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

A Nation Embarrassed

by Sarwat Siraj

ALL hell broke loose out on the streets of the capital city last week when a High Court Division Judge felt embarrassed to hear the Death References in the Bangabandhu Murder Case and sent it to the Chief Justice for reallocation.

Senior leaders of the ruling Awami League, including the acting party chief, led a thousands of activists, carrying sticks and sporting shrouds on the forehead, in an unprecedented procession. The processionists demanded execution of the death sentence by December 30, 2000. Also, at another rally, the home minister said that the judges, who feel 'embarrassed' to do justice, should be removed from their offices.

Although not adequately defined in the books of law, judges feeling embarrassed to hear a case is a familiar, if not frequent, phenomenon. Numerous examples can be cited where the judges have been embarrassed. Recently, in the sensational 'slum eviction' case the court felt embarrassed to hear the case and sent it to the Chief Justice. People have not yet forgotten, how, during the early 1990s three division benches of the High Court were embarrassed to hear the Golam Azam citizenship case. Various division benches were repeatedly embarrassed to hear the 'arms case' against deposed President H M Ershad. Back in 1986, High Court felt embarrassed to hear Matia Chowdhury's *habeus corpus* petition.

A judge can feel embarrassed if he has reasons to believe that the process of judgement may lead to violation of his constitutional pledge to "do right to all manner of people according to law without fear or favour, affection or ill will" as depicted in the third schedule under Article 148 of the Constitution.

More specifically, a judge may feel embarrassed if, for example, he himself were involved in the case in hand as a counsel; if a friend, acquaintance or relative of the judge is a party to the case; or, if the case involves an issue about which the judge cannot be unbiased while dispensing judgement.

Therefore, embarrassment is not about delaying justice; on the contrary, it is about ensuring it.

So far as the demand for removal of embarrassed judges is concerned, the less said the better; since, any comment in this regard will only expose the lack of appreciation, if not understanding, of the Constitutional issues on the part of our political leaders.

According to Article 96 of the Constitution, a judge on the High Court Division can be removed from his office exclusively by the President of the Republic, provided that the Supreme Judicial Council, consisting of the Chief Justice and the two next senior judges, after making an enquiry as per. When the Council is of the opinion that a judge has ceased to be capable of properly performing the functions of his office or has been guilty of gross misconduct, it seeks the President's directive for removal of the said judge.

Again, interpretation and determination of 'misconduct' will depend on the nine-point code of conduct for judges laid down by the Supreme Judicial Council back in 1977, according to Article 96 (4)(a) of the Constitution.

Therefore, no amount of unsubstantiated allegation, provocative speech, aggressive procession or vicious threat can remove a judge of the higher judiciary from his office, for his destiny is decided by the Constitution itself and not by a mob provoked by irresponsible politicians.

The ruling party wants justice for the horrific killings of the 15th August, probably the most vicious since the murders of the Romanovs in 1918. Their zeal for justice is sincere and justified. However, they seem to be overzealous — *trop de zele*, as the continentals would put it. Problem lies in the fact that they are trying to dictate the terms of justice. The justice of their choice, of their convenience, the justice they must have by the end of a certain day, or else...

The ruling party's actions, however, do not correspond to its so-called commitment to do justice in the Bangabandhu murder case. The government wants the host countries to extradite the absconding convicts, which essentially requires existence of extradition treaties between the states involved.

Further, the ruling party wants speedy disposal of the Bangabandhu murder case but has not taken any constructive step to ensure that. Awami League wants justice and wants it quick, and so do the 100,000 litigants who are currently awaiting justice in the High Court Division of Bangladesh Supreme Court. Millions of people in this country are lost in our labyrinthine 'justice system'. Once in the maze, it takes years before one finds his way out and out he comes with a verdict that has been rendered pointless due to lapse of time.

The age-old saying 'justice delayed is justice denied' is as appropriate for the plight of the 100,000 litigants in our higher judiciary as it is for the bereaved members of the ruling party.

