

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

Expediting Justice Delivery System

Case Management and Mediation

by A K Roy

CASE management is an important step towards ensuring the proper administration of justice. The basic concept behind case management is for the court to become actively involved, to analyze the specific issues presented by a particular lawsuit and to work with the counsel and the parties prior to the case, in analyzing the specific issues presented by a particular lawsuit and to work with the counsel and the parties. This will manage the structure of future proceedings to achieve the fastest and most cost effective resolution of the dispute.

Traditionally, the role of trial judges had been viewed primarily as presiding over trials, hearing and evaluating evidence, finding facts, applying the appropriate legal standards, making judgments, and dispensing justice. The judges must accept collective and individual responsibility for court control and active management of the flow of all cases from filing to dispositions.

Commitment of judges to court control of caseload is the cornerstone upon which improvements in case processing can be built.

A substantial number of influential judges must resolve to take control of the caseload process and to undertake whatever change is necessary to bring the Court's backlog and delay within reasonable boundaries. "Court control does not imply an arbitrary or dictatorial attitude by the Court. It is intended to be a coordinating mechanism. Commitment to control must also embody commitment to change. The judges, as individuals, must be willing to change work habits, communicate openly about caseload problems and made whatever personal sacrifice of style or inclination may be necessary to bring and keep control of the caseload in the hands of the court.

New procedures and standards for case flow management cannot be established in a vacuum. Policies, rules, procedures, and orders are not self-executing. In setting standards, for example it is necessary to develop a monitoring

ing system to allow constant measurement of whether or not the goals specified are being achieved. Otherwise they are meaningless.

Monitoring may take many forms statistics on methods and numbers of dispositions, age of cases disposed of, the age-and types of pending cases, numbers of cases filed, periodic observation to determine whether new procedures are being followed and whether they are adequate and informal interviews with participants.

Monitoring does not end with measurement. Feedback to those in charge of the system is also necessary. On the basis of this feedback steps must be taken to bring the system back within the acceptable boundaries when necessary.

The caseload management system should be modified periodically to meet changing conditions. The status of case must be monitored from filing to termination.

Constant monitoring of case status is key to the control of case progress. There must be continuing, readily available knowledge about the current status and history of each case and the caseload as a whole. The status of individual cases can be kept under watch by simple record-keeping systems that record



completed actions and the next action date for each case.

The file of case control cards constitutes a pending case file or tickler file segregated by case status or age. It contains the pertinent information about the status of the caseload as a whole. By simple summarization it can be determined how many cases are pending, how many are in each stage of advancement towards disposition, and which cases are showing excessive delay. These summaries can be computed daily or weekly for purposes of case assignments and monthly for purposes of review and identification of trends or trouble areas. More sophisticated system can be devised but they express essentially the same concepts.

By contrast, in some courts and scheduling of cases for trial

requires that the assignment clerk make a page-by-page search of the relevant books to find cases whose entries indicate that the case is probably eligible to be set for trial. The court has no idea of the status of its pending cases, nor any control over their progress, nor a mechanism for determining which cases are ready for trial. In such circumstances, scheduling is not only time consuming but also subject to gross error and oversight, resulting in case sitting for year with no progress and no judicial attention.

The court administrator should coordinate the caseload management process and assist in the planning, monitoring, feedback and modification processes. The involvement of a court administrator is essential to provide detailed planning to assist

in implementations and administration, and to coordinate auxiliary staff operations with judges, activity. While the judges are the policy formulators and leaders in an effective caseload management system, the court administrator's support is vital to the effective working of system.

The most outspoken critic of case management in the USA Professor Judith Resnik has charged that the emphasis on judicial case supervision is a departure from the traditional role of judges and is inconsistent with our notions of due process and the proper functioning of adversarial system. Professor Resnik's major concerns with pretrial judicial involvement may be grouped into four categories: (1) impartiality, (2) accountability, (3) preservation of the adversary system and (4) cost-effectiveness.

Under Article 109 of our Constitution the High Court Division of the Supreme Court of Bangladesh enjoins the power of superintendence and control over all the courts subordinate to it. In pursuance of that Constitutional provision one full time inspecting Judge for every 10 district courts for a term of one year by rotation may be appointed by the Chief Justice. This will ensure the constitutional responsibility of the High Court Division to control and supervise the subordinate courts as well. In the same way in

a district the district judge will be held responsible to ensure such close monitoring system for effective case management.

