LAW watch

Is tolerance enough?

EUROPAWORLD

Kofi Annan, the UN Secretary-General, presented a succinct view of the UN agenda last week when he declared "Our objective [is] to create a global community built on the shared values of solidarity, social justice and respect for human rights." It is seldom that the UN's message is set out so clearly and in a way in which it is easy to evaluate what nations have to do to reach such a self-evidently desirable objective.

The Secretary-General's declaration came in a message commemorating last Friday's International Day for Tolerance, one of a seemingly interminable succession of UN observances that range from the mighty (World AIDS day) to the mundane (World Television Day). As a peg on which to hang the message, tolerance, will serve. Like human rights everybody pays lip service to tolerance provided they can go on to identify their own series of undeclared exceptions. But solidarity, social justice, a global community? These are far from being uncontroversial even in, or maybe even especially in, some of the greatest and best developed nations.

One has only to contrast expenditure on arms - still running at some $2 billion a day on the one hand, with the repeated failure of the vast majority of rich nations to come anywhere near the UN's target for official development assistance on 0.7 per cent of GDP, on the other, to know that the ideas of solidarity and global community are not at the forefront of the policy agenda in most rich countries.

Are we on track to hit the international development targets set at the Millennium Summit a year or so ago? No we are not. There has been some progress - and China and to a lesser extent India are moving forward, - but overall any third party evaluation would conclude not just 'could do better' but 'must do better.'

Annan said that tolerance "the value that makes peace possible" lay at the heart of what he had set out. Much depends, one suspects, on what exactly is meant by tolerance. Tolerance of evil, of human rights abuses, of suffering, of gross distortions of global priorities are surely inimical to the idea of solidarity and a global community.

But where Mr Annan is clearly correct is in stressing yet again that exclusion and marginalisation lead to hostility and fanaticism - and so generate further intolerance - which too often finds its expression in armed struggle or terrorism. "Dialogue must prevail over violence," he said. "Understanding over indifference, knowledge of others over ignorance and prejudice."

But the same knowledge that can assuage intolerance can also breed it. Telling rich societies that they should learn to be more tolerant of the poor and oppressed is not quite the same as telling the poor that they should continue to be tolerant of a world in which so great a division of resources persists. As the revolution in global communications continues so will the realisation in the poorer countries of the extent to which large numbers of their peoples are excluded and marginalised. The pressure for action will not be abated by an appeal to tolerance only, but only by a greater commitment to greater global solidarity.

Source: EuropaWorld 2001

RIGHTS corner

UN Conventions on Terrorism

LAW DESK SPECIAL

1.Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, New York, 14 December 1973

The Convention applies to the crimes of direct involvement or complicity in the murder, kidnapping, or attack, whether actual, attempted or threatened, on the person, official premises, private accommodation or means of transport of diplomatic agents and other "internationally protected persons". Internationally protected persons are defined as Heads of State or Government, Ministers for Foreign Affairs, State officials and representatives of international organizations entitled to special protection in a foreign State, and their families.

States Parties have obligations to establish their jurisdiction over the offences described, make the offences punishable by appropriate penalties, take alleged offenders into custody, prosecute or extradite alleged offenders, cooperate in preventive measures, and exchange information and evidence needed in related criminal proceedings. The offences referred to in the Convention are deemed to be extraditable offences between States Parties under existing extradition treaties, and under the Convention itself.

CLOSED for Signature

2. International Convention against the Taking of Hostages, New York, 17 December 1979

The Convention applies to the offence of direct involvement or complicity in the seizure or detention of, and threat to kill, injure or continue to detain a hostage, whether actual or attempted, in order to compel a State, an international intergovernmental organization, a person or a group of persons, to do or abstain from doing any act as an explicit or implicit condition for the release of the hostage.

Each State Party is required to make this offence punishable by appropriate penalties. Where hostages are held in the territory of a State Party, the State Party is obligated to take all measures it considers appropriate to ease the situation of the hostages and secure their release. After the release of the hostages, States Parties are obligated to facilitate the departure of the hostages. Each State Party is obligated to take such actions as may be necessary to establish jurisdiction over the offence of taking of hostages.

