LAW *in-depth*

Children in custody still denied justice

MD NUR ISLAM

THE number of juvenile delinquents are not negligible. Most of those children delinquents are languishing in the jail custody with total denial of their rights. Since crime is a social malady children are often vulnerable to it. When children are not be brought up in a desired and congenial environment, they tend to be involved in different types of crime and finally discover themselves to be delinquents. No child is born as a delinquent. The parents of each child harbour future dreams to their children but many of the dreams do not come into reality because of the adversaries of the society. Keeping this view in mind, the juvenile justice system should be given its due priority with regard to necessary developments and substantive changes in the enactment. For that end, juvenile justice system should not be confined to only the treatment of children when they come in conflict with the laws but to include the root causes behind the delinquent behaviour and the measures to prevent them.

In 1974 a comprehensive children Act was enacted, it has also got a complementary, namely, the children rules-1976. And the cases of children supposed to be governed by Act aided by the criminal procedure code & the penal code.

Definition of children

The different laws have defined children in different ways. But for the very purpose of this system, the children Act has defined a child as any person under the age of 16 years. The convention on the rights of children (CRC) defines a child as any person under the age of 18 years.

Juvenile justice and court

Juvenile justice has become an international issue with introduction of the convention on the rights of the child (CRC) coming into force in 1990. The essential element of a juvenile justice system is an attitude. An attitude that values each boy and girl who is in the justice system and cares about how the experiences in the system will shape the life of each one of them. The manner in which police arrest or interrogate a youngster, the way judges make decisions about guilt or sentencing, the educational, recreational and safety conditions in detention facilities, the programs for rehabilitation and reintegration that is to say every component of the entire system must be constructed to prevent humiliation and avoidable suffering. Juvenile justice in a broader sense not only includes the treatment of children when they come in conflict with the law, but also involves the root causes of the offending behaviours and the measures to prevent them.

In infringement of international standards, juvenile inmates are often held together with adults. A study shows that there are 1063 children in 60 jails and 280 more in the correction centers in Bangladesh. Many of Bangladeshi's jail and police lock-ups mix juvenile and adult prisoners. Children in such circumstances, frequently fall victim to bodily abuse, including sodomy and rape by adult inmates. In such a situation the appropriate measures have to be taken with a view to eradicate the impediments as existed in our juvenile justice system.

The children Act 1974 was enacted to consolidate and amend the hitherto existing laws relating to the custody, protection and treatment of children and trial and punishment to young offenders. This Act has laid down the provision for establishing the juvenile courts for any local area for the purpose of the trial of the youthful offenders. The section 3 of the Act says" Not withstanding anything contained in the code, the government may be by notification in the official gazette, establish one or more juvenile courts for any local area. The section 4 of the act has provided provision to exercise the powers of juvenile courts by (a) the High Court Division (b) a court of sessions (c) a court of an additional sessions judge and of an assistant sessions judge, a sub divisional magistrate (district magistrate), a magistrate of the first class. The section 5 of the act deals with the power of the juvenile courts while the section 6 suggest separate trial of the children accused, the section 7 regarding the holding of setting of the courts, the section 9,10,11,12,13,14 and 15 are procedural in nature. The part viii of the act has dealt with the provisions regarding the bail of the offenders, the restriction on punishment, power to discharge or commit in suitable custody etc as espoused in section 48-54 while the part viii of the same act as enshrined in sections 55-61 has exposed the provisions regarding definition, supervisions ect of the victimised children. The demands of establishing juvenile court and the separate trial of the juvenile offender are getting momentum in our country. The need for separate juvenile court is being emphasised in workshop, seminar etc by the conscious section of the people.

Age determination factor

For smooth and proper functioning of juvenile justice system, the determination of age is a must. In laws of Bangladesh there is no uniform definition of children, the different laws define children differently Apart from this, the birth registration mechanism is very poor in our country and the same is not properly and adequately maintained and, as such, the concerned authority has to depend on mere inference and speculation while determining age of children. In this respect a proper device with determining the age of children should be chalked out. If need be, laws will be amended in case of juvenile justice to ensure that the age of a child offender is determined by the date of the offence committed.