In our legal system mediation has not been introduced. It is one of the oldest forms of peaceful dispute resolution. It is a procedure designed to resolve disputes through agreement i.e., through the mutual consent of the parties. It is a valuable dispute resolution tool. In short, mediation is a valuable weapon against delay, cost and injustice.

The reasons and causes of delay are manifold which mainly include inappropriate case management, split trial dates, absence of specialized court system, lack of supervision and dutifulness of the judges, lack of proper coordination among different sections of prosecution, absence of effective mechanism of judging the judges. To this end, some practical measures can be adopted for functioning quite effectively to reduce burden of the courts. The measures are (a) Conciliation or Mediation. For proper consideration to utilize the conciliation or mediation in the criminal proceedings, like Singapore, Court Mediation Center may be established thereunder the supervision of the Court Mediation Center. Mediation may be conducted to deal with minor criminal offences where there is a relationship between parties, and here it is desirable to preserve that relationship; (b) Alternatives to prosecution -- like Japan and the Republic of Korea, Bangladesh may have a system called suspension of prosecution, whereby under particular circumstances, the public prosecutors have the discretion not to institute prosecution even if there is sufficient evidence to sustain prosecution. This system may be introduced to alleviate the overcrowding problems in prisons.

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From Law Desk ...

Human Rights Summer School A New Frontier of Clinical Human Rights Education

by Abul Hasnat

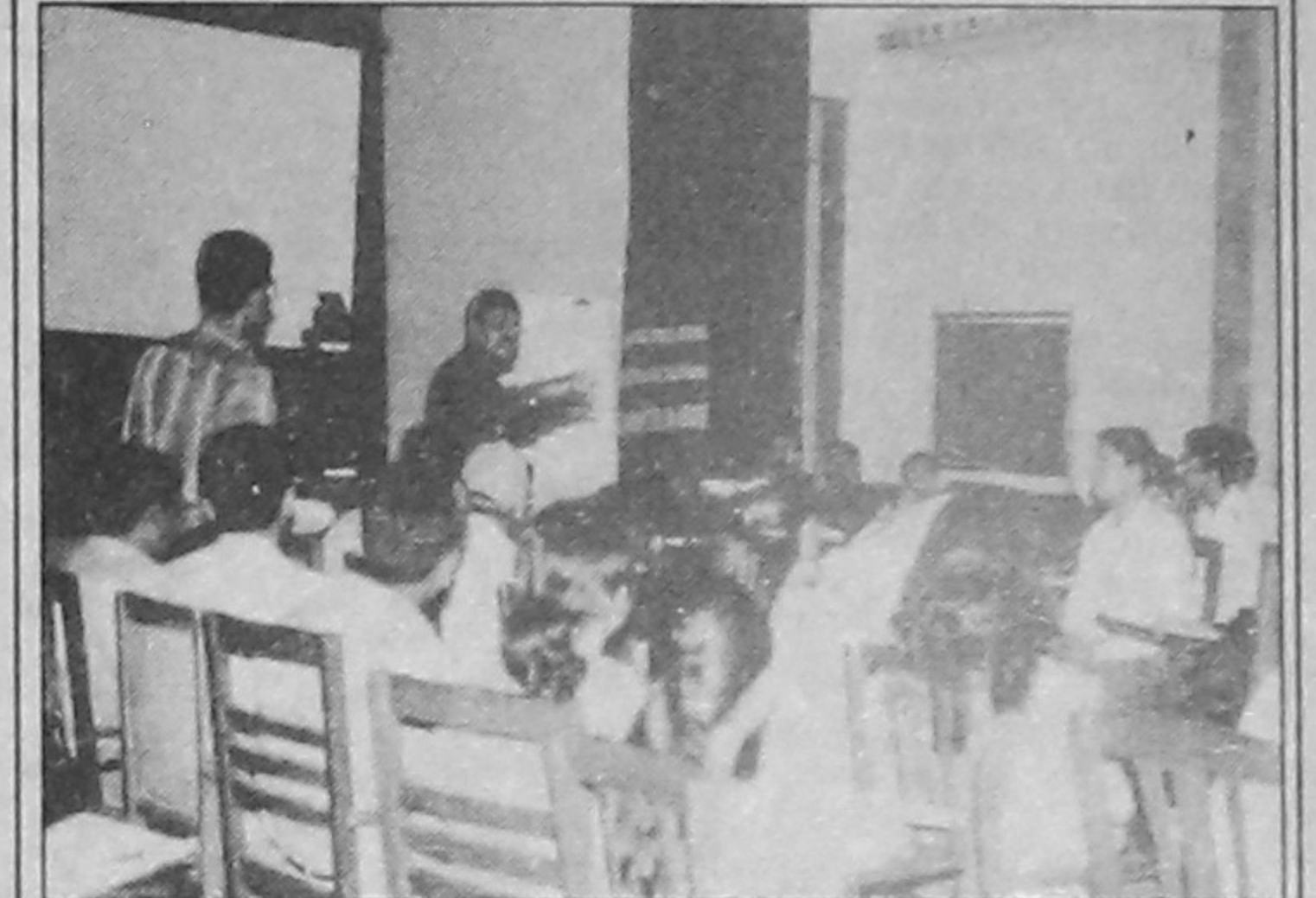
The concept of summer school is nothing new in the west. For decades faculties of different European and American universities are actively pursuing specialized training sessions, workshops during summer vacation. Such programmes enjoy wide acceptance and popularity among students, professionals, and activists. A two weeks residential schooling for the university law students focussing on human rights and their enforcement was held at Comilla from 2nd to 15th October 2000. "This was the first ever human rights summer school in Bangladesh," claimed Dr. Mizanur Rahman, Director, Human Rights Summer School, and Community Law Reform.

