LAW *in-depth*

The quest for gender justice

A K ROY

BUILDING a gender-just society was perceived as part of the task of nation building, of development and social reconstruction. The role of law in the whole process is perceived as non-ambivalent, well-defined and positive.

But two decades and many struggles later, the answers are no longer so clear-cut, in spite of the fact that the contemporary women's movement in India had in fact coalesced into a movement by mobilising public opinion around the need for legal reforms for redressing individual cases of atrocities against women. The Mathura rape case of 1979, the Shah Bano case on divorce under the Muslim personal law in 1985 or the Bhanwari rape case in 1994 are landmarks that in many ways determined the course and content of the contemporary feminist movement in India.

The Mathura rape case had ushered in a wave of public outcry and was instrumental in bringing about wide-ranging changes in rape laws in the country. However, even under the changed legal regime, hardly any substantive improvements seem to have taken place in the ground conditions. Although punishments have become more stringent, the rate of conviction has dropped significantly in the post-reform years. The insensitivity of the justice delivery mechanism and the trauma of the rape victim under an unsympathetic system continue unabated.

The Shah Bano case typifies an attempt at societal change aborted at the altar of political exigency. In this case, the Supreme Court had held that a divorced Muslim woman like divorced Indian women from other religions, has the right to receive a regular maintenance allowance from her husband under Section 125 of the Criminal Procedure Code of India. This judgment had provoked strong reactions from conservative Muslim segments of the country, as it was perceived as an encroachment by the state upon the arena of Islamic law. The Indian government subsequently buckled under the pressure and passed a new law negating the Supreme Court judgment.

The Shah Bano case not merely exposed the importance of the state in bringing about societal reforms in the face of fundamentalist opposition, it also brought out the multifarious ways in which such situations can be usurped by divisive forces to press for various sectarian goals. In this case, conservative rightwing Hindutva forces started pressing for a Uniform Civil Code, ostensibly to further the rights of Muslim women, although it was clear that a Uniform Civil Code by itself is unlikely to better women's position, unless such a code is also actually empowering for women. It is well known that as personal laws under all religions stand today, they are stacked up against women. As has been argued by some progressive Islamic scholars, Muslim personal laws can be reformed for greater gender justice even without recourse to a Uniform Civil Code. This is exemplified by a recent judgment delivered by the Bangladesh High Court, which calls for a progressive reinterpretation of Muslim personal law in line with modern social values.

In the Bhanwari Devil case an enlightened 'Satin' under the women's Development Programme of the Rajasthan government was subjected to mass rape for opposing the practice of child marriage in the community. The culprits are yet to be brought to book. This case continues to typify the near-impossibility, under certain circumstances, of successfully challenging deeply entrenched patriarchal power structures through legal channels alone.

The contemporary women's movement is at the crossroads now. In the light of the experience of the last twenty years, the question that keeps recurring is whether it's instrumental in ushering in any change in the gender balance? Can legal reforms or litigation indeed ever deliver the goods. Law has in fact been often used to reinforce the social subjugation of women. Some believe that given the patriarchal nature of the state, and given the reflection of such bias in the framing and dispensation of justice by the judiciary and its functionaries, it is not sensible to expect that law can ever be a potent force for change in the existing social structure; that the hope of ensuring gender justice using law as a instrument of social engineering is an altogether impossible dream.

In a way this ambivalence about law and legal reforms in matters of securing gender justice is nothing new in the history of women's movement in India. Back in the nineteenth century, when social reformers like Raja Rammohun Roy and nationalists like Bal Gangadhar Tilak were concerned with oppressive social practices like "sati" or child marriage, the tensions between the indigenous scriptural dicta and the colonial heritage of the British legal system always lurked in the background. While Rammohun's denunciation of the practice of "sati" had been based primarily on his reading of the scriptural text, Tilak's refusal to address social issues primarily through legal instruments laid down by the foreign rulers was based on the perceived illegitimate cry of the colonial hegemony in all its ramifications. The social history of the period is replete with the tension between the liberalism strain of thinking of the pre-independence era which was geared to adopt and adapt from Western liberalism traditions on the one hand and the nationalist revivalist movements which aimed at social reforms working from within indigenous traditions on the other. Much of this tendon can be attributed to the dominant political climate of the era.

