



LAW alter views

The constitution and judicial independence

IMTIAZ OMAR AND ZAKIR HOSSAIN

POST-COLONIAL constitutions have their distinctive flavour of elaborate provisions of separation of judicial power and judicial independence. The Bangladesh constitution is no exception. An added dimension which the Bangladesh constitution shares with a few others is the establishment of Supreme Judicial Council to enquire into allegations of misconduct, impropriety, and infirmity of Supreme Court judges.



PHOTO: STAR

Recently, allegations were made from the Bar that one of the newly appointed judges of the High Court Division had manipulated his LL.B. transcript. Faced with an intransigent situation of impending boycott of the Court by members of the Bar, and the refusal of the accompanying judge to sit with him in a Division Bench, the Chief Justice has stood down the concerned judge.

The major question that has arisen among some sections of lawyers, judges, academics, commentators and journalists is that, should the Supreme Judicial Council be invoked to address this problem. The judge under question has not been confirmed yet; he is a temporary judge. For purposes of argument, it is accepted that the Chief Justice has certain responsibilities and discretion to see to it that respectability and legitimacy of the supreme constitutional judicial organ of Bangladesh be maintained and perpetuated. So a temporary judge can be stood down. If the concerned judge has, in fact, manipulated his academic transcript, it is an abhorrent act. It has in fact been found by an enquiry committee appointed by the Chittagong University authority that he has done so.

Despite all these, there should not have been any insurmountable problem in convening an enquiry by the Supreme Judicial Council which has been established by the Constitution to take care of this rather sordid state of affairs. That course of action would have enhanced the legitimacy of the action taken in respect of the judge. It would also entrench the respectability of the Chief Justice. Beyond all these, it would have given the impression that matters like this can be taken care of an institutional procedural way rather than by seemingly partisan tactics by sections of the leadership of the Bar Association.

Maintaining the legitimacy and independence of the judiciary is a difficult task in any country. The responsibility for this lies not only with political branches of the government, but also on the Bench and the Bar, and the enlightened citizenry. Some instances of encroachment on the independence of judicial domain in Bangladesh may be remembered as lessons for the future. One judge of the Supreme Court who was destined to be the Chief Justice had his dream unfulfilled because the retirement age was abruptly lowered. Another Chief Justice could not serve out his term, because by military decree a two-year serving Chief Justice automatically retired. Members of the Bar persisted in boycotting the Court in 1982 because of decentralisation of the High Court Division.

Despite everything, the Bangladesh Supreme Court played a significant role in government. One Chief Justice stepped into take over as President in a situation of chaos after military coups and counter coups. Significant political questions, which were incapable of resolution in the political processes, were determined by our Supreme Court. Whenever possible, the Supreme Court displayed a bold and courageous stand against political excesses.

It is very important that our highest judicial institution be safeguarded from partisan political intrusion, erosion of legitimacy, and unwise judicial statesmanship. The Bangladesh Supreme Court is a bastion of political balance in the society and polity, but a fragile bastion. Everyone shares the responsibility of protecting this fragile bastion. No one should lay siege to it in any way.

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FACT file

Who is a child in Bangladesh?



PHOTO: AFP

Rahim, an 8-year-old slum-dweller, has left school in search for a job, but he is not eligible for work as he is under 12. According to the Shop and Enterprise Act, anyone under the age of 12 is defined as a 'child'.

Masum, a resident of the same slum, goes to a neighbouring factory and finds that as per the Factory Act he will have to wait until he turns 16 to get work there. Rahim's friend Kamal gets upset when the local election is announced because he is not eligible to vote until he turns 18. He is a child until he reaches that age.

These people have one thing in common: none of them know when their childhood will end.

What does it mean by child in Bangladesh? Laws in Bangladesh differ in the definition. There is no single common legal definition for child although 18 has been set as the legal age limit of a child in the United Nations Child Rights Charter and most countries of the world follow this law.