The general focus of the summer school was the development of advocacy skills among the law students so that they can supplement their traditional academic curriculum with an intensive training on issues relating exclusively to the fundamental human rights and freedoms. The purpose was a confidant Dr. Mizan maintained, to enable them to contribute to the securing of the fundamental human rights of the people of Bangladesh. The clinical method of teaching, which is, recognized worldwide as the most effective training methodology in this regard, was applied in the Summer School.

A group of around 60 students coming from the law faculties of different universities was selected as participants. Teachers of different law faculties, leading human rights activists belonging to reputed organisations and human rights lawyers of the bar were chosen as instructors of the school. "Such combination of trainees and trainers, is, no doubt, a rare occasion for any learning initiative. The most important thing is motivation, which had been the driving force of the summer school. You can not imagine the extent of motivation generated there in 15 days. The strong bond of co-operation and humanity among students of different regions was clearly visible," Dr. Mizan added.

"Human Rights: A Summer School Manual" was published for the school participants. Basically a compilation of different articles and legal instruments, the manual will also serve human rights activists, lawyers and, to a certain extent, academia. For similar future training, the manual will act as a resource book.

The summer school will be followed by the Community Law Reform Programme. To discover the legal grievances of the religious and ethnic minorities is the main object of this programme. "We will send out selected summer school participants to the abode of minor-



ity communities. The students will stay with them, speak to them and then try to unearth their realities. It will suggest specific measures whereby the deprivations and grievances may, as far as practicable, be remedied by effecting reforms on the existing customary and legal framework of each of the communities," Dr. Mizan elaborated.

The summer school is a new window of the existing clogged and backdated legal education provided in the formal institutions. The training is intended to apprise students of crucial societal issues, like poverty alleviation, empowerment of the womenfolk, rights of the minority, environmental issues, eradication of child labour, basic health care in rural areas, etc. "Creating a pool of human rights advocates for the human rights movement in Bangladesh is the primary purpose of this initiative. The 1st summer school was the maiden venture towards that end. And it will, from now onwards, continue," a beaming Mizanur Rahman asserted.

More New Laws in the Offing

Law Desk Report

The government has decided to enact new laws to make public life more safe and secured. These laws will address issues like smoking in the public places, filing false cases, selling acid in the open market, consumer's right, and safe blood transfusion. There are existing laws to deal with these issues but those are vague and insufficient in the present context. The Law Minister informed that draft laws are prepared but the laws are still under active scrutiny from all aspects.

To control smoking there are 2 existing laws one of them had been enacted in 1919 and another one in 1952. In these laws smoking have been prohibited in certain limited areas like the cinema hall or flammable areas. In these laws, to sell tobacco to someone below 16 years of age had been prohibited. But these laws are not in force any more. In the new law, all the educational institutions, hospitals, important places like the railway stations, bus terminal, airport or the launch station, public transportation, shopping complex, office, court, in all these places smoking shall be prohibited. In violation of this law there will be provision for immediate punishment and penalty.

