

Law and Our Rights

"All citizens are equal before law and are entitled to equal protection of law"-Article 27 of the Constitution of the People's Republic of Bangladesh

Litigating Women's Human Rights

By Sara Hossain

IN the last fifty years, there has been a proliferation of international human rights instruments and standards. The value and usefulness of such standards in protecting human rights depends upon their interpretation by courts and tribunals, and whether there are adequate means for enforcement of the decisions of such bodies.

The value of human rights law is not limited to its use in international bodies alone, and contains great potential for protecting rights through its application in domestic courts. In fact, this is perhaps the most significant forum for use of such law, given the very small number of people who will ever have recourse to international tribunals.

The extent to which human rights law can be directly used will depend on a number of factors. These include whether the country in question has a constitution or bill of rights, which instruments it has ratified and in certain cases, whether national legislation has been passed to incorporate the provisions of such instruments into national law. In some countries, international instruments which have been ratified by a state may be directly enforceable in the courts. In others, such as most of those in South Asia, including Bangladesh, specific legislation must be passed.

Even where human rights instruments have not been ratified, or implementing legislation has not been passed, international human rights law can still reinforce the efforts of lawyers and activists to ensure legal enforcement of rights. Thus while international human rights law is not directly applicable in national courts, many courts in the Commonwealth accept that international human rights law may be referred to in the course of interpreting national or constitutional fundamental rights standards, particularly where the national law is uncertain or incomplete.

International human rights law may also be of persuasive value in legal argument, particularly given that many constitutions, including our own in Bangladesh, have drawn heavily upon the UDHR and other international human rights instruments. Bangladesh has acceded to a number of international human rights instruments, including the Convention on the Elimination of Racial Discrimination, the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) and the Convention on the Rights of the Child. Recently, on 5th October 1998, it acceded to five further human rights instruments, including the International Covenant on Economic, Social and Cultural Rights (ICESCR), the Convention Against Torture (CAT), the Convention on the Political Rights of Women, the Convention on the Minimum Age for Marriage, Consent to and Registration of Marriage and the Convention on Migrant Workers.

Use of Law Based Strategies

Before considering specific instances of litigation on human rights, it is worth recalling that in order to ensure the effective-

effectiveness of such litigation, it is often necessary to undertake multi-pronged strategies. These include formulating proposals for law reform, developing campaigns for changing law or practice, preparing reports on or monitoring human rights violations, or developing human rights education. In many instances, given the lack of access to the legal system, it is also necessary to develop legal aid schemes, provide information and advice about the use of the courts and the content of the laws, and to sensitize court officials regarding attitudes and approaches to their work which effectively limit the effectiveness of their action.

Litigation

Litigation to protect human rights includes engaging in individual cases before courts and tribunals. Such cases may involve challenging specific legislation or particular practices as being in violation of human rights standards, and providing redress to individual victims. In some cases, litigation on human rights does not focus on individual complaints but forces on a number of plaintiffs, or a particular practice, which may be challenged through class actions, or what we have come to know as public interest or social action litigation.

Other than direct involvement in litigation, it is also possible to influence the development of case law through the use of third party interventions, or the filing of amicus briefs. Through this process, a person or organisation which is not a party to the litigation may submit additional materials to the court which may provide new legal arguments, a selection of comparative case law and practice and other relevant background information. So for example, a group of NGOs and experts had submitted an amicus brief to the War Crimes Tribunal in The Hague which set out proposals for protecting women victims of rape in armed conflict.

Domestic Litigation: Bangladesh Citizenship

In a recent case, specific legislative provisions which restricted women's rights to transmit their nationality to their children were challenged as being violative of fundamental rights of equality, equal protection of the law, and freedom of movement, and to international standards prohibiting gender based discrimination. Relevant interpretations of the constitutional guarantees invoked, and provisions of particular international human rights instruments, such as CEDAW and the CRC, were placed before the Court by counsel and by amicus curiae. The Court nevertheless held that the legal provisions in question did not violate fundamental rights provisions. The matter is now pending appeal before the apex court.

