COURT *corridor*

Emergency, bail and the Apex Court: Some issues

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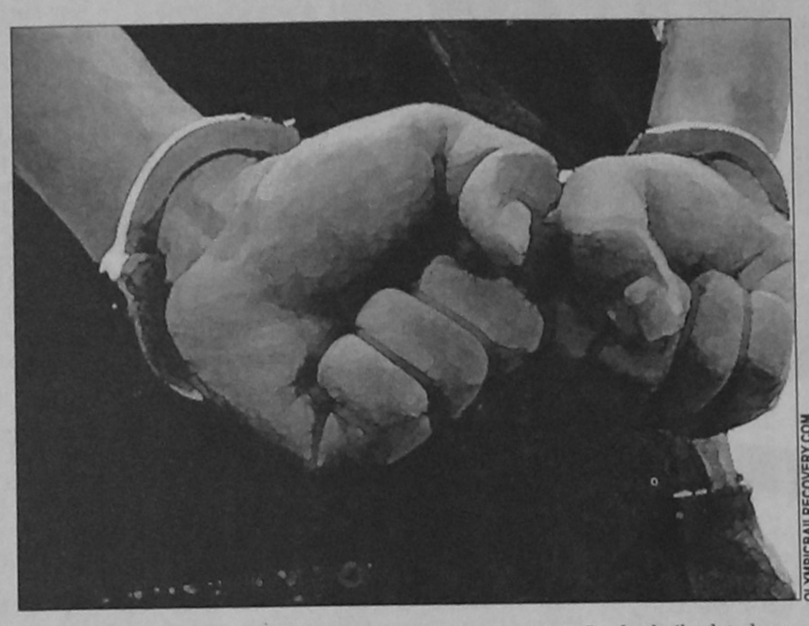
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ALEXANDAr Hamilton - one of the founding fathers of the USA - termed the Judiciary as the 'least dangerous' organ of the State with its mere 'judgment arm' while the Executive got the title 'the sword' and the Legislature 'the purse'. The Hamiltonian era of 18th and 19th century of executive omnipotence is over. So also is the 20th century of parliamentary hegemony over the executive. Now we live in the 21st century the century of judicial verdicts controlling both the parliament and executive. Judicial freedom, activism and stature are something with which no negotiation is desired nor allowed.

Emergency is a tool in the hands of the executive to tackle the events threatening the very existence of the State to save it from being swept away. Tackling emergency allows the executive to sidestep some of the fundamental rights of the citizens and sharpens its already sharp 'sword'. As for the judiciary, it is the time to test its viability as the true guarantor of people's right. During the normal times, everything is generally routine and rational but it is the time of crisis which puts a nation and its people on test (ABM Khairul Hoque J. in the Fifth Amendment Case, 14 BLT (Spl), p. 91). Emergency crystallizes the reach of the 'judgment arm'.

Again, the Supreme Court's power to release an accused on bail in fit cases stems from Articles 102(2)(b)(i) (Writ of Habeas corpus) and 104 (Power to do complete justice) of the Constitution. Since the Constitutional right to liberty is subject of more than one fundamental rights - rights from some of which no derogation is allowed even during the gravest emergency - guaranteed by the Constitution, it puts a heavy onus upon the authority taking away the said liberty to justify such action strictly according to the law and the Constitution (D.C. Bhattacharya J in Auruna Sen v. Bangladesh, 27 DLR 122). The High Court Division has got the power even to proceed suo motu under s. 491 of the CrPC to release an accused on bail. Though the power under section 491 may be curtailed by legislation, it is not the case with Article 102(2)(b)(i). Being a Constitutional mandate it cannot be taken away or curtailed by ordinary legislation (West Pakistan v. Shorish Kashmiri, 21 DLR (SC) 1) or even by amending the Constitution (Anwar Hossain v. Bangladesh 1989 BLD (Spl) 1). A Proclamation of Emergency may hit only Article 102(1). Force of Article 102(2) would remain intact always.

The wrangle starts

On the night of March 20, 2007, the Caretaker Government promulgated an amendment to the Emergency Power Ordinance 2007. In the bail-related section, the amended Ordinance said, "Regardless of whatever is stated in sections 497 and 498 of the Criminal Procedure Code or any other law, an accused under the Emergency Power Rules (EPR) will not be released on bail during the inquiry, investigation and trial of the case against the person." Rules were amended to strip an accused of the right to file bail petition during investigation or trial of a case. Moreover, they cannot seek redress from 'any higher courts against any order given by any court or tribunal before or during the trialuntil the delivery of the final verdict'. The gazette notification of the amendment was issued with retrospective effect from 13 February 2007.

