



RIGHTS corner



LAW in-depth

An assessment of the doctrine of 'due process'

M. JASHIM ALI CHOWDHURY

ARTICLE 31 of our Constitution envisages reasonable and non-arbitrary laws and procedure. It has two components:

1. Inalienable right to be treated in accordance with law.
2. No action detrimental to the life, liberty, body, reputation or property of any person.

Much of the significance of Article 31 lies in that it envisages the famous doctrine of Due Process which is said to be a concept having its birth in America.

The Fifth Amendment to the U.S. Constitution states that no person shall be deprived of life, liberty, or property, without due process of law.

The Fourteenth Amendment further illuminates the concept by saying: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The central aim of due process doctrine is to assure fair procedure when the government imposes a burden on an individual. The doctrine seeks to prevent arbitrary government, avoid mistaken deprivations, allow persons to know about and respond to charges against them, and promote a sense of the legitimacy of official behaviour. The doctrine is understood in two senses: Procedural due process and Substantive due process.

Procedural due process is the idea that government must follow fair and generally accepted legal procedures in its actions against individuals.

Substantive due process refers to a requirement that laws and regulations be related to a legitimate government interest (e.g., crime prevention) and not contain provisions that result in the unfair or arbitrary treatment of an individual. There are some behaviours of individuals that, according to the court, are generally beyond the reach of government power, such as the free exercise of religion or participation in private organisations working on public problems and issues.

The government may not regulate these actions, not even by the use of the fairest legal procedures, because to do so would violate the most fundamental rights of individuals in a constitutional government. If government officials want to regulate these kinds of usually protected actions, they must demonstrate that they cannot achieve a legitimate public purpose by any other means.

Evolution of substantive due process

The modern notion of substantive due process emerged in decisions of the U.S. Supreme Court during the late nineteenth century. In the 1897 case of *Allgeyer v. Louisiana*, 165 U.S. 578, 17 S. Ct. 427, 41 L. Ed. 832, the Supreme Court for the first time used the substantive due process framework to strike down a state statute. The *Allgeyer* case concerned a Louisiana law that made it illegal to enter into certain contracts with insurance firms in other states. The Court found that the law unfairly abridged a right to enter into lawful contracts guaranteed by the Due Process Clause of the Fourteenth Amendment.

For about forty years next followed what may be called freedom-of-contract version of substantive due process. This freedom meant that individuals had the right to purchase or sell labour or products without unreasonable interference by the government.

In one famous case from this era, *Lochner v. New York*, 198 U.S. 45, 25 S. Ct. 539, 49 L.Ed. 937 (1905), the court struck down a New York law (N.Y. Laws 1897, chap. 415, art. 8, § 110) prohibiting employers from allowing workers in bakeries to be on the job more than ten hours a day and sixty hours a week. The court found that the law was not a valid exercise of the state's police power. The court argued that it could find no connection between the number of hours worked and the quality of the baked goods, thus the law was arbitrary.

During the 1930s, the court used the doctrine of substantive due process to strike down federal legislation as well, particularly legislation associated with President Franklin D. Roosevelt's New Deal. After a 1937 court-packing scheme in which Roosevelt attempted to overcome court opposition to his programs by appointing additional justices, the court changed its position on substantive due process and began to uphold New Deal legislation. This time a majority on the court, including Chief Justice Charles E. Hughes and Justice Benjamin N. Cardozo, abandoned the freedom-of-contract version of substantive due process.

Even before the court abandoned the freedom of contract approach to substantive due process, it began to explore using the Due Process Clause of the Fourteenth Amendment to reevaluate state laws and actions affecting civil freedoms protected by the Bill of Rights. Since the 1833 case of *Barron ex rel. Tiernan v. Mayor of Baltimore*, 32 U.S. (7 Pet.) 243, 8 L. Ed. 672, the Supreme Court had interpreted the Bill of Rights as applying only to the

federal government.