In the context of the contemporary women's movement, the ambivalence that marks feminist engagements with law as an instrument of ensuring gender justice has a somewhat different character. While demand for legal reforms has been one on the major focus for mobilising popular support, and specific cases of atrocities on women have been used to further the aims of the movement, the disenchantment with the potential of law as an instrument of social transformation has been triggered by two simultaneous developments. On the one hand, last twenty years' experience of the effect of legal reforms had been perceived to be not altogether positive. At least two essays in this collection strongly conform to this view. The meticulously researched documentation by Flavor Agnes on the effects of legal reforms in the area of violence against women covering rape and domestic violence as well as dowry related violence, suggests that laws, old and new, are structured to operate against the larger interests of women. The treatment of women under institutionalisation as argued by Usha Ramanathan in her paper reinforces this view. Neither litigation, nor legal reforms have, in the opinion of the authors, been able to deliver gender justice. The dominant social culture within which such justice is sought to be mediated have proved to be much too strong for legislation or judicial activism alone.

The second development can be traced to the growing engagement of feminist research with the post modernist wave in Western academic thinking and its deconstructionist implications for a monolithic, linear strategy for women's empowerment. Nivedita Menon's paper reflect some of the analytical complexities that arise in the context of cross cutting discourses in the field of law for gender justice. Menon's paper exhibits the undercurrent of tension between conflicting compulsions of contemporary research in feminist jurisprudence and feminist practice and activism in the legal arena. However, recent thinking in the area has made considerable progress in addressing such tension squarely by laying bare the complex and contradictory nature of law, and the need for such understanding for successful accessing of law as an instrument of social change. The arena of law is seen as a site for discursive struggles, where the dominant notions of gender, tradition and culture are challenged from a multiplicity of perspectives, including the feminist perspective. The extent to which law is made to serve as an instrument of gender justice depends to a large extent on an informed understanding of the strength, and the potential weaknesses of the dominant ideology of gender and the ability to engage with tenacity and wisdom, to explore the moral and substantive weaknesses of the familial ideology in the legal arena.

A relatively new area of legal discourse in the context of gender is social rights of women, such as the right to health. Usha Ramanathan's paper recounts the current status of law on women's health. What it does not explore in depth is the whole range of issues that are linked with women's reproductive rights and their legal ramifications. The Indian Penal Code does not admit of the notion of marital rape, thereby signifying a negation of a major dimension of such rights to women. The link between this negation and the role of the dominant familial ideology that shapes the contours of women's substantive legal rights in the country is fairly obvious.

The rights discourse does opine up new dimensions of analysis and investigation. Social movements, which aim at fighting exploitative practices, may utilise the moral strength of individual dignity to strategise the fight for justice. However, in order to invest such strategisation with some substantive content, it has to be properly contextualised. For instance, the whole issue of reproductive health rights for women in India needs to be seen in the perspective of the dismal status of primary healthcare in the country, as also the rampant poverty of the masses that negates access to basic needs irrespective of gender.

The author is a District and Sessions Judge. This article is based on his participatory experience of an international workshop on "gender" jointly organised by the UNICEF-Bangladesh and the Ministry of Women and Children Affairs.

HUMAN RIGHTS *monitor*

A HUMAN RIGHTS BASED BOTTOM-UP APPROACH

Corruption and poverty: Breaking the vicious cycle

MORTEN KJAERUM

FROM the examinations of States parties to the UN Committee on Economic, Social and Cultural Rights we know of cases of pregnant women who cannot access basic public health services without bribing the nurses and doctors. We know of young people who have their right to education violated either because the victim cannot pay his way into and through the system, or because funds disappear from the education area due to corruption. Reading through the examinations of countries in the Committee on Economic, Social and Cultural Rights as well as other UN Committees such as the Committee on the Rights of the Child, there are clear indications of the close links between corruption and violations of economic and social rights.

Following the country examinations corruption violates economic and social rights most severely at three levels:

1. The institutional level, were money is often diverted from social services to pay for large-scale infrastructure projects such as roads and factories. Such projects are more likely to bring in revenue for politicians in the form of bribes.

2. At the population level, where citizens cannot access education and health services because they cannot afford the bribes. In some countries, for example, patients are expected to pay doctors directly to receive prescriptions. Such practice establishes severe patterns of discrimination and increases the gap between those who have and those who don't.

3. And thirdly, at the judiciary level, where inadequate redress of corruption crimes fails to deter the practice and adds to a culture of impunity that only makes the problem worse.

In the human rights world too little attention has been paid to the effects of corruption on human rights. The UN Committees address corruption, but not to the extent the issue deserves, and at the domestic level human rights institutions and NGOs are only in the early stages of developing their strategies in this regard.

