europe, the Round Tables organized by the Council of Europe every other year have helped the participating Ombudsmen familiarize themselves with the necessary knowledge to deal with their new obligations.

In a recent decision by the Court of Human rights of Strasbourg, the Parliamentary Ombudsman was recognized as a legal remedy (Case Raninen v. Finland 152/1996/771/972). From my point of view, this will once again raise the question of defining if the Ombudsmen in their activities in the human rights' field should be given a more formal position by the Council of Europe, thus giving them an international backing for their responsible work. As I see it, this is urgently needed especially for the Ombudsman institutions in the new Member States of the European Council.

The growing impact of international law in the life of citizens and in the activities of the Ombudsmen has also led to discussions on the international level and to the creation of international Ombudsmen institutions. From time to time, deliberations have started at the Council of Europe concerning the establishment of a "Human Rights' Commissioner" whose role would be to promote the implementation of Human Rights in the Member States. In the 90s, the Council of Europe has adopted a high number of new Member States with quite disturbing problems in the Human Rights' field which can hardly be dealt with by traditional human rights' institutions.

It has therefore been envisaged to create a "Human Rights Commissioner". During the Head of States' Summit which took place in Strasbourg in October 1997, this proposal was welcomed by the Member States and the Committee of Ministers was instructed to study the arrangements. So far, no practical results were published and the outcome still seems uncertain. Personally, I do believe that it would be an urgent need to enhance the credibility of the work of the Council of Europe in the new Member States and to create new tools to achieve results in the Human Rights' field. A European Commissioner working closely and effectively with his colleagues and the other authorities in the Member States would surely be an important step forward.

Within the European Union, an Ombudsman institution was established by the Maastricht Treaty. This Ombudsman's remit consists in the supervision of the activities of Community institutions and bodies with the purpose of detecting and undoing maladministration.

Every European citizen has a right to complain to the Ombudsman of the European Union. As the European Ombudsman has received a number of complaints about the application of Community law on the national level, a flexible cooperation on an equal basis has been established between the national Ombudsmen and the European Ombudsman to promote the supervision of Community law on the national level. The attitude in this activity has been cooperative by all parties, but it will only be possible to evaluate after some time.

The new responsibilities included in the Amsterdam Treaty, especially as regards the right to asylum and the legal status of foreigners, may give this cooperation more substance. My firm opinion is that without this kind of cooperation, European citizens will not fully enjoy their rights under Community law.

Contribution by the European Ombudsman.

LAW WATCH

Rapists to be Sentenced to Death in India

INDIA'S Home (Interior) Minister L K Advani has declared that the Bharatiya Janata Party-led government is preparing to amend the law to make rape punishable by death.

Advani told the *Times of India* newspaper that the cabinet had already given its nod to the amendment proposal, which has been sent to state governments for their comments. "Once this formality is completed, it would need minor amendments in the existing law to make rape punishable by death," he said.

At present, the penalty in a rape case can be anything from a seven-year prison term to life imprisonment. According to the findings of a survey conducted by the National Conference of Women's Studies, one woman is raped every 54 minutes and two girl children are raped every day in the country.

During the last session of the Indian Parliament a consensus had been reached among all political parties that rape should invite capital punishment, Advani claimed.

Women's rights activists have long complained that laws regarding crimes against women including rape are vastly inadequate and have several loopholes. They have been demanding harsher punishment for them.

According to official statistics, incidents of rape in India have increased by 32 per cent between 1990 and 1997. Last year, 14,000 women were raped in the country, against the 1996 figure of 12,661. In 1990, the figure was 9,518.

The Delhi-based National Commission for Women (NCW), an advisory body to the government, had earlier recommended that the current definition of rape be changed to include sexual harassment like touching, gesturing and exhibition of any body part by the perpetrator with a sexual motive, in addition to the clause of penetration.

The commission had also recommended harsher sentences for child rapists — life imprisonment for the rape of a minor girl under 12 and ten years' jail term for the rape of a girl aged between 12 and 18.

Statistics indicate that during 1992-95, there was a 23.4 per cent rise in sexual crimes against children from 3,113 to 4,067. At least 3,393 cases of child rape were reported in 1993 and 3,896 in 1994.

Bihar, one of the most lawless states in India, has recorded 846 cases of rape till August this year which is the highest in the country. A woman is said to be raped every six hours in the state.

Activists say actual rape figures are many times higher since most cases of rape go unreported as most victims fear social ostracism.

The few that do tell the police suffer the consequences as the legal recourse is a tedious and expensive process. Besides being mocked and ridiculed, victims are harassed by police officials, say women's groups that have taken up cases on behalf of rape victims.

They also claim that the medical examination — crucial to build a case against the perpetrator — is usually delayed on one pretext or the other providing an opportunity to the rapist to escape conviction.

— India Abroad News Service