The United Nations Child Rights Charter has tried to establish this age limit so that every state fulfils the rights of the children until that age. So what is the rationale behind having different age limits in different laws in this country?

According to the Bangladesh Penal Code, a child under the age of seven cannot be punished for an offence. The Shop and Enterprise Act 1965 defines everyone under the age of 12 as a child. As per the Factory Act 1965, it is unlawful for a child under 16 to work. According to the Child Act 1974, everyone under 16 is legally a child.

The Underage Marriage Prevention Act 1929 on the other hand sets two different age limits for girls and boys. For boys the minimum age is 21 and for girls the minimum age is 18. In the Bongyio Bhubogharay Act 1943, a person is considered to be a child until the age of 14. The Mine Act 1923 considers a person to be a child until the age of 15. Under the Basic Remuneration Act 1961, a person is a child until the age of 18. The Employment of Children Act 1938 considers anyone under the age of 15 to be a child. In the Motor Vehicle Act 1939, a person under the age of 18 is a child and is not allowed to drive a light vehicle and in the case of heavy vehicles, the person's age must be at least 20.

In the Child Labour Restriction Act 1933, anyone under the age of 15 is considered a child. In the Women and Children Oppression Prevention Act 2000, a person under 14 is deemed to be a child. According to the Adolescence Act, until a person reaches the age of 18 s/he is considered to be an adolescent. The Muslim Family Act of 1961 describes a person as a child until the age of 16.

A child has the right to know his/her legal age limit. In our society and culture, childhood is expected to end long before the age of 18. This points to the fact that we are not aware of a child's rights. It is the responsibility of the government to protect the rights of the children. It is the failure of the government to carry out its responsibilities that has left the children of this country defenceless. They have to look for work to survive. It is because of this failure that the child who should go to school now looks for work in shops, factories and houses.

"The government is encouraging child labour by setting different age limits for children in different acts," says Director of Bangladesh Child Rights Forum. He added, "Besides fixing the child's age limit, the government should also make birth registration compulsory. In our country it is difficult to prove the exact age of a child for lack of his or her birth certificate."

Lawmakers give their reasons for having different age limits in different acts.

Senior Advocate of the High Court Fariduddin Ahmed says, "Even under 18s sometimes carry out such serious offences that require punishment and a court case is necessary by law. And in a poor country like ours it is sometimes the bite of reality that forces a child under 18 to look for work. In that case a child would be deprived in absence of an appropriate law. A person can avail of the opportunities of working

even after the child age limit is set at 18, which is what happens in Western countries. Children there are allowed to work part-time and do light work. They are given a proper working environment. Although they do not work out of necessity, they do it to build themselves up for the future and get some pocket money. We can also set up correctional facilities for adolescent delinquents and set up a special court for adolescents."

Dr. Sumaiya Khair, Professor of Dhaka University's Law Department, adds, "If the age limit for a child is set at 18, we can allocate different jobs that are appropriate for children under that age."

Why is there such a difference between the legal marriage age of girls and boys?

Speaking about this difference, Prof Govinda Chandra Mondol of Dhaka University's Law Department says, "This age difference has been maintained by the law keeping social perspective in mind. In our society, if it is customary for the groom to be older than his bride as he is expected to be the bread-winner of the family." Prof Mondol adds, "It is not a problem to set the marriage age of a boy at 18, it has just been set at 21 because we do not encourage two people of the same age to get married in our culture."

If two 18-year-olds get married, the girl's father can file a case against the boy under the Underage Marriage Prevention Act. In this case, the boy will have to face a lot of harassment.

Bangladesh is not the only country where age limit creates problems. We can see the same image in many other countries of the world. Angela Melchiorre's research, 'At What Age' reveals that in 25 countries of the world there is no set age limit for compulsory primary education for children. In 33 countries, there is no minimum age for work and in 44 countries where girls are allowed to marry earlier than boys.

