COURT *corridor*

The Judiciary-Innovative Practices

MR. JUSTICE SAMSUDDIN MANIK CHOWDHURY

Innovative practices of the judiciary can play a great role in upholding the rights and dignity of convicted and under-trial prisoners.

FROM an optimist's point of view it can be aptly claimed that the Courts in the sub-containment have been able to go to some length to rise to the occasions several times to demonstrate their invincible authority and Constitutional commitment to take to task many custodians who were responsible for homicide within prison cells.

The high water mark of judicial resplendence on this score, so far as Bangladesh is concerned, were displayed by its Courts by sentencing a number of police officials to varying terms of imprisonment for custodial killings in a number of cases, which were cogently acclaimed by the media and the civil society.

The decision which attracted widest media interest, home and abroad, was the one which stemmed from the case of Mainul Haque Vs The State, generally known as Yasmin rape and murder case, in which the High Court Division of the Supreme Court of Bangladesh, while affirming death sentences passed by the trial court (appeals against the High Court Division's judgment are now pending in the Appellate Division) on the allegations of rape and murder of a humble young lady while in a police van (She was not a prisoner in custody as such) made a number of spectacular recommendations for bringing to books players of custodial ferocity. While it would be utterly wrong to make any comment or observations on the finding and the judgment of the High Court Division in so far as appeals are now in pendency in the Appellate Division, it would not be violative of the sub-justice rule to describe these recommendations generally, without reference to the finding and the judgment of that particular case, as an impeccably salutary instance of innovative practice. The High Court Division also highlighted the desirability of taking account of the provisions of international covenants in interpreting municipal statutes.

In the case of SK. Baharul Islam Vs The State, the High Court Division affirmed convictions passed by the trial court on some police officials, whose acts of brutality were found to have been responsible for the pathetic demise of a pre-trial prisoner. In a recently concluded trial the court concerned sentenced, along with others, some police officials to imprisonment of different descriptions for the alleged killing of a promising young student, named Rubel, allegedly during interrogation (in so far as appeals are pending it would again be violative of the sub-judice rule to make any comment on the said judgment save stating the factum of the trial and the conviction).

The High Courts and the Supreme Court in India have achieved glaring and enviable, and no doubt, path-paving examples to show how access to justice by pre and in under-trial prisoners can be streamlined. The most extensibly heralded one, which was reckoned by the Asian Languages Service of the BBC to be worthy of bringing to the ears of its audience, is however, the decision the Supreme Court of India has recently promulgated by ordering the government to indict a number of police officials in whose custody a pre-trial prisoner succumbed to death following subjection to physical violence some five years ago. Their Lordships rejected as concocted previously supplied medical and inquest reports.

In most of the death-in-custody cases, the courts in the subcontinent made best use of that rule of evidence, emanated form the mother parliament in West-Minister for the whole of the pre 1947 India (which rule has survived the test of time in all the countries of the sub-continent throughout the post imperial era) which imposes a burden upon such persons who ought to have special knowledge of certain relevant circumstances having been in a special situation, to explain such circumstances. This rule enabled the prosecution and the Courts, by innovating "Last seen together" principles, to overcome the hurdle associated with evidentiary burden, which are inherent in custody killing cases.

The Indian Superior Courts made a pageantry of judicial innovations, over the few preceding years, by inducting tortious remedies of pecuniary compensation in such Judicial Review of Administrative Action cases (known in the sub-continent as Writ cases) whereby the vires of different types of police actions were challenged. This unique and pro-active innovative blending formulae is particularly effective, as are evident from the ratio arrived at in a number of cases, including that of Behra making justice accessible to those prisoners who are under-investigation or are facing trial. The soothing wind of the said breakthrough, generated in Indian jurisdiction, encountered no impediment to fly over to the neighbouring jurisdictions. So, in BLAST Vs The state, the High Court Division of Bangladesh Supreme Court missed no opportunity to endorse the view that in appropriate cases compensatory award can be imposed against malfeasant police personal even in a case under Writ jurisdiction. In the case of Mohammad Ali V Bangladesh and others, the High Court Division in its writ jurisdiction awarded compensation, payable personally be the malefactor police officials, to the person whose residence they searched without warrant, and without having reasonable ground to suspect, in the course of investigating certain allegations against a visiting female aline who was at the relevant time in police custody.

