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REVIEWING the views





To head off mass migrations set a global minimum wage

MICHAEL ARDON

The fact that globalization is widening the gap between the rich North and the poor South, and is increasing poverty in many developing countries, is used to discredit the very idea of globalization. This is confused thinking.

The term "globalization" is generally understood to mean the trend to enable a free flow of goods and capital by removing national and regional barriers. Such a definition is misleading, because it leaves out one of the most important elements of a truly competitive global economy - the free flow of work forces.

Globalization, as practiced today, is based on fundamentally contradicory elements: a free flow of goods and capital, coupled with a ban on the free flow of work forces from country to country. Globalization based on naintaining restrictions on immigration is self-contradicting.

The basic paradox of the current ideology of globalization is that without the freedom of laborers to work anywhere, free competition and the rule of market forces in the global economy are mere fictions

What is more, most of the negative results of globalization, as it is now practiced, originate from this restriction on the free flow of work forces.

It is this restriction which maintains wages of less than a dollar a day in developing countries. It is this restriction which leads to the coexistence of very poor and very rich countries in the world of today. It is this restriction which nourishes feelings of hatred and revenge in poor countries toward the affluent North

But of course the North cannot afford to lift all restrictions on immigration, in the world as it is today. That would result in migration to the rich countries by hundreds of millions of poor laborers. Such population movements could be seriously disruptive

There is no rapid solution to the inherent contradiction between restricted immigration and globalization. The only long-term solution lies in bridging the gap between the per capita incomes in the rich and poor coun-

Only when this income gap is narrowed will a global free flow of labor be possible without massive migration.

People do not tend to leave their homelands for a differential increase in income. Language, cultural and social barriers, the high costs of migration and of finding alternative living quarters, all this tends to discourage people rom leaving home unless they have to.

Given the choice between \$20 a day at home and \$40 a day in a distant developed country, most people will choose to stay at home. Not so, though, if the choice is between staying at home hungry on \$1 a day and emigrating to a developed country where a minimum wage and social benefits are secured.

A reasonable gap in incomes between South and North that would ninimize the drive to emigrate would have two positive results:

A 20-fold increase in wages in the South would eliminate hunger and extreme poverty for billions of people, and would simultaneously eliminate the global dangers that result from these conditions.

Foreign capital would continue to flow to the South, even if the ratio of labor costs between South and North were 1-to-2 instead of 1-to-40.

But by what mechanism could such a substantial narrowing of the gap be achieved? One of the options is a comprehensive global minimum wage

The minimum wage might initially be only slightly higher than the present low wages in some developing countries, so as not to disrupt their economies, but it would be increased annually. Ultimately it should reach 40 to 50 percent of the average minimum wage in the industrialized nations

Compliance with such a minimum wage might be achieved by a ban on mports from countries that fail to adopt it.

In the aftermath of Sept. 11, the time has come to realize that a deluxe globalization for the rich, without globalization of the labor force, is not sustainable, and that until some equity is attained between poor and rich countries, no true globalization will be achieved

Furthermore, if the gap between the two worlds is not narrowed, the poor countries will continue to breed forces that endanger the very existence of our civilization.

The writer, a professor of chemistry at The Hebrew University in Jerusalem, contributed this comment to the International Herald Tribune



MARTIJN SNIP

VER the last couple of months the newspapers have been writing a lot about violence against religious minorities in Bangladesh. According to newspaper reports violence has increased since the last elections and minorities, predominantly Hindus, have been affected. With scant knowledge about Bangladeshi culture, society and politics I arrived in Bangladesh just a few months ago. Reading the newspapers I wondered about this violence: where did it come from and what was really going on? Is this issue just another example of the rule of law shortcomings in this country? The following are just some of my observations as a bideshi.

