



## HUMAN RIGHTS analysis

### THE CASE OF SUDAN

# Demand for international response for an internal conflict

KAMRUL HOSSAIN

RECENTLY, the Secretary General of the United Nations, in one of his statements, declared that the crisis in Sudan's western Darfur region is the worst humanitarian disaster of present days. The Arab militiamen in the region are accused of committing atrocities against black Africans living in Darfur. The Sudanese government has also been accused of supporting the Arab Janjaweed militias by providing them with arms and other means of support. It has also been evidenced that the government forces oversaw and directly participated in massacres, summary executions of civilians including women and children burning of towns and villages, and the forcible depopulation of wide swathes of land long inhabited by the Fur, Masalit and Zaghawa. The Janjaweed militias with the support of government have so far killed thousands of Fur, Masalit, and Zaghawa, raped women, and destroyed villages, food stocks and other supplies essential to the civilian population. They have driven more than one million civilians, mostly farmers, into camps and settlements in Darfur where they live on the very edge of survival. Hundreds of thousands have fled already to neighboring Chad, but the vast majority of war victims remain trapped in Darfur. Report from the Darfur region has predicted that as many as one million people may die this year mainly from starvation and disease. The conflict has already claimed more than 30,000 lives, and the experts warn that without a rapid international response many more will die since direct killing is not yet stopped. But how international community may act in an internal conflict such as this has been the crucial question in order to help solve the conflict. Some argue for humanitarian intervention, whereas others suggest economic sanctions to be imposed by the Security Council.

#### Background of the Present Conflict

The conflict in Sudan has historical roots. But the present conflict has basically escalated in February 2003 when two rebel groups, the Sudan Liberation Army/Movement (SLA/M) and the Justice and Equality Movement (JEM) drawn from members of the Fur, Masalit, and Zaghawa ethnic groups, demanded an end to chronic economic marginalisation and sought power-sharing within the Arab-ruled Sudanese state. They also sought government action to end the abuses of their rivals, Arab pastoralists who were driven onto African farmlands by drought and desertification, and who had a nomadic tradition of armed militias. The government has responded to this armed and political threat by targeting the civilian populations from which the rebels were drawn. It has engaged in ethnic manipulation by organizing a military and political partnership with some Arab nomads comprising the Janjaweed; armed, trained, and organized them; and provided effective impunity for all crimes committed. The government, however, signed a cease-fire with Darfur rebels on 8 April 2004. It has been, however, apparent that the cease-fire was not working in either military or humanitarian terms.

#### Nature of Conflict in International Law

From the outset of the conflict it may be assumed that the present crisis in Sudan is merely an internal disturbance since it is within the territory of Sudan itself. In principle government of Sudan may take any action it finds fit to preserve its political independence and territorial integrity. Under article 2(7) of the United

Nations Charter it enjoys the right not to be intervened in matters, which are essentially within its own territorial or domestic jurisdiction. This is so called sovereignty right of a state. The emergence of the principles of human rights, however, has limited this right, and thus, human rights are not any longer a matter that is essentially within the domestic or territorial jurisdiction of a single state. There are certain international standards that a state should follow while treating its own citizens. When gross violation of human rights occurs by means of killing,



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ethnic cleansing, forcefully replacing people from their home, creating a situation that may lead to a refugee crisis, systematic rape, making obstacles in the supply of humanitarian needs and so on, the matter then cease to be an internal one any more. It constitutes serious international concerns since these are the obvious infringements of the internationally agreed obligation under the treaties and conventions concerning human rights. Moreover, principles of international law suggest that there are certain norms that are never to be derogated under any circumstances even in absence of any treaty obligation. The violation of human rights, particularly mass killing, ethnic cleansing, and genocide are strongly advocated as violation of the principles of *ius cogens* a set of non-derogable rules in international law. Despite its political nature of decision-making the Security Council has agreed human rights violation as international nature of conflict in many of its resolutions. The Security Council designated the conflicts as threat to international peace and security under Chapter VII of the Charter, which means that an international action is possible in response to those conflicts. Apartheid in