In at least 125 countries, 7 to 15-year-olds are taken to court for their offences and kept in dangerous prison conditions although this is the compulsory primary education age. In some countries while it is not even compulsory for 14/15-year-olds to go to school, in the same country another law allows children younger than that to work while 12-year-olds are allowed to get married and children as young as seven are punished for their crimes.

Bangladesh needs to define a set age for children so that they can enjoy their rights.

Source: NewsNetwork



PHOTO: STAR

Star LAW analysis

THE PURGATORY OF ARREST

Are our laws adequate to meet human rights demand?

KAWSER AHMED

DEATH of the accused in crossfire while being arrested by the law enforcing agencies has become a common phenomenon in Bangladesh. The recurrence of like incidents has given rise to a kind of public controversy throughout the country, most of which generally point to some extra-legal reasons. Whatever may be the underpinnings of those reasons, inadequacy of normative sanction as to safeguarding a person at the time of arrest is also a major cause for all these incidents. There is no denial of the demand that at present criminal jurisprudence as well as criminal law should haul in the same line of Human Rights; otherwise the administration of criminal justice will fail to move with the times.

How to Arrest

The procedure and manner as to how an arrest should be effected are dealt with by the Code of Criminal Procedure 1898 (Cr. P.C.). Section 46(1) of Cr. P.C. has described in general how an arrest should be made. Section 46(2) of Cr. P.C. says, "If such person forcibly resists the endeavour to arrest him, or attempt to evade the arrest, such police officer or other person may use all means necessary to effect the arrest." That the word "all means" includes the power to use force can be discerned from section 46(3) of Cr. P.C. Section 46(3) says, "Nothing in this section gives a right to cause the death of a person who is not accused of an offence punishable with death or with imprisonment for life." The general construction of section 46(2) and 46(3) gives the impression that if any person does not submit himself to the arresting authority may be arrested in any manner. Section 46(3) puts a thin restriction on the power given to police in section 46(2) that police officer is not allowed to use force morbidly (but may use force to incapacitate him) to arrest an unruly offender who is not accused of offence punishable with death or imprisonment for life. So finally the meaning of section 46(3) stands as such, the police officer is given the right (section 46(3) contains the word "Right") to shot a person dead resisting the arrest if accused of offence (not convicted) punishable with death or imprisonment for life.

The make-up of section 46(3) seems quite aberrant because it does not possess the meaning of "arrest" in real sense, the simple reason is anywhere in the world arrest means the process of bringing a person under police custody alive, not to kill him. The matter of eyesore of this section is that nothing is stated about the degree of force to be applied by the police at the time of arrest. So a police officer can easily get away with impunity if he injures an accused where it is not at all necessary, or hurts any one grievously where a small injury would do the purpose. After all these, even if a police officer is accused of abuse of power, he can invoke section 76 and 79 of the Penal Code 1860 as a bulwark against it on the excuse that whatever he did was in good faith and by mistake of fact. About unlawful arrest, the position of law in relation to a person is negative. A person cannot resist unlawful arrest as Section 99 of the Penal Code states no private defence is admissible against any act done by a public servant, which does not cause apprehension of death or grievous hurt, though the act may not be justifiable by law. The net result is the police enjoy a general immunity under these sections of Cr. P.C. and Penal Code.

A glimpse of Jurisprudence

From the viewpoint of jurisprudence, laws regarding arrest suffer from an unbalanced combination of jural relation of power, liability, immunity and disability. The police have the power to arrest the accused implies that the accused are under liability (as jural correlative of power) to comply with it, have no immunity (as jural opposite of liability) against such power, and have absence power against police activities (as jural contradictory of immunity). If we put it the other way round, for example, the accused are liable to section 46 implies that the police have power against the accused (as jural correlative of liability), have no disability (as jural opposite of power) to act, and have absence of liability (as jural contradictory of disability) for it. As we have seen the police by deploying the provisions of the Penal Code as shield can enjoy a kind of immunity; the effect will be, the penal laws will suffer from disability (as jural correlative of immunity) to take account of police responsibility, and will be powerless (as jural opposite of disability) against the police. So it is clear that excess power of police has largely wiped away their accountability. The ultimate question is how to solve this riddle? The answer is straightforward; the said jural correlatives, opposites and contradictories should be dovetailed in a way in order that the balance of relationship between the police and the accused does not tilt so much in favour of the former. To this purpose, the nearly unlimited power of police should be trimmed down on the one hand and on the other some positive rights should be created in favour of the accused to make the activities of police duty-oriented (as jural correlative of right). In addition to that, the police may be inundated with some positive responsibilities as to the manner of carrying out arrests.