Looking at the history of Bangladesh and its people, I get the impression that it has always been quite a tolerant society and that during the Liberation War Bangladeshis fought together, irrespective of whether one was Muslim or Hindu. On the other hand, the violence did not end with the conclusion of the war in 1971. An impoverished economy might have contributed to the

The problem lies with the enforcement of the law. The system of law enforcement and the law enforcers themselves (police, public prosecutors and the judiciary), generally speaking, seem to be incapable of creating an environment of law and order in this country. When I hear victims of a crime, looking for justice, say that they would rather go to the newspaper to report their story than to the police there must be something wrong.

violence in general. Poverty is at the root of corruption and corruption in the law enforcement agencies definitely does not contribute to establishing proper rule of law. In this environment perpetrators might get away with crimes without facing arrest or prosecution. Moreover, even in a society with proper rule of law, poverty breeds crime

When I read the papers and the reports from human rights organizations, I could think that the situation of minorities in Bangladesh since the October 1, 2001 elections is very alarming. But keeping the widespread "general" violence in mind, the story the papers write and the human rights organizations report might not be the whole story. No doubt there is violence, but there has been violence all the time. Taking for granted what the newspapers and human rights organizations write might give the wrong picture. Human rights organizations focus on human rights violations, that is their raison d'être and what they get funded for. Newspapers, as commercial entities, want to sell the news that's their business. These motivations do not necessarily mean that the reports are biased, but it definitely says something about the focus of both the media and the human rights organizations. In my opinion, it is no surprise that their reports are alarming and sometimes appear to be somewhat exaggerated. This blurs the picture and confuses me.

The situation could be that ordinary criminals, or mastans, took advantage of the power-vacuum right after the elections and committed crimes without fear of prosecution. And subsequently that these same criminal elements continued with their practices as the new government scrambled to establish its new administration. Is this kind of violence politically motivated? Or indeed religious motivated? Or is it just economically and criminally motivated? These seem to be important questions to ask

That said, I don't think the motives really matter in determining whether we're dealing with human rights violations or not. Does a crime have to be labeled "religiously motivated" to become a human rights violation? Or can an economically motivated crime also be considered a human rights violation? The answer depends very much on the definition of a human rights violation. It is clear that every individual enjoys the same universal basic rights these are what we call human rights. But when can we speak of a human rights violation? For example, say I'm walking down the street and someone stabs me with a knife. Would this be called a violation of my basic human right of physical integrity? No, as long as there is a law in place that considers this a crime, as long as there is proper enforcement of that law, I do not consider this a human rights violation. Things turn out differently, however, if there are no laws at all, or if there are laws in place but the authorities violate those laws themselves or willingly allow them to be violated. The gray area is where there might be willingness on the part of the authorities to enforce the law, but they just lack the capabilities and resources to actually carry out their mission. I think this scenario is applicable to the situation of Bangladesh.

I, a bideshi, got confused, reading and talking about this violence against religious minorities issue. I was expecting to clearly find gross human rights violations, but as just pointed out, the reality is not that simple. The deeper I

dig into this subject, the more complex and murky the situation seems to be. Yes, I came across a lot of violent incidents indeed, and allegedly, the Hindu minorities were affected. But hard facts pointing towards a systematic pattern of violence against Hindus seem to be scarce. A lot of information seems to be from hearsay; human rights organizations seem to rely on the media for their information before conducting their own research; and the media in turn, write about the findings of human rights organizations. This all appears to be the same circulation of information. When I read about widespread feelings of insecurity amongst the Hindu population, I immediately have to ask where this fear comes from. I can imagine that when frightened people are being told horrifying stories about further attacks on minorities, this contributes to even stronger feelings of insecurity, although these sentiments are just based on unsubstantiated stories. Then again, violence definitely seems to be happening, but to what extent and for what reasons, that is not clear to me. I can't deny getting the impression that this is much more a law and order problem than a clear human rights violation.

This takes us back to the law and order-problem briefly mentioned before. In my opinion the laws in Bangladesh are fairly good (the notable exceptions are Section 54 of the Code of Criminal Procedure and the Special Powers Act the so-called "Black Laws"). The problem lies with the enforcement of the The system of law enforcement and the law enforcers themselves law. (police, public prosecutors and the judiciary), generally speaking, seem to be incapable of creating an environment of law and order in this country. When I hear victims of a crime, looking for justice, say that they would rather go to the newspaper to report their story than to the police there must be something wrong



"Not only in the cases of violence against minorities, but everywhere across the spectrum of Bangladeshi society the law and order situation is not good."