The issue of women's right to transmit nationality to children on an equal basis with men is a question which has come up within a number of jurisdictions. Cases relating to this issue are currently pending before a court in Pakistan. Similar matters have been litigated in other jurisdictions, including Sri Lanka, which is now in

the process of amending the relevant administrative regulations, and most prominently perhaps, in Botswana, where the Supreme Court held, in *Unity Dow's* case, that the provisions of the UDHR, CEDAW and international human rights instruments could be prayed in aid in applying constitutional standards.

Safe Custody

A series of recent cases challenging the practice of placing women and girls in so-called "safe" custody implicate questions of women's fundamental rights to liberty and security of the person, protection from cruel, degrading or inhuman treatment, and equality and equal protection before the law. One such case, filed as a public interest petition, concerned the incarceration of Sheikh Begum, 35 years old, following a severe



sexual assault by a gang, which involved a stick and marbles being pushed into her private parts. Sheikh Begum alleged that she had been held in safe custody without her consent, and further that she had been handcuffed to her bed while hospitalized immediately following the attack. This case was one of the more egregious examples of the practice, which involves women and minor girls, usually victims of rape, including custodial rape, kidnapping and other criminal offences, and witnesses to such offences being placed, by judicial and/or, in safe custody within prison. Those who are placed in "safe custody" are kept confined with convicted and under trial prisoners. In a number of cases, women and girls have been kept imprisoned in the name of "safe custody" for periods of up to four years. The Court granted

an interim order releasing Sheikh Begum from safe custody. However, a final judgement has not yet been given, and the questions raised in the petition regarding the constitutionality of the practice, and whether it is being exercised in an arbitrary and discriminatory manner, and is itself a violation of women's fundamental rights to equality and equal protection of the law remains pending for hearing.

Abduction and Forced Marriage

A number of cases have come before the High Court in the past few years concerning allegations of abduction and forced marriage of young women. Some of these cases are particularly appropriate for us to examine here as they have a definite British/Bangla dimension. The pattern in these cases has been that a young woman, who

any international or regional court or tribunal for redress of human rights violations. We have no access to the UN Human Rights Committee, or to the complaints procedures available under CAT and CERD.

At a regional level, Asia is the only region in the world without a human rights court, unlike Africa, Europe and the Americas, with the African Commission on Human and People's Rights, the European Court of Human Rights and the Inter-American Commission and Court of Human Rights in Washington. Each of these courts not only consider individual complaints but have also developed special procedures to consider specific forms of violations, such as torture and ill-treatment in custody or arbitrary detention.

Although we have no recourse to these systems, some of their case law and their practice may nevertheless be of assistance in attempts to protect human rights in Bangladesh and in our region.

A recent example is that of Indravati Pamela Ramjattan, a young woman who has been on death row in Trinidad for the past seven years. Pamela's allegations that she was subjected to appalling domestic violence by her husband during the eight years of the relationship were not taken into account by the Trinidad courts in respect of her conviction or sentence. No evidence was presented to the court regarding her experience as a battered woman, nor were any arguments made regarding the exculpatory effect or value of this experience. In fact, this information was used by the prosecution to show a motive for the murder. A petition filed on behalf of Pamela is currently pending hearing before the Inter-American Commission of Human Rights (the "Commission"). This specifically refers to Pamela's experience of abuse by her husband. It also alleges that in failing to consider this experience in affirming her conviction and sentence, the Government of Trinidad and Tobago is in breach of Pamela's human rights, in particular her right to a fair trial, equal protection of the law, and non-discrimination on the ground of sex. Also, for the first time, the petition raises arguments regarding Pamela's experience of being a battered woman — the most important factor in her case and a factor which was singularly ignored by the police, the legal aid lawyers, prison authorities, courts and the Government of Trinidad.

