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### LAVVISION

## Becoming a judge

HE day I placed the robe on me almost twelve years ago. I felt not only greatly honoured but also humbled with gratitude to almighty Allah. I also remembered my father, late Justice K. M. Hasan (senior) and my uncle late Justice Sayem, who always wanted to see me as a judge and then again as an exemplary judge. I will never forget their despair and distress when I sidetracked from my legal profession by accepting a diplomatic assignment, though it was temporary. Their wishes and blessings are still with me as a source of inspiration and guidance as I seek to be the judge they envisioned.

Frankly speaking, I always wanted to be a judge, to do justice with my conscience within the bounds of law devoid of personal feelings, allegiance and leaning towards any side. I remember my father advising me "A judge is there not to play favourites to any side or to serve partisan interest but to decide a case impartially and when it is apposite not to shy away from dispensing justice, however unpleasant it might be. A judge has to draw a line and take a stand and function as a towering force of judicial fairness no matter what. A judge is there to maintain his independence and discharge his paramount duty to protect the rights of citizens. The robe is not only to attire the judge physically but to attire his unquestionable honesty and integrity, the two most essentials in a judge." His advice stayed with me all these days and I pray it remains so till the day I lay down my robe.

Soon after attiring the robe, I was thrown into a world of intellectual adventure known only to those who enjoy treading in the path of law. I was always troubled with the technical compliance with justice, sometimes in flagrant denial of substantial justice. In course of time I came to learn what is meant by expanding the language of law to meet the needs of the day, the dynamics of our changing society and the exigent circumstances. But at the same time I became aware never to be unnecessarily invasive or to belie the language of law or to create judicial confusion.

Appropriate will be to carefully and steadily develop our own jurisprudence based on the country's own social, political, cultural, economical and religious background and experience, however diverse they may be. The jurisprudence of a country is never a finished product, delivered and passed in tact from generation to generation. The history of jurisprudence, in any country, is an ongoing process. In developing our jurisprudence, which I consider to be the driving force behind any legal system, we shall have to rely more on the nature of our legal rights, underlying meaning of legal concepts and the essential features of our legal system. This is a time in

which we should all be in silent reflection in order to present our legal system to the world as they never were.

Imbedded in our constitution as pillars of our nation are, rule of law and independence of judiciary. From the birth of this nation to this day all ordinary citizens have cherished these values as the essential fabrics of our life, and honoured them by standing for them. As the new century dawns, the courts of Bangladesh are challenged to make good on the basic question of freedom of judiciary. There is a great necessity in our country to guard against the corrupting influence of power, and there is nothing that can be a better or greater safeguard than an independent judiciary. To achieve that we will require to retrieve the deepest meaning of the very principle we

Liberty and rule of law have always gone hand in hand, and no one has contributed more to liberty than the bar and the bench. The legal luminaries of our country, both past and present, have been relentlessly fighting to give reality to something not readily attainable. They have assisted the courts with their learning and wisdom, to have the dream of law and liberty secured by the courts, to harmonize individual liberty with pubic order in other words to subject all form of arbitrary power to

cherish and establish in solid foundation our legal system.

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to the struggle and commitment of both the bar and the bench. This country produced outstanding jurists with vision, who have adorned both the bar and the bench and never accepted a proposition, if they thought that the proposition was unsustainable in law or it will compromise the rule of law. It is because of them this court is what it is today. They have carved for themselves a niche in the hearts of freedom loving people of this country.

The new era we are living in is different from previous eras in magnitude and complexity. Social activists increasingly prefer legal to legislative action, to convert difficult social and political choices into legal issues and substitute social and political debate and legislative struggle into litigation. As a result new field of litigation is extending and the burden has to be borne by the courts. But the basic aim for the court remains the same how to get to the truth to do complete justice. The judicial process, as we understand, would be impossible, unless the truth is elicited by two opposing sides putting before the court different facets of the truth. There is not a more difficult job than to discover the truth, because truth is not simple, or something apparent or to be discovered by merely looking at one side of it. It has so many facets, so many perceived contradictions and inconsistencies, that it requires two trained legal minds to put all aspects of it before the court, and the third expert mind to come to a conclusion a conclusion which is the nearest to what one can reach in the discovery of the truth and thus administer justice according to law. The administration of justice is not possible along by a fair and impartial judge. It is possible only with the assistance of courageous and upright advocates. It is a cooperative effort in which both the judge and the lawyers interact closely.