The incumbent Chief Justice of Bangladesh, in his inauguration speech, aptly emphasised on the need to have our judicial system reformed and for introduction of various modes of alternative dispute resolution (ADR) to meet the ever-increasing demand of time and to ease up pressure on the traditional courts.

On April 18 this year, the Home Minister expressed his bewilderment before a sea of protestors as to why the higher judiciary was taking so long to dispose of the Bangabandhu death references. It is the people of this country who should be asking the Home Minister as to why, despite being in power and in such a hurry to get justice, his government has not reformed the notoriously slow justice system.

Had the ruling party taken more such wise and drastic steps as nullification of the Indemnity Ordinance, not only the Bangabandhu murder would have been decided by now but also the whole nation would have been freed for good from the curse of prolonged judicial battles.

Should it be the way to seek justice? Is it anything less than intimidation of higher judiciary?

The government in the prevailing circumstances should have acted responsibly, been patient and let the law take its own course. Confrontation between judiciary and executive has never served the interest of the common people. It has inevitably led to despotic rule and disintegration of the institutions of a country. When in October 1995, the former British Home Secretary Michael Howard proposed a legislation, infringing upon judicial discretion and increasing the executive involvement in disposal of criminal justice, the then Chief Justice Lord Taylor, in an unprecedented move, spoke out public against the Home Secretary's proposals. Later other judges and a former Master of the Rolls joined him in protest against the government.

To our immense pride, unlike its English counterpart, our judiciary has not only kept dignified silence in the face of relentless attack on itself but also has been self critical in the recent past.

A judge has the choice of being embarrassed and he is not obliged to give reasons for his embarrassment. Maligning him for making a legitimate choice just because it is not convenient for the government is totally unacceptable. In its desperation to get "justice" before the end of their tenure the ruling party seems to have forgotten where to draw the line.

On July 18, 2000, the Higher Judiciary of Bangladesh, our only voice of sanity was strangled mercilessly on the streets of Dhaka as the nation witnessed a shameful display of savagery.

As our judiciary gets crucified with the crown of thorn on its head and reed in its hand, we, as a nation, bear the cross. If our elected government is not ashamed of what it has done, we, the people, are.

The Weird Culture of Reservation

by A H Monjurul Kabir writes from UK

STATES and other subjects of international law participating in international relation take part in the conclusion of new international treaties or accede to international agreements in force. As per article 2(1)(d) of the Vienna Convention on the Law of Treaties 1969, "a reservation is a unilateral statement, however phrased or named, made by a state when signing, ratifying, accepting, approving or acceding to a treaty, that purports to exclude or modify the legal effect of certain provisions of the treaty in their application to that state."

Making reservations to multilateral human rights treaties is also an well-accepted practice in international law although they are of distinguishable character from international treaties of trade, commerce etc., which are contractually finite in nature. The underlying purpose is to gain wider acceptance from international community. The International Court of Justice in its 1951 Advisory Opinion on Reservations to the Genocide Convention explained that the contracting parties to human rights treaties adopt such conventions "for a purely humanitarian and civilising purpose. They have, one and all, a common interest, namely, the accomplishment of hose high purposes which are the raison d'être of the Convention. Consequently, in a convention of this type one can not speak of individual advantages or disadvantages to States, or the maintenance of a perfect contractual balance between rights and duties. The high ideals, which inspired the Convention, provide, by virtue of the common will of the parties, the foundation and measure of all its provisions." (Advisory Opinion of May 28 on Reservations to the Genocide Convention, 1951 I.C.J. 15).