To control filing of false cases we have section 250 of Criminal Procedure Code and section 211 of Bangladesh Penal Code, which deal with false, frivolous or vexatious accusations. However, these two laws are so vague and inconsistent that now it has become almost useless. In the new law for giving false witness there will be immediate and active steps to punish the wrong doers.

Acid throwing is a grave social problem now a day. In the proposed new law, no one shall be allowed to sell acid to anyone without specific document. There will be no acid in the wholesale shops or in the open market. Those who will violate this law they will be punished in the same manner as an acid thrower.

There are adulterated foods in the markets. To control marketing of adulterated foodstuffs there are certain laws enacted in the British regime. Those laws are no more appropriate to cope with the changed scenario. Those laws were insufficient to protect the consumer's rights and interests. Under the new law, there will be provisions to prohibit manufacturing and selling, and those who will act in contravention of the law shall be punished.

Selling infected or contaminated blood or transfusion of such bloods may cause grave harm to a person. The new law shall ensure that bloods should be taken into a blood bank only after proper examinations and tests.

Announcement

For last five years 'Law and Our Rights' page has been expressing your views and concerns on legal and human rights issues of public importance. On past occasions this page underwent several changes in response to your suggestions.

The Daily Star intends to make this page more people friendly, informative and practical. We cordially invite you to be a part of our team to make this happen. Please send us your ideas, thoughts and recommendations to:

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Law Report

Non-implementation of the Judgement and Order of the Supreme Court Amounts to Contempt of Court

High Court Division of the Supreme Court of Bangladesh
Contempt Petition No. 75 of 1999
(Arising out of Writ Petition No. 2456 of 1996)
Before Justice M.M. Huq and
Justice Abdul Rashid
Order November 01, 2000.

This Contempt Rule was issued calling upon the opposite parties to show cause as to why they should not be proceeded for contempt of court for violation of the judgement and order passed by the High Court Division on April 10, 1997 in Writ Petition No. 2456 of 1996 by not delivering vacant possession of the property to the petitioner within 60 (sixty) days from the date of receipt of the copy of the judgement.

This Contempt Rule was issued upon Mr. Sohail Ahmed, Secretary, Ministry of Housing and Public Works, Government of Bangladesh, Dhaka and another, by the judgement on April 10, 1997. High Court Division made the Rule absolute and declared that the property in question is not an abandoned property and directed the respondents to hand over vacant possession of the property viz. House No. 22, Road No. 5 (Old) Dhanmondi Residential Area, Dhaka to the petitioner Mr. M.A. Aziz within 60 (sixty) days. Since the order of the High Court Division was not complied with and implemented this contempt petition was filed and there upon on January 18, 2000, a Contempt Rule was issued upon the Secretary and another.

Advocate S.S. Halder appeared on behalf of the contemner Mr. Sohail Ahmed Chowdhury. On April 4, 2000 the matter came up in the list and an order was passed fixing April 25, 2000 for hearing. On April 27, the contempt matter was heard in part and then on April 30, on the prayer of Mr. S.S. Halder, it was adjourned to May 8, 2000. On June 8, 2000, 76 it was further heard in part and on the prayer of Mr. Halder it was further adjourned to June 13. On July 6, on the prayer of both sides the matter was adjourned to July 10. In the meantime the Secretary, Mr. Sohail Ahmed had filed an affidavit stating that he passed the order of release and then for approval the matter was sent to the Minister Mr. Engineer Mosharraf Hossain.

Unless and until the Minister passed an order the property cannot be delivered. On July 20, we passed an order directing the Minister Mr. Engineer Mosharraf Hossain to give para-wise comment and explanation through the learned Attorney General and we also requested the learned Attorney General to assist us. On the prayer of Mr. S.S. Halder on August 9, again the matter was adjourned to August 23.

It may be mentioned that against the judgement and order of the High Court Division the Government filed Leave Petition being CPFLA No. 744 of 1997 before the Appellate Division but the same was dismissed on October 28, 1999. Again the Government filed a review petition which was also dismissed by the Appellate Division on August 9, 2000. Since the Secretary has filed an application swearing an affidavit before this Court stating that he placed the matter before the Minister Mr. Engineer Mosharraf Hossain for releasing and delivering possession of the property in question as his approval is necessary, but the Minister is withholding the matter without taking any step for implementation. We earlier passed an order directing the Minister to file para-wise comment and explanation which he filed but it was found totally unsatisfactory because in para-wise comment and explanation it was stated that an enquiry committee was constituted headed by Mr. Justice (Retired) Md. Badruzzaman and the Committee is finding out the fraud which was totally unconnected with delivery of possession.

