PARLIAMENT *scan*

RESERVED SEATS FOR WOMEN

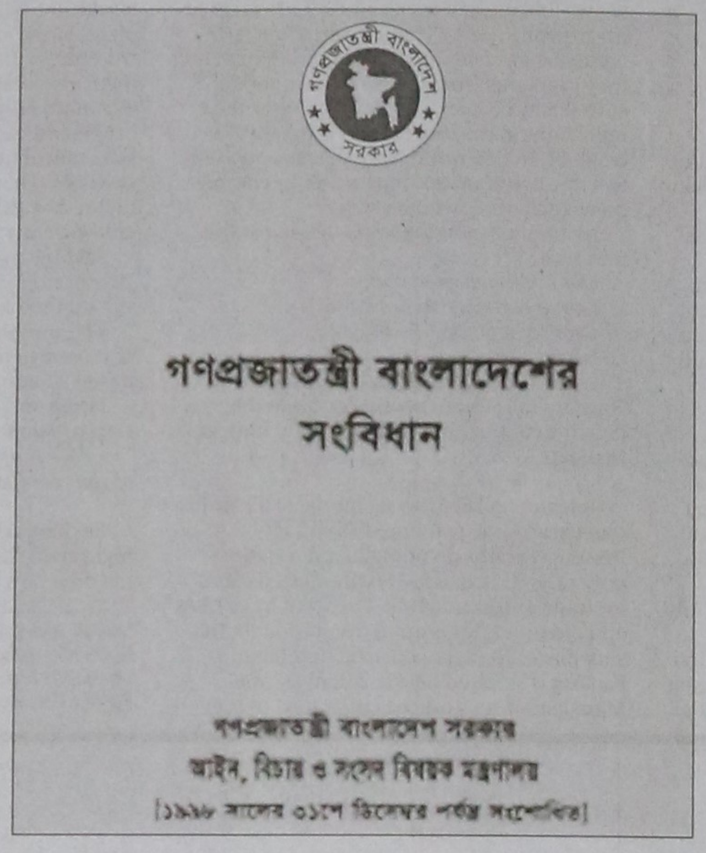
Constitutionality and human rights issues

S. M. MASUM BILLAH

HUMAN rights having gender connotations demand effective political aspirations of women for their implementation. The women's access of right to property, non-discrimination, education, equality, marital legal consequences cannot be established without just and rational law. That is why legislation from gender sensitivity is significant. Hence, a nexus between the effective political empowerment of women and protection and promotion of women's human rights is established. Much to our delight, in the 9th parliamentary election some 19 women have got elected and more importantly, in opposition to all traditions, four crucial ministries (excluding the Premier) have been placed under the women leaders' charge. This has paved the way for effective participation of women in the decision making process, which consequently would contribute to the economic empowerment of downtrodden women in Bangladesh and decriminalisation of politics. While these are some rays of optimism, in some cases tentative aspirations, there still are hundred miles to go. Especially the issue of reserved seats for women in parliament deserves detail analysis and rightful treatment.

The reserved seats

In the original constitution 15 seats were reserved for women. In order to retain the continuity of women's participation in politics, the reservation was further reinforced in 1978 and in 1990 and the number of seats was increased to 30. In 2004, by 14th Amendment to the Constitution, the number of seats



was further increased and provisions were made for proportionate division of seats among the political parties according to their attained seats in Parliament. The debate still goes on about their mode of election. Formerly the women members to these reserved seats used to get elected by the Member of Parliament. Now 45 reserved seats are distributed as per the seats achieved by the political parties in the general election. In both cases the method is ex-facie contradictory to the basic tenets of democracy. Because, in earlier method only the winner took it all and in the latter method the achievement of popular vote is not taken into consideration. In 2004, Awami League got 9 women seats out of 45 as their share (AL refused to take it) though they bagged 42% of the popular vote. In the same line BNP would get 6-7 seats though they have got 33% support of the mass people.