Beginning in the 1920s, however, the court began to apply the Bill of Rights to the states through the incorporation of those rights into the Due Process Clause of the Fourteenth Amendment.

By the 1960s, the court had extended its interpretation of substantive due process to include rights and freedoms that are not specifically mentioned in the constitution but that, according to the court, extend or derive from existing rights. It found that the due process clause of the Fourteenth Amendment is not limited to those guarantees spelled out in the Bill of Rights, but instead contains protection against practices and policies that may fall short of fundamental fairness without violating a specific provision.

Sometimes a statute may be so vague that it violates due process. If a statute lacks the required definiteness or specificity, the U.S. Supreme Court will hold the statute "void for vagueness." In *Giacco v. Pennsylvania* it was held that a law fails to meet the requirement of doctrine of Due Process Clause if it is so vague and standardless that it leaves the public uncertain as to the conduct it prohibits or leaves the judge or juror free to decide, without any legally fixed standards, what is prohibited and what is not in each particular case.

In *Roe v. Wade* 410 U.S. 113 No. 70-18 a pregnant single woman (Roe) brought a class action challenging the constitutionality of the Texas criminal abortion laws, which proscribe procuring or attempting an abortion except on medical advice for the purpose of saving the mother's life. A licensed physician (Hallford), who had two state abortion prosecutions pending against him, was permitted to intervene. A childless married couple (the Does), the wife not being pregnant, separately attacked the laws, basing alleged injury on the future possibilities of contraceptive failure, pregnancy, unpreparedness for parenthood, and impairment of the wife's health.

The court held that the right asserted by Jane Roe is embraced within the personal liberty protected by the Due Process Clause of the Fourteenth Amendment. It is evident that the Texas abortion statute infringes that right directly.

In *Moore v. East Cleveland* 431 U.S. 494 a zoning ordinance limited residence in a dwelling unit to the nuclear family within the meaning of the ordinance and Mrs. Moore was convicted for the offence of violating the ordinance. The ordinance was held to be violative of the due process guarantee as the court found the law to be an unreasonably intrusive Regulation of the Family.

Criticisms of substantive



due process

The court's use of the incorporation doctrine and substantive due process has been controversial. Critics charge that substantive due process is a distortion of the original meaning of due process, which involved only adherence to formal and fair procedures by government officials in actions against individuals.

Further, critics say that substantive due process has been used by judges to interfere in matters that should be left to resolution by majority vote in Congress or state legislatures. Originalists call substantive due process a "judicial usurpation".

Many non-originalists, like Justice Byron White, have also been critical of substantive due process. As propounded in his dissents in *Moore v. East Cleveland* and *Roe v. Wade*, as well as his majority opinion in *Bowers v. Hardwick*, White argued that the doctrine of substantive due process gives the judiciary too much power over the governance of the nation and takes away such power from the elected branches of government.

Finally, critics claim that substantive due process and the incorporation doctrine have been used by the U.S. Supreme Court to wrongly suppress the authority and power of state governments.

However, virtually no one challenges

the general value of due process of law as a guarantee of procedural consistency and fairness. In *Shaughnessy v. United States* (1953), Justice Robert Jackson stressed that controversy about substantive due process does not change the most fundamental and general agreement about procedural fairness, which "is what it [due process] most uncompromisingly requires."

Conclusion

By now the Due Process has been one of the finest features of almost all the leading democracies of the world. Interestingly Article 31 of our Constitution is wider in its scope and operation than the due process clause of the American jurisdiction inasmuch as it covers the entire range of human activities and is affected when a person is adversely affected by a state action irrespective of the question whether it affects his body, person, reputation or property. American due process clause is attracted only when detrimental action relates to life liberty and security of person."

The writer is a Lecturer at the Department of Law and Justice, Metropolitan University, Sylhet.

WORLD DAY AGAINST CHILD LABOUR
Call for eliminating child labour in agriculture

This year's World Day Against Child Labour on 12 June is to focus on the elimination of child labour in agriculture, which accounts for a staggering percentage of the world's working children and is one of the most dangerous forms of work for children and adults like.