Serious contradiction in laws

There is also a serious contradiction in laws, while the children Act terms the under-16 as minor, the majority Act 1875 terms all the citizens under 18 years as the same too. The government must revise the relevant laws in order to remove the inconsistencies. Moreover, this Act is silent about exploitation of children in the name of family enterprise/businesses. The issue is whether such exploitation in the name of family business is punishable or not.

Recent development at abroad

International treaties and customary international law forbid capital punishment for offenders under the age of 18 at the time of the offence for which they were convicted. Iran, Saudi Arabia, Nigeria and the Democratic Republic of Congo are the only countries that are known to defy the world wide consensus that the death penalty should not be imposed on juvenile offenders. Recently, the governors of two states, South Dakota and Wyoming have signed the legislation raising the minimum age for capital punishment in their states to 18. In the United States, 31 states and the federal government now prohibit the execution of juvenile offenders.

Some major obstacles

Poverty is major reason behind juvenile offence in a country where 48 percent people live under the poverty line; Most significant problem is ignorance of magistrates, law enforcement agencies and probation officer about the legal approach to children; Lack of training of magistrates and other law-enforcers on how to deal with children that impedes greater prevention of abuse of troubled children; Lack of society or community mechanism to address child-rights issues; Lack of relevant amendment, proper interpretation and understanding of the children Act, 1974 and children Rules, 1976; The existence of the 1943 vagrancy Act, which is said to be 'anti poor' and 'counter constitutional'; and lack of co-ordination among the government agencies.

Some recommendations

Reduction of poverty and socio-political instability should be viewed as fundamental changes that could positively change people's mind set towards children; a greater bondage between parents and children and lower incidence of broken homes could reduce the problem of children pushed towards crime; co-ordination between magistrates, policemen and probationer officers have to developed; And a greater awareness is needed among government workers about sensitivities in dealing with juvenile offender.

Concluding remarks

Juvenile justice is something completely different from criminal justice. Protective legislations and their proper implementation through an effective child-friendly legal system based on ground reality can safeguard the rights of juvenile offenders. A creative approach is necessary to improve the juvenile justice system and establish a just society. Only new thinking, new values, new projection and positive outlook with determined action can achieve this. With a humble hope of due consideration of authorities for enactment of adequate laws in this regard, this work is concluded herein.

The author is a Senior Assistant Judge.

JUDGMENT *review*

Inventing exceptions to International Law

DR. LIAQUAT ALI KHAN

If to dispute well is law's chief end, Harvard law professor Alan Dershowitz has honed this ability to a stunning craft. In high-profile cases, such as O. J. Simpson, Doctor Dershowitz, a seasoned criminal law jurist, serves as a media-savvy lawyer determined to defend "the guilty." Less well know is, however, that this advocacy Mephistopheles thrives on inventing unpopular, counter-intuitive, and even unjust exceptions to international law--a subject he normally does not teach. These exceptions----mutually folded in each other's orb---allow the torturing of terrorists, the assassinations of their leaders, and the demolition of their family homes. What is most intriguing is the contempt that Dershowitz has for the International Court of Justice (ICJ) and its current President (the Chinese judge) whom he calls a thug, discarding the language of professional courtesy.