To the younger generation of lawyers my advice is for them to realize that law is not only what the court said the last time, it is more what the court will say next. Law is a great discipline of mind. It has trained you to think clearly precisely and accurately. In law every word has a definite meaning and it must find its proper place in its own context. A legal mind is basically logical, and has the courage to face the results of its own mental reasoning, and not to hide under a cloud of rhetoric and declamation. Your duty, no doubt, is to do your level best for your client by putting all aspects of the case that are favourable to your client before the court. So don't be verbose and don't mislead the court or conceal the aspects that should be divulged. Even if you lose you will make a mark for yourself.

Lastly, I admire the spirit of the lawyers who strive to uphold the judiciary and the legal system. A legal system takes years to be built on tradition and convention but takes little time to be destroyed. Experience teaches us to be in constant vigilance to protect the legal system we are so proud of.

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# LAW watch

## The strange triumph of human rights

HE international uproar over the American treatment of prisoners in Guantanamo Bay is but the latest illustration of the extent to which we now inhabit a world of human rights. Everyone supports them. Not even Donald Rumsfeld comes out against them. Critics may argue that they represent a western attempt to ride roughshod over diverse cultural sensibilities, or yet another imposition of the tyranny of Enlightenment values. Many people say that they are honoured only in the breach. But whether reality or rhetoric, human rights are a global phenomenon.

This was not so before the Second World War. The language of rights that emerged at the time of the French and American revolutions had only a minor impact on diplomatic practice. Not even groups such as the National Council for Civil Liberties or France's Rights of Man league were much concerned with human rights in the broad sense in which we use the phrase today. How, then, in the space of just a few years, between the Atlantic Charter in 1941 and the founding of the United Nations at the end of the war, did the language of human rights come to occupy such a prominent position in international diplomacy that the new world order would be built upon a commitment to their advancement? Why did the states grouped together in the UN come to accept what amounted to a curtailment of their power over their citizens or subjects? Was it all down to the power of a vision and its

#### Quest for answers: Down the memory lane

This, which we might call the Eleanor Roosevelt version of history, is only part of the story. There have been many tireless advocates for human rights in the past: some, like the emigre Russian lawyer Andre Mandelstam, laboured in vain; others, like the originator of the Genocide Convention Raphael Lemkin, or Eleanor Roosevelt herself, were more successful. Yet they were successful only because states heeded them. It was President Harry S Truman who appointed Eleanor Roosevelt to the UN commission that was responsible for drafting the 1948 Universal Declaration of Human Rights. Why did he do so?

In another version of the story, the impetus comes from the Nazi atrocities, especially the Holocaust. This offers history in the guise of a morality tale: the realisation of man's capacity for ultimate evil led to the triumph of good. Yet the Holocaust as such was much less central to perceptions in 1945 of what the war had been about than it is today. And we still have to explain how those hard-bitten state bureaucrats, from Moscow to Whitehall who had successfully resisted the siren call of moral feeling in the past, should now have succumbed. The postwar rise of human rights can be recounted as the triumph of civilisation over realpolitik. But it cannot be explained fully unless we are aware that it also involved an element of cynicism, and that it served state interests, too.