The glorious side of the scenario depicted above, can by no means, bestow a sense of total fulfillment. Innovative practices have still a long way to travel before it reaches its aspired destination. In addition to cases of death in custody there are other areas of harrowing predicament which the pre and under-trial prisoner face day in and day out. In most of these spheres innovative practice have still reminded in its maidenhood. Violation of such indefeasible and inviolable Constitutional rights, such as right to know the reason of arrest, right of access to the lawyer of choice, lawyer's and relatives right to know the prisoner's whereabouts, right to speedy trial, right not to be subjected to torture, cruel, inhuman or degrading treatment, are some of the phenomena which often remain beyond the accessibility of justice where innovative practices warrant the vision of an infallible surgeon, to bring South Asian region at par, or nearly so, with the standard prevailing in more advanced democracies. The Superior Courts power of suo motto intervention, through writ of mandamus, where the executive organ of the state founders, needs gearing up in tune with the revolution that has been taking place in judicial creativity globally. Superior Courts have a messianic duty to lay down irreconcilable directives for the police in unequivocal terms that they have no more right to use force than an ordinary citizen has, save those reasonably required to execute a lawful arrest and, that it is not consonant with the dictates of law that, as one former deputy commissioner of Dhaka Metropolitan Police, who himself had to seek access to justice when, by irony of fate, the table turned around, is alleged to have had stated that physical torture during interrogation is a normal device of criminal investigation. It is true that when such matters are brought to the notice of the Courts, they pass necessary directions for immediate rectification.

While laudable success stories in caging a good number of felons in custody killing cases have given a picturesque look to the wisdom of innovative perceptibility of the judiciary in the countries of the subject region, apparent judicial go slow, or even retreat, in infusing humble pies to those who dare to put the provision of the Constitution topsy-turvy, have remained in implausible obscurity. The question as to whether magistracy in the South Asian countries always go by the dictates of law in granting prosecution's prayer for remand, remains high in the agenda. Judicial innovative practices are desperately needed to make them feel that the statutory provisions are indispensable in this gray area.

One highly topical issue that deserves in depth as well as compassionate consideration in a discussion on access to justice revolves round the question of enlargement on bail of pre and under trial prisoners. It would be too naive to undermine the necessity of keeping certain pre and under trial persons, such as those outlaws who put the tranquility of the society on the fence, and those godfathers of notorious crime cartels whose visible diabolism unleash havoc on the law and order situation. Indeed statutes and case laws equip the authorities with plentitude of power to keep such goons at the bay pending investigation and trial, and the courts' refusal to let them at large on bail would, by no means, be tantamount to comprising with the notion of justice. Those venomous gang stars apart, the question of bail of other accused persons, who are entitled to be presumed to be innocent, before charges against the are proved, under our adversarial system of jurisprudence, call for innovative practices of hairline precision, having utmost regard to the question of the protection of the society as a whole on one hand and the question of right to personal liberty of a person, charges against whom are yet to be adjudicated upon, on the other hand. The superior courts all over the sub-continent have laid down guidelines and principles, through countless of decisions. The theme of access to justice requires the superior courts to transmit unambiguous signal that the magistracy must follow those guidelines without deviation or face the wrath of the law.

Judicial innovative practices call for a thorough investigation to arrive at a conclusion as to whether the wide spread application of "danda bari" in the prisons of the subject region, is or is not in accord with the constitutional provisions of the countries concerned which renounce and denounce infliction of cruel, in-human and degrading treatment. (The vires of the rules empowering use of "danda bari" is already under investigation by the High Court Division in Bangladesh).

