



Role of legal and judicial officers is critical for gender mainstreaming

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BANGLADESH, being a sovereign republic it comprises three basic organs of state; the executive, the legislature and the judiciary. The administration of justice is the responsibility of the judiciary, which comprises the Appellate Division and the High Court Division of the Supreme Court at the higher level, followed by a hierarchy of civil and criminal courts at the District level. In strict sense the Appellate Division of the Supreme Court is the highest Court of the republic comprising of 7 judges including the Chief Justice. Article 22 of our Constitution granted judicial independence and impartiality of judgments.

Gender mainstreaming is a process of assessing the implication for women and men of any planned action, including legislation, policies or programmes, in all areas and at all levels. Judicial system, therefore, need to be engendered. To get an impartial judiciary sensitization of judges, magistrates, law officer and lawyers is beyond the question. It is said that judiciary is endangered if it is not engendered.

The rule of law is deeply interconnected with freedom from fear and all other freedoms. Without the rule of law and fair administration of justice, human rights laws are no more than paper. Justice is something that people dearly value. UNDP Human Development Report 2000 quoted of a poor farmer in Bangladesh as, "I can tolerate poverty, but not to get justice in the eye of the law in my own country just because I am poor, that I cannot accept."

HDR 2000 also noted that in some societies administration of justice remains elusive because of changing norms and inadequate institutional capacity. Justice has become a commodity that often only the rich and powerful can afford let alone poor women, the victim of human right violation.

Judicial officers have had an important role in the society to uphold-



the constitution of the country and maintaining check and balance system. They have the sole authority to determine the facts in most criminal and civil cases, acting as a powerful buffer against arbitrary enforcement by the executive and judicial branches.

The courts can insulate women against injustice suffered due to biological and sociological factors.

There is said that 'all law is not justice; nor is all justice law alone'. At times there could be more justice without law and vice versa. Sometimes mindless application of laws, could lead to injustice. So need of a sensitised judiciary is beyond the question.

There is utmost important to improve the environment for doing business by increasing the efficiency, effectiveness, and accountability of the civil justice system, and increase access to justice, particularly for women and the poor.

The Constitution of Bangladesh maintains all citizens are equal before law and are entitled to equal protection of law (article 27). The Universal Declaration of Human Rights (1948) landmark treaty marking the struggle for women's rights. Described as the Bill of Rights for women, it spells out what constitutes discrimination against women and propagates strategies based on "non-discriminatory" model, so that women's rights are seen to be violated, if women are denied the same rights as men. Beijing Platform for Action (PFA) also note as 'ensure equality and non-discrimination under the law and in practice, (Paragraph 232, PFA).

Gender sensitisation of judges, judicial officers and lawyers is im-

portant so that they treat women with dignity and honour and inculcate confidence in them by the sober conduct, behavior and ideology of the judicial concern whenever the victim approach to them and seek justice. Judges have to keep in mind that women are weaker section of the society. At the courtrooms women should be treated with courtesy and dignity while appearing there. Any comment, gesture or other action on the part of any one in or around the courtroom which would be detrimental to the confidence of the women is to be curbed with heavy hand. Court proceedings involving women must begin on time and repeated appearance of women in the court and harassment should be carefully avoided. The female members of the Bar need to be encouraged in the profession, maybe by giving assignments as Court Commissioners for inspections and recording statements of witnesses. Crime against women ought to be dealt with on priority basis so as to be decided finally at an early date lest the delay should defeat the justice.

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This is the third part of our special series on securities market. In the next instalment we will discuss contemporary regulatory challenges that is holding back the expansion of our securities market.