The role of reservations under the regime of international human rights law signifies the constant tension between promoting universal participation in a human rights convention and protecting of the Convention. The alarmingly high number of reservations having very wide implications on the efficacy of the Convention occasions genuine threats to its purported implementation. Both the number and the extent of the reservations entered by the states parties threaten to undermine the positive influence of the Convention that may have in the lives of children as well as impair the performance of the Committee. There have been concerns that the integrity of the Convention may have been sacrificed for ensuring almost universal participation. Echoing the concern the Declaration and Programme of Action adopted by the Vienna World Conference on Human Rights in 1993, encouraged States to avoid the resort to reservations, and called for " ... States to consider limiting the extent of any reservations they lodge to international human rights instruments formulate any reservations as precisely and narrowly as possible, ensure that none is incompatible with the object and purpose of the relevant treaty and regularly review any reservations with a view to withdrawing them." The Declaration welcomes the progress made in the codification of human rights instruments, which is a dynamic and evolving process, and urges the universal ratification of human rights treaties. All States are encouraged to accede to these international instruments; all states are encouraged to avoid, as far as possible, the resort to reservations.

The CRC Position: Impeding the Implementation

Article 51 of the CRC, directly inspired by Article 28 of the Women's Convention, allows reservation to the extent of its compatibility with the object and purpose of the Convention. The 'object and purpose' test set out in Article 51 derives from customary law as codified in Article 19(c) of the Vienna convention. It has been argued that all of the substantive provisions of a human rights treaty are essential to its 'object and purpose' and as a result reservation to any substantive provision is illegal. Making specific reference to the CRC, the Vienna Declaration and Programme of Action states, "... States to withdraw reservations to the Convention on the Rights of the Child contrary to the object and purpose of the Convention or otherwise contrary to international treaty law" (UN Doc. A/CONF.157/23, Part II).

Fifty-six states parties have made reservations to substantive provisions of the Convention. Twenty- five of these are European or other developed countries. Nine states parties have made general reservations, making the Convention subject to the states parties' constitutional or Islamic law. States parties have formulated reservations to twenty-two of the Convention's thirty-nine substantive articles undermining some of the most fundamental principles and aspects of it e.g., non-discrimination (Article 2), right to life (Article 6), right to a name and nationality (Article 7), contacts between parents and children (article 9), freedom of expression (Article 13), freedom of religion (Article 14), freedom of assembly and association (Article 15), adoption (Article 21), right to education(Article 28), procedural rights of juvenile offenders(Article 37), detention of juvenile offenders(Article 40) etc.

The Children's Convention allows states to withdraw reservations at anytime. However treaty law has traditionally considered that states can not adjust reservations after ratification or accession, which is, no doubt, an extreme one forcing states into isolation. In that case, the only option remains for a state to adjust their position without totally withdrawing the reservation is to negate the Convention. This practice should be changed.

Combating the Weird Practice

It is clear from the long list of reservations entered by the states parties to the Convention that states are opting for a selective application of its provisions and as a result of which very little change is effected within the states. A limited number of states parties have objected to reservations that they consider unacceptable. One or more of the following countries – Austria, Belgium, Finland, Germany, Ireland, Norway, Portugal, Slovakia and Sweden — have challenged reservations made by Indonesia, Bangladesh, Djibouti, Jordan, Kuwait, Tunisia, Pakistan, Malaysia, Syria, Qatar, Iran and Myanmar. There is no consistent pattern of objecting reservations of other countries. Most objecting states are making apathetic, somewhat careless objections with no ideological policy. Sometimes political considerations outweigh real concerns for implementation. In its General Comment (No. 24), echoing the case law of the Inter-American Court of Human Rights, the European Commission of Human Rights and the European court of human rights, the Human rights committee opined that the objection regime of the Vienna Convention is "inappropriate to address the problem of reservations to human rights treaties."

In a number of recent cases involving children, the European Court of Human Rights followed the standards of created by the Convention. It also reviewed some of the reservations set up by its member states. In its 1988 judgment in Belilos v. Switzerland, the Court summarily considered the consequences, applying the test of intention of the reserving state, and concluded " It is beyond the doubt that Switzerland is, and regards itself as, bound by the Convention irrespective of the validity of the declaration."