Jail Codes in the sub-continent require under-trial prisoners to be kept apart from convicted inmates. This is a matter that the judiciary should innovate practices for ensuring the abidance of. Similarly innovations are needed for making sure that the special allowances accorded to the female etc accused in respect to bail by the criminal procedural legislation in the sub-continent are not side tracked.

Regular prison visits by the statutorily designated persons, whereby numerous maladies in the prisons can be divulged are absolutely essential for achieving wholesome prison reform.

The question orbiting round the availability of appropriate medical care for all prisoners, not to speak of pre and under-trial prisoners, is a matter that deserves extra-ordinary mode of innovation bearing in mind that right to life is the most precious of all fundamental right.

We must no allow our faculty to forget that some reforms of historic proportion were geared up by judicial innovations. The concept that the Supreme Court has the power to review and strike off a legislation, purportedly carried through by the parliament, would not have seen the light of the day had the judges of the US Supreme Court, headed by Chief justice Marshal in the immortal case of Marbury Vs. Madison, not innovated the proper applicability of the doctrine of "Due Process", to commensurate with the aspiration of the people. The achievement of supremacy for the British parliament as against Crown prerogative is largely attributable to the judges like Chief Justice Coke. Again it is the judicial innovative practice of recognizing the sovereignty of British Parliament, which have so far kept the said concept afloat.

It is innovative practice again, by which the Home of Lords has been able to re-interpret a long standing statute by putting a gloss over the same through it's power of interpretation in line with the demand of the day, thereby changing the very appearance of the legislation as it stood under previous regime of interpretation (R Vs K, B Vs DP-P). The August House there by portrayed that through the cannon of purposive interpretation of statues the courts can effectively mould it's to character to make it meaningful to contemporary generation.

In South Asian region also the superior courts have exhibited vividly the courts power to invalidate even constitutional amendments purportedly carried through by the parliaments. (Anwar Hossain's case in Bangladesh enlarged the size of the list). It is the judicial innovative practice by which Bangladesh Supreme Court asked the Government to ensure separation of the judiciary (Masdar Hossain's case). Pakistan Supreme Court ruled that inculpatory statement made after three day's in remand could not be accorded any credence. Rooms for similar innovative practices by the courts in the said region for the enforcement of inalienable rights of the pre and under-trial prisoners are certainly in existence. Reliance on international covenants in interpreting statutes, greater use of the doctrine of purposive interpretation, expansion of the doctrine of public interest litigation as well as the doctrine of legitimate expectation, and the extension of the rules of natural justice of make it at par with US jurisdiction's "due process" can be taken in aid innovative practices. *(Abridged)*

Mr. Justice Samsuddin Manik Choudhury presented this article at the 2nd South Asia Regional Conference on 'Access to Justice and Penal Reform' held in Dhaka from 12-14 December 2002.

LAW *views*

Child labour: Perspective Bangladesh

AFROZA ZERIN FAISAL *and* **SHAHIN ZOHORA**

COMPARED with a few years ago, awareness in respect of child rights, both in the national and international context, has increased. The campaigners against child labour have recently begun to focus their attention towards the child labourers as the number of child labourers is increasing in an alarming way.

The attention of researchers and advocates of children's rights primarily is focused on the exploitation, abuse and discrimination suffered by child labourers, which are deplorable and clear contravention to the child rights set out in the 1989 United Nations Convention on the Rights of the Child and in the supplementary convention on the abolition of slavery, slave trade and institution and practices similar to slavery of 1956.

Specially, in the non-industrialized and developing countries like Bangladesh, where employment opportunity is limited, labour cheap, poverty widespread, the sense of social hierarchy strong, the number of child labourer is increasing in an alarming way.

Children are being engaged in different types of activities including domestic labour. They are also being engaged even in risky and hard works like welding, lifting excessive weights, making brick etc. But very surprisingly, they are being victimized of low rewards, lack of love and affection, deprivation of other facilities also.