The High Court Division stands upright

The High Court Division Bench of Justice Nozrul Islam Chowdhury and Justice Zubayer Rahman Chowdhury took over the issue on March 29, 2007 when Maijuddin, an oil trader from Khulna, filed a petition seeking bail in a case filed under the Emergency Powers Rules involving supply of adulterated oil. 'The High Court Division has the jurisdiction to hear bail petitions even in cases filed under the Emergency Power Rules' it resolved the debate on April 22, 2007 after hearing the counsels for the state and the petitioner, and six amici curiae. The amici curiae opined that, as the highest court of the country, it is the duty of the Supreme Court to protect the constitution and the fundamental rights of the citizens. Whereas the Parliament does not have the power to deprive the Supreme Court of the right of review, no scope of President's having the power arises. As the government preferred an appeal, the Appellate Division on May 24, 2007 stayed the verdict.

After the April 22, 2007 verdict, the High Court Division on August 19, 2007 granted anticipatory bail to the detained former Law Minister Moudud Ahmed in a case filed under the Emergency Rules on charge of bringing and selling foreign liquor by evading taxes. It also granted bail to Sabera Aman in a case lodged under the Emergency Power Rules. On September 20, 2007, the Appellate Division allowed the government's appeal and stayed the bails till the disposal of the appeals.

The High Court Division Bench of Justice M Mozammel Hossain and Justice Syed AB Mahmudul Huq, in two verdicts delivered on December 13, 2007, granted bail to Sigma Huda and Mir Helaluddin, jailed in separate corruption cases under the Emergency Rules. Ascertaining its power to hear bail petitions of convicts under the Emergency Rules, the High Court Division held that no rule made by the government could take away the High Court's inherent power to hear bail petitions. The Anti-Corruption Commission and the government filed an appeal with the Appellate Division on December 18, 2007. After hearing the Appeal the Appellate Division struck down the High Court Division verdict on March 6, 2008.

The appellate division surprises

It surprised all when on 23 April 2008, the seven-member full court of the Appellate Division headed by then Chief Justice M Ruhul Amin passed an order allowing a government appeal against the HCD verdict. The six other judges endorsing the government appeal were M Fazlul Karim, MM Ruhul Amin, M Tafazzal Islam, M Joynul Abedin, M Hassan Ameen and MA Matin. "The appeal is allowed," the CJ pronounced the four-word judgment, which made it virtually impossible for many VIPs in politics, business and bureaucracy caught under the Emergency Rules to get released on bail. The four-word judgment in short meant that no Court in Bangladesh, including the Supreme Court, could entertain or adjudicate on any matters relating to the EPR.

Seek justice to Allah

Thereafter on May 26, 2008 while rejecting a bail petition filed by the Jamaat-e-Islami Secretary General, Ali Ahsan Mujahid in the Barapukuria coal mine graft case, the High Court Division Bench of Justice Nozrul Islam Chowdhury and Justice Ataur Rahman Khan advised Mujahid's counsel to seek justice to the almighty Allah saying that the hands of the judges were tied. 'We cannot go against the oath we took under the constitution,' Nozrul Islam also said.

The Supreme Court Bar Association at a general meeting on May 11, 2008 decided to file a petition with the Appellate Division seeking review of its 23 April verdict.

The Asian Human Rights Commission (AHRC) in its statement of April 24, 2008 (http://www.ahrchk.net/statements/mainfile.php/2008statements/1485/) criticized the Appellate Division Judgment as contrary to all the principles and norms relating to the powers of the highest court in any country. The AHRC called upon the United Nations High Commissioner for Human Rights and all UN agencies, and human rights agencies globally to take up this matter as an issue of priority relating to the defense of human rights in Bangladesh.

The full text showers some rain

The full text judgment of the Appellate Division published on May 29, 2008 eased the situation by quite some measure. The judgment in its seven-point observations held that the HCD may consider bail petitions in cases filed under the EPR on three grounds - in the case of short sentence not exceeding three years when appeal could not be disposed of within 90 working days for no fault of the appellant, in the case of serious illness that may threaten the convict's life according to a certificate given by a duly formed medical board and if the case is filed with mala fide intentions, on suspicion, or in a corum non judice.

The floodgate opened

We see some Benches of the High Court Division in the habit of indiscriminate granting of anticipatory bail in large number of cases and thereby causing substantial damage to the cause of justice (Justice Kazi Ebadul Hoque, Image and Reputation of the Supreme Court, DLR Journal p.1 -4, 57 DLR (2005) at p. 3). Often the 'judgment arm' of the Apex Court is, in the words of the Appellate Division, exposed to the opprobrium of purveyor of 'palmtree justice' (Naziruddin v. Hameeda Banu, 45 DLR (AD) 38, 44)