The value added by involving the human rights world in the fight against corruption would be three fold:

Firstly, human rights institutions have developed a number of methodologies and strategies to create a human rights culture within a given institution and the environment relating to that particular area, be it the judiciary, police or other sectors. The human rights world has moved much further than only focussing on violations, impunity and redress. Human rights education is one key factor, but education should be developed together with organisational and institutional changes. Human rights education in a police or justice sector may be in vain without fundamental changes in procedures and structure.

Second, the rights based approach to development offers a unique possibility to move rights awareness from an exclusive focus on civil and political rights to include economic, social and cultural rights as well. The awareness raising and instrumentalisation of civil and political rights the last 20 years has empowered many marginalised groups in different parts of the world. When people realise that the international community shares their view that the violation of their rights is inhumane, their willingness grow to stand up and defend their rights. The global democratisation process the last 20 years got increased momentum from this awareness. Today we can prosecute a torturer from country A in country B. We could work toward a situation where a person who has seriously violated economic and social rights through corrupt behaviour could equally be prosecuted in foreign countries if the home country is not willing to do so. It has an effect.

If the past decade was about civil and political rights, this decade could be about economic and social rights. If awareness is created that the right of the individual to education or health services should be met by a duty-bearer the next step is almost automatic that people will try to identify the duty-bearer. In this process NGOs and others will have to learn how to read budgets of municipalities and governmental structures in order to follow the flow of resources in society.

Knowledge needs to be conveyed regarding democratic standards for transparency, access to information and a number of other issues relevant to combat corruption. A bottom up approach can help to change the situation and create a higher level of accountability.

Thirdly, the added value would be that a number of existing institutions would relate to the issue. In the human rights world an interesting potential for the fight against corruption may be that the links between the international and national monitoring mechanisms are being tied more closely together.

With the emergence in the last decade of National Human Rights Institutions and human rights ombudsmen world wide, the missing link between the international and national levels is created.

Thus, we see that international and regional monitoring mechanisms are becoming still more relevant in the implementation of treaty obligations because key national actors have been established in more than 100 countries within a period of 10 years. Many of the National

Institutions have taken ownership to the recommendations from the monitoring mechanisms. If the issue of corruption got a stronger standing in the human rights world the fight against corruption could benefit from this developing dynamics.

Thus, my suggestion for practical next steps would be to enter into dialogue with the network of National Human Rights Institutions to identify ways to create a higher level of interest, insight and knowledge about their role in the fight against corruption. Some of our colleagues are already working in this field, so they could take the lead. National Institutions have strength in that they have a pluralistic composition of their governing structure, comprising NGOs, labour market representatives, parliamentarians, religious groups, etc. Thus, strategies will get important input from these diverse groups as well as having a considerable spreading effect. In particular the National Institutions can support the NGO community in their capacity building in local communities.

Furthermore, discussions should be initiated on how treaty bodies and special rapporteurs can address the issue of corruption within their mandates. Where is the borderline between human rights analysis and concern on the one side and politicising and internal affairs on the other? The closer interaction between national human rights institutions and treaty bodies will be useful in identifying the room for legitimate concern.

In conclusion, I believe that both the organisations and institutions working in the field of anticorruption as well as human rights would greatly benefit from closer collaboration. The

collaboration will solve neither the issue of corruption nor human rights violations, but the

interaction may add important new dimensions that strengthen the overall issue of these global concerns.

The author is director the Danish Institute for ~~Human Rights. The paper was presented in 12th~~ International Anti-Corruption Conference, Guatemala City and Antigua, Guatemala, 15-18 November 2006.

LAW *news*

Monsanto fined in French court for 'false' herbicide ads

The US agrochemical giant Monsanto was fined 15,000 euros (19,000 dollars) in a French court for misleading the public about the environmental impact of its flagship herbicide Roundup. A former chairman of Monsanto Agriculture France was found guilty of false advertising for presenting Roundup as biodegradable and claiming that it left the soil clean after use. Monsanto's French distributor Scotts France was also

fined 15,000 euros.

Environmental and consumer rights campaigners brought the case in 2001 on the basis that glyphosate, Roundup's main ingredient, is classed as "dangerous for the environment" and "toxic for aquatic organisms" by the European Union. Both defendants were ordered to pay damages of 5,000 euros to the Brittany Water and Rivers association and 3,000 euros to the CLCV consumers group.

The water association said the verdict, which is to be published in the influential Le Monde daily, "puts an end to Monsanto's lies" and was "excellent news for water protection". A spokesman for Monsanto France, which plans to appeal, said the "verdict does not call into question the usefulness of the Roundup range of products". "There is a relationship of trust between our products and their users and we believe that consumers will continue to use Roundup."

Source: AFP