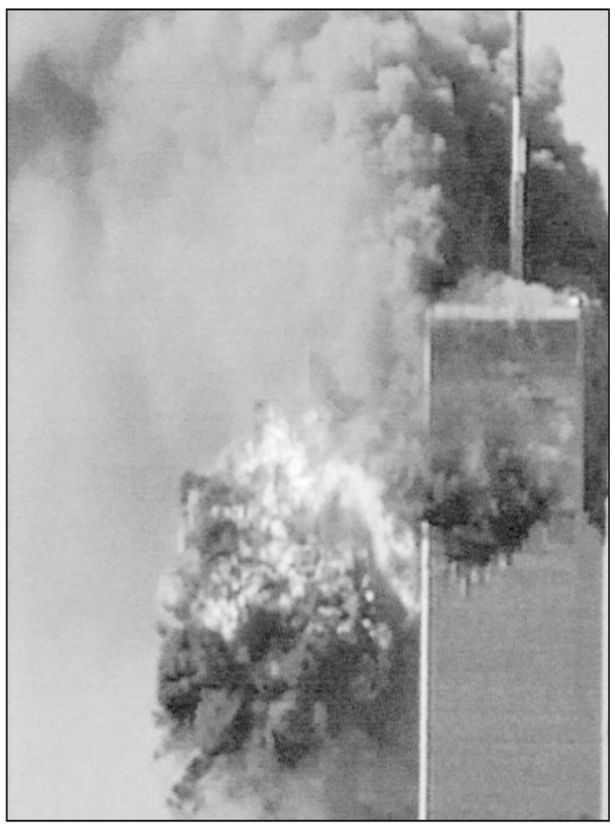
States Parties have obligations to establish their jurisdiction over the offences described, make the offences punishable by appropriate penalties, take alleged offenders into custody, prosecute or extradite alleged offenders, cooperate in preventive measures, and exchange information and evidence needed in related criminal proceedings. The offences referred to in

the Convention are deemed to be extraditable offences between States Parties under existing extradition treaties, and under the Convention itself.

CLOSED for Signature

3. International Convention for the Suppression of Terrorist Bombings, New York, 15 December 1997

The Convention applies to the offence of the intentional and unlawful delivery, placement, discharge or detonation of an explosive or other lethal device, whether attempted or actual, in, into or against a place of public use, a State or government facility, a public transportation system or an infrastructure facility, with the intent to cause death or serious bodily injury, or extensive destruction likely to or actually resulting in major economic loss. Any person also commits an offence if that person participates as an accomplice in any of these acts, organizes others to commit them or in any other way contributes to their commission. The Convention does not apply where an act of this nature does not involve any international elements as defined by the Convention.



September 11 episode has changed the global out look to wards terrorism

States Parties are required to establish jurisdiction over and make punishable, under their domestic laws, the offences described, to extradite or submit for prosecution persons accused of committing or aiding in the commission of the offences, and to assist each other in connection with criminal proceedings under the Convention. The offences referred to in the Convention are deemed to be extraditable offences between States Parties under existing extradition treaties, and under the Convention itself.

CLOSED for Signature

4. International Convention for the Suppression of the Financing of Terrorism, New York, 9 December 1999

The Convention applies to the offence of direct involvement or complicity in the intentional and unlawful provision or collection of funds, whether attempted or actual, with the intention or knowledge that any part of the funds may be used to carry out any of the offences described in the Conventions listed in the Annex, or an act intended to cause death or serious bodily injury to any person not actively involved in armed conflict in order to intimidate a population, or to compel a government or an international organization to do or abstain from doing any act. The provision or collection of funds in this manner is an offence whether or not the funds are actually used to carry out the proscribed acts. The Convention does not apply where an act of this nature does not involve any international elements as defined by the Convention.

The Convention requires each State Party to take appropriate measures, in accordance with its domestic legal principles, for the detection and freezing, seizure or forfeiture of any funds used or allocated for the purposes of committing the offences described. The offences referred to in the Convention are deemed to be extraditable offences and States Parties have obligations to establish their jurisdiction over the offences described, make the offences punishable by appropriate penalties, take alleged offenders into custody, prosecute or extradite alleged offenders, cooperate in preventive measures and countermeasures, and exchange information and evidence needed in related criminal proceedings. The offences referred to in the Convention are deemed to be extraditable offences between States Parties under existing extradition treaties, and under the Convention itself.