Pamela Ramjattan's case is the first one in which any international tribunal will be required to consider arguments regarding the impact of battered women's syndrome, and to examine the gender dimensions of the right to life and the right to fair trial in the specific context of domestic violence and its consequences.

In this case, lawyers sought the assistance of INTERIGHTS in developing arguments integrating submissions on battered women's syndrome and human rights, in making representations to UN mechanisms, such as the Special Rapporteur on Violence Against Women, its Causes and Consequences, and the Special Rapporteur on Summary and Arbitrary Executions and in disseminating

information about the case. In the Ramjattan case, a number of comparative precedents were cited, including an earlier decision of the Canadian Supreme Court, which had emphasised the importance of considering expert evidence of battered women syndrome, in order to debunk the myths about women who face violence and abuse. Battered women's syndrome explains why battered women don't run away from a violent relationship, why they don't ask for help before killing, and why they believe at the time of responding to the violence that there is no alternative to this action. The evidence proffered in that case demonstrated how a woman who has been battered becomes trapped in her situation, covering up the incidents of abuse, and falling into a cycle in which the abuser alternates between bouts of violence and pleas for forgiveness.

These circumstances combine to affect the women's state of mind, and thus the reasonableness of her plea of self defence is to be assessed in the context of her particular circumstances as a battered woman, rather than against the standards of reasonableness applicable to a man. Cases from other jurisdictions were also cited, primarily from the US, and from the UK.

Obstacles to Implementing Women's Human Rights

While the handing down of the judgement may resolve a particular issue, it rarely marks a clear "victory" for the litigant. Even where a judgement is favourable, the extensive delays in the court process, and the procedural obstacles faced by litigants may seriously diminish its impact.

Further, and particularly in our region, we often face serious difficulties in enforcing court judgements. One of the questions which glares out at us from the cases we've discussed concerns the role of the judiciary. There have been a number of significant efforts by judges to consider the relevance of international and comparative human rights law to their own decisions in national courts, and a number of such recent exercises have focused exclusively on issues relating to the gender dimensions of human rights. Information about relevant developments in caselaw is also being increasingly made available to both judges and lawyers.

In addition to lack of access to justice, and the relative insensitivity of particular courts to women's human rights, the failure to respect judicial decisions, and the culture of impunity which surrounds this, are among the more significant obstacles to implementing women's human rights.

This is the revised version of the keynote paper on the Gender and the Law presented in the British-Bangla Law Week (29 November-5 December 1998) organised by the British Council.

The writer, a Barrister-at-Law, is Legal Officer for South Asia, INTERIGHTS-International Centre for Legal Protection of Human Rights.

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Law Watch

Class Conflict or Clash of Civilizations

By Adilur Rahman Khan

RECENTLY a campaign have been waged by a section of intellectuals, part-time NGOs and pro government newspapers that the madrasahs in Bangladesh are being used as the dens of anti-liberation forces and so called fundamentalists, who are now out to act against the independence of the country by providing training to their cadres like Afghan Taliban and are also involved in arms smuggling to destabilize the country.

Bangladesh, a traditional land of *sufis* and *shonayashis* always harbored peace and meaningful coexistence among all its people belonging to different religious beliefs. The people of this land went for a year of liberation in 1971 against Pakistani domination on the basis of Nationalism, Democracy and Socialism, where secularism was later brought in.

But some people in Bangladesh today belonging to the vested interest groups and intellectual community, who according to poet Farhad Mazhar, rise up in the morning with a illusory fear of so-called "Islamic fundamentalism" and take the role of Don Quixote to fight against the shadow. These people relentlessly campaign for the division of the people into two groups, one belonging to the pro liberation camp and the other belonging to the anti liberation camp. They do not have the time to recollect the history that apart from several thousand Razakars, Al-badrs, Al-shams and several thousand members of the so-called Peace Committee, who were instrumental in their genocidal campaign during the whole nine months time and who were never tried under the Act XIX of 1973 (this law was enacted to try the war criminals of 1971) by any government of Bangladesh today, including the first government of Sheikh Mujibur Rahman. No one should also forget that most people of Bangladesh either directly or indirectly participated in the war of liberation. The denial of which will only lionize the in-fighters, unless these intellectuals and their allies are really out for that.