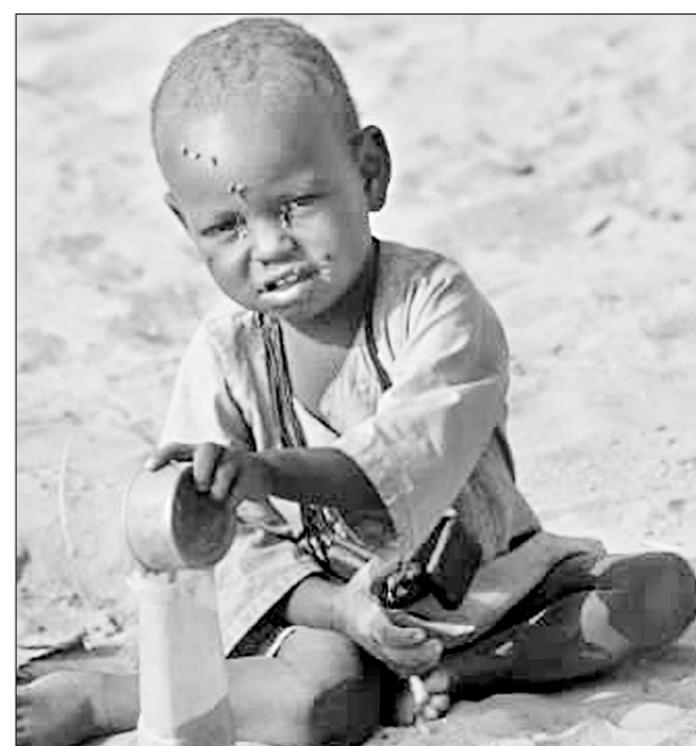
South Africa, suppression of democratic rights of the Haitian people, famine in Somalia, genocide committed in Bosnia-Herzegovina and in Rwanda are some of the few examples where the Security Council found that although the conflicts were primarily internal, but had serious impact for the restoration of international peace and security. In case of recent conflict in Sudan, it is pretty apparent from the features as delineated in the above that the conflict has not been anymore an internal crisis. The international nature of the conflict in Sudan is apparent not only from the gross violation of human rights, but also from the refugee flow to across the border into Chad the refugee who are then followed by the Janjaweed, and which may result in a clash with Chad's army that may produce a full-scale international war.

#### Humanitarian Intervention or Sanctions!

The failure of the Sudanese government to protect its citizens has had a repeated international pressure for the international intervention. Therefore, many have argued for humanitarian intervention. The legal basis for humanitarian intervention is, however, weak unless the Security Council authorizes the action under Chapter VII of the Charter. NATO action in Kosovo in 1999, for example, had not been legally justified because of the absence of UN authorization under Chapter VII of the Charter, although there was an extreme need to do so. On the other hand, some suggested UN imposed economic sanctions, which is also part of Chapter VII of the Charter. In this context, briefly, Chapter VII of the United Nations deals with a crisis or situation that constitutes a threat to or breach of international peace and security. Article 39 of the Charter, the key article to enter into Chapter VII, ensures that the situation is constitutive of a threat to international peace and security. Then the Security Council is free to choose whether a non-military sanction (article 41), or the military action (article 41) is to be used to mitigate the conflict. A legal humanitarian intervention is possible if the members of the Security Council agree to authorize use of force under article 42 of the Charter. In the absence of such an authorization any resort to use of force under the plea of humanitarian intervention is illegal. The Security Council, nonetheless, has been discussing to impose economic sanctions (part of article 41) since the beginning of the recent conflict. The disagreement among the members of the Council has always been producing a presidential statement (a statement made by the president of the Security Council) that evidences the lack of consensus among the permanent members. The Security Council, however, on the 30th of July, 2004 adopted resolution 1556 demanding the Sudanese government disarm the militias in Darfur. The resolution was adopted under Chapter VII of the Charter. It was at some point a compromise among the permanent members of the Council. Two of the members (China and Pakistan) have abstained. The compromise is found in its decision not to use sanctions instantly, rather allowing the Sudanese government some time (30 days) to disarm militias, with a threat to impose economic sanctions in case Sudan fails to fulfill the demand. The point still is that how effective it may be to solve the humanitarian crisis once economic sanctions are imposed. Do sanctions really help the ordinary civilians who are the victims of this humanitarian disaster?