OPEN for Signature until 31 December 2001

LAW vision

The law's delay: An Indian perspective

There is no doubt that when lawyers seek adjournments those particular cases are bound to be delayed, but this does not mean that such adjournments are the cause of the overall delay in the justice delivery system. To say so would be akin to the railways claiming that their trains run late because of the last minute cancellation of tickets by passengers.

JOS. PETER D'SOUZA,

THE law's delay: start a discussion on this topic and very soon it veers around to how lawyers delay cases. The metamorphosis is subtle but certain. More and more, in the public eye, advocates are being targeted for nearly all the ills that plague our judicial system. Heading the list of maladies is the inordinate delay in disposal of matters. We appear to be hell bent on proving that the wheels of justice are turning slowly, if not coming to a grinding halt. 'Let the law take its course', has become the pet phrase of every politician indicted in some scam or the other. That at present there are over two crore cases pending in Indian courts shouldn't shock anyone. Those manning the judiciary ought to have seen this figure coming for some time now. The fact that they seem shell-shocked only goes to show that they have been behaving like proverbial ostriches.

Most people who form an opinion on this issue do so from personal experience: a case to which they are a party has been endlessly lingering in court for no rhyme or reason. More than once the party has witnessed either his or the opposing advocate seek an adjournment, and has dared not ask why. Hence delays in court are the making of the tribe of black coats. Such opinion is fortified when lawyers go on strike and boycott courts.

There is no doubt that when lawyers seek adjournments those particular cases are bound to be delayed, but this does not mean that such adjournments are the cause of the overall delay in the justice delivery system. To say so would be akin to the railways claiming that their trains run late because of the last minute cancellation of tickets by passengers. We can tell how ridiculous this would sound coming from the mouth of a Railway Minister. Similarly, even if half a dozen or more cases are sought to be adjourned on a particular day, this cannot be held to be the cause of the backlog in disposal of cases in that particular court. There are many others to be heard and disposed of. It is common knowledge that on any given day at least half the cases must be adjourned due to lack of time. The lawyer who seeks an adjournment is very often a blessing in disguise to a sitting overburdened judge, though he would not like to admit it. So even if for some reason little or nothing transpires in court and the board collapses (to use the popular phrase), the justice delivery system of that particular court should not be affected. The judge always has plenty of work piled up in his chamber needing his urgent attention. There are orders and judgments pending to be dictated. There are issues to be studied in matters already argued. All this and more could be attended to during these days. It is not uncommon that after matters are argued no order or judgment is passed for months on end. Sometimes the judge who has heard the arguments is transferred before he can pronounce the judgment, and the matter has to be re-argued before the next judge, or even the next. One aspect of the High Court board is the list under 'Final Hearing', i.e. matters to be finally heard and disposed. There is a standing joke that now there should be a subsequent list titled 'Final Final Hearing'.

Adjournments or innumerable and unending applications are not the root reasons for our judicial predicament. They are among many causes, to which could be added unfilled vacancies of judges' posts and unnecessary litigation by the Government and its agencies. But even all these added together cover-up a cause lying much deeper in the recesses of our psyche: for the Indian judiciary, time has no real value. Those managing the judiciary should be brave enough to admit responsibility. This is especially so the higher one goes. One of the facets of the truism that 'judges go by face law and not case law', is on the time graciously granted to senior counsel to argue matters endlessly. Every one of us has witnessed the innumerable number of hours given to senior counsels to argue even simple anticipatory bail applications. Any other advocate would be lucky to squeeze in fifteen minutes.