Mr. Abdul Baset Majumder, advocate for the petitioner, submitted that in the review petition this allegation of fraud was brought to the notice of the Appellate Division but after hearing the matter the review petition was rejected by the Appellate Division. In such a situation since the Minister is the head of the Ministry and since the matter is lying with him we passed an order on August 23, 2000, directing the Minister to implement the judgement and order of the High Court Division which was affirmed by the Appellate Division and deliver possession of the property in question to the petitioner by October 17. On October 18, this matter came up in the list and the learned Attorney General prayed for one week time for giving information about delivery of possession of the property. On October 25, the learned Attorney General appeared before the Court and submitted that he had given advice to the Minister for implementing the judgement and order of the Supreme Court but he had not received

any instruction from the Minister and that is why he could not make any submission.

On October 10, Mr. M. Amir-ul Islam appeared on behalf of the Minister and prayed for time. The Court wanted to know as to under what capacity he is praying to appear in this case because in this case no Rule has been issued upon the Minister. He has filed one application which was without Court fee and affidavit. We have quoted this fact in our order on October 25, 2000. However, we adjourned the matter on the same day and fixed today the 1st November, 2000 for passing necessary order. It appears to us that since no Rule has been issued upon the Minister and since Mr. M. Amir-ul Islam is not the Law Officer of the Government he has no locus standi to appear in this fashion in a case like this.

Mr. Abdul Baset Majumder, on the other hand, submitted that after getting judgement and order of the High Court Division the petitioner has been moving heaven and earth to get possession of the property but on this plea or that plea the judgement of the Supreme Court has not yet been implemented.

Although the Secretary of the Ministry had already passed an order for releasing the property and delivering it to the petitioner, but the Minister is holding the matter without taking any step for implementation. Further, this Court directed the Minister vide order on August 23 to implement the judgement and order of the Supreme Court and deliver possession by October 17 of the property in question to the petitioner inasmuch as he is the head of the Ministry and the relevant file is lying with him. Under law he is bound to hand over possession of the property in question to the petitioner. But unfortunately the order on August 23 was not complied with by delivering possession of the property by October 17 to the petitioner.

Mr. Baset Majumder submitted that with deliberate intention and mala fide motive the Minister Mr. Engineer Mosharraf Hossain is showing total disrespect to the judgement of the Supreme Court and with a mala fide motive he is withholding the file for a long time. From the above circumstances it appears that willingly and with mala fide intention the Minister in withholding the file without passing any order of delivering possession of the property in question to the petitioner, and thereby wilfully and with deliberate intention is flouting the judgement of the Supreme Court. In such a situation we are of the view that justice demands that we should issue a Rule for Contempt of Court upon Mr. Engineer Mosharraf Hossain, Minister in-Charge of the Ministry of Housing and Public Works, Government of Bangladesh.

"Let a Rule be issued calling upon Mr. Engineer Mosharraf Hossain, Minister in-Charge of Housing and Public Works, Government of Bangladesh, Bangladesh Secretariat, Dhaka to show cause as to why he should not be proceeded and punished for committing contempt of Court for not implementing the judgement and order of the Supreme Court of Bangladesh passed in the above writ petition, subsequently affirmed by the Appellate Division, and also for not complying with the order of the High Court Division passed on August 23 for delivering possession of the property to the petitioner by October 17 and or pass such other or further order or orders passed as to this Court may seem fit and proper."

This Rule is made returnable by November 9 and this matter be posted in the list for further order on November 13.

Mr. Engineer Mosharraf Hossain, the Minister in-Charge of Housing and Public Works, Government of Bangladesh, is directed to appear before this Court in person on November 13, 2000 at 10:30 AM positively.

Since the respondents so long failed to implement and carry out the judgement and order of the Supreme Court till today, being empowered under Article 112 of the Constitution of Bangladesh we are directing the Inspector General of Police, Bangladesh, the Metropolitan Police Commissioner, Dhaka and the Officer-in-Charge, Dhanmondi Police Station, to give and deliver vacant possession of House No. 22, Road No. 5 (Old), Dhanmondi Residential Area, Dhaka to the petitioner Mr. M.A. Aziz by evicting the occupants, if any, within 10 (ten) days from the date of receipt of the copy of this order and they are directed to report compliance within 7 (seven) days thereafter to the Registrar, Supreme Court of Bangladesh.