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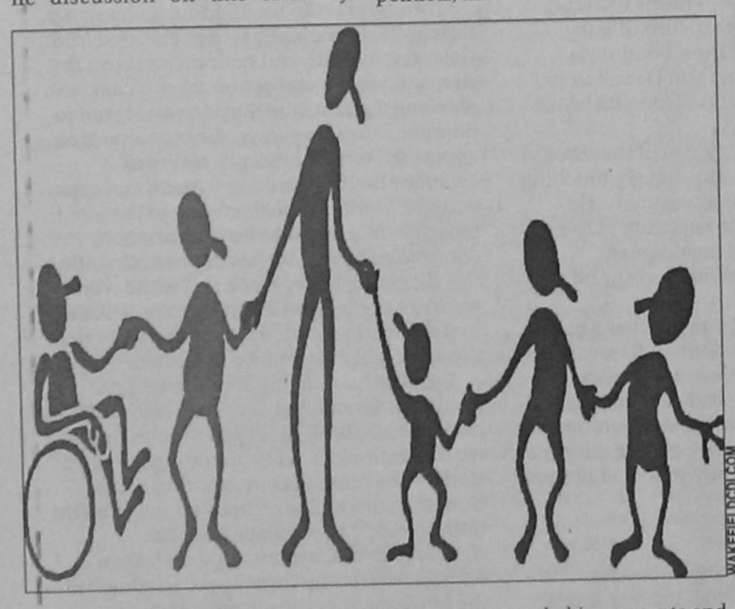
HUMAN RIGHTS *monitor*

(Dis)ability is injustice not tragedy: Unequal treatment not inherent inequality

FAYAZUDDIN AHMAD

ACCORDING to the World Health Organization (WHO) statistics approximately ten among every hundred- of all human beings- live with some form of (dis)ability. And more than 400 million of them live in developing countries- often the poorest of the poor in terms of income. It is extremely important to understand that much can be done to diminish the condition of being (dis)abled- ensuring justice for them. Even though the established theories of justice turn out to be insufficient- providing a satisfactory understanding of the (dis)ability, the deep-rooted hold of these traditional approaches not only affects discourses in philosophy, but also influences the reach of public discussion on this critically important subject.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Dominant approach of the western socio-political philosophy- formulating an account of basic social justice has been to imagine society's institutions as resulting from a social contract, in which parties come together to achieve the benefits of cooperation. Typically the parties are imagined as roughly equal in ability, and the partnership is imagined as one that is profitable to them all- by cooperating they each get more than they could get by not cooperating. Hence theorists in the social contract tradition omit situations of asymmetrical or lifelong dependency from their accounts of how society's basic institutions are designed. Legal-political philosophers like Martha Nussbaum examined the problems which create for John Rawls's account of justice, and she argued that the difficulties are deep and cannot be remedied by a mere modification of the contractarian perspective. Things get more complex when forced isolation, state sanctioned abuse, dehumanization, status degradation, public mortification, involuntary sterilization, denial of fundamental rights, and even euthanasia occupy prominent roles in disabled people's history. Inquiries into social, cultural, political, and economic situation are often not grounded in concepts and philosophies associated with (dis)ability studies generally.

Nussbaum (in her Frontiers of Justice- Disability, Nationality and Species Membership) has evidently taken stands that were absent earlier. In Rawls's structure, people in the original position bargain behind a veil of ignorance- where they do not know their own race, or class, or birth, or sex, or conception of the good. Nussbaum subjected Rawls's standpoint to penetrating criticism. As she points out, his model of a social contract rests on several unexamined assumptions. Question comes to one's mind- contrary to widespread belief- whether by the worst-off class Rawls meant the severely disabled or Rawls assumed that everyone in the original position will be productive? The entire point of the bargaining that takes place there is to arrive at a fair division of the gains from social cooperation. Nussbaum argued that the appeal to simplification fails.

Rawls made another controversial assumption in setting forward his theory of justice. He starts with a closed society, essentially equivalent to the modern nation-state. Nussbaum asked for the justification of this restriction. Why is the application of the principles of justice confined to the citizens of one nation? She also raised a question about restricting the principles of justice to human beings and advocated for a capabilities approach that both she and Amartya Sen have introduced. It is a gigantic leap from orthodox view- considering the transformation of the idea of helping the (dis)abled from merely admirable to a matter of right. Nussbaum recognized that people, as ends in themselves, have a right to lead their own lives without being subject to unlimited demands from others; though- for most others- she nowhere specified the limits to the demands that the needs of the disabled impose on them. She repeatedly pointed out that aid to the disabled is a matter of justice rather than charity. She termed the family a political institution apparently it is to be coercively remodeled to meet her various agendas, feminist not least among them.

Amartya Sen believes that fairness to people in divergent circumstances is central to the subject matter of justice, and any adequate theory of justice must tell us how such fairness is to be achieved. Indeed, it is not hard to argue that any theory of justice must address this issue, in order to qualify as an acceptable doctrine, and must identify what is owed by society to the people who happen to be significantly handicapped. To Sen, a (dis)abled person may find it harder to get a job or to retain it, and may receive lower compensation for work. This earning handicap will be reflected in the opulence-based theory, since a disabled person may well be seriously disadvantaged in terms of income and wealth. But that is only a part of the problem. To do the same things that an able-bodied person does, a person with physical (dis)ability may need more income than the able-bodied person.

