"ALL CITIZENS ARE EQUAL BEFORE LAW AND ARE ENTITLED TO EQUAL PROTECTION OF LAW"-*ARTICLE 27 OF THE CONSTITUTION OF THE PEOPLE'S REPUBLIC OF BANGLADESH*

REVIEWING THE VIEWS

Our judicial legacy of 1971

S. M. Masum Billah

HOW does the judiciary of Bangladesh respond to our liberation war? In the juncture of trial of crimes against humanity, genocide and the like, it is proper to examine the attitude of our highest judiciary towards the spirit of liberation war 1971. We need to understand that Bangladesh is the first country in the world which is trying the perpetrators of 'international crimes' in a domestic tribunal. The *Kader Mollah* verdict gave a massive wave of criticism and consequently, a social transformation is taking place in our motherland. *Mollah's* verdict was a surprise on the face of the record. But it also should be viewed from a judicial history perspective, where the responsibility of the judiciary as an equal, coordinate organ of the state should be studied and evaluated. Before the inception of International Crimes Tribunal Bangladesh (ICT-BD), the war crimes issue came indirectly (or somehow directly) for the consideration of our apex court in several cases. In the following paragraphs I'm trying to sketch the mindset of the judiciary in cases involving 1971 issues. At first the constitutional basis of Bangladesh should be grasped very minutely.

The Constitution of Bangladesh is an impression of sweat, tears and blood, the words used in it are not merely black and white letters. Therefore, in our constitutional dispensation we need to revert to this root always when we interpret and understand the constitution. A judge also should keep this historical fact in mind while dealing with the issues of our came into being as a nation. Why did we become a separate nation, why did the people of this land decide to form a state is sacredly embodied in the Proclamation of Independence. As a response to unprecedented savagery, treacherous war levied upon us by the Pakistani authoritarian regime -- as a retort to crude contempt of human rights, Bangladesh declared the independence on 26th March 1971 in order to ensure for its people equality, social justice and human dignity. This Proclamation is the beaconing light of our spirit of liberation war and judicially has been settled as: 'The genesis of Bangladesh Constitution' (Per J. B. H. Chowdhury in *8th Amendment Case*). So, the widely hailed rule of interpretation i.e. the purposive interpretation should be understood in Bangladesh context to signify the spirit of liberation war. Anything repugnant to this journey should be discarded and thrown away.

The first saga to our spirit of liberation war was given by Justice A S M Sayem, when he conceded martial law subjugating the constitution. The irony of fate is that this Justice Sayem formulated the footholds of public interest litigation in *Berubari Case*, in 1974 when the concept was still unknown in the Indian subcontinent and was maturing in England in the hand of Lord Denning. The second saga on the constitutional supremacy (note that I'm taking martial law as opposed to mockery to our emergence as a nation and as a manipulation and tailoring to restore the anti-liberation elements like rehabilitation of Golam Azams in the socio-politic corpus of Bangladesh) was done by J. Ruhul Islam in *Halima Khatun Case*(1978). Here is a para from the judgment: "It may be true that whenever there would be any conflict between the Constitution and the [Martial Law] Proclamation ... it does not seem to concede such superiority to the Constitution. It has lost its character as the supreme law of the country.....It was the duty to the judges to administer a 'harsh' or even an unjust law." Indeed this was a stigma bearing an impression of decadent jurisprudence which knocked down the backbone of our judicial thought.

A very important case bearing the genocidal and crimes against humanity issue came before the Appellate Division in 1982 in *Dr. Sazzad Hossaen* v. *Registrar, Dhaka University*, where the apex court

declared the termination of the petitioner from Vice-Chancellorship of Dhaka University on the allegation of his involvement in abetment to intellectual killings in 1971, void. In this case the spirit of liberation war was thwarted in the face of grammar of law.
Ordinance 67 of 1972, designed to purge out the *razakars* from the administration came before the Appellate Division for examination. The relevant section 5(b) can be reproduced here for the understanding of the readers: "The Board shall upon reference made to it by the government agencies or an information received in writing from any source, examine the case of a government servant with reference to his activities, records and such reports or allegations made against him in respect of- (b) **Conduct** or activity in exercise of powers or in the discharge of duties manifesting ardour or zeal amounting to collaboration, that is aid, assistance or support to any activity directed against the liberation struggle or the creation of Bangladesh or **conduct** exhibiting faith in and support to the ideology of Pakistan or **conduct** in support of the elements inimical to the liberation struggle or to the creation of Bangladesh including in particular, the occupation forces of Pakistan".

The para was preceded by the expression 'official capacity' which posed the question that whether all the conducts in the above para should be done in 'official capacity or the word 'official capacity' should only be applicable in case of the first 'conduct'. Justice Kemaluddin Hossain divided the para by three 'conducts' and was of the opinion that only first conduct should be done in 'official capacity' to be punished but other two conducts may be punished even if it is committed in an individual capacity. To quote Justice Kemaluddin Hossain: "I am re-informed in reading these clauses disjunctively, because these three clauses are separated, first by the word 'or' and 2ndly by the word 'conduct' at the beginning of each of the three clauses. If they are read conjunctively then the word 'conduct' in second and third clause becomes either tautologous or superfluous. But if they are read disjunctively all the three clauses fits in grammatically and semantically for the purpose of the Act." Through this observation he found Dr. Hossaen guilty of Pakistani zeal. Unfortunately, other majority judges led by J. B H Chowdhury read the para conjunctively and found Dr. Hossaen not guilty. They also questioned the validity of the Ordinance on the ground of violating the 'retroactivity' principle. Thus, through this majority decision, an ardent advocate of intellectual killings Dr Sazzad Hossaen, was again judicially rehabilitated paving the way for others. This literal approach of the majority judges produced wholly an unreasonable result. For reader's interest, it will be relevant to quote one English legal mind, Lord Reid, "to apply the words literally is to defeat the obvious intention of the legislature and to produce a wholly unreasonable result. To achieve the obvious intention and to produce a reasonable result we must do some violence to the words ..... the principle is well settled."

Then came the black chapter of our judicial acumen in *Golam Azam's citizenship Case* (1994). In this battle, judicial giants like J. M Habibur Rahman, J. Mustafa Kamal, J. ATM Afzal and J. Latifur Rahman confirmed Azam's citizenship terming his involvement in 1971 atrocities as 'irrelevant' and 'political'. To quote from a paragraph of the judgment: "In considering a matter before it the Court will only consider whether the aggrieved person has got the legal entitlement to the relief claimed. Any consideration of his political antecedents having no bearing on the questions of law involved in the matter will be irrelevant. Equally, it will be irrelevant to consider to what probable political consequences will follow if the citizenship is granted." Irony is that a Zimbabwe case was referred to deny Azam's role saying: "Political antecedents to an aggrieved person, otherwise notorious for his anti-people role" should be rejected. The Appellate Division unfortunately failed to appreciate its political legitimacy (source of power) and the origin of the constitution under which it was dispensing justice. And the decision has been the cause of national catastrophe in the days to come.

Then in a fine political revolution in 2009, the government constituted the ICT-BD to try the perpetrators of 'international crimes' within Bangladesh's Jurisdiction. For this time these were defined cases of war atrocities. The first three verdicts of ICT-BD (*Abul Kalam Azad Case*, *Kader Mollah Case* and *Sayedee Case*) are rather based on the above enfeebled judicial mindset which we were carrying. It should be admitted that the verdicts are definite breakthroughs from the court's previous legacy, though the *Mollah* verdict failed to go at par with the people's expectation. What may be the factors that enticed the judiciary to give 'less than people's expectation' verdict? One may be the 'play portia role' of international criminal law and other one is definitely, political dwindle-ness on the issue. Our political culture suggests that we have always learnt to criticise the government for the court's verdict and failed to draw a bottom line between the organs of the state. This phenomenon has encouraged the judiciary to be lenient on the 1971 issue. In the claptrap of past-mindset, the domestic prosecution of 'international crimes' by the apex judiciary of Bangladesh (including the ICT-BD) is set in fine tune. In the past cases, the people's reaction did not reach in an orchestra to make the judiciary accountable for its findings. The *Shabagh renaissance* may touch the judiciary for a transformation. It appears to be true in *Sayedee* verdict.

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LAW ALTER VIEWS

Introduction of ADR in criminal cases

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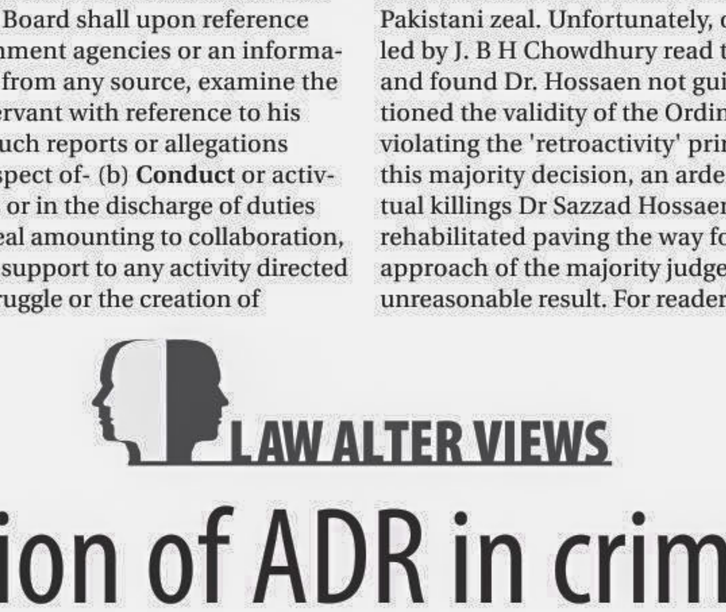
A huge backlog and delay in the disposal of cases, and consequent high-cost of litigation limits access to formal justice for the poor and disadvantaged in Bangladesh. According to a statistics from Transparency International, Bangladesh, we have only 77 Supreme Court justices, and 750 other judges to dispense justice to a population of nearly 150 million. This scarcity of judges is a contributing factor to the ever-increasing number of unresolved cases. For example, in 2006, only 148,563 cases were disposed of from a total of 617,059 cases placed before the district courts of Bangladesh and therefore, 468,496 cases pending for disposal at the end of the year. As a means to get rid of this backlog, Alternative Dispute Resolution (ADR) is often acclaimed for providing low-cost, quick access to justice. Unlike litigation ADR, more particularly mediation, is an informal dispute resolution process where parties can negotiate to settle disputes and determine outcomes which are mutually beneficial to them.

There are various types of ADR depending on their nature and objectives. For example, in some cases parties negotiate themselves without any help from third party while in other cases a third party may interfere and try to settle the dispute for mutual benefit of the parties. Amongst different forms of ADR, mediation is the most widely used ADR mechanism in Bangladesh. Outcomes of disputes settled through ADR may vary from outcomes suggested