The Committee on the Rights of the Child has initiated attempt to encourage reserving states parties to withdraw their reservations, which in fact threaten the very purpose of the Convention. In 1997, the Committee convinced Pakistan to withdraw a very broad reservation to Article 14. Still their attempts are meted with stiff resistance by the states parties. Faced with similar obstacles, the Human Rights Committee takes a bold step towards the articulation of a new and separate reservations regime in respect of human rights treaties, explicitly departing from what has been often characterised as the unsatisfactory operation in relation to such treaties of the classical provisions of reservations enumerated in Articles 19-23 of the 1969 Vienna convention. It is also asserted in its General Comment (No. 24) that it is for the Committee to determine the compatibility of reservations with the object and purpose of the Covenant (ICCPR), a responsibility not assumed by the other UN human rights treaty bodies. The Committee on the Rights of the Child should follow such robust approach.

The practice of reservations characteristic of states is of a non-agreed nature, which is due in large part to the ambiguity and lack of clarity in many formulations of the 1969 Vienna Convention on the Law of Treaties. The urgent need for the further codification and progressive development, especially with regard to human rights treaties, is apparent. It has been proposed by several quarters that treaty bodies make requests to the international court of Justice for advisory opinions on the issue of reservations. Universality is served by maximising membership in the Children's Convention without fastidious scrutiny of each state party's commitment that may well be compromised through its reservations. The growing culture of entering all encompassing and vague reservations to human rights treaties like the CRC must be stopped.

Strengthening Electoral Process

by Abul Ahsan

THE Fair Election Monitoring Alliance (FEMA) has recently announced its recommendations on the electoral law reforms in Bangladesh. The recommendations are the result of wide ranging consultations and exchange of views at the national regional and district levels involving politicians, legal experts, academics, representatives of professional groups, media and the civil society.

The proposals thus formulated were formally handed over to President Justice Shahabuddin Ahmed when a FEMA delegation called on him at Bangabhaban on 22 March 2000. During the visit the President welcomed the initiative of FEMA in the matter and made valuable comments and suggestions on the proposals. One of the ideas put forward by the President was the formation of advisory bodies comprising distinguished citizens of the country at the national and district levels to provide advice and support to the Election Commission regarding the organisation and the conduct of the election.

FEMA under took the task about three years ago, in the background of a growing concern in the country that the existing laws and regulations governing election have not served the nation well or adequately. Globally, the collapse of the Soviet Union in the late nineteen eighties and in our own context the restoration of democracy in the country in 1991 and the gradual empowerment of common men and woman have reinforced the realization that only a democratic government can take the right decisions about the use and allocation of national resources and promote harmony, stability and progress in the society. It has been felt, to achieve the objectives, the first step is to ensure that national elections are held regularly on the basis of multiparty participation and that these are free, fair and credible.

The basic objectives of the reform proposed by FEMA are:

a) to empower and strengthen the Election commission so as to enable it to hold free and credible elections.
b) to make the electoral process transparent and easily identifiable.
c) to address problem of fraud, manipulation and other mal-practices in the election.
d) to enforce accountability on the part of institutions, bodies and individuals involved in the electoral process.

In the above context, FEMA has recommended that the existing practice of appointing Deputy Commissioners and Upazila Nirbahi Officers (UNOs) as Returning Officers and Assistant Returning Officers should be changed and that they should be replaced by Commission's own officers. In addition, supplemented where necessary by members of the District Judiciary. It has been further proposed that election results of the constituencies should be announced by the Election Commission and not by the Returning Officers as is the case now. Furthermore, the Election Commission should have the authority which it does not enjoy at the present, to nullify an election result if it has sufficient reasons to believe that the result in question including the result of on uncontested election has been obtained through manipulation or illegal practices.

FEMA is of the view that the changes proposed will shift the key role and functions from the officials of the district administration to the Election Commission where they legitimately belong while at the same time sparing the former the allegations, not always fair or legitimate, of partisanship or being subjected to influence by one political party or the other.