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SECURITIES regulation in Bangladesh, then part of British India, initially started in the guise of corporate legislation. In 1913, the Indian Companies Act 1913 was enacted and it contained specific provisions (Sections 92-100) regarding the contents of prospectuses their filing procedure and liability for statements provided therein. From the late 19th century through the mid-20th century there was a steady growth of stock exchanges in British India. However, there was no effective central or uniform regulatory control over the stock exchanges for a long time. In 1865, the Government of Mumbai enacted Act XXVIII of 1865 to control speculative activities in the securities market. This Act is claimed to be the first and the earliest legislation relating to the Stock Markets in India. Later, the Act XIII of 1886 was enacted under British Raj to regulate the securities issued by the Government.

The Indian Securities Act 1920 was the first formal attempt to effectively regulate the overall securities market of the region. However, this Act again was only directed to regulate 'government securities', but not those of companies. In 1923, the Atlay Stock Exchange Enquiry Committee was set up to look into the matters of Mumbai Stock Exchange. It was followed by the enactment of the Bombay Securities Contracts Control Act 1925. This Act empowered the Government "to grant and withdraw recognition to a stock exchange" and provided that "rules of a recognized stock exchange could be made or amended only after prior approval of the Government". It is found that all the stock exchanges in India functioned under the framework of Bombay Securities Contracts Control Act 1925. Therefore, it is stated that for a long time, the stock exchanges in British India actually operated under their individual

contract regulations.

Until the Second World War, raising of capital in British India via non-governmental securities was free from any effective control. In 1943, the Defence of India Rules 1943 imposed restrictions for the first time on the issue of corporate capital in British India. Also, non-compliance with such restrictions was made an offence, punishable with "imprisonment for a term which may extend to five years or with fine or both". No company was allowed "except with the consent of the central government" either to make an issue of capital or to make any public offer of securities for sale in British India or anywhere.

Under the Defence of India Rules, the Government for the first time introduced some sort of prospectus regulation in the securities market of British India. Rule 94A(3) of the Defence of India Rules reads as:

"(subject to exceptions) ... no person shall issue in British India any prospectus or other document offering for subscription or publicly offering for sale any security which does not include a statement that the consent of the Central Government has been obtained to the issue or offer of the securities."

It is observed that the formation of the Defence of India Rules, so far it was related to the securities markets, was basically a wartime measure against speculation in such markets. Once the Second World War was over, it was realized that the control on capital issues was still necessary to secure a balanced investment of the country's resources in industry, agriculture and the social services.

Hence, the said rules continued after the war and were later incorporated into the Capital Issues (Continuance of Control) Act 1947.

The Capital Issues (Continuance of Control) Act enabled the Central Government to have control over any kind of issues of corporate capital in British India. The office of the Controller of Capital Issues (the Controller, henceforth) under the Central Government administered this act. Companies were compulsorily required to make an application to obtain approval from the Controller for

raising capital in the securities market, be it the local market or that of a foreign one. There was no specific need to register the prospectus with the office of Controller. There were also no clear-cut guidelines for standards or contents of prospectus to be distributed among prospective investors for attracting investment. The office of the Controller only required that the prospectuses and other advertisements should contain a statement to the effect that the relevant approval from the Controller had been obtained.

It is not at all clear from the Act as to what were the required formalities in getting an approval for capital issue from the Controller. As a matter of fact, the Controller did not have the time, the staff, the powers of enquiry, the benefit of public hearing, the experience, skill or expertise to assess the technical, commercial and financial aspects of the projects so as to provide guarantee to the investors. Until 1947, regulation regarding market manipulation and insider trading were completely undeveloped in British India. Also, neither the Capital Issues (Continuance of Control) Act did enjoin the Controller to discharge such obligations, nor does the background of the Capital Issues (Continuance of Control) Act encompasses. The Controller was only expected to act within the four corners of the Capital Issues (Continuance of Control) Act and the guidelines.

then order the applicant to provide accounts, books or other documents or to furnish further information. Also, according to section 8 and 13 of the Capital Issues (Continuance of Control) Act, applicants were generally prohibited from making any false statement to the Controller.