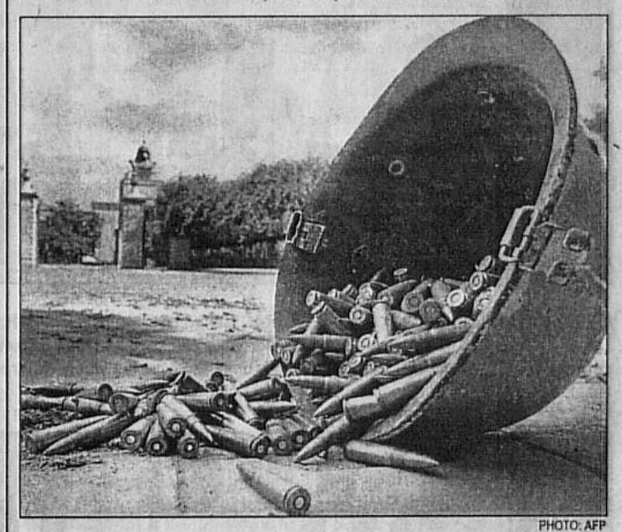

PHOTO: AFP

Somewhat intrigued by his incendiary views daringly, and sometimes crudely, expressed in books and newspaper columns, I requested to interview Dershowitz, an interview he granted promptly and generously. We both taped the interview, I for no other reason but to save a souvenir. I came out of the interview with a clear impression that---setting aside civil liberties that informs his criminal defense rhetoric---Dershowitz concocts these exceptions not merely to embellish his ivory tower but to proactively defend, and sometimes shape, Israeli policies in occupied Palestine.

For example, Dershowitz's contempt for the ICJ has deepened ever since the Court decided to rule on the legality of Israel's separation wall. Comparing the ICJ to a Mississippi court in the 1930s, Dershowitz contends that the ICJ is a credible court for the rest of the world but not for Israel, just as the Mississippi court was a just tribunal for whites but not for blacks. This argument, in its analogical enormity, paints the ICJ as an exceptionally anti-Israel body. Furthermore, Dershowitz challenges the neutrality of ICJ judges, arguing that they are shameless mouthpieces of their governments. When asked to comment on whether he holds the same view about British and American judges on the Court, Dershowitz stepped back to distinguish between the Court and its judges, now saying that the ICJ is bigoted but many of its judges are not. This distinction made no sense to me, since all judges on the Court, except one, held the separation wall to be illegal.

Dershowitz's exceptional defense of Israel is not confined to academic criticisms of the ICJ (or the International Red Cross or the United Nations). In the interview, Dershowitz, who opposes death penalty, revealed that he had sat on the Israeli assassination committee that reviews the evidence before terrorists are targeted and killed. This "due process" hearing is designed to reduce the raw charge that state-sponsored assassinations are blatantly unlawful.

Dershowitz favors targeted assassination of terrorist leaders "involved in planning or approving on-going murderous activities." Under this protean standard, it is unclear whether spiritual and political leaders who favor terrorist violence but do not materially participate in specific terrorist acts may also be assassinated. These niceties aside, the idea of a Harvard law professor sitting on an occupying state's assassination committee would be, to many in the legal academy, a bit annoying.

What rattles his many critics the most, however, is the innovative exception Dershowitz draws to the Convention against Torture (1987). The Convention prohibits all forms of torture and provides for no exception.

In fact, the prohibition against torture has attained the status of jus cogens the peremptory norms of international law that cannot be abandoned or altered.

Dershowitz confesses to know all this. Yet he makes an empirical argument to carve out an exception. Since torture cannot be eliminated in the real world, he argues: "Ay, think so still, 'til experience change thy mind." Dershowitz proposes the legal system to regulate torture by requiring state officials to obtain a judicial warrant before torturing.

Despite Dershowitz's connections and influence, Israel refused to launch the proposed torture warrant but embraced the idea of exception to the Convention it had signed.

However, when more than 90 percent of the Palestinian security detainees began to be tortured, the Israeli Supreme Court put an end to the fledgling exception.

Undeterred by such judicial rebuffs, Dershowitz continues to manufacture legal exceptions to shore up the universally condemned Israeli practices, such as bulldozing the family homes of terror suspects. Calling it property damage, he apparently dismisses the sanctity, the intimacy, and the memories attached to a family home, anybody's family home. As if demolition of family homes is a minor punishment, Dershowitz is willing to pull down even the entire "villages of suicide bombers." He thinks perhaps that it takes a village to raise a suicide bomber. It does. When her entire village has been grabbed by the neck and choked, some kid (a "terrorist") is surely going to be mad as hell.