At the Supreme Court the record is even more dismal. Some examples will help readers appreciate how things move in the Apex Court. The hearing in Keshavanda Bharti's case lasted for about six months. The bench consisted of 13 judges at a time when the total strength of the Supreme Court was 14 judges. Similarly, earlier in 1967 in R C Cooper's case the bench comprised 11 judges, when the judges strength of the Supreme Court was 12, and the hearing lasted for 37 working days. Looking at the judges' strength during this period when the aforementioned cases were heard, no other work apart from routine admissions could be processed by the court. The position was not very different in the famous case L. C. Golaknath vs. State of Punjab. As a matter of fact because of these last two cases there was a quantum rise in pending cases lying before the Supreme Court. In what is known as the Judge's case, a bench of seven judges heard arguments from August 4, 1981 till the end of the year. A high number of judges being occupied in the hearing of only one case has the in built tendency to push up the arrears. All these factors were responsible for the rise in arrears in the Supreme Court.

Besides court time being taken up by the uninhibited verbosity of advocates, the judges seem to delight in producing judgments of unending length. The above-mentioned Keshavananda Bharti case produced a monumental judgment running into 700 closely printed pages. Though it is supposed to be a judgment, in fact it failed to decide any specific issue. At the end of this great exercise in futility the Court passed a two-sentence order to the effect that "the cases are remitted to Constitution Bench for disposal in accordance with law" and that "the Constitutional Bench will determine the validity of the Twenty-sixth Amendment". There was no majority decision on any significant point that the court was called upon to decide. In the Judges case, where seven judges heard arguments for five months, the result was separate judgements by each of the seven judges running to a total of nearly 1000 printed pages. Though many issues were raised in the judgment, the core problem relevant to the lay citizen was who has the final say in matters of appointment and transfer of judges of a High Court. Was it the Chief Justice of India of the Government of India? No layman reading this convoluted judgment will ever comprehend the answer to this question. In short the Supreme Court handed over the reins to the Government, but this judgment came to be known more for an ancillary matter of the right to file writ petitions in public interest. Lengthy arguments and lengthy judgments all take time. Reading judgments, if one has the patience to do so, one gets an uneasy feeling that our judges suffer from an unfulfilled wish of writing a treatise in law. And that is exactly what a judgment is not meant to be.

As an institution, the judiciary could be rated as being the most inefficient in India. No institution can change if the men in control are not mentally prepared to listen. And that is the root problem with our judiciary. They have no in-built mechanism for listening to public opinion.

It is important to remember that management of the courts is in the hands of the judges, and not advocates. What is lacking is Court Management. Advocates do not come into the picture at all. At most they can suggest ways and means. But more often that not, when advocates do attempt to make suggestions to improve matters, these are turned down by the judges. Not long ago a junior advocate filed a writ petition in the High Court requesting that every court in Goa arrange for witnesses to be seated while deposing in the witness-box. The reason given, besides the tremendous hardship that witnesses have to undergo without any reward, was that they also have to face tiring and lengthy cross-examinations. Most people we spoke to thought it an excellent idea. The matter came up before a division bench (of two judges) who from the word go went for the kill. The moment the advocate stood up they asked her as to why she stood instead of sitting. They just would not permit her to get in edgeways. She was literally ridiculed for filing such a writ and was pressurized to withdraw it. This she refused. Finally it was disposed with a one word order 'dismissed'. One wonders whether she or any other advocate would ever come forward with another suggestion!

The problem with our Judiciary is its bosses - the judges. They just don't like to be told by any other than a retired brother judge of the Supreme Court that they are making an absolute mess of things. They have no managerial skills, and do not care to develop them. They will not invite outside opinion on how to go about things. They just do not know the meaning of the phrase 'cost effectiveness'. As an institution, the judiciary could be rated as being the most inefficient in India. No institution can change if the men in control are not mentally prepared to listen. And that is the root problem with our judiciary. They have no in-built mechanism for listening to public opinion. Genuine feedback will never be available if those at the helm do not want to be hurt by what others say. And judges cannot bear straight talk. They are so used to the bowing and bending that they get unnerved when someone stands upright in their presence. Nothing short of a moratorium on the Contempt of Courts Act will invite genuine feedback from all and sundry. Nothing will help the judiciary better than a few months of straight talk. It is worth the try. 'Fast track' courts may seem a good idea. Manning them, a better one. But first it would be best to fill all existing vacancies in existing courts. Even this is not the answer. Only when the judiciary invites experts from outside- especially from the management-training cadre-to study our problem that we will begin to see some sensible solutions to our stagnating situation. Till this is done we will always have lawyers to blame for the laws delay.