Actually what these peoples are out to cover up is the real division in the society. A section of people in the last three decades have become fabulously rich, whereas the rest of the population are facing serious economic hardship. All the political jargons, bureaucratic moves NGO actions and lip services proved to be counter productive for the common mass in the last twenty-seven years of Bangladesh.

Moreover, westernization has brought the virus of neo-colonialism in the brains of these intellectuals who do not see anything else other than so-called "Islamic fundamentalism" as the enemy. These people fail to accept that, Islam has been picked up by the west for their xenophobic campaign, like communism of the cold war era, to develop their military hardware to pursue their global supremacy through economic domination and military juggernaut. These peoples tend to satisfy their global and regional gurus through their own propaganda.

In Bangladesh those people go to Madrasahs who cannot afford to study abroad, or in cadet colleges or in private kindergartens, which means the students from relatively poorer background generally go to the Madrasahs. The age old set up and system which stood up like a solid rock against the colonial aggression of the British Raj and who called India under the British rule as "Darul Harb" and were instrumental in providing volunteers to fight against at the British occupation, is totally unknown and for gotten by the people belonging to the upper echelon of this country and the so-called intellectuals who have become a parasite to their country and the masses.

It is true that there is a need to modernize the Madrasah education with latest subject matter and technology and to make all the educational institutions and madrasahs at par. But by doing illusory campaign against the Madrasah students, attacking the Madrasah system, and bringing repression and harassment on them will only flare up the conflict between the classes and also will help to give a misconception of religious intolerance about a tolerant Bangladesh society to the common people of the outside world for the benefit of the interest of the masters of these intellectuals and their allies or cronies.

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Legitimizing Prostitution as a Sector

PROSTITUTION, which is no more than the buying and selling of women and children's bodies for the benefit and pleasure of men and sex exploiters, has been around for ages. Because of this, it is regarded as the inevitable human condition of women which society is powerless to prevent. Given the hugely profitable and globalizing sex industry that has assumed diverse and modern forms from brothel to street prostitution, entertainment, pornography, sex tourism and the Internet, more voices in support of "sex work" are increasingly being heard. According to these voices, in the face of the deepening economic crisis, there is more reason now than ever before to recognize the sex sector as a legitimate business on the basis that it provides basic necessities to women and their families.

More recently, the ILO-sponsored book, *The Sex Sector: The Economic and Social Bases of Prostitution in South Asia*, though claiming to be scholarly and dispassionate analysis of the economic and social bases of prostitution, has joined these voices. The study attempts, "to identify the socioeconomic policies that have directly or indirectly influenced the growth and increasing complexity of the sex sector." Based on four country studies conducted mostly by academics and economists, the book argues that because of the massiveness of the sex sector and its contribution both to national and international economies, countries ought to consider the possibility of "official recognition of the sector, including maintaining records about it... for assessing the health impacts of the activities associated with the sector for determining the magnitude of labor market policies needed to deal with workers in the sector and for extending the taxation net to cover many of the lucrative activities connected with it."

The book reinforces the child/adult distinction on prostitution saying that while adult women can "choose" prostitution as "work" all instances of child prostitution must be considered unacceptable. It does not interrogate the nature of the "choice" nor the conditions under which those "choices" are made. From the study one is led to believe women in prostitution make gradual choices among a range of real career choices when the reality shows that women are driven by circumstances of want, deprivation, lack of opportunity, prior sexual abuse and unhappy relationships among a complex set of factors that include the structural economic, social and gender inequalities that impact these so-called "choices". The book further ignores evidence already established in many studies showing that a significant number of adult women prostitutes have been sexually abused as children, later to become compliant to accept their situation by the time they are adults.