Let a copy of this order be immediately sent to the Inspector General of Police, Bangladesh, the Metropolitan Police Commissioner, Dhaka, and the Officer-in-Charge of Dhanmondi Police Station, Dhaka for implementation of this order.

Book Review

SHOMOKALIN ANTORJATKAIN

By Dr. Shah Alam

Published by New Warsi Book Corporation

September 2000

Price: Tk. 275.00, (Off Set: Tk. 360.00)

Shomokalin Antorjatkain Ain or the Contemporary International Law is a textbook written in Bangla by Dr. Shah Alam, the Dean of the Law Faculty of the Chittagong University and former member of the Law Commission. The book contains eighteen chapters, the first five concentrate on the origin and sources, the fundamental concepts and principles, and the relationship between the National and International Law. Chapters six to seventeen deal with specific institutions of Public International Law. Chapter eighteen focuses on the contentious aspects of International Law vis-a-vis developing countries. As a textbook, it states the general principles of Public International Law as well as it provides different factual situations Bangladesh had to encounter.

Chapter Eight is on International River Law, a very relevant topic for the students of this region. The author has discussed at length the prevailing water sharing dispute between Bangladesh and India. According to Dr. Alam the acquiescence and the compromising attitude of the then West Pakistan in exchange for a treaty with India regarding the Indus had made the consequences of the Farakka Barrage a *fait accompli* for the people of Bangladesh. He has pointed out the violation of International Law by India by changing the course of the international river the Ganges and thus putting a negative impact on Bangladesh, her economy, her environment to name a few. The different interim arrangements with India in 1975, the 31st meeting of the General Assembly of the UN in 1976, the five-year treaty in 1977, the two MOU of 1982 and 1985 and the thirty-year treaty signed in December 1996 have been discussed in detail in this chapter. The author has focussed on the negative consequences of the Farakka Barrage and the high handed attitude and actions against the lower riparian Bangladesh. He had provided a comparative study of the two treaties of 1977 and 1996 which enables the reader to better understand the present effects of the treaties and the fate of our people.

The controversial concept of globalization and the institutions and instruments through which the concept is being established has been dealt with in the last chapter (Chapter Eighteen) of the book. This is an area of International Law yet to be developed in Bangladesh. Although a single chapter on this vast topic is inadequate, Professor Alam has touched the important issues such as preferential trade, technology transfer, dumping, foreign investment. The right to receive special economic assistance and special trade preferences by developing countries is discussed and at the same time Professor Alam put forward the rationale behind the said right as it has been seen by the international community since the 70s. Dr. Alam has not only referred to the commissions set up by UN, the declarations, conventions, sanads but also referred to the relevant articles through which the gradual changes took place. The creation of GATT and WTO and the objectives have been briefly discussed. A considerable portion of this chapter deals with International Law of Development. The author has emphasized on the developing countries' right to development and the duty of the developed nations in this regard.

The important topic of Jurisdiction has been discussed in Chapter Seven under the heading of State in International Law. Under the universal principle of state jurisdiction Professor Alam mentioned the war crimes committed in 1971. He firmly stated the scope for the trial of those who committed these heinous crime and that there is no limitation of time for this type of trials which he has substantiated by noting that those who committed war crimes during the Second World War are still being tried. But this topic (Jurisdiction) should have been elaborated in a separate chapter altogether.

Reference to some practical problems faced by Bangladesh should have been included to enable the students of law to understand these aspects properly. In the Law of the Sea (Chapter Nine) under the continental shelf the Talpaty issue should have received some attention. Being a book on contemporary International Law Aviation Law/Air Space Law, Asylum and Extradition should have been highlighted.

Different cases helped lay down different principles of International Law. But relevant case reference is relatively fewer in the book. Case tabling has some errors as well, such as the Eichmann's case, which has been cited at least twice but the table contains a single reference.

Shomokalin Antorjatkain Ain has been a timely and welcome contribution to the literature of Public International Law from Bangladesh's perspective. The choice of words and the simplicity of the language shall help students to understand the subject better. The student community will be grateful to Dr. Shah Alam, as this book shall work as a tool to explore the new horizon and to remain conversant with the new concepts of International Law as it is applied in the contemporary world.

Reviewed by Rabeya Jamali