It is stated that investor's protection was never in the responsibility agenda of the Controller. As a matter of fact, the Controller did not have the time, the staff, the powers of enquiry, the benefit of public hearing, the experience, skill or expertise to assess the technical, commercial and financial aspects of the projects so as to provide guarantee to the investors. Until 1947, regulation regarding market manipulation and insider trading were completely undeveloped in British India. Also, neither the Capital Issues (Continuance of Control) Act did enjoin the Controller to discharge such obligations, nor does the background of the Capital Issues (Continuance of Control) Act encompasses. The Controller was only expected to act within the four corners of the Capital Issues (Continuance of Control) Act and the guidelines.

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LAW OF THE SEA

Strategic divisions of the oceans in seabed mining

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THE UNCLOS III was adopted in 1982, notwithstanding the strong objections of the industrialised states to many of the provisions of Part XI, on seabed mining in the "Area". The "Area" is the seabed and ocean floor and subsoil thereof beyond the limits of national jurisdiction. The Area and its resources are the common heritage of mankind and no state can claim or exercise sovereignty or sovereign rights over any part of the Area or its resources. This controversy over seabed mining had occupied the central stage of the convention for more than 15 years and indeed, this deadlock threatened to unravel the work of decades. In the early 1970s, at the time the drafting of the Convention began, the developing countries argued that, because the resources of the Area beyond the zone of coastal state jurisdiction were "the common heritage of mankind," and the deep seabed should be exploited only under the auspices of the United Nations, and seabed miners should share the benefits from their endeavours with mankind as a whole. Private firms and consortiums from the industrialised states, however, were undertaking most of the exploration and technology development related to seabed mining. These firms risked their own assets and worked for their own stockholders, and neither they nor their governments felt an obligation to share either their profits or their technology with a UN "Enterprise" that proposed to compete with them.

The original Part XI of the Convention explicitly asserted UN control over the mineral resources of the area of the deep seabed seaward of the limits of national jurisdiction. Moreover, it established a seabed-mining regime called, the International Sea-Bed Authority (ISBA). Specifically, the Convention set up a "parallel system" in which

the seabed would be mined both by an Enterprise controlled by the ISBA and by various national and multinational entities, mostly from the industrialised world. To make this system feasible, the latter were to be required to pay substantial up-front fees, which would be used to fund the ISBA and the Enterprise. The other mining entities were also to turn over to the ISBA for exploitation by the Enterprise half of each mine site they had identified. These and other seabed mining provisions were strongly opposed by the United States and many other industrialised countries, which characterised the regime as so interventionist that would discourage investment and prevent development of the seabed resources.

Besides, the United States, United Kingdom, and West Germany did not sign the Convention, and the other industrialised nations that did sign it, did not subsequently ratify it. Instead, they proceeded to abide by the provisions of the Convention except for those relating to seabed mining. In 1984, Belgium, France, West Germany, Italy, Japan, the Netherlands, the United Kingdom, and the United States entered into the "Reciprocal States Agreement," which set forth the rules and procedures under which, in the absence of an UNCLOS Convention, their firms would undertake seabed mining. In lieu of registering their mine sites with the ISBA Preparatory Committee as called for in Part XI of the Convention, most of the Western seabed mining consortia registered their exploratory sites under the existing laws of the United Kingdom, the United States, or West Germany.

All these problems came up due to discovery of potato-size polymetallic nodules, which constituted a potential alternative source of strategic minerals. The nodules are composed largely of iron and manganese oxides but often con-



leaches minerals out of the rock. As the warm, mineral-rich water rises, it cools and the minerals precipitate out and are deposited on the seafloor. At some vent sites, the deposits contain metal compounds of singular purity. At other sites they contain a much wider variety of minerals -- including lead, zinc, silver, gold, and germanium -- than the polymetallic nodules lying on the

flanks of islands and seamounts at depths of about 3,000 feet. In general, such crust deposits would most likely be found within the EEZs (on the continental shelves) of coastal states, which consequently would have the sole right to exploit them. The technology for mining vent and crust deposits has yet to be developed, but preliminary indications are that both forms of mining could be undertaken with significantly less investment than nodule mining. In both cases, the technology for processing the minerals would be similar to that already used on land.