#### Concluding Remark

In a sense it is good to intervene militarily, which is quicker, and which do not target the innocent civilians; but the fact is that military intervention is pretty unlikely unless the state willing to intervene has its own interests. An authorization from the Security Council is not even always easy, which could frame a legal action. At the same time it has now been proved that economic sanctions have become a blunt instrument. The sanctions such as these do not affect the regime; rather these affect the ordinary innocent civilians. The long sanctions continue the more is there the humanitarian crisis. Thus, it is now strongly advocated that targeted sanctions may help ease the crisis to some extent. The idea is that sanctions will target the regime, not the country as a whole. In Sudanese case the target groups may be the government (and its officials) and the Janjaweed militias. Arms embargos



goes, travel ban, freezing the assets in foreign banks are some of the examples that may be invoked. These will perhaps help reduce the humanitarian disaster.

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## LAW education



## LAW vision



### SEPARATION OF JUDICIARY

# How long will it take?

HUSSAIN M FAZLUL BARI

IN a democratic state, the power rests on three separate organs, namely the executive, the legislature and the judiciary. The constitution of Bangladesh vests the executive power in the executive and the legislative power in Parliament. Though there is no specific vesting of judicial power, it is vested in the judiciary [Muhibur Rahman vs Bangladesh 44 DLR (AD)]. The judiciary comprises all courts and tribunals, which performs the delicate task of ensuring rule of law in the society.

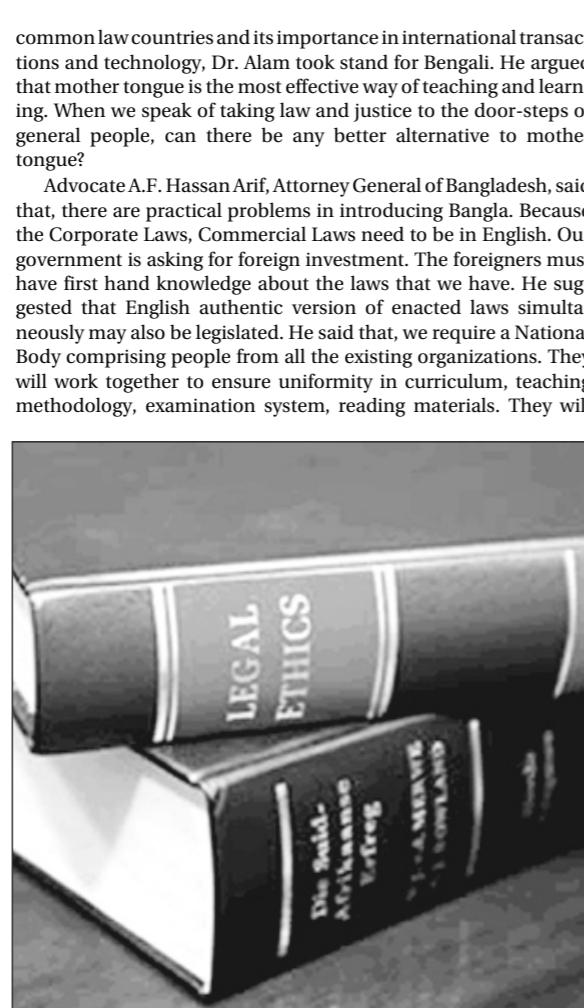
In independent and sound judiciary is since qua non-for a fair society. The judiciary interprets law, settle legal disputes and enforce popular rights. And such independence implies freedom from interference by the executive or legislature in the exercise of judicial power. In a simpler language, it means that the judges are in position to render justice in accordance with their own sense of justice without submitting to any kind of pressure or influence. Part VI of the constitution deals with the judiciary. Bangladesh has a hierarchy of courts in three tiers. In other words, the judges under the constitution may be classified in following heads: The judges of the Supreme Court, the District Courts/Judicial Officers and the Magistrates.