The ILO's International Programme on the Elimination of Child Labour (IPEC) estimates that over 100 million boys and girls aged 5-14 work as child labourers on farms and plantations the world over, where they are often exposed to hazards and risks that run the gamut from the mixing, handling and applying of toxic pesticides to using dangerous cutting tools, to working in extreme temperatures and operating powerful farm vehicles and heavy machinery.



To strengthen the worldwide movement against child labour, the ILO is to launch a new partnership on 12 June with five international agriculture-based organizations: the Food and Agricultural Organization (FAO), the International Fund for Agricultural Development (IFAD), the International Food Policy Research Institute (IFPRI) of the Consultative Group on International Agricultural Research (CGIAR), the International Federation of Agricultural Producers (IFAP) and the International Union of Food, Agricultural, Hotel, Restaurant, Catering, Tobacco and Allied Workers' Associations (IUF). The aim of this new partnership will be to develop common policies, programmes and activities at international and national levels against child labour in agriculture. These partner organizations will play an important role in working with ministries of agriculture, agricultural advisory services, research bodies and other offices involved in agricultural policy issues. It may also be expanded in the future to include other agricultural-based organizations.

The ILO stressed that not all children working in agriculture can be considered child labourers under the terms of ILO conventions No. 138 and No. 182 if they perform tasks appropriate to a child's age and that are a normal part of growing up in a rural environment. The World Day Against Child Labour is observed worldwide on or around 12 June each year. It serves as a catalyst for the growing worldwide movement against child labour.

Source: ILO.

HUMAN RIGHTS monitor

Litany of horrors at war crimes trial

The war crimes trial of former Liberian President Charles Taylor began with a catalog of horrors, as prosecutors at a U.N.-backed court here accused him of subjecting tens of thousands of civilians to a systematic campaign of murder, sexual abuse, amputation and slave labor. Unleashing rampaging guerrillas and child soldiers in the neighboring country of Sierra Leone, Taylor oversaw atrocities that displayed "the very worst humans are capable of doing to one another," said prosecutor Stephen Rapp in his opening statement.

Taylor, who refused to appear in court, is charged with crimes against humanity by the Special Court for Sierra Leone, a tribunal created by the United Nations to seek justice for a desperately poor country that endured mayhem between 1996 and 2002 when Taylor was an emblematic regional despot. Taylor, 59, sent word that he would not be in court because he

presiding judge, Julia Sebutinde of Uganda. Khan's attempts at a dramatic departure were blocked by admonitions from Sebutinde, who warned that he was on the verge of contempt of court.

Finally, the three-judge panel allowed Khan to leave, and a junior defense attorney remained to represent the imprisoned former warlord. The judges ordered court officials to respond to Taylor's complaints by granting him more time to prepare his case and pay for a lawyer in Sierra Leone to travel to The Hague to consult with the defendant. The disruption was partly a result of theatrics by Taylor that resembled the political grandstanding by Slobodan Milosevic, the Serb强人, during a lengthy trial here that ended when he died last year.

The stumbles highlighted the difficulties in trying complex international cases. Prosecutors have made an effort to keep the prosecution

close alliance with the rebels of the Revolutionary United Front in Sierra Leone.

Although Taylor is being charged only with crimes in Sierra Leone, prosecutors argue that his tactics in his native Liberia foreshadowed the pattern of atrocities for which he is now on trial. Rapp alleged that Taylor entered into a "joint criminal enterprise" with Foday Sankoh and other Sierra Leone rebel leaders to terrorize civilians. Taylor trained, armed and controlled the rebels, prosecutors said, citing the use of go-betweens, meetings, letters and diamond shipments and other evidence to show Taylor's direct involvement in and knowledge of crimes in the neighboring country. The horrors mounted in 1996 and 1997, Rapp charged, when the Taylor-backed rebels escalated the slaughter and looting of entire villages, forced women and girls into sexual slavery and engaged in systematic amputations as they taunted victims to ask their president for new limbs.