Constitutional Viewpoint and Human Rights

The relation between the constitution of the People's Republic of Bangladesh and the provisions of Cr. P.C. is solely incongruous. Article 31, 32 of the constitution have strictly spoken for protection of law against any act detrimental to life, liberty, body, reputation or property of any person save in accordance with law. As per the concept of natural law, the word "law" does not remain to be mere legal procedure, but fair and reasonable procedure of law. Now where does the honour of these articles lie when the police have power under Cr. P.C. to apply force indiscriminately to take away life or to injure anyone physically, which is further strengthened by the provisions of Penal Code? The vices of section 46 of Cr. P.C. automatically comes into question. And what is more, the section 46 of Cr. P.C. also restricts the enjoyment of other fundamental rights enshrined in article 33(1), 33(2) and 35 of the constitution because those rights have utility only for living persons. If violation of fundamental rights is regarded as unconstitutional, any impediment to enjoy them should also be regarded so.

As our constitution has incorporated almost all civil and political rights as fundamental rights, the leading edge interpretations of constitution are expected to come from human rights

approach. The right to life, liberty and security against arbitrary deprivation embodied in the Universal Declaration of Human Rights and International Covenant on Civil and Political Rights has been already set forth as international standards for treating persons all over the world. The sooner we will realize that a person who is accused of an offence is at first a human being; before his guilt is proved he is not an offender, the sooner we will step towards right path.

Conclusion

Without much effort, it is possible to extrapolate that Cr. P.C. and Penal Code were designed to serve colonial purpose. We have ceased to be colony, yet our faith in colonial laws has remained more than those of our former colonialist rulers. Contrary to our law, in UK the Criminal Law Act 1967 says, "A person may use such force as is reasonable in the circumstances in the prevention of crime, or in effecting or assisting in the lawful arrest of offenders or suspected offenders or of persons unlawfully at large" (section 3). A similar provision is present in section 117 of the UK Police and Criminal Evidence Act 1984. A clear reflection of article 2 of the European Convention for the Protection of Human Rights and Fundamental Freedoms is noticeable. Misapplication of force by reason of mistake of fact is not excused there. What should we do now? Our legislature is not bound to amend or enact good laws for anyone's sake, yet our judiciary can declare bad laws ultra vires. So the Supreme Judiciary can take it upon itself to declare them void and set down guidelines as to manner of effecting arrests. And by means of constitutional provision, they will have the force of law as good as any statute. This may be an evasion, but sometimes the end justifies the means.

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PHOTO: STAR

HUMAN RIGHTS advocacy

Universal Children's Day Petition

We all are aware of unacceptable wrongs in the world...

- Children dying because of adult wars,
- Children raped because of adult impulses,
- Children beaten, victims of adult madness,
- Children suffering poverty and famine because of lax adult governments,
- Children exploited for work, prostitution and pornography because of adult profits.

Each and every child deserves the right to be protected, educated and respected. Governments must face their responsibilities toward children, and every country in the world must establish and enforce active policies to protect children and to fight against the violence they endure.

Children are our future; the ones who will care for our planet tomorrow.

We may not change the world in one day, but as a symbol, we can designate a specific day to unify all children world-wide: A universal day when we can individually look at children differently and honor each child as a person in need of our continuous presence and protection. A day to please children around us, to take them where they long to go and play with them. A special day when we will reflect on those children in the world, deprived of that precious gift we call "Love".

Source: petitiononline.