Needless to say, there is a lot of legislation, both in national and international arena, to protect the child rights. But in developing countries like Bangladesh existing laws are rarely implemented. One of the key reasons for this situation is that political willingness to implement such laws is very weak. However, there are a good number of legislation in Bangladesh regarding child rights and child labour. Under the fabrication of Article 28 (4) of Bangladesh constitution the state must make special provisions for ensuring the welfare of the women and children and for the advancement of the backward section of citizens. Besides these constitutional provisions there are a good number of special laws for the protection of the children's right. Such as the employment of children Act of 1938, the children (Pledging of labour) Act of 1953, the Factories Act of 1965, the Plantations Labour Ordinance of 1662, the Shops and Establishment Act of 1965 etc. Under section 45 of the Factories Rules, 1979 the young persons shall not be employed to work at the power presses milling machines used in the metal trades; guillotine machine, circular jaws and plate printing machines etc. On the other hand section 48 stated that no female or male child shall be employed in any factory to lift, carry or move by hand or on head any material, article, tool or appliance exceeding 30 or 35 lbs. Moreover, under the Factories Act, 1965 section 66 provides that no child who has not completed fourteen years of age shall be required or allowed to work in any factory and section 70 provides that no child shall be required or allowed to work in any factory for more than five hours in any day. But we can observe the utmost violation of these laws especially in the garments factories. The same section provides again that the period of work of all children employed in a factory shall be limited to two shifts which shall not overlap more than seven and a half-hours each. But the practical scenario is completely different. Here we can notice that the child rights are nothing but a myth in regulatory sense.

Besides these above-mentioned laws Internationally, there are a lot of standards which directly or indirectly applicable for the protection of child rights. In addition to the 1989 convention on the rights of the child and its precursor, the 1959 declaration of the rights of the child, which includes: The United Nations Conventions against Slavery, (1926 and 1956) specially applicable for those children who are working as domestic workers, the International Covenants on Civil and Political Rights, and on Economic; Social and Cultural Rights (1966) and the 1979 Convention on the Elimination of all forms of Discrimination against Women, specially applicable for female child labour.

There are also a good number of ILO standards that have been used or interpreted to cover the exploitation of child workers, including convention No. 135 concerning the minimum age for admission to employment (1973) and ILO's convention No.29 concerning forced or compulsory labour 1930.

The children's rights have also been preserved by the Universal Declaration of Human Rights of 1948. Here article 25(6) declares that everyone of childhood is entitled to special care and treatment and every child is entitled to enjoy social security whether born of wedlock or not. It also includes the right to protection from abuse and neglect.

Although Bangladesh is the signatory of most of these instruments, they have a little effect in protecting the rights of child workers. Very recently, like other countries of the world Bangladesh observed child day with special arrangement. Moreover, children rights week had been observed from 29th September in order to establish children's rights. But unfortunately, in spite of all these arrangement and existing laws regarding child labour issue, right of child seems to be nothing but a myth. However, let alone the national legal reform, lack of enforcement and failure to implement existing legislation at all levels from the enforcement agencies to the judiciary is the main reasons behind the increase of the number of child labour. Wherein the whole world has taken the commitment to establish the children's rights and groom them as worthy citizen to face the challenges of 21st century, here child labour should be restrained in regulatory sense and undoubtedly this is the high time to take effective measures to implement the existing laws and not to confine them only within policy declaration. Simultaneously, it is the obligatory duty of the state to ensure the full enjoyment of all rights provided in our constitution and other legislation for those children who are involved in child labour.

It is clear like the light of day that unless and until we can give the assurance of the basic necessities to all the children during their childhood it is impossible to stop child labour.

Afroza Zerin Faisal and Shahin Zohora are Lecturers,School of Law, Queens Univercity, Dhaka.

RIGHTS *corner*

Bangladesh has offered higher education for women but not jobs

MOSAMMAT KULSUM AKTER

SHAHANA Sultana, a housemaker, remembers the day when she passed her M.A. from Jagannath University College three years ago. At that time she was confident about getting a job and starting a new career. Soon she became frustrated after her several job applications failed to get a job. She is now a homemaker not by choice but because she was refused a salaried job.