A peak of savagery came during a rebel invasion of Freetown, the Sierra Leone capital, in 1999, an operation assisted by a contingent of Liberian fighters, asserted prosecutor Mohamed Bangura of Sierra Leone.

"We will hear evidence that the city's hospitals and clinics were full beyond capacity with wounded and dying," he said. "Waves of freshly amputated civilians began streaming into the city, sending a grim reminder that the invaders were still close.... The scale of the invasion

Freetown was unmatched: burning, killing, amputation, abduction, looting, abuse of women." Taylor eventually was overthrown by rivals in Liberia. He went into exile in Nigeria in 2003 soon after the international charges were filed. Before fleeing his homeland, he ordered the assassinations of several former henchmen to prevent them from talking, prosecutors alleged. Now it remains to be seen whether Taylor will agree to take part in the attempt to judge him.

"The people of Sierra Leone have a saying: No matter how long the night is, light will come," Bangura told the court. "For years, the accused's crimes have remained in the dark. Today we start to shed light on his responsibility for the suffering of the people of Sierra Leone."

Source: Las Angeles Times

Compiled by: Law Desk

against Taylor streamlined and focused, mindful of the way the voluminous Milosevic case dragged on, Rapp said in a phone interview. "We've got 18 months to do it," he said. "We don't want to be in a situation of using up all our time and only presenting half of what's essential. So we have to use every minute as wisely as possible." Procedural issues and political maneuvering did not detract from the tragic sweep of the case against Taylor lay out. Rapp described how Taylor's bloody rise to power in a civil war in Liberia, where he was ultimately elected president in 1997, interwove with his

LAW week

IGP talks tough against corrupt policemen

Inspector General of Police (IGP) Noor Mohammad sought cooperation from the people in developing good policing and urged them to be watchful of police activities. "Protest instantly or inform us if you see any policeman doing anything wrong or unfair... Speak up loud against anything bad they do... Today's problem was created due to keeping mum over the years," he said while addressing a meeting with civil society members at Rajshahi deputy inspector general's conference room. "A corrupt policeman, whatever position he may hold, will lose his job and land in jail and such elements cannot save themselves from the punishment by lobbying," the IGP said. "We want to get rid of the 100-year-old colonial image, change the existing concept of policing and it is not possible without close cooperation of people," he said, adding, "We cannot bring any revolutionary change, we can keep the process of turning police into a symbol of reliability and trust going on." At Rajshahi Police Lines, the IGP asked policemen to change their behaviour and be friendly towards people. "We will show zero tolerance for misbehaviour and corruption," he warned.

-The Daily Star, June 11.

EC moves to stop foreign funding

The Election Commission (EC) has made a move to impose a ban on receiving funds from foreign sources to run political parties or their election campaigns. "No political party shall receive any donation or funding from any foreign country or organisation or a person who is not of Bangladeshi origin," the EC said in its draft proposal. The proposal was recently drafted as part of its ongoing initiative for electoral reforms to ensure financial transparency in the activities of political parties. Major political parties including Awami League, BNP, Jatiya Party and Jamaat-e-Islami have reportedly been collecting funds from foreign sources for a long time particularly to run their election campaigns. A number of AL and BNP leaders detained on charge of corruption have allegedly admitted to taking money from foreign sources to run their party's election campaigns. Former state minister for home affairs Lutfuzzaman Babar, during quizzing by the Task Force for Interrogation (TFI), divulged to the interrogators that BNP chairperson and immediate past prime minister Khaleda Zia collected Tk 300 crore for election funding from the governments of Pakistan, Kuwait and Saudi Arabia before the stalled ninth parliamentary elections. Once the EC's proposal is made a law, none of the political parties will be allowed to collect funds from foreign sources and registration of a political party will be cancelled if it violates the law. -The Daily Star, June 12.