Dismissing studies that "highlight the pathetic stories of individual prostitutes... which tends to sensationalize the issues and to evoke moralistic rather than practical responses," the book, in effect, trivializes the tremendous human suffering and violence that women in prostitution constantly experience. While the economic gain are emphasized by the ILO study, none of the social and human costs, including the contraction of life threatening diseases like HIV/AIDS, along with other STDs nor the physical, social and psychological harm to women and children are brought into scrutiny. But these social costs have economic implications if one were to consider how much is spent rescuing women and children from organized sex syndicates and assisting in the recovery of women and children from STDs and HIV/AIDS, trauma and low self-esteem. Conversely, how much would society benefit from women and children who would be active and productive agents in the development of their countries if they were not trapped in systems of prostitution?

The study interrogates why women and children are going into prostitution but never raises the issue of the male sexual demand for prostitution nor the role prostitution plays in reinforcing and perpetuating the subordinate status of women in society. The long list of recommendations puts all of the burden on individual women and civil society while not even mentioning the need for male accountability in putting an end to a system that has relegated women to a social status in which they are merely accessible sexual commodities.

The ILO has been internationally acclaimed as a strong defender of workers' rights. Unfortunately, in championing the sex industry as a sector, they have only succeeded in defending male and pimps' rights to sexual access of women and children and have severely undermined the struggle for women's rights and equality.

Source: COALITION Asia-Pacific Report November 1998

Human Rights Commission: Perspective Bangladesh

By Dr M Ershadul Bari

Continued from previous issue

The Human Rights Commission must be independent in performing its functions effectively. It should be legally and politically autonomous to the extent that no branch of government or any public or private entity can interfere in, or obstruct, its work. The question of independence of the commission is inextricably linked with the method of appointment, security of tenure, salaries and other terms and conditions of service of members of the commission and its functions.

Method of Appointment

The method of appointing the members of the human rights commission is of utmost importance for the independence and credibility of the commission. The members of the commission may be appointed by the head of the state on the recommendation of a selection committee consisting of the existing chief justice of the highest court of the land, former chief justices, leading members of the parliament both from the ruling and opposition parties, (prime minister and leader of the opposition) representatives of the bar council and of other relevant professional groups. Since the independence of the commission greatly depends upon the personal qualities of its members, only men of independent character, keen intellect, high legal acumen, honesty, integrity, efficiency, impartiality and dignity who have proven expertise and competence in the field of human rights should be appointed as the members of the commission. Only then they could be expected to discharge their duties without submitting to any personal likeness or dislikeliness, improper influences, inducements, pressures, threats or interferences from any quarter expect submitting to the law and the commands of their own conscience. Clearly, the commission will only be as independent as the individuals of

which it is composed. All members, acting individually and collectively, should be capable of generating and sustaining independence of action.

Security of Tenure

Security of tenure is the most fundamental of the guarantees of independence of the members of the commission. Nothing can contribute so much to their firmness and independence as security of tenure. For it enables the members to discharge their duties without fear of the consequences regardless of whether their activities do not please some other person or persons. Therefore, once appointed, a member should hold office for a fixed period of time. He should be removable during his tenure only for proved misconduct. Such removal must of necessity be made a difficult process, involving careful consideration by more than one person, otherwise a member of the commission cannot acquire that habit of independence requisite in his office.

Salaries and other terms of conditions of service

If the members of the commission are to be independent, they should be given adequate salaries and granted appropriate privileges so that they remain free from any outside pressure or temptation to better their pecuniary conditions by illegal means. Their remuneration, privileges and other terms and conditions of service should not be altered to their disadvantage during their terms of office.

Co-operation with Non-Governmental Organisation

The national human rights commission should establish and maintain close relations with non-governmental organisations involved in the promotion and protection of human rights. This can include organising joint projects on human rights, joint review of policies affecting human rights and joint venture in the areas of human rights education and

training. It should be stressed that non-governmental organisations have a particular focus, a freedom of movement and flexibility of action which make them a vital information source for human rights commission.