The upshot

In fact, during the past decades, different women organisations have been demanding direct election for the reserved seats to enable them to represent the people and not the party in power. It is argued that with no accountability to any constituency, the provision for reserved seats restricts women's effective participation in the decision-making process as they only serve as the supporters of the majority party in the parliament. Another phenomenon is added from 8th parliament that the female reserved seats are being used as a camouflage for the non-politician (businessman) member of parliament to fulfill the quorum in parliament sessions. It is high time to think about the direct election or some more acceptable method of democratic representation in the reserved seats to ensure true political empowerment of women in Bangladesh.

The judicial apathy

Apart from the lethargy of political stakeholders e.g. the parliament, government, political parties, unfortunately the issue has not secured a warmth treatment by the apex judiciary of Bangladesh. The constitutional validity of 10th Amendment requiring extension of 30 women reserved seats for another ten years was first challenged in 1990. In Dr. Ahmed Hussein vs. Bangladesh [44 DLR (AD) 109], it was held by the Appellate Division that as the provisions of reserved seats were in the original constitution from the outset, hence it is valid. It seems that there is a lack of appreciation of the fact that the issue of 'reservation' itself is limited and temporary. At least that was the intention of the framers of the constitution. When reality demands the continuance of such provision the judiciary should have to think how that reservation can be much more effective for advancement of women. The issue of 'reservation' was addressed by Justice TK Thomen in Indra Swahney (AIR 1993 SC 477) thus, "Reservation must not outlast its constitutional object and must not allow a vested interest to perpetuate itself....Every reservation founded on benign discrimination and justifiably adopted to achieve the constitutional mandate of equality must necessarily be a transient passage to that end. It is temporary in concept, limited in duration, conditional in application and specific in object. Reservation must contain within itself the seeds of termination". It is submitted that in Ahmed Hussein, the Supreme Court lost an opportunity to show judicial activism in refraining from making observation on the evil consequences of indirect election in reserved seats. The issue once again came before the Appellate Division in 2004 when some leading women activists and human rights NGOs filed a writ petition (Farida Akter Case 11 BLC 156) challenging the validity of 14th amendment to the constitution and a law thereunder providing indirect election (in fact distribution of seats) to 45 reserved seats. But the court placed reliance on Ahmed Hussein and upheld its constitutionality. It was contended on behalf of the appellants that the indirect election is against the basic structure being opposed to the core essence of democracy. The court rejected the contention by saying that as per Article 28 (4) of the constitution the parliament can make special provision for the women and provisions for indirect election is not something undemocratic. It appears that the consequences of such indirect election over rule of law and good governance, governmental accountability, probability of spreading the nets of favourtism & familial lineage, spirit of women advancement as enshrined in the constitution, public opinion etc received little account from the bench. Through this verdict only the power of the ruling party has been accentuated in the parliament. Interestingly, in an immediate preceding case of Shamima Sultana Seema vs. Bangladesh [57 DLR (2005) 212] the demerits of reservation and indirect election were taken note of by the court. ABM Khairul Haque J. in his obiter dicta, held, "It does not seem fit in with the normal democratic legacy, rather raises a number of questions, such as to whom these members in the reserved seats remain accountable since they do not have any constituencies of their own. It is anything but democratic if they owe their loyalty to the existing members of the parliament who elected them. This system as it appears, instead of either helping the democratic process or upholding the dignity of the women, rather helps the party which is the majority in the parliament, to increase its edge over the other parties at the cost of women members who are so elected, rather selected in such a peculiar manner, unknown to any truly democratic country". The learned judge doubted the constitutionality of amendments increasing the time for reservation and process of election.

He observed, "Since those amendments (1978 & 1990) were made when the traditional constitution ceased to function, the legality of those amendments is open to question". In fact, popular demands for equal representation of women in all spheres of national life is one thing and incorporation of a provision for reserved seats for women in the parliament in such a manner is altogether a different matter from a juristic point of view. It is submitted that in Farida Akter, an opportunity was created to reconcile the decision of Ahmed Hussein & observation of Shamima Sultana Seema by directing the government to bring a Bill providing for direct election in reserved seats of parliament.

The expectation from this Parliament

1.Direct election in the women reserved seats should be held. To decipher the riddles of numeric equation (45 seats for 64 districts) the number of seats should be increased to 64. The demand of certain quarters of the society to make it 100 also has some substantiality because population and territory of some districts are considerably larger than other districts.

2.A Women Caucus in the parliament may be formed. The Caucus would be formed irrespective of party affiliation. This Caucus may be vocal on women's human rights standpoints and other policy formulations having bearing on women issues. The adoption and implementation of the proposed National Women Policy could be the first focus of such Caucus.

3.To increase people's perception about the role of female parliamentarians, their involvement in the parliamentary affairs need to be ensured. A female Member of Parliament may be elected to the post of Deputy Speaker. In making the list of panel members who conducts the session of the House in the absence of the Speaker or Deputy speaker, women members might be given preference. In the parliamentary committees their participation is required to be guaranteed.

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HUMAN RIGHTS *monitor*

Imprisonment of juveniles only as a last resort

THOMAS HAMMARBERG

THERE is a disturbing trend in Europe today to lock up more children at an earlier age. The age of criminal responsibility is already very low in some countries, such as the United Kingdom. Suggestions to lower the age limit to 12 years old have recently been made in France, while a similar law has been adopted in Georgia. In my opinion the time has come to move the argument away from fixing an arbitrary age for criminal responsibility and find a more childfriendly solution to juvenile justice. A caring society responds promptly, resolutely and fairly to juvenile offences. Juveniles are certainly not helped by a laissez-faire response if they violate the law. It is imperative that young persons are taught to take responsibility for their actions.

However, experience has shown that criminalisation, and in particular imprisonment, tends to undermine efforts to assist juveniles in reintegrating positively into the community. Criminalisation and periods spent in juvenile detention centres may have the reverse effect of turning these juveniles into adult criminals.

Young offenders are children first and foremost and should be protected by all the agreed human rights standards for children. This is one of the messages of the United Nations Convention of the Rights of the Child ("CRC") which calls for a separate system of justice for children. Under the CRC, which has been ratified by all European countries, children are defined as those who are under 18 years old.

This point has been stressed by the European Network of Ombudspersons for Children (ENOC) in a position statement issued in 2003. These experts urged States "to review their juvenile justice systems against the requirements of the CRC and European human rights instruments".

We need to separate the concepts of "responsibility" and "criminalization". It is essential to establish responsibility for conduct which contravenes the law. Where responsibility is disputed, there has to be a formal process to determine responsibility in a manner which respects the age and the capacity of the child. However, this does not have to be a criminal process nor involve the criminalization of children.

Once the facts of an offence are established, there would need to be a multi-disciplinary assessment of what is required to ensure awareness of the offence by the child. Such an assessment would also determine how best to respond to the needs of the victim and prevent the child from re-offending. Such measures would, where necessary, be compulsory. The proceedings would not identify the child publicly and would not be formally linked to the adult criminal justice system.

Imprisonment should generally be avoided. Any arrest or detention of a child should only be used as a measure of last resort and for the "shortest appropriate period of time". The only justification for detaining children should be that they pose a continuing and serious threat to public safety. This requires frequent periodic review of the necessity of detention in each case. The conditions of any detention must be humane and focused on rehabilitation. Schooling should be provided as set out in the 2008 European Rules for Juvenile Offenders.

In many of my assessment reports, I underline the importance of keeping juveniles separate from adult offenders. A recent judgment of the European Court of Human Rights against Turkey highlights the possible dire consequences of not respecting that important principle.

Guidelines on child-friendly justice are currently being discussed within the Council of Europe. The debate on the reform of the juvenile justice system should include the desirability of avoiding criminalisation and putting the best interests of the child at the forefront of the discussion.

In promoting such policies and procedures which respect the human rights of young offenders, the rights and concerns of victims are not neglected. Victims must receive appropriate reparation and support from the State. But victims' interests and those of the wider society - are not served by a system which fails to rehabilitate offenders.

During my visits to European countries I have met a number of juvenile inmates in prisons and detention centres. Many of them have suffered neglect and violent abuse within their own families and have received little support from society at large. Understanding the origins of violence and serious offending in children does not mean condoning or sympathising with it.

An effective and humane policy would put strong emphasis on prevention. Social workers are more important than prison guards in this context. Certainly, broader reforms for genuine social justice have to be part of a strategy to tackle the problem of youth offending.

Unfortunately, this has not been the focus of the public debate in several countries. Instead, people's justified concerns about juvenile behaviour have been exploited for populist political purposes: children and young persons have been demonised and described as major threats to society.

The CRC encourages a minimum age to be set for criminal responsibility. Below such an age, it is presumed that a child does not have the capacity to infringe the penal law. Children in Scotland can be held criminally responsible at the age of eight years old. In England, Wales and Northern Ireland the minimum age is 10. In many of the Nordic countries the age for criminal responsibility is set at 15 and in Belgium it is 18 years old. The Council of Europe's European Committee of Social Rights (which monitors State compliance with the European Social Charter), the UN's Committee on the Rights of the Child and other UN Treaty Bodies have all recommended substantial increases in a number of member states.

I would like to move the debate on from fixing an arbitrary age for criminal responsibility. Governments should now look for a holistic solution to juvenile offending which does not criminalise children for their conduct.

The United Nations Guidelines for the Prevention of Juvenile Delinquency, while adopted 19 years ago, still provide the right benchmark. "Labelling a young person as 'deviant' or 'delinquent' or 'pre-delinquent' often contributes to the development of a consistent pattern of undesirable behaviour by young people...".

Yes, it is in all our interests to stop making children criminals. We should therefore treat them as children while they are still children and save the criminal justice system for adults.

The writer is Commissioner, Council of Europe.

Source: www.commissioner.coe.int.

RIGHTS *corner*

US: Gains and disappointments on women's rights

"This bill dramatically improves a woman's chance to fight pay discrimination and it greatly improves the fairness of the system for everyone."

The new law supporting the right to equal pay is a major step forward for women, but dropping funds for contraceptives from the economic stimulus package will impede women's rights and cost more in the long run, Human Rights Watch said in a press release.

The Lilly Ledbetter Fair Pay Restoration Act, the first bill President Obama signed, expands the time period for filing pay-discrimination claims. The victims, many of them women, were previously limited by a 2007 Supreme Court decision that said they could only file claims against their employer within 180 days of their first unfair paycheck, even if they did not learn of the problem until years later. Under the new law, claims can be filed within 180 days of receiving any discriminatory paycheck.

"This bill dramatically improves a woman's chance to fight pay discrimination," said Meghan Rhoad, researcher in the women's rights division at Human Rights Watch. "And it greatly improves the fairness of the system for everyone."

However, with President Obama's support, members of Congress removed provisions of the economic stimulus proposal that supported access to contraceptives. Human Rights Watch understands that the provisions, which would have allowed states to expand access to contraceptives under Medicaid, were taken out after protests from some congressional members. However, a 2007 Congressional Budget Office analysis of an almost identical proposal estimated that such funding for contraceptives would save $200 million over five years, including money Medicaid would otherwise have spent on services related to unintended pregnancies.

Access to contraceptives enables women and their families to make considered decisions about the number and spacing of their children. These decisions carry profound financial and other implications for families, and the decision not to expand access to contraception under Medicaid means that fewer families will be able to make those decisions, Human Rights Watch noted.

"Ensuring access to contraception is not only the right thing to do, it makes economic sense," said Rhoad.

Source: Human Rights Watch.