CA warns against illegal hill cutting

Chief Adviser (CA) Fakhrudin Ahmed sounded a strong warning against illegal hill cutting in the port city and said persons involved in such an act would be punished. He gave the warning while talking to reporters in the landslide-hit Kacharigona area, adjacent to Chittagong Cantonment. The CA said the army will remain alert and remove people from vulnerable areas to safer places. He also assured the people of resolving the water-logging problem in the port city. "Our first task is to rescue, treat and help rehabilitate the affected people," said the head of the caretaker government. Earlier, after disembarking from the plane at Shah Amanat Airport, the chief adviser drove straight to Lebu Bagan in Hathazari where Chittagong GOC Major General Sina ibne Jamali briefed him about the aftermath of Monday's landslides that killed more than 100 people. Communications Adviser Major General (retd) MA Matin, Chittagong Divisional Commissioner Mokhslesur Rahman and senior civil and military officials were present. -Unb, Dhaka, June 13.

Khaleda, Tarique, 12 others sued for non-submission of service return

Immediate past prime minister Khaleda Zia, her elder son Tarique Rahman and 12 other BNP leaders, who were directors of Daily Dinkal Limited, were sued for not submitting service return of the daily for the last several years. Abdul Mannan, deputy registrar (current charge) of the Joint Stock

Companies, filed the case under section 36(5) of the Companies Act 1994 with the Court of Chief Metropolitan Magistrate, Dhaka. According to UNB, the other accused in the case are Tarique's business partner Giasuddin Ali Mamun, Sheikh Razzak Ali, Barrister Abdus Salam Talukder (already died), Barrister Nazmul Huda, Major (retd) MA Mannan, Manjurul Ahsan Munshi, Fazlul Azim, Nurul Amin Talukder (already died), Ali Asgar Lobi, Rokonuddin Molla and AKM Mosharraf Hossain. Metropolitan Magistrate Abdullahe Baki accepted the case and summoned all of them to appear before the court on July 16 in person. -The Daily Star, June 13.

Butenis unhappy with ban on political activities

Outgoing US Ambassador Patricia Butenis has said she is disappointed at the ban on political activities in Bangladesh, which she feels, does not apply to 'behind-the-scenes' activity to promote a new political party. In one of her last public appearances, she also said her biggest regret during her 14-month stay as the US envoy was the failure to hold the January 22 elections, as she feels the political leadership was 'ready to let a disaster unfold.' "...I am disappointed that I am leaving Bangladesh with the ban still in place on all political party activity, a ban which does not seem to apply to some behind-the-scenes activity promoting the concept of a new party," Butenis said while addressing the American Alumni Association at Gulshan Club. Although noting 'interesting' reform drives to improve the political and electoral process, she said, "I believe the engagement and ideally the support of the established parties are essential because, at the end of the day, it is hard to build a viable political process without them." -The Daily Star, June 14.

Two more extortion cases against Hasina

Two separate extortion cases—one for Tk 5 crore and another for over Tk 2.99 crore—were filed against former prime minister and Awami League (AL) President Sheikh Hasina. Noor Ali, managing director of Unique Group of Companies, filed a case with Tejgaon Police Station accusing Hasina and her two relatives of extorting Tk 5 crore in exchange for mediating between the Power Development Board (PDB) and his firm to finalise a power plant in 1997. Azam J Chowdhury, managing director of Eastcoast Trading Private Ltd, filed the other case with Gulshan Police Station against Hasina and AL leader Sheikh Fazlul Karim Selim for extorting over Tk 2.99 crore. Earlier, another case was filed against Hasina on April 9 for extorting Tk 3 crore. In his complaint, Noor Ali alleged that he had to give two flats to Rupa Chowdhury, wife of Hasina's cousin Sheikh Helal, after Helal threatened to interrupt the work of Noor's firm. Noor said of Tk 5 crore, he handed over Tk 3.2 crore in 12 cheques to Hasina at Ganabhaban between June 8, 1997 and May 20