An important recommendation of FEMA relates to the disposal of petition on election disputes including any appeal that may have been preferred within the time frame of 270 days. The disputes should be filed with the Election Tribunals constituted with retired District Judges or other eligible individuals in place of sitting Judges who are too busy with their normal duty to attend to the matter in time. As a result, hardly any election petition has been disposed off during the life time of the parliament concerned. Action proposed by FEMA will go a long way in deterring candidates to seek to win elections by any means fair or foul knowing that the result might soon be annulled.

Two other important reform measures proposed by FEMA, relate to the need to integrate the existing Code of Conduct formulated by the Election Commission along with the additions suggested by FEMA, in the Representation of the People Order (RPO) 1972, so as to make its violation punishable by law. The Code lists the Dos and Don'ts for the political parties and their candidates including the use of money and muscle power. This will help maintain congenial environment in the constituency before and during the election day, a most essential factor to ensure good voter turn out and allowing them to vote in accordance with their free choice.

The proposal of FEMA that all political parties should register themselves with the Election Commission is a key element in its strategy to strengthen the electoral process. As this is the practice in many countries including some of our neighborhood, through the registration, the political parties *interalia* undertake to hold regular elections for different party offices in accordance with their own constitutions, declare all donations and contributions received by them from time to time and have their accounts audited periodically. This will serve as a safeguard against the use of money to buy party nominations and address the problem of bank defaulters, extortionists, and organised gangs to take political cover and to influence government decisions.

Finally, FEMA has suggested that the number of reserved seats for women should be increased from 30, as is the case now, to 64 that is one seat for every district to be elected through direct vote by all voters. In addition each political party should nominate at least 25 percent of all candidates from women. In view of the numerical strength of women in the country, there is a strong case to increase their representations in the parliament. But there are opposite views against the way the seats are now being filled up.

Some other issues which are important, but which are not mentioned here include;

preparation of electoral rolls and voter registration by involving civil society and in as transparent manner as possible, the questions of voter identity card and election expenses, on which FEMA has made specific recommendation.

In conclusion, I would like to underline that the recommendations made by FEMA involve action at the legal institutional and political levels before they can produce the desired results. Equally important is the role of the media to sensitize all voters, specially the new ones, about the issues involved in the election and to serve as a watch-dog to ensure that all concerned parties including the bureaucracy and the law enforcement agencies behave in a constructive and responsible manner. Each of these steps are important in their own right but in particular the political dimension of the whole process should be highlighted. This is because, even the best electoral laws may be rendered ineffective, if all-powerful political parties and their leadership do not abide by them or show sufficient regard or sensitivity to their application. As the most important players with wide spread network of workers throughout the country, their self discipline, sense of responsibility and commitment to the democratic process are essential to ensure free and fair election.

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Impartial Use of PSA: Myth or Reality?

by A R Shamsul Islam

WHEN the much-disputed Public Safety Bill (PSB) was being enacted people from almost all tiers of the society raised a voice against this legislation on various counts. While branding the act as undemocratic and repressive of human rights principles, grave skepticism was expressed if the Public Safety Act would be applied impartially at all as the government put the Public Safety Bill through legislation by dint of enjoying the majority in the otherwise dysfunctional parliament.

Although repeated emphatic assurances from the ruling party lawmakers, the Home Minister and above all, the Prime Minister, were forthcoming that the PSA would be applied fairly and impartially, people's apprehension remained far from being allayed. They had fresh in their memories the bitter experience of discriminating use of the Anti-terrorism Act during the BNP regime.

As the PSA has begun to operate, the practical proof how impartially it is being used is coming to hand. Let us examine the incident of barricading Dhaka-Narayanganj road following alleged looting of fifteen lakh taka from Madina Trading Corporation, a cement trading house owned by a ruling party top influential MP, at Munshikhola in Fatulla thana of Narayanganj district.