In addition, there are special judges for special acts. The

The twin function of the Magistrates and also the dependency of the lower judiciary upon the executive is a colonial legacy. After independence in 1947, Pakistan government enacted East Pakistan Act No. XXII of 1957 which provided for separation of judiciary from the executive. The law is still hanging for a simple gazette notification. As regards independence and separation of judiciary, our constitution of 1972 is fairly developed. But the framers of supreme law of the land made an unfortunate insertion in art. 115 and 116 as 'Magistrates exercising judicial functions' which still remain unamended. Art 22 in unequivocal term states that 'the state shall ensure the separation of the judiciary from the executive organs of the State.' As one of the fundamental principles of state policy. It is not readily judicially enforceable. Nevertheless the state cannot ignore it for long. There was undercurrent of demand of implementation of constitutional obligation from the very inception of Bangladesh. But the Fourth Amendment undermined the constitutionalism itself, which obviously destroyed the independence of judiciary. The subsequent upheavals of politics rather by-passed it. In 1976 law commission recommended that subordinate judiciary on the criminal side should be separated from the executive.

In the mean time, we witnessed two extra-constitutional processes. In 1987, initiatives were taken to separate the magistracy by amending code of Criminal Procedure, 1898. For unknown reason the Bill could not be passed before the Parliament. After the fall of autocratic rule in 1990, expectation was high to ensure separation of judiciary. But the next two governments of 1991 & 1996 did nothing in this regard except spoiling its tenure. In 1999, the Supreme Court issued 12 point directives in famous Masdar Hossain case to ensure separation of lower judiciary from the executive. The successive governments have taken time again and again to delay the process. It may be recalled that the caretaker government (2001) has taken all measures to ensure separation but stop at the request of AL and BNP two major parties of the country. The BNP lead coalition government is working very slowly towards separation of judiciary. It is a pleasure that judicial Service Commission and Judicial Pay Commission have been created. It is mentionable, The 22nd & 29th BCS (Judicial) candidates are hanging for long time. Various rules and amendment in the relevant sections of code of Criminal Procedures 1898 are under consideration of Parliament of the Law, Justice and Parliamentary Affairs Minister announced that it will take additional six years (!) to ensure separation of judiciary. (The Daily Star 20/6/04) this statement is reflective of how indifferent the Government is about separation of judiciary the demand of separation of the judiciary from the executive is universal to ensure the independence of judiciary and safeguard the rights of the people. It is quite unfortunate that the Government is moving towards at shai's pace. It may be noted that Pakistan and India have taken necessary steps to free the judiciary from the executive at all levels in 1973 and 1974 (in West Bengal in 1970) respectively. Ensuring justice and independence of judiciary will remain a far very until lower judiciary is separated from the executive. It is mandatory and constitutional obligation of the Government to ensure separation of the judiciary from the executive. Five years have been elapsed since the Supreme Court gives its directives in Masdar Hossain case. Law Minister is seeking for additional six years in this regard. We can fairly question: How long will it take to ensure separation of judiciary from the executive?

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common law countries and its importance in international transactions and technology, Dr. Alam took stand for Bengali. He argued that mother tongue is the most effective way of teaching and learning. When we speak of taking law and justice to the door-steps of general people, can there be any better alternative to mother tongue?

Advocate A.F. Hassan Arif, Attorney General of Bangladesh, said that, there are practical problems in introducing Bangla. Because the Corporate Laws, Commercial Laws need to be in English. Our government is asking for foreign investment. The foreigners must have first hand knowledge about the laws that we have. He suggested that English authentic version of enacted laws simultaneously may also be legislated. He said that, we require a National Body comprising people from all the existing organizations. They will work together to ensure uniformity in curriculum, teaching methodology, examination system, reading materials. They will

Colleges pass in the third class. He identified this as a reason for degradation of the Law College education and proposed third class should be immediately abolished.

Dr. Mizanur Rahman, Professor, Department of Law, Dhaka University, said that, legal education of this country must be justice education geared to the empowerment of the poor people of this country. So, the curriculum that does not address the issues of poverty should not be the curriculum of the law schools in this country. Legal education in Bangladesh must be a socially responsive legal education. He said that, legal education cannot be cent per cent academic, nor it can be cent per cent vocational or practice oriented. There must be, Dr. Rahman continued, a balance of both the two and it requires combined effort of the Law Faculties and the Bar Council.

Dr. Naima Haque, Dean, Faculty of Law, Dhaka University, said that law colleges require constant monitoring, because with part-time institutions we cannot expect quality law graduates.

Dr. Borhanuddin Khan, Associate Professor, Department of Law, Dhaka University, said that, by and large the university degrees are supposed to be academic. He pointed out that, only around 10-20% law students of public universities go to legal profession and others do something else. If we design the curriculum considering the needs of the lawyers only, we shall miss the main focus.

