Star LAW *analysis*

Trial of Pilkhana massacre under Military Laws? A legal examination

ROKSANA AKHTER


SYED ZAKIR HOSSAIN

ONE of the most atrocious occurrences in the history of Bangladesh has taken place in the downtown of the capital where nation has lost many of its bravest army officers from this barbaric bloodshed at Pilkhana, BRD Headquarter. The unanimous demand has been raised throughout the nation that the perpetrators be punished. But due to inadequate provisions in the existing Bangladesh Rifles (BDR) legislations the administration is in quandary as to which law to be followed in bringing the executor to justice. The Government has announced to set up a special tribunal to try the criminals but this procedure might face challenges in terms of its validity. In this connection I would like to appraise the existing legislations under which the culprits can be punished effectively within quickest possible time and thereby expectation of the nation can be materialised.

The Bangladesh Rifles has been raised and maintained as a Force in accordance with the provisions of the Bangladesh Rifles Order, 1972 (P.O. 148 of 1972) and defined as 'disciplined force' within the meaning of Article 152 of the Constitution. But the application of BDR law in the situation in question seems to be futile as it does not provide for the trial of Superior Officers namely, Deputy Assistant Director, Assistant Director & Deputy Director, or the civilian employees serving in BDR. However, P.O. 148 of 1972 contains provisions on trial of Subordinate Officers and Riflemen only for offences like mutiny through Special Court but maximum punishment is up to seven years rigorous imprisonment.

If the Director General (DG), Bangladesh Rifles is vested with the power of first class Magistrate by the Government under Article 16A of the said Order, he may try the offences under the Penal Code, which are committed by the Subordinate Officers and Riflemen against other Subordinate Officers or Riflemen or Signalmen of the force, but the same does not apply to offences against the Army officers.

The Bangladesh Rifles (Special Provisions) Ordinance, 1976 (Ord. no. 85 of 1976) deals with only the departmental proceedings whereby penalties of dismissal, removal, discharge or compulsory retirement from the service can be imposed on all the members including civilian employees. But the offences committed by the unruly rebels, as it appears from the initial investigation, deserve capital punishment and as such the above Ordinance does not meet the requirements of proposed trial.

It is pertinent to note that the army officers serving at BDR on deputation remain subject to the Army Act, 1952 until duly retired, released, discharged, removed or dismissed from the service. The DG, BDR is already empowered to convene General Court-Martial under the Army Act and such courts have power to try any offence punishable under the Act and to pass any sentence, maximum being death, authorised by the said Act.

As per Section 5 of the Army Act, the Government may, by notification, apply all or any of the provisions of this Act to any force raised and maintained in Bangladesh under the authority of the Government. It is fitting to mention here that the term force has not been defined anywhere in the Army Act. However, Section 5, sub-section (2) clearly contemplates that the force referred to in sub-section (1) of section 5 must be a force organised in line with the army rank structure. So far BDR is concerned, there can be no doubt that it is a force organized on army pattern with units and sub-units and rank structure.

The composition, administration, organisation and role of BDR clearly show that it is an integral part of the Armed/disciplined Forces being the prime paramilitary force intended primarily to support the army in its operational requirement. Army officers are posted in BDR units according to a carefully planned manning policy so that BDR units can in time of war or hostilities be able to provide effective support to the army. Nevertheless BDR personnel are given training at Army training centres & schools in their different levels of career in line with Army training.

Thus the functions and duties of BDR are indivisibly connected with operational plans and requirements of the Army. There can be no doubt that without the efficient and disciplined operational role of BDR the military operations in border areas during peace as also in times of war will be seriously hampered and a highly disciplined and efficient BDR is absolutely essential for supporting the operational plans and meeting the operational requirements of the Army or Armed Forces at large.

Therefore, the members of BDR can be described as the members of the Armed/disciplined Forces within the meaning of the Article152 of the Constitution and consequently the application of Army Act, 1952 to the members of BDR could be said to have been not barred by that Article and the fundamental rights of the BDR personnel are also validly restricted under Article 45 of the Constitution and Article 16C of the P.O. 148 of 1972.

In view of the above, if the Government may, by notification, apply all or any provisions of the Army Act to the members of BDR in ensuring speedy dispensation of justice and to that end the concerned Ministry may issue necessary notifications/SROs for smooth discharge of duties of the officers concerned with military tribunal (Court-martial) including their jurisdiction, powers and duties incidental to the operation of the Act.

It is also significant to bring up here that if the Army Act is applied to the members of BDR, the mastermind of the mutiny can also be brought to trial under section 2(1) (d) (i) & (ii) of the Army Act. As soon as the mutineers become subject to the Army Act, their right to move to the Supreme Court for the enforcement of fundamental rights shall be automatically restricted and the trial can be completed at the quickest possible time by several courts martial.

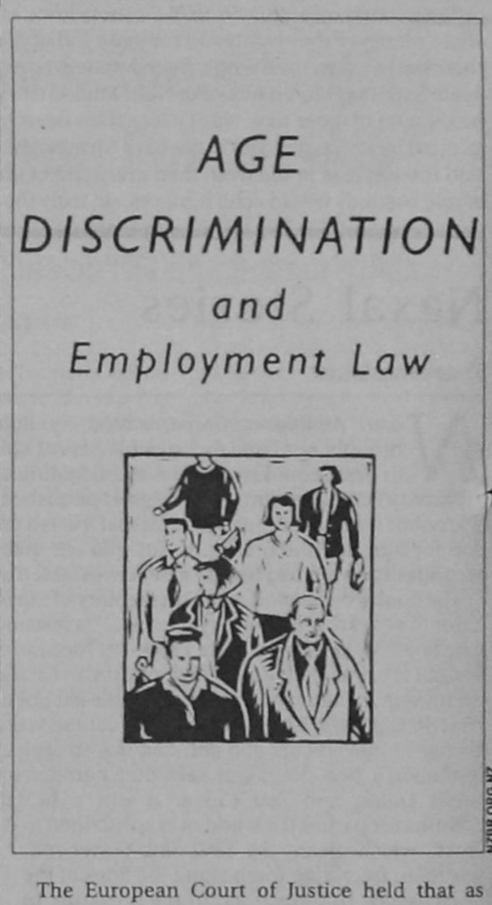
Roksana Akhter is Senior Lecturer, Department of Law, Dhaka International University.

FACT *file*

UK permitted to implement age discrimination law

ON 5 March 2009, the European Court of Justice held that article 6(1) of Council Directive 2000/78/EC did not make compulsory retirement ages unlawful in the case of The Incorporated Trustees of the National Council on Ageing (Age Concern England) v. Secretary of State for Business, Enterprise and Regulatory Reform, Case C-388/07. The case involved a challenge by the National Council on Ageing (Age Concern England) to the Employment Equality (Age) Regulations 2006 which were introduced to implement Council Directive 2000/78/EC. Under article 6(1) of the Directive, differences in treatment on grounds of age are permissible if they are objectively and reasonably justified by a legitimate aim, for example where related to employment policy, the labour market or vocational training. Furthermore, the means of achieving that aim must be appropriate and necessary.

The Age Regulations provide that employers may dismiss employees at a "normal retirement age" or in the absence of such an age, at 65 years, without such dismissal being regarded as discriminatory. Age Concern claimed that this aspect of the Regulations constituted a direct general defence for discrimination. It submitted that the Directive did not intend such a widespread defence and therefore the provision was contrary to the Directive's purpose. Furthermore, Age Concern claimed that correct implementation of the Directive required the UK to set out a specific list of justifiable reasons, by reference to a "legitimate aim", for differential treatment under national law. Age Concern argued that the Directive intended only to provide for a very limited exception to the fundamental right of non-discrimination.



NZBR.ORG.NZ

The European Court of Justice held that as States have a broad discretion as to the manner in which they implement European Union Directives, Council Directive 2000/78/EC could not be interpreted as requiring Member States to draw up a specific list of differences in treatment which may be justified by a legitimate aim and therefore permissible. The Court opined that the wording of the Directive made it clear that the examples given of legitimate aims and justifiable differences in treatment were purely illustrative. Furthermore, it was for a national court to decide whether a national provision which allowed employers to dismiss workers who have reached retirement age was justified by "legitimate" aims within the meaning of the Directive.

The case demonstrates the difficult balance between freeing work opportunities and retaining skilled labour in the workforce that must be struck with regard to age discrimination legislation. In the fragile economic climate such a system will inevitably make those at the margins of the workforce, particularly those above the compulsory retirement age, most vulnerable. The judgment of the ECJ explained that national courts should decide whether a system of compulsory retirement is justified by a legitimate aim. The ECJ directed that States must establish a high standard of proof in justifying such a legitimate aim, stating:

"Mere generalisations concerning the capacity of a specific measure to contribute to employment policy, labour market or vocational training objectives are not enough to show that the aim of that measure is capable of justifying derogation from that principle and do not constitute evidence on the basis of which it could reasonably be considered that the means chosen are suitable for achieving that aim."

Source: The Equal Rights Trust.

RIGHTS *investigation*

Missing girls ... missing women

The key to eliminating sex-selective abortion is not in the abortion procedure itself, but rather in the motivation for having it. Sex-selective abortion is merely a symptom of the root problem: a deep-seated preference for sons based on social, cultural, economic, and historical factors.

CSRINDIA.ORG

ARUNA KASHYAP

ADS screaming "Girl or Boy?" are banned in India. Major internet search engines Google, Yahoo, and Microsoft have been put on notice to ensure that they do not provide advertising platforms for sex-determining technology. Yet, efforts by prospective parents to ensure that their baby is a boy -- the so called "son-preference" -- remain a serious problem in India.

With the focus on domestic debates about abortion, many Americans may be unfamiliar with the complicated dynamics in other countries such as India. Recently I was listening to a discussion about women's rights when the facilitator commented, "Everyone here is for women's right to choose in abortion," and saw nods of agreement. Likewise, there was a unanimous call for an end to discrimination against girls.

However, when the facilitator probed further, raising questions about how discrimination and abortion affected each other, commotion ensued. I heard some horrific stories and tapped into a charged debate that highlighted some dangerous implications for women's rights in the country.

Skewed gender ratios have caused justified outrage in India, where there are 927 girls for every 1,000 boys. The picture is even grimmer if one looks at the gender ratio based on birth order -- 250 girls for every 1,000 boys for the third child. The widespread use of sex-determination tests and resulting sex-selective abortions contributes to this disturbing imbalance.

The Indian government is taking some measures to curb the "supply" side of sex-determination. The Parliament passed a law regulating medical professionals' use of sex-determination technology and made it illegal to advertise such services. Most people are in agreement with such an approach.

But many women's rights advocates grow concerned at some of the more blanket measures that have been proposed. "I have sat through many government meetings where officials have advocated a ban on second trimester abortions in practice to prevent sex-selective abortions," a leading women's health activist pointed out. The newspapers carried a story of how a woman who aborted five months into her pregnancy following a sex-determination test was arrested, even as she was bleeding profusely, and imprisoned, along with her sister-in-law, who had helped her.

Many government officials, eager to improve the gender ratios, are informally instructing doctors to curtail women's access to second-trimester abortions. Women with daughters who seek abortions face special scrutiny. In some cases, police apprehend women instead of the doctors who conduct the sex-determination tests.

What might seem like a sensible solution to some in fact poses a grave danger for pregnant women in India. As evidence from other parts of the world demonstrates, curtailing access to abortion could kill more women by driving abortions underground.

The key to eliminating sex-selective abortion is not in the abortion procedure itself, but rather in the motivation for having it. Sex-selective abortion is merely a symptom of the root problem: a deep-seated preference for sons based on social, cultural, economic, and historical factors. Many women in India who seek sex-selective abortions are, in fact, under severe pressure to produce a boy. Some face violence, social exclusion, and expulsion from their homes if they do not.

Sons' traditional roles in providing financial support for their parents in their old age, inheriting and controlling family property, and conducting death rituals as well as the skyrocketing cost of dowries and the low social value placed on daughters underlie the demand for sex-selective abortion. Unless sustained policies and efforts to alter such attitudes are introduced, the demand for sex-selective abortions will not be eradicated.

Curtailing access to safe abortions is only likely to exacerbate women's woes by driving them to unsafe methods. In fact, despite legalizing abortion several decades ago, India continues to lose thousands of women to unsafe abortions every year. A whopping 90 percent of the estimated six million abortions occurring annually are performed illegally. Unsafe abortion contributes to 10 percent of the estimated annual 117,000 maternal deaths in India.

Altogether, India's rank on the 2008 global gender gap index is appalling. Ranked 116 of 130 countries based on a range of indicators, India would be among the winners if there were prizes for the worst country on women's health and survival.

The demand for sex-selective abortions is a telling symptom of this gender gap index, and points to the economic and social disparities that lead families to prefer sons over daughters. To address the unacceptable gulf between births of boys and girls, the Indian government's goal should ultimately be to fight "son-preference" by advancing women's rights and equality.

The government should positively promote the value of women's lives through expanding educational and economic opportunities and encouraging public discussion about traditional attitudes rather than resorting to blunt instruments such as a curtailing women's access to second trimester abortions. Otherwise, India may soon be in running for the gold when it comes to the worst country for women's health and survival.

Aruna Kashyap, Asia Researcher for the Women's Rights Division.

Source: Human Rights Watch.