Despite his legalistic jihad for Israel's security and despite his employment of the Harvard Law School stature to propose questionable exceptions to international law, Dershowitz does not completely throw away the sense of limits. For example, he opposes Nathan Lewin, a prominent Washington lawyer and a federal judge hopeful, who blatantly argues, contrary to popular feelings of the Jewish community, that family members of suicide bombers be executed.

By no means is Dershowitz an incorrigible ideologue nor is he morally sightless. His reading of international law is most certainly flawed and he needs "to settle in his studies." His intellectual honesty is nonetheless beyond doubt. He is what he thinks. He does not duck hard questions. And he does all this with an inexhaustible capacity to swallow contradictions. At the end of the play, however, when all arguments have been made, when all exceptions have been put to rest, and when the nation that launched a thousand missiles has been defended, Dershowitz relaxes his grip with a disarming sense of humor expressed through borrowed jokes. In his book Why Terrorism Works (2002), for example, he tells readers how he, as a boy, pondered over difficult hypothetical scenarios such as this: "If you were up to your neck in a vat of cat vomit and somebody threw a pile of dog poop on your face, would you duck?"

One may relish Dershowtiz's forward wits, but only to wonder at the unlawful things he permits.

The author is a professor at Washburn University School of Law in Kansas.

LAW *opinion*

REKINDLING AN OLD DEBATE

How effective a Caretaker Government can be?

AMINUL HOQUE & KAWSER AHMED

AFTER we have lost parliamentary democracy in 1975, it took long 16 years and blood shedding struggle to regain it. In 1990, after removal of the then President H.M. Ershad, Chief Justice Md. Shahabuddin Ahmed was appointed as the president of the country to hold a free & fair election which he successfully conducted. Since then the elected government was supposed to hold the next general election.

But wide rigging in various parliamentary by-elections, especially in Magura, led to the demand of making an arrangement of holding general election under the authority of a non party caretaker government and after a long political confrontation article-58 of our constitution was amended by inserting various provisions for such a non party caretaker government in article 58(B, C, D, E). Article 58B(3) provides that all the executive power of the republic shall be exercised by the chief adviser in accordance with the advice of the non party caretaker government,

The combined effect of article 58D(1) &58D(2) is that the non party caretaker government is empowered to take all measures to assist the Election Commission in holding free, fair and peaceful election and in taking such measures, the caretaker government does not have the limitation relating to policy decision provided in article 58D(1). The provision of article 58d(2) is not in any way controlled by the provision of article 58D(1). So the caretaker government enjoys some unfettered powers to perform any function to ensure the environment for holding free & fair election.

As the non party caretaker government is not any elected body, they are only responsible to the president [article 58B(2)]. Article 58C provides that immediately retired chief justice of Bangladesh and in his unwillingness, any other retired Chief Justice or retired justice of the appellate division has to be appointed as the chief adviser of the caretaker government. Being the judges of the highest judiciary is always considered to be very prestigious and honorable portfolio. It should not be exaggerating to hold that after introducing the provision of caretaker government in this country, this office has got importance of a different dimension. Now every judge of the appellate division is a potential head of the government for a specific period.

The judges, being a human being, must have, in person, some political ideologies which do not seem to affect the due discharge of their duties. But after the 13th amendment, our politicians have seemingly become desperate to have like-minded person in the office of chief adviser. As a result, there have been a lot of incidents like more appointment of judges (who are alleged, by some quarters, to be ineligible and inefficient), non- confirmation of the appointment of those who are considered to be of different political beliefs and promotion of the judges belonging to similar ideology breaking the rules of seniority. As presumed by members of the civil society, the underlying objective for unstable practice in relation to appointment of judges is that politicians want to have a like-minded person as a chief adviser. If the aforesaid statement is true, such practice undoubtedly is very much opposed to the benevolent concept of non party caretaker government and harmful for the image of the supreme judiciary.