Not only in the cases of violence against minorities, but everywhere across the spectrum of Bangladeshi society the law and order situation is not good. This is a very serious shortcoming not only of the current governgovernments. I have heard the opinion that the last caretaker government administration improved? Acting in on the part of the law enforcement incapable or unwilling government. not something that I, being a foreigner months, can make a judgment on.

Martijn Snip, a lawyer from The Netherlands, visited Bangladesh for a research on the state of minorities





Exploring writ of Habeas Corpus

Constitutionality of quota

ment, but also of all the previous failed in this respect too. But to what extent has the situation under the new this regard is the responsibility of the government. Inaction and passivity authorities are signs of an either

Whether it is incapability or unwillingness is hard to judge, and definitely in Bangladesh for just a couple of

Custody of minors

Justice S K Sinha

LAW lexicon

HE High Courts Act 1861 empowered the High Courts established under the Act to make its own rules. Moreover, the High Courts were conferred to make rules under section 491 (2) of the Code in matters of the Writ of Habeas Corpus. In exercise of those powers, the Rules 28 to 41, part-II chapter XI of the Appellate side Rules were framed in matters of the nature of Habeas Corpus, of them, rules 38 and 39 are relevant for our purpose. Rule 38 provides that whenever the High Court Division is of the opinion that a prima-facie case for granting the application is made out, a rule nisi may be issued calling upon the person against whom the order is sought to appear to show cause why such order should not be made and at the same time to produce in court the body of the person alleged to be improperly detained. Rule 39 provides that upon perusal of the cause or causes as may be shown, if the High Court Division is satisfied that there is reasonable ground for believing that the detenu has been improperly detained, it shall pass order directing the detenu to be set at liberty or delivered to the person entitled to his custody. This rule making power given upon the High Courts by legislature are wide to entitle the High Court Division to say that a person improperly detained be delivered to the person entitled to his/her custody.

In respect of minor where an offence has been alleged to have committed by somebody relating to the said minor, there is no specific law in our country allowing the detention of the minor into custody for the minor is not an accused and could not, therefore, be arrested and detained. In Bombay, section 14 of the Bombay Children Act 1924 (Act XIII of 1924), enables the court to make arrangement for the proper custody of a minor who is involved in an offence. Section 552 of our Code of Criminal Procedure empowers a Metropolitan Magistrate and District Magistrate to direct the restoration of the minor to the legal guardian. In the absence of any statutory specific provision of law, it should not be read a prohibition and if the minor is recovered, a Magistrate in appropriate cases may make such order as in the circumstance of the case seems proper, to order for detention in judicial custody under section 100 of the Code until the custody of the minor is determined by a competent court having jurisdiction to decide the same. 21BLD(2001) A minor, in such cases, is at best be deemed a witness but he/she can not be detained against his/her will i.e. the will of the guardian. There are numerous decisions of the High Courts and Supreme Courts of this sub-continent that in case where a minor is abducted and recovered, he/she should not be detained in judicial custody. Indeed, in exercise of discretionary powers, court can exercise control over the minor and taking detention of the minor in judicial custody with a view to temporarily isolating him/her from certain influence, may be made by the dictates of justice. It is for giving a chance to the minor to develop his/her own independent opinion free from influence. Such a course is usually taken in order to enable the minor to be free from the effect of any coercion or under influence that might have been exercised over him/her. It is thought that such minors in such situation are incapable of exercising an independent mind unless kept for a reasonable time in neutral custody. This discretion may be exercised by the Magistrates subject to his supervision that the minor should be kept in isolation from the under trial prisoners. The government and NGO's should come forward to establish Neutral Homes for keeping the minors temporarily away from the under trial prisoners so as to exclude the possibility of any influence by others.