Morshed Mahmud Khan, Dean, Faculty of Law, Chittagong University, said that law graduates should be sensitized to human rights, empowerment of women and other development issues of the nation.

#### Evaluating the Roundtable Discussion

All the relevant issues like the existing curriculum, teaching methodology, examination system, reading materials, continuing legal education, medium of instruction were discussed in the Roundtable and the discussants opined to review those to cope with the changing national and international needs. The discussants were in unison for restructuring the whole system of Law College education. They also advocated for an admission test, age bar for admission into Law Colleges and provision of second-class number (45%) as pass number.

A law graduate in Bangladesh, even after completing his/her law education, is not sufficiently capable to join the Bar or Bench. All the participants in the Roundtable underscored the necessity of vocational training and continuing legal education for the Judges, Lawyers, Teachers, and Law Professionals.

Legal education has been facing confusion as to what should be the medium of instruction. This issue was placed for discussion in the Roundtable and all the academics, judges, and lawyers gave their judicious opinion. Most of them opted for English, while some of them were in favour of Bengali, but not at the expense of English.

Almost all the discussants were unanimous in taking initiative to introduce Law in the S.S.C. and H.S.C. level. They said that basic conception of law must be given to every student at the secondary and higher secondary level. They also expressed their consent to establish a National Body to monitor the institutional activities and individual activities of the teachers and students.

#### Concluding Remark

The ultimate purpose of the legal education is to ensure greater social justice, and promote national development. The whole legal education system in Bangladesh should be restructured for achieving those goals.

Writers are conducting a research on the Legal Education System in Bangladesh under the auspices of the Bangladesh Law Commission.

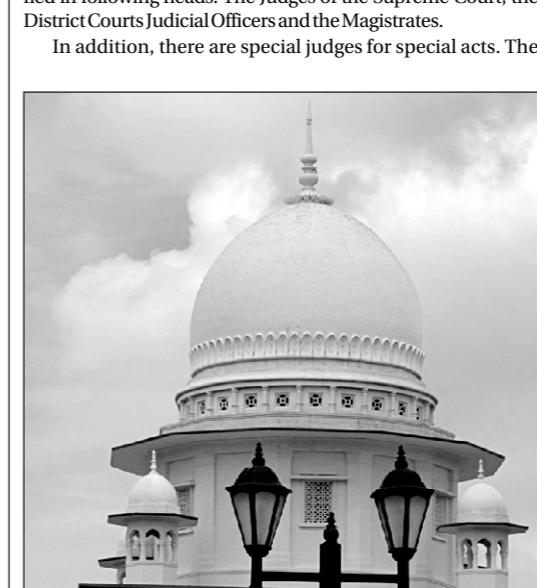


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first group satisfies all criteria of independence except economic one. The District Judge enjoys almost substantial safeguard to their independence being mostly under the control of High Court Division of Supreme Court. The magistracy is in the weakest and unfortunate feature of our legal landscape. Our subordinate judiciary (chapter II of Part VI) is not independent and beset with multifarious problems. It is the lower judiciary to which most of the people are connected; nevertheless, various shortcomings of magistracy frustrate the very purpose of the criminal justice. The magistrates under exclusive control of the executive are discharging judicial as well as executive functions interchangeably. Again Magistrates having legal training for couples of months are in want of legal acumen. In fact, the prime problem of independence and separation of judiciary lies with the Magistrate courts.

Author is an advocate.

Dr. Shah Alam said that, acquiring legal knowledge becomes a life-long professional and intellectual pursuit, which underlies the need for continuing legal education for lawyers as well as judges. He mentioned that the Judicial Administrative Training Institute (JATI) is giving training to the judges of the subordinate judiciary, and Bangladesh Bar Council has introduced Bar Vocational Courses as requirements for enrolment in the Bar. But training of the junior lawyers is still far from being sufficiently addressed. Their training needs to be institutionalised on national scale, he said emphatically.

Dr. Shah Alam said that, bilingual hazards in legal education and legal profession are well-known in Bangladesh. Only the private universities have opted for unilingual system making English the sole medium of instruction, he mentioned. Recognising the dominant position of English in legal education and legal profession in