The long and short of the above incident is that on April 10, in broad daylight, some armed miscreants stormed into Madina Trading Corporation at Munshikhola and decamped with fifteen lakh taka as alleged by the owner of the house. The local people by and large have vouched that the alleged looting incident is sequel to a long-standing dispute over a piece of land between the MP, owner of Madina Trading Corporation, and a UP chairman and local Awami League leader. Some local men also doubted that the robbery at Madina Trading Corporation was faked up by the MP's men with a motive of maligning and harming the UP chairman.

Apparently livid with the looting incident the MP took law in his own hand. He and his men attacked four Ansars, deployed at a nearby piece of land belonging to that UP chairman, tied them and handed them over to Fatulla police alleging their involvement in the said robbery.

It is reported in a section of the press that during the above operation the MP had a revolver in his hand that was loosely kept covered by a piece of cloth.

The halting of traffic on Dhaka-Narayanganj road for six hours was perpetrated by MP's men by stationing trucks haphazardly on the road. It is alleged that when questioned the OC of Fatulla thana admitted that the ruling party lawmaker was around when the blockade occurred. There is further allegation that the said MP's men forced the businessmen of the locality to clamp down the shutters of their stores in observance of hartal protesting the robbery incident.

Police finally filed a case under the PSA against about 100 people on charge of barricading Dhaka-Narayanganj road for about six hours on April 10. Of the accused 29 were named while about 70 others remained unidentified.

Curiously enough, the MP was dropped from the list of the accused despite the fact that the police itself acknowledged that during the road blockading the MP was found around and there are eyewitnesses deposing that the MP led the road blockading exercise protesting alleged robbery at his trading centre.

This is an instance how impartially the PSA is being used irrespective of party affiliation.

Some days back a news was published in the dailies that a police Sergeant jumped into a moving bus on a bridge in the metropolis and struck the driver with an iron rod causing him to bleed profusely in a bid to punish the driver who offered to pay the sergeant a tip of two hundred taka against his demand for four hundred taka. In the tussle between the driver's desperate attempt to speed away his bus from the greedy Sergeant and the infuriated Sergeant's revengeful dash to nab the fleeing driver the passenger-laden bus dangerously tossed to and fro on the bridge finally registering a lucky escape from colliding. This act of the wild Sergeant amounts to commission of offences falling well under the purview of the PSA. There was a clamour to whisk the delinquent Sergeant into the herd of the PSA. But the government overlooked the incident coolly and calculatingly.

After all a policeman was involved in it and the government is no fool to be involved in punishing police personnel under the PSA.

In fact our police enjoys a kind of immunity from legal and other actions for wrongs done by them. During the controversy over the PSA when it was pointed out that the police was prone to abuse the PSA the government representatives proudly advocated that the PSA provided for a "safety clause" under which the police personnel found to be abusing the PSA would be brought to book. Interestingly, that clause was smartly scrapped by the government under the cloak of an amendment using it as a desire of the Hon'ble President. Amusingly the President never bore any such desire of clipping off that clause. He advised amendments to the PSA in other spheres.

Much of the inconsistencies of the political parties between what they preach and what they practise emanate from their peculiar mindset. It is alleged that they have not learnt to believe that political supremacy can be obtained now a days without the backup of muscle powers. So they go for mustering terrorist elements. Their door practically remains open to the hoodlums in all seasons.

In fact in these days the allegiance of the activists to a party does not rest on the ideology of the party. It is based on "cash prospects" and "uninterrupted facilities" the party can provide for them.

There are constitutional bars to floor crossing in the parliament. But no such prohibitive strictures stand up in the merry game of changing parties by the terrorists. That is why Khaleque of Mirpur could criss-cross BNP-AL-BNP on a single evening within a couple of hours only.

Interestingly, the MP involved in Dhaka-Narayanganj road barricading belonged to the BNP till he, prior to the parliamentary polls of 1996, joined the AL and obtained party ticket for the assembly elections merrily side-tracking many a veteran, trusted Awami leader vainly aspiring for contesting the polls.

So long as the party leadership cannot get through the phobia that the party cannot survive unless blessed with musclemen impartial application of any instrument of the government, let alone the PSA, will remain a distant reality.