An unlawful detention of a minor from the legal guardian is equivalent to an unlawful imprisonment of the minor. The availability of other remedy under the Guardian and Wards Act 1890, for obtaining the custody of the minor is not a ground for refusing an application under section 491 by the guardians of the minor who are entitled to have their custody. The Family Courts do not retain any power to give custody of the minor, when an offence alleged to have been committed relating to the said minor. It is in the interest

of the minor alone which is the paramount consideration, while determining the proper custody of the minor, the High Courts carry with its widest discretionary powers in exercise of the control over the proceedings and pass appropriate orders for the custody of the said minor in favour of the guardian. While a minor is a female alleged to have been abducted from the custody of her parents and married by the abductor, it has been overwhelmingly held that the parents had a right in preference to the right of the alleged husband and are entitled to the custody of the minor. (15DLR(Dac) 148, 42 DLR 79, 297; 17 DLR (Dac) 544; 28 DLR 123; 46 DLR (AD) 10; 48 DLR (AD) 67; PLD 1972 SC 6, AIR 1960 SC. 93, AIR 1929 Mad 834). Under the English law as well, the main consideration which ought to weigh with a court of Chancery is really the question of the welfare of the minor. The jurisdiction arises from the power of the Crown delegated to the court of Chancery, and it is essentially a parental jurisdiction, and it is to be exercised for the benefit of the minor. The moral and religious welfare must be considered as well as its physical well being and due regards must be had to the ties of affection. The word "welfare" must be taken in its widest sense.

But where there is subsisting order of a court of competent declaring a person to be fit and proper person to exercise quardianship over minor, the retention by that person legally appointed, of the custody of the minor can not be called illegal or improper and the procedure by way of writ of Habeas Corpus under section 491 Cr.PC should not be exercised by the High Court Division. The proceedings under section 491 is a summary in nature and is not an appellate or revisional jurisdiction. It is not granted where the effect of it would be to review the judgment of any court.

In case of a detention either in private or public custody of a person who is a sui-juris there is distinctive principle of law in trying with such matter by the High Court Division. The case present little difficulty because the said detention can be challenged by the victim or anybody else on his behalf. The court can not detain a major against his/her will and he is bound allow him to go to his/her free will. But in case of a minor, the minor can not be said to be capable of giving consent and the detention against the wishes of a lawful guardian of the minor is prima-facie illegal. The consent, thus refer is the consent of the guardian and not of the minor. If the dejure guardian, therefore, applies for the custody of the minor on an application under section 491 in respect of the said minor detained illegally, the court must dispose of the application with reference to the welfare and interest of the minor which is the dominant consideration before deciding the said application. When a minor is abducted from a lawful guardian, the parents do not come to the court seeking custody of the minor with any profit motive, they do it generally out of parental concern and love for their minor. ATM Afzal, J. in the case of Wahed Ali Dewan Vs. State 46 DLR (AD) 10 observed

"We can understand that these are difficult matters to decide before evidence is recorded at the trial and on top of it there is always the human consideration which overtakes strictly legal standards when a victim refuses to go with her parents at the times even after persuasion by the court itself. The court in such cases out of anxiety to do proper justice examines the victim and speaks to her.'

The powers of High Court Division that whenever a person is illegally or improperly detained in public or private custody, if it thinks fit, directs that such person be set at liberty is sufficiently wide. This right can be invoked by any person under it. Unless this power has been expressly taken away by a competent piece of legislation, as was done earlier suspending the operation by section 10 of the Restriction and Detention Ordinance, 1944 (III of 1944), the High Court Division, has power to issue writ of Habeas Corpus directing the authority detaining a detenu is illegal and improper. Therefore, one should not have any doubt that the High Court Division has no power to determine the question of custody of a minor improperly detained in exercise of powers under section 491 of the Code.

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in public services

MD. REZAUL KARIM

QUALITY of all persons is one of the most important fundamental rights in a constitution. Discrimination on any ground is not generally permitted. Discrimination can only be made to maintain equality which is termed "positive discrimination". Under the principle of positive discrimination "quota" for "backward section" in a country is provided. But to what extent and to whom "quotas" are to be provided, are the questions to be determined regarding the social backdrop of a state. It is to be ensured that reservation must stop where reverse discrimination begins.

Constitutional provision

In Article 27 of Bangladesh Constitution, equality of all persons has been ensured. In Article 29 (1) & (2) equality of all persons in public services has been ensured and in article 29 (3) (a) the state has been empowered to make provision in favour of any "backward section" of citizens for the purpose of ensuring their adequate representation in the service of the Republic without providing any meaning or criteria of backward section.

Reservation in India and Pakistan's Constitution

In article 14 of Indian Constitution general provision of equality has been provided. Article 16 of the Constitution provides equality of opportunity in public services while 16 (4) provides for reservation for "backward class" without providing any definition of the term.

Article 27 of the Pakistan Constitution provides safeguards against discrimination in services remains after exclusion of the "forward section" meritorious peoples of the country. while its first proviso provides for reservation of post belonging to "any

class or area" to secure their

adequate representation in services of Pakistan which shall not extend twenty years from the commencing day.

within a backward class.

Equality and reservation

As reservation is made to maintain equality so it should be stopped when equality is gained. Reservation must not affect the basic principle of equality. Regarding this Mahmudul Islam in his book "Constitutional I aw of Bandladesh", has commented 'reservation is an exception to the guarantee of article 29 (1) and (2) and it should not be interpreted or given effect to in such a manner as to nullify the guarantee of article 29 (1) and (2)'. So, in giving preference to any 'section' or 'class' the guarantee of equality has to be borne in mind and a balance has to be maintained

Backward Section

Under article 29 (3) (a) of Bangladesh Constitution reservation can be made for "backward section". The corresponding term in Indian Constitution is "backward class" the expressions have not been defined in these Constitutions. So, question arises what does the expression 'backward section' of citizen in article 29 (3) (a) signify and how should be they identified? This is a single most difficult question

In India the opinions of judges and framers of the Constitution are taken into consideration for terming any class backward. In this regard judge, E.S. Venkataramiah in Indira Sawhney V. Union of India, AIR, 1993, has commented, "An examination of the question in the background of Indian social context shows that the expression "backward classes" used in the Constitution referred only to those who were born in particular caste, or who belonged to particular races or tribes or religious minorities which were backward.

The opinions of Indian jurists and judges may be helpful in interpreting

"backward section" in Bangladesh Constitution.

Identification of backward section

How the issue of identification of 'backward section of citizen should be dealt with. Will there be any particular method of identification or should it vary from state to state, region to region or from urban to rural society. The answers will have to be dealt with keeping in mind the generalities of the situation and not with problems or situations of a peripheral nature which are peculiar to a particular state, district or region. Each and every situation can not be visualized and answered. That must be left to the discretion of concerned authority.

Creamy layer in backward section

said that care should be taken that forward

Now question arises whether everybody of a "backward section" is entitled to the benefit of reservation or some 'forward section' people of the same section has to be excluded. In this regard in India many developments have taken place during the last ten years. Indian Supreme Court in various decisions has said that care should be taken that forward classes do not exist in the backward class list. So, the affluent part of a backward class called "creamy layer" has to be excluded from the benefit of the said section

and the benefit of article 29 (3) can be given to the section which remains Indian Supreme Court in various decisions has after exclusion of the "forward section" within a backward class.

classes do not exist in the backward class list. So, Reservation and efficiency the affluent part of a backward class called in administration

"creamy layer" has to be excluded from the Now question comes whether benefit of the said section and the benefit of reservation extends to the article 29 (3) can be given to the section which the administration depriving the Indian Supreme Court in several decisions has said that care has to be taken that reservation does not

> adversely affect efficiency in administration. In a case the Indian Supreme Court has said, if the state proposes to provide reservation on the ground of inadequate representation of certain backward classes in services, if it is considered by the appropriate authority that such reservation will adversely affect the administration then reservation is not permissible. These decisions are to be considered in Bangladesh context.

PARC for abolition of quota

In a report in "The Daily Star" of 28th October, 2000 which headed "PARC for Abolition of Quota in Govt. Service" said, 'the Public Administration Reforms Commission has strongly recommended abolition of quota system in government services blaming the system inefficient and non-functioning. The local and international experts now call Bangladesh Civil Service an inefficient service. It added that quota system had caused an obstacle to meritorious people to enter civil service which is entrusted with responsibilities of performing wide and complicated work. The PARC report said the region based or other quotas were contrary to the spirit of the onstitution

At last it can be said that it is high time to look into the provisions of Bangladesh Constitution concerning reservation for a "backward section". For whom the term "backward section" was meant is to be identified. Steps to be taken to exclude "creamy layer" in a backward section. Care has to be taken that efficiency in administration is not violated in providing reservation. A balance has to be maintained between reservation and equality of all persons. If these steps are not taken, a gross injustice to the meritorious people of this country and to the people at large will continue.

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