Though this kind of untoward incidents are not new in this country but after the inclusion of caretaker government provision, the politicians have become more uncompromising in this regard. In the previous regime of B.N.P nine persons were appointed without consultation with the then Chief Justice Shahabuddin Ahmed. But after he objected about two of those judges, the government cancelled their appointment.

Afterwards in 1999, two high court judges were promoted to appellate division superseding two other senior judges of HCD allegedly for their different political identities. This time also there was allegation that no consultation with Chief Justice was done. Consequently there was agitation and attempt of negotiation but all such attempts went in vain. After coming to power in 2001, BNP government appointed one of those superseded judges as chief justices again superseding two senior judges in the appellate division and their justification was that by this they have given due treatment to a person who was unduly deprived of his entitlement. We have all reason to believe that such practice of our politicians is leading to a situation when only identical political belief will be the only eligibility for appointment as a judge in the apex judiciary.

PHOTO: AFP

Bangladesh is not the only country where on various occasions judges in apex court have been appointed and promoted on political consideration. The trace of such practice can also be found in countries like UK, USA etc. But in those countries no compromise has yet been made in relation to the qualification and integrity of the proposed persons and no where it has been alleged, as much as is made in this country, that almost unqualified persons are appointed or quite eligible person has been denied of proper position. In the aforesaid countries, government may decide to appoint a party man as judge in higher judiciary for rewarding him for long term service to the party provided that he possesses all necessary qualifications and as soon as he is appointed, his relation with that party ends. The new judge is expected to be quite neutral while discharging his duty. In contrast, all the politicians in our country seem to be expecting that the judges, appointed or promoted during their tenure, will render their support to them on every occasion whatever it might be, even after their retirement while occupying another portfolio like chief adviser. Resultantly, it is alleged that to select a very loyal party man for such post, politicians are even ready to waive some crucial criteria like eligibility and integrity.

Bangladesh falls in that category of the countries where the constitution has been given supremacy over the legislature and the highest judiciary of the country has been entrusted with the duty of supervising and maintaining this supremacy. So from the very beginning, the office of the judges of Bangladesh Supreme Court became very crucial in establishing democracy in this country in its true sense. The preamble of the constitution of Bangladesh says: "it shall be a fundamental aim of the state to realize through the democratic process a socialist society, free from exploitation-a society in which the rule of law, fundamental human rights and freedom, equality and justice, political, economic and social will be secured for all citizens." To ensure rule of law, fundamental rights, equality and justice in a society the most crucial role is played by the court of law.

Accordingly the supreme court of Bangladesh has been accorded the power to enforce certain fundamental rights, embodied in chapter-3 of the constitution which has been given direct enforceability through the said court. Indeed after reintroducing parliamentary democracy in 1991, our highest judiciary has done some commendable jobs in ensuring fundamental rights, public interest and, importantly, to put effective restrictions upon the arbitrary exercise of the executive power. Against all the deprivation, corruption, suppression of the government or any other, the judges of the highest judiciary remain as the last hope for the nation. But when it is vehemently alleged that ineligible & inefficient persons are appointed there, we are afraid that we are losing our last ray of hope. We have all reasons to apprehend that such person may not be able to act going beyond all kind of fear and favor.

In a developing country like Bangladesh, both peoples' participation and the existence of a strong judiciary are equally important. To ensure peoples' true participation in democracy, the concept of caretaker government has been introduced. But it is now evident that influence of politics is undermining the very concept of caretaker government and posed a severe threat to neutrality and efficiency of our apex judiciary vis-à-vis democracy. More to the point the politicians seem to be devoted not to separate judiciary from the executive. The caretaker government, which was made to strengthen democracy, has become a threat to it. If necessary, the provision of caretaker government should be amended. And obviously before everything, the judiciary should be made totally independent.

The authors have graduated from Department of Law, University of Dhaka.