Jos. Peter D'Souza is an advocate, India. Courtesy: Folk School, Asian Human Rights Commission

Artha Rin Adalat
Some problems and prospects

SYEDA AFROZA ZERIN

EVEN after 30 years of our independence, we have failed to build up a well-structured economy in our country. For the last few decades, the past Governments have tried their best to make effective policies to provide a better economic structure. Unfortunately, for a number of reasons even in the economy sector, we are lagging behind. Consequently, our country is on the brink of a financial disaster. Needless to say that the Loan Defaulters are playing a very controversial role in disbanding our economic structure. For a number of reasons, for a long period there has not been any legislative development on this. However, under the wretched economy the Legislatures felt an urge of enacting a special law for realisation of loans given by the various financial institutions to various Loaners.

Although the idea of enacting a special law to recover the unpaid loans has been around for a several years at last in November 1989 the President of the Peoples Republic of Bangladesh issued "Artha Rin Adalat Ordinance 16" by the Notification in the Official Gazette exercising the power under Article 93 (1) of the Constitution. Subsequently within a very short time, some of the sections were amended and this Ordinance was accepted and passed by the Parliament. Later 20 January 1990 the Artha Rin Adalat Ain came into force. In the year of 1992 and 1994, this Act was amended. Although there is no official English version of this Act but those used here are accumulated from judgements delivered at different times.

In the light of its preamble, it is apparent that the main object of this Act was to recover the loan given by the Financial Institutions. So, undoubtedly only the financial institutions have the locus standi. Under this act, the financial institutions have been specified under section 2.

Section 2 (KA) of this Act covers only the following institutions as the 'financial institutions' under this Act. These institutions are:

1. A bank constituted under the Bangladesh Banks (Nationalization) Order, 1972 (P.O. NO 26 of 1972)

2. A banking company as defined in clause (o) of Section 5 of the Banking companies Act, 1991(Act 14 of 1991)

3. The House Building Finance Corporation Established under the Bangladesh House Building Finance Corporation Order, 1973(P.O. No. 7 of 1973)

4. The Bangladesh investment Corporation established under the investment Corporation of Bangladesh Ordinance, 1976

5. The Bangladesh Shilpa Rin Sangstha and the Bangladesh Shilpa Bank.

6.the Bangladesh Krishi Bank and the Rajshahi Krishi Unnayan Bank

7. A Financial Institution as defined in 2(1) of the Financial Institutions Act.

8. Banks executed under Islamic Shariat.

9. Leasing Company instituted for giving loan for leasing of Machinery given for the Development of any industrial enterprise

10. International Finance Corporation

11. Commonwealth development Corporation

12. Asian Development Bank

13. Loan given by any other International Financial Institution.

Section 3 of the Act provides that the provisions of this Act shall be, unless otherwise provided there in, deemed to be in addition to, and not in derogation of, any other law for the time being in force. So if any financial institutions are established under any law and if that law provides for any special provision for realisation of loan those provisions will not be hampered by this Act. Therefore realisation of loan by the Bank established under Bangladesh Bank (nationalisation) order 1972, Griha Nirman Rin Dan Shangstha established under Bangladesh House Building Finance Corporation Order, 1973, Bangladesh Investment Corporation established under the Investment Corporation of Bangladesh Ordinance, 1976 Bangladesh Shilpa Rin Shangshtha established under Bangladesh Shilpa Rin Shangstha Order, 1972, Bangladesh Krishi Bank established under Bangladesh Krishi Bank Order can be done even under the P.D.R. Act as well as under the Artha Rin Adalat Act. Therefore, these particular Institutions are enjoying certain privileges. They can follow either the procedures specified in the P.D.R Act or the procedure of the Artha Rin Adalat Act for the recovery of loan. Consequently, they are enjoying a lot of flexibility because of the difference of procedures of the different Act. Section 2 of this Act has given the definition of 'loan' as well. Under the Act "loan " is defined as advance, loan cash credit, overdraft, banking credit, discount bill or any other financial assistance or facilities, by whatever named called. Sub clause (2) of Section 2 also includes guarantee, indemnity , letter of credit or any other financial facility which a financial institution gives or issues or accepts as liability on behalf of borrower .