Because of such importance of the minerals etc and consistent refusal of the developed countries to sign the UNCLOS III, in 1990, amidst a general thaw in both East-West relations and North-South relations, the UN Secretary General sponsored new consultations explicitly at ameliorating the objections of the United States and the other industrialised countries to the Convention's seabed mining regime. The new Agreement changed the proposed earlier Part XI regime in several fundamental ways. In particular, it reduced the power of the developing countries as a voting bloc in the ISBA and increased the influence of the United States and other industrialised countries. The Assembly is now permitted only to ratify or remand decisions of the Council; it cannot originate policy. Among other things, the Agreement sets up three four-member chambers of the Council--one for the major Consumers (importers) of minerals that could be mined from the seabed, one for the major Investors in seabed mining, and one for the major land-based Producers (exporters) of minerals that could be mined from the seabed.

Another arrangement would permit as few as 11 developing countries to block decisions of the Council and it gives the United States and Russia seats in the Consumer chamber. Conse-

quently, the US government could block decisions of the Council with the support of two of the other three members of the Consumer chamber. It also requires that substantive decisions in four areas be made only by consensus. The areas are -- protecting land-based producers from adverse effects of seabed mining; revenue sharing; amendments to rules, regulations, and procedures implementing the seabed mining regime; and amendments to the seabed mining regime itself. In addition, the Agreement addresses other US objections to the original seabed mining provisions by establishing a Finance Committee controlled by the five largest contributors to the Authority's budget to make budget and financial decisions by consensus. Now the seabed mining consortia are simply encouraged to undertake joint mining operations with the Enterprise, eliminating production control measures and significantly reducing the fees required of commercial miners before the onset of production. The Enterprise, which would engage in seabed mining on behalf of the developing world, will not be established unless and until the economic viability of seabed mining has been demonstrated.

Indeed, the Agreement contains a provision to the effect that the 10 developed countries registered as pioneer investors are Belgium, Canada, France, Germany, Japan, Italy, the Netherlands, Russia, the United Kingdom, and the United States; the other four pioneer investors are China, India, Poland and South Korea. In July 1994, the new Agreement was presented to the UN General Assembly, and a resolution supporting it was overwhelmingly approved, with 121 states in favour and none opposing. As of March 2006, 122 countries including USA and all other major industrialised states have ratified the Agreement.

Many of the developing countries

had become willing to reconsider this issue, because they recognised that the developed countries were unified in opposition to these provisions and would not accede to the Convention unless they were changed. The new Agreement reached in 1994 eliminated, or greatly weakened, the provisions to which the industrialised states most objected but retained the framework in which seabed mining would be conducted under the authority of the ISBA. The compromise was made possible by the conclusion of both sides that what each viewed as the optimal seabed mining regime was not achievable. The general view among the industrialised states is that the seabed mining provisions are now acceptable, particularly when weighed against the importance of supporting the rest of the objectives of the Convention. The general view among the developing countries is that paving the way for universal acceptance of the Convention was worth the concessions they made on seabed mining in the Agreement.

The convention and the fundamental changes from the 1994 Agreement constitute a huge success for the world body and especially to the US and other industrialised states. It can be fairly said that there is a broad acceptance in state practice of the fundamentals of the regime -- that the resources of deep seabed are the common heritage of mankind. It would be difficult to repeat the achievements of this convention if we were to begin anew or to rely on unclear assertions that something more could be achieved by the developing countries. Bangladesh has signed and ratified this Seabed Mining Convention in 2001. But have we made any effort to know what is there in the seabed of the Bay of Bengal and how to claim the extended continental shelf up to 350 nm?

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