Additionally it is apparent that some of the inputs of good living come not from personal income, but directly from social arrangements, such as institutions for public education and civic facilities. Many (dis)abled children, whether deaf or in wheelchairs, are denied, in effect, reasonable access to elementary education, in many developing countries, because of a lack of arrangements for disabled people. Most of the schools, particularly in the less developed countries like Bangladesh, are built without access for children who have physical (dis)abilities, and most teachers are not trained to deal with children who have handicaps of different kinds, including learning (dis)ability.

To reach to justice building on these theories and practices- a fresh beginning might be needed that can well start with terminology like "disabled". (Dis)abled people for last two decades began to criticize the link between physical difference and social death, began to draw a distinction between impairment- which has to do with the ways we differ from one another- and (dis)ability- which has to do with the way impaired people are treated in a society that does not plan for impaired people. (Dis)ability, on this understanding, is not in-ability but dis-enablement, and non-disabled people are not, in comparison, innately able. They are, rather, enabled by a society set up to accommodate their needs. (Dis)ability is injustice, not tragedy; unequal treatment, not inherent inequality.

Proper consideration is required understanding the ways in which the physical and social environments limit ability to develop human powers and to enjoy liberty and independence, the ways in which human dependence is highlighted or downplayed in a variety of ways. In discussing equality, much individuality, like race and sex, should not play a role in determining social advantage. Theorists limit themselves when they insist on that we learn to value those who cannot make the expected contributions to the larger community; they fail to consider how the larger community limits who may contribute. Nussbaum urged that we provide better support to those who are dependent, but she did not question how we decide who is dependent and who is not.

(Dis)ability rights activists addressing dis-enablement have argued, as have other rights activists before us, that to build an environment- social or physical- that benefits some people and not others is discrimination. Those who oppose these rights arguments say that the environment is fine, and that efforts to level an already flat playing field are just another form of discrimination. Where theorists may see unable lives, one also could see disenabled lives; where they may see dependence and inability, one also could see barriers. And yet the barriers are not so clear, not so easily addressed as some writers seem to believe, and it is not as clear as we might think how we should re-envision our society to welcome, to value, to enable all people to full membership. Given what can be achieved through intelligent and humane intervention, it is amazing how inactive and smug most societies are about the prevalence of the unshared burden of (dis)ability. Social intervention against (dis)ability has to include prevention as well as management and alleviation. In feeding this inaction, conceptual confusion plays a significant role. We have to resist the massive neglect of the needs of disabled people through conceptual confounding. There is need for clarity here as well as for commitment.

The writer is an advocate and researcher.

RIGHTS *corner*

End violence against women

International day for the elimination of violence against women, 25 November 2008

THIS year's International Day for the Elimination of Violence against Women marks a defining moment in the global drive to end violence against women. Fuelled by advocacy and action at the grassroots and national levels, the issue has moved to centre stage at the United Nations.

On 19 June 2008, the UN Security Council unanimously adopted resolution 1820, which recognises sexual violence in situations of armed conflict as a threat to national and international peace and security. The resolution calls for decisive actions by all involved in the conflict to protect women and girls. It calls on international security institutions to make sure that women participate in all aspects of conflict resolution and peace building to ensure there is redress for crimes. Resolution 1820, combined with resolution 1325, form a powerful platform on which to build effective actions to end impunity for violence against women and ensure women's participation in all aspects of reconstructing institutions and communities.

The overwhelming outpouring of support shows us that there is an ever-growing movement of people who urgently seek solutions to

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ending violence against women. Now, we must use this momentum to get governments to implement the laws and policies already in place. Despite the fact that more governments than ever have passed such laws, there is still a wide implementation gap. To protect women from violence, and respond to the needs of survivors, we urge the adoption of accountability frameworks, with minimal standards of protection and response. These provide a checklist against which to assess the degree to which a country is upholding the human rights of women. Among the measures which should be in place are:

Prompt police response, health and legal services, free of charge, for poor women and girls;

Shelters and safe options for women surviving or fleeing life-threatening situations;

National hotlines available 24-hours a day to report abuse and seek protection;

Basic front-line services for emergency and immediate care for women and girls who have suffered abuse and rape; and

Accountable judiciary and national action plans to end discrimination and promote equality.

The Secretary-General's system-wide UNiTE campaign offers a blueprint for implementation and combined action. Partnerships between the United Nations and governments, civil society, the private sector, men and youth, and the religious community show great promise. Between now and 2015 we must all work together to make implementation our top priority.

Source: UNIFEM.