That means all kind of financial assistance or facilities which will be given by the above mentioned financial institutions will be termed as loan irrespective of the term used to describe such assistance or facility. In Alco Hygienic Products Ltd. Vs Islami Bank Bangladesh LTD. 47(1995) DLR 264 it was held that the definition of loan given in Section 2(kha) of this Adalat Act clearly indicates that the amount taken from the bank on condition of repayment in whatever names this may be termed comes within the definition of Rin. But very surprisingly despite this definition of loan confusion prevails regarding this. One of the example in this regard is the Decision of the Appellate Division of the Supreme Court of Bangladesh in Sultana Jute Mills Ltd. and Others Vs. Agrani Bank Ltd and Others 46(1995) DLR (AD). Moreover, in this Appeal the interpretation of some of the Sections of this Act pose some questions, which need to be clarified.

Section 5 of this Act deals with the power and jurisdiction of the Artha Rin Adalat.

From Section 5(1) of the Adalat Act, it appears that notwithstanding anything contained in any other law all suits concerning the realisation of "loan " by financial institution shall be instituted in the Artha Rin Adalat and all suits shall be decided only in the said Adalat. Section 5(4) grants to the Artha Rin Adalat the powers and Jurisdictions of a civil court, but subject to the provisions of the Adalat Act. Sub clause (5A) of section 5 provided that the hearing of any suit in a Artha Rin Adalat shall not be adjourned for more than three times and such a suit shall have to be disposed of within a period of six months form the date of its institution. But this Section did not give any definition of hearing. Not even the section provided for any alternative remedy in case of failure of disposing the suit within six months. Moreover, for disposing a suit within 6 months the period should be calculated only based on working days. According to Section 6 (1) No question shall be raised before any Court or any other authority regarding the proceeding, order, judgement and decree of the Court, but subject to section 7.

Sub-clause 2 of Section 6 provided that notwithstanding anything contained in subsection (1), where any defendant intends to file an application for cancellation of an ex-parte decree against him by any Artha Rin Adalat in accordance with rule 13 of Order ix of the Code of Civil Procedure, 1908, he shall along with the application, deposit in the Court at least 25% of the money decreed against him or a bank security of equivalent amount, and his application shall not be entertained if such deposit is not deposited.

Under the original Act, one had to deposit half of the money decreed against him. Later the amount was reduced to 25%. However, this provision for depositing money in the said Court should be abolished fully. Here the amount of decreed money should not be 25% but the principal amount could be 25%.

Under Section 7 if any person is aggrieved by the judgement or decree of the Artha Rin Adalat, he may, within thirty days from the date of the decision or the decree appeal before the High Court Division. Here we do not find any alternative remedy in case of failing to appeal within 30 days. Provided that no appeal shall be preferred against an interlocutory order of the said Adalat. Provisions of Section 6 and 7 are contradictory. Section 6 declares that the judgement of this Act will be final but section 7 provides Appeal, which is very much ambiguous. So to remove the ambiguities both the sections should be amended.

Perhaps this is the only special law where an appeal against an interlocutory order is barred. True that the main object of the Artha Rin Adalat Act is the recovery of loan given by the financial institution without any delay. Therefore, here the approval of an appeal against an interlocutory order will increase the procrastination of disposing of suits. However, to ensure the justice an appeal against an interlocutory order should be allowed and special Court of Appeal could be established for hearing and disposal of appeals against interlocutory order.

Although till to date these loopholes remain in this special Act but after the enactment of this Act the number of loan defaulters has been reduced. From 1994 to 1999 about 406-title suit and 215 tittle suit has been filed under this Act. Among these 264 title suits has been disposed. To make this Act more fruitful and effective the ambiguities and shortcomings of this Act should be removed without any delay.

Syeda Afroza Zerin is a LL.M candidate of Department of Law, University of Law.