Finance

The effective functioning of the commission depends largely upon the financial and material resources made available to it. In order to maintain the independent status of the commission, it should have secured budgetary outlay sufficient to perform its task. Otherwise, the legislature and ministers, who control the purse strings, will be in a position to use the power of the purse to influence the functioning of the commission. Furthermore, the members of the commission may make endeavour to please the legislature or the executive in the hope of obtaining more favourable provisions in relation to financial and material resources. The remuneration payable to the members and staff of the commission and other administrative expenses should be charged upon the consolidated fund so that they may be discussed in, but shall not be subjected to a vote of, the Parliament.

Establishment of a Human Rights Commission in Bangladesh

The 1972 Constitution of Bangladesh provides that it shall be a fundamental aim of the State to realise a society in which the rule of law, fundamental human rights and freedom, equality and justice, political, economic and social, will be secured for all citizens. In order to promote and protect human rights in Bangladesh and in providing redress to victims of violations quickly, the Government of Bangladesh approved in April 1995 a project to assess the need for the establishment of a national human

rights commission and make recommendations in this regard. The project entitled "Action Research Study on the Institutional Development of Human Rights in Bangladesh" (IDHRB) was to begin in July 1995, but it was delayed due to political crisis in the country. It was revived in March 1996 when an Agreement was signed between the Government and the United Nations Development Programme (UNDP). Under the IDHRB project, the budget of which is two crore, formally began in July 1996 and is scheduled to complete on 31 December 1999. The Ministry of Law, Justice and Parliamentary Affairs was to supervise, monitor and evaluate the project under the agreement. The main object of the project, supported by the UNDP which has been assisting the establishment of such national institutions in a number of countries in the region, was to prepare the grounds for setting up a viable institutional mechanism to promote and protect human rights.

The project will seek to find out ways and means to build a mechanism for protecting and safeguarding human rights as guaranteed under the Constitution of Bangladesh at the grassroots level and to see the effective implementation of the existing legislation and enactments mentioned (i.e. legislation and ordinances such as the Dowry Provisions Act of 1980, the Children Act of 1974, the Cruelty to Women Ordinance 1983 (Deterrent Punishment) and the Women and Children Oppression Act of 1955).

Eventually a draft bill, for the establishment of a Human Rights Commission in Bangladesh, has almost been finalized by the Institutional Development of Human Rights in Bangladesh Project (IDHRB). The draft has so far been revised three times over the period of more than a year after exchanging views with human rights activists, lawyers, journalists, local non-governmental

organizations and foreign experts. In an interview with the Daily Star on 18 November 1998, the Law, Justice and Parliamentary Affairs Minister said, "Most of the home work has already been done. I will try to move the bill for setting up of the NHRC (National Human Rights Commission) in any of the next two sessions of Parliament. Eight days later on 25 November 1998, he said at a discussion organized by the 50th Universal Human Rights Declaration Day Observance Committee in Dhaka that "A bill will be placed in Parliament in its next session for establishing a Human Rights Commission to protect people's rights.... The Human Rights Commission Bill will have some special provisions to prevent any government employees from curbing people's rights.... It will be a safeguard for the people to enjoy their rights."

The foregoing discussion shows that while human rights principles are universal and universal and standards have been negotiated and accepted at the international level, responsibility for the implementation of these norms primarily rests at the state level. The task of promoting and protecting human rights is primarily a national one as human rights involve relationships among individuals, and between individuals and the states. At the national level, rights can be protected through adequate legislation, an independent judiciary and the enactment and enforcement of individual safeguards and remedies. But the costly and complex procedures of the courts often make them inaccessible to the less advantaged persons and groups such as ethnic and linguistic minorities, indigenous populations, children, refugees or women. The courts may not be able to deal with certain types of violation of human rights effectively. The establishment of the national human rights com-