Kohinoor Akhter Priti, 32, has made no use of her post-graduation with an honours degree. She is a housemaker because her husband did not allow her to work in a private company.

"My husband said I could work in a government office. I could not get one of his choices. So, I'm doing nothing to utilise my education." says Priti, now a busy woman taking care of her husband, children and household work. Like Shahana and Priti, thousands of educated Bangladeshi women remain unemployed. They are jobless despite a government provision of reserving 10 percent of government jobs for the women. On the one hand these women don't get the jobs, while the quota remains unfulfilled on the other.

Women constitute nearly half the country's population. Thus they account for half the country's workforce. Women should fill 10 percent of gazetted and 15 percent of non-gazetted jobs in Bangladesh, according to a long-established provision. Yet, there are many educated women without jobs.

The number of women receiving higher education from colleges and universities is increasing remarkably in the country and they are making brilliant academic achievements at all stages. But a large number of the highly educated women still remain jobless due to various reasons. Their abilities and talents go unused.

Educated women strive to join the mainstream workforce. But they face a number of hurdles. Well, many families are simply not interested in letting the women to make such careers. They will always cite the negative sides of such an endeavour; lack of security, poor transportation, and maltreatment by office bosses and gender discriminations.

In many offices, the work of female staff members is not properly appreciated. Sometimes their male colleagues discourage them from improving their skills and taking up challenging tasks. Some people, however, think that most women are not interested in making a career in salaried jobs. The argument is that women shy away from tough jobs. "Maltreatment by male colleagues often discourages women from joining formal career jobs," says advocate Masuda Roy, legal aid secretary of Bangladesh Moil Parishad. She says women are lagging behind in career development although most of them have better academic results. The results of BA, SBC, BSS and Com examinations of 2001 under the National University reveal that seven of the 12 merit positions were secured by female students beating their male competitors, she informs.

According to Bangladesh Bureau of Statistics, there were a total of 10,53,087 posts of officials and employees at different levels in different government departments in 1999 and 1,08,618 of those were gazetted. The same year a total of 1,16,915 posts remained vacant, including 31,219 posts of first and second class gazetted officers and 85,696 posts of non-gazetted, third and fourth class employees. These posts remain vacant mainly because of non-fulfillment of women quota, officials say adding women are designated to get 1,49,287 gazetted and non-gazetted posts but a large number of posts could not be filled up. According to available statistics, the rate of higher education received by women does not match with the rate of taking jobs. As a result, large number educated women remain jobless despite encouragement by the government.

Not only education but also job opportunity has to be ensured to female students

Immediately after independence, the government had kept 10 percent government jobs reserved for women of the families who suffered because of the war. Later in 1985, the Establishment Ministry in a notification cancelled the facilities for war-affected families and introduced 10 percent women quota in gazetted posts and 15 percent in non-gazetted posts.The country's constitution recognises the equal rights of women in all working fields of society while the national policy on women development states that women should be encouraged to enter into services in greater number.

The United Nations also urges the member states to take appropriate steps for ensuring women's participation in all jobs and remove all sorts of discrimination against women. Retired judge of the High Court Justice Goal Ribbon says the state has the responsibility to maintain equality among men and women. "Quota system is not enough, the government should formulate a long-term policy and implement it properly." Prof Dr Meghna Guhathakurta says women's opportunities should not be limited to quota system. "A congenial environment will have to be created in the society so that women can prove their abilities." She says the government as well as civil society should come forward to create such an environment and change the mentality about women's capability, efficiency and skill.

Women rights activists observe that the existing social system does not necessarily permit women to engage in jobs while many of them cannot continue jobs due to problems within the families. In last two decades, a large number of women were engaged in development activities initiated by NGOs, but many of them dropped out. "From the very childhood, a girl is taught to grow up to marry and bring up children. That's is our social system," said Advocate Salma Ali, executive director of Bangladesh National Women Lawyers Association. "This system should be changed", she says.

NewsNetwork