It was only after the defeat of Napoleon that the Great Powers began seriously intervening in the affairs of other states in the name of humanitarianism and civilisation. Through the 19th century, the Concert of Powers evolved a set of constitutional principles, including a commitment to freedom of worship, and the abolition of religious and civil disabilities, which they tried to impose on new states seeking to join the European "family of nations". Hence they sought to force reform on the Ottoman empire, and later made international recognition of the new Balkan states conditional upon their pledging fair treatment of religious minorities. During the First World War, the importance of these cases was magnified as old multinational empires finally fragmented and exploded in a welter of inter-religious and inter-ethnic violence. The murder of hundreds of thousands of Armenians in 1915-16 which led the Entente Powers to appeal to the Ottoman authorities to stop the killing in the name of humanity and to threaten the postwar prosecution of those involved - was only the most extreme example. The bloodletting continued after the war. In 1918-19, there were reports of pogroms in eastern Poland and Bessarabia, and huge flows of refugees

Meeting to draw up a peace settlement in Paris, the victors in the war were committed to recognising new national states in eastern Europe on the basis of the principle of self-determination. The difficulty was that, as the news from Galicia suggested, these new states might well make the problem worse by harshly handling their minorities. The powers therefore made international recognition of the new states conditional upon their guarantee ing their minorities certain collective entitlements. What was new in this situation was that the monitoring and enforcement of these rights was entrusted to a new international organisation, the League of Nations, rather than to the Great Powers themselves. It was this system, for the organised international protection of group minority rights - not human rights as we conceive them - that formed the subject of public concern and discussion in the interwar era. We cannot understand the turn to human rights after 1945 properly unless we see it against this historical background

The League system fitted squarely into an earlier Victorian tradition of Great Power paternalism, a paternalism that coexisted comfortably with both liberal Christianity and racism. A Japanese proposal that the League

should be committed to racial equality was shelved unceremoniously, while the idea of making the minority rights regime universal, rather than specific just to the new states of eastern Europe, was dismissed early on. The League was not to be allowed to pontificate about racial segregation in the US, nor about the English treatment of Catholics or of the Chinese in Liverpool. And because Germany was not brought into the system either, there would be no way for the League to protest the Nazi treatment of German Jews after 1933.

### **Protecting minorities**

\In the event, the League's foray into minority rights pleased no one. The breat Powers nated being required to pass judgement Czechoslovakia - their client states - were behaving. As Germany and the USSR regained strength, the British and French almost entirely lost their appetite for anything that might weaken the eastern European states they had brought into existence. Those states in turn felt humiliated by the international obligations they had been forced to sign, and blamed their minorities for publicising their grievances and failing to assimilate. And the minorities themselves, as a result of these factors, gradually lost faith in the protection provided by international law. Their complaints to Geneva dried

It is largely forgotten today that, between the wars, Germans were the largest ethnic minority in eastern Europe. They lived in Poland, Czechoslovakia, the Baltic states, as far south as Greece, and in the USSR to the east. Their fate was a huge issue in Weimar Germany. With the collapse of the League, the way was open for Adolf Hitler and the Nazis to carve out a foreign policy that would replace Geneva's weak commitment to protection through international law and supranational co-operation with national expansionism, bilateral diplomacy and the use of force. National socialism was concerned above all else with the fate of the Germans abroad. Indeed, the war Berlin waged from 1938 is best viewed as a war on behalf of "Germandom", which would solve the racial tangle of eastern Europe by a combination of territorial conquest and forced population movements. Ethnic Germans were ordered to leave the Baltic states. Italy and the USSR and make their way into the welcoming arms of the Reich, so that they could be resettled eventually on lands seized from Slav inferiors in the east.

It was against the backdrop of these events that President Roosevelt and Winston Churchill met in August 1941 and, even before the United States entered the war, made the first of a series of statements intended to define more sharply what the war was about. Almost from the start, Churchill himself stressed the need to defend the rights of the individual. In January 1942, the 26 countries that signed the Declaration of the United Nations pledged not only to adhere to the principles contained in the Atlantic Charter, but to join in a crusade "to preserve human rights and justice in their own lands as well as in other lands". Thenceforth, in official - and even more in unofficial - thinking and planning for the postwar era, the subject came up again and again, until gradually it became an integral aspect of the new nternational security organisation, initially unnamed, later termed the United Nations Organisation, that was to take over from the discredited

The reasons why human rights jumped to wartime prominence are various. In the first place, both the British and the Americans wanted to reaffirm the principles of liberal democracy vis-a-vis authoritarian regimes that, as in the Nazi case, had come out explicitly against the rights of the individual. The need to reassert those rights against the power of the state was evidently a natural by-product of a liberal view that the war had started because of the inherent bellicosity of dictatorships. Second, the Americans in particular wanted to carve out a universal mission for themselves internationally, and the British were content to go along with this because they desperately wanted the Americans at their side both in the war and after it. But the third, and perhaps the most important, reason was simply that human rights offered an attractive and plausible alternative to minority

The League and all it stood for were discredited by the time the war started; it was not helped by the notoriously pro-Nazi stance of Joseph Avenol, its second secretary-general. Of those who had pushed for minority rights the last time around, few were left. No one much bothered with what the Germans thought: they were about to be expelled en masse from eastern Europe in the largest single forced population movement in European history. As for Jewish groups, they entered the war deeply ambivalent about the minority rights system: it had, after all, failed to protect the German Jews from Hitler. Those who did not turn to Zionism now felt that being singled out as a minority was itself inviting trouble: better to stand - as they had done in the 19th century - on their rights as individuals than as a group. The British, for their part, had ended up pretty lukewarm about being asked, as they saw it, to defend the indefensible before the war. They were happy enough to bury the whole thing. And indeed, with the Red Army sweeping all before it and likely to be in control of eastern Europe, it was obvious to Whitehall that resuscitating the old League system would never

But it was above all the representatives of those small east European states that had been forced to swallow the bitter pill of minority rights last time around which came out most strongly against being forced to try it all over again. The Czech president Eduard Benes wrote in January 1942 that the Germans must never again be allowed to take advantage of the generosity of the Czech state. Even at this stage, he was convinced that Czechs and Germans could no longer live together. There must be, he argued, a transfer of population after the war, and the League's system of giving minorities collective entitlements - to schooling in their own language, for instance - must give way to an approach that focused instead on treating all citizens of the state equally before the law. Here lay the fundamental difference between minority and human rights; the former identified people as members of a group, the latter as individuals. "The protection of minorities in the future," Benes wrote, "should consist in the defence of human democratic rights and not of national rights. Minorities in individual states must never again be given the character of internationally recognised political and legal units, with the possibility of again becoming sources of

The idea of minority rights did not die all at once. It was still being discussed, rather gloomily, inside the Foreign Office after the war had ended. In 1946, the Hungarians tried to propose a revival of the system at the Paris peace conference in order to protect Hungarian minorities in neighbouring countries; but that this should not happen was one of the few things the British, the Russians and the Americans could agree on easily Benes's argument won out, and although they were little discussed at San Francisco in 1945, human rights were prominently if briefly highlighted in the United Nations Charter, which defined, among the chief purposes of the UN, promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction to race, sex, language or religion".

#### Avoiding 'quarantee of human rights? But just what were the United Nations committing themselves to? Enforce-

ment was the nub of it. Preparing a background briefing before the San Francisco conference, one British Foreign Office official had wondered whether the UN Charter might include a clause guaranteeing human rights. This elicited a sharp reminder from Charles Webster, the historian who advised the FO on these matters: "Our policy," he wrote, "is to avoid 'quarantee of human rights' though we might not object to a declaration.'

There was no appetite among the big powers for any form of words which implied that the UN, or any other group, should have the right to enforce observation of human rights. Thanks to the Americans in particular, a stringent domestic jurisdiction clause protected member states from the intervention of rights activists. In the next three years, the UN's Commission on Human Rights, with Eleanor Roosevelt in the chair, began to put flesh on the bare bones of the charter. And there, too, the strength of American resistance to any form of human rights regime with teeth became very obvious. There would be no immediate binding convention, nor any scheme for implementation. What was left were words, better known as the 1948 Universal Declaration of Human Rights.

Bereft of any system by which to enforce the rights it lauded, the declaration was regarded by many international lawyers as so much hot air, a step back from the ambitions enshrined in the minority rights system. A least the League had granted an international body the right to monitor, and indeed intervene, in the internal affairs of some states in defence of a body of citizens. It now looked as though the price paid for ensuring that the League's successor took a universal approach to rights was to strip that approach of any efficacy. Human rights became little more than a cold-war football. Minority rights were kept off the agenda entirely. "He who dedicates his life to the study of international law in these troubled times," wrote Joseph Kunz, an Austrian emigre in 1954, "is sometimes struck by the appearance as if there were fashions in international law just as in neckties. At the end of the First World War, 'international protection of minorities' was the great fashion: treaties in abundance, conferences, League of Nations activities, an enormous literature. Recently this fashion has become nearly obsolete. Today the well-dressed international lawyer wears 'human rights'.

In the past decade, events in Yugoslavia and Rwanda have reminded us, if we needed reminding, that wishing away the problem of minorities was no answer to what remains an urgent political issue. Since then, the Europeans in particular have set up mechanisms to monitor the collective rights of minorities. As for human rights, appreciating the extent to which they offered - at least as established in the United Nations after the end of the war - a vehicle for a new US role abroad, without impinging upon that country's juridical autonomy at home, may help us understand why the country of the American constitution and the Bill of Rights has been so reluctant to support efforts to turn pious promises and vague affirmations into enforceable

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### LAWSCA

### The real Islam is not about extremist politics

MAHATHIR BIN MOHAMAD

slam is a religion of peace and moderation. If it does not appear to be so today, this is not due to the teachings of Islam but to interpretations made by those who are apparently learned in Islam to suit their patrons or their own vested interest. Islam differs from Judaism and Christianity, because it has no system of priests. Muslims believe that Hebrew and Christian priests changed the original religions. They do not want priests to change Islam

But over the centuries those learned in Islam, the ulama, gained such authority over the Muslim laity that many of them tended to use their considerable influence to gain power for themselves. They became like the priests of other religions. Early ulama figures were knowledgeable in many disciplines besides theology. Today, political ulamas are knowledgeable only in those parts of the teachings of Islam, which seemingly support their political views. Many misinterpret and distort Islam to legitimise their political creed. A favourite view is that only ulamas may rule a country, democracy notwithstanding. These political ulamas reject knowledge that is not specifically religious for fear that people with such knowledge might challenge their authority. The early Muslims were great scholars excelling in mathematics and the sciences, but today's Muslims are generally backward in most fields of learning. They are also not knowledgeable in Islam.

Every time an attempt is made to bring Muslim nations to the develop-

ment levels of non-Muslim countries, Muslim groups emerge demanding a return to Islam." These groups are usually violent and often declare "holy wars" against Muslim governments that are trying to develop their countries. Because Muslim countries are backward, instead of helping themselves as enjoined by the Koran, they tend to depend solely on divine help, led by the deviant ulamas.

In Malaysia, the government I lead is labelled secular and un-Islamic by the opposition Pan Malaysia Islamic Party. The party is headed by people who claim that they are ulamas. Hatred for the so-called secular government is fostered in their kindergartens and schools. Fighting against this hate

campaign absorbs much of the government's time, hindering development.

Yet Malaysia is a reasonably developed modern nation not in spite of Islam but because of Islam, because it tries to adhere to Islam's fundamentals. Islam is not just a religion. It is a way of life. It should bring about peace stability and success. It is a way of life, which does not neglect spiritua values and can bring greatness to the followers of Islam, as it once did. Malaysia is an Islamic country. The state religion is Islam. Non-Muslims are free to practice their religions, because this is permitted by Islam, But deviant Muslims still insist that Malaysia is secular and the government must be overthrown, preferably by violence.

Islam abhors wars of aggression and the killing of innocent people Defensive wars are permitted, but should the enemy sue for peace, Muslims must respond positively. Islam has promoted the acquisition of knowledge and skills. But the ulamas later interpreted learning to mean religion only Bereft of nonreligious knowledge, the great Islamic civilization declined and faded away. If Muslims return to the fundamentals of Islam, they could concentrate on the development of their nations. They would be at peace with each other and with non-Muslim nations. Muslim nations would then be well administered by trained and skilful people. They would be able to compete within the global community. As a result, they would have a vested nterest in international stability and peace, and would want to maintain it. If today Islam is perceived to be a religion of backward, violent and irrationa people, it is not because of Islam itself as a faith and way of life. It is because Muslims have deviated from the fundamentals of Islam and abused its teachings to justify their personal greed and ambitions. Islam, fundamental Islam, does not just have a role in the modern Islamic state. In this grossly materialistic age, Islam can instil the spiritual values, which distinguish man

This comment by the Prime Minister of Malaysia was adapted by the International Herald Tribune from an address on Sunday at the World Economic Forum meeting in New York

## RIGHTS corner

### Rights defender in danger

LAW DESK REPORT

Mr. Abdur Rahim is one of the most prominent Myanmar Muslim peacemakers and human rights defenders He is also President of Arakan Muslim Community Development Foundation (AMCDF). He had narrowly escaped from the laws of Rekhine State of Myanmar and the military intelligence. He fled away from Myanmar and took refuge in Bangladesh. Locally, a few human rights organisations including Odhikar and Democracy Watch have been assisting him with bare necessi-



Since then, he has been living in Bangladesh as distressed person without any protection, foodstuff and accommodation. As he had contacted a few international human rights organisations and furnished them with frequent reports concerning the infringement of human rights against the Muslim people of Arakan, the Myanmar military junta displeased with him and issued a special order to kill him. An order of killing against Mr. Rahim was issued by the western commander-in-chief on February 24, 2001. For saving his life, he entered Bangladesh in the first hour of 26 February 2001.

#### Background

Mr. Rahim served in Myanmar as an educator from October 1, 1966 to November 23, 2000 until he was arrested by the Intelligence Branch of the military government. During his service in official capacity, he earned reputation as social worker. For his steadfast work in the protection of suffering Muslims, he had to face many obstacles and restrictions. The Military Intelligence Staff No 10 arrested him on November 23, 2000 while he was serving in his official duties as a prominent leader and kept him in Myauk-U Confinement for one month and three days with severe starvation. In custody, he had been given insufficient foodstuff and unclean water.

In custody the Tatmadaw (the military) and the police had routinely and arbitrarily beaten him, scalded his head with hot water, kicked with heavy boots and punched him with fist. "As a result I have lost my teeth. My eyes are injured so badly that I can hardly see anything clearly. I became unconscious several times due to their cruel, inhuman and degrading treatment Then they sent me to Sittwe Prison where investigation was conducted and as no offence was found against me, the Appeal District Judge freed me as an innocent. However, no sooner had I been freed from prison than a holy mosque in Myaungbwe was burnt into ashes by the M.I. (10), police and Maghs. However, no action was taken against the real culprits rather the cases had tactfully been closed up indicating that the Muslim leaders did it. Then the officers of the western commander-in-chief ordered a Brigade to kill me", Mr. Rahim narrated.

Anti-Muslim campaign on 4 February, 2001 was the replica of Nagamin, King Dragon Operation of 1978, which had been actually an operation of cleansing ethnic Muslims like that of 1942 Muslim massacre. In this anti-Muslim riot, 2000 innocent youths and helpless Muslims were shot to death about 1500 were missing and one thousand were injured seriously. Nearly 1000 houses were burnt into ashes. Many holy mosques were also burnt into ashes by the military, police and Maghs.

There is no rule of law in the territory. All the restrictions and prohibitions are for the ordinary people, specially the Arakanese Muslims of Myanmar. It can be mentioned that 18 Ulemas (Muslim scholars) with their families took a plan to travel Sittwe to Yangoon and boarded a launch. Unfortunately, the military and police reached there and forcefully made to capsize their launch. Everyone on board was killed,' Mr. Rahim mentioned

#### Appeal for refugee status or asylum

Mr. Rahim was interviewed by the UNHCR, Bangladesh on a number of occasions. However, the UNHCR informed him nothing about the status of his appeal for refugee status. He has also requested to the Government of Bangladesh for granting him asylum. He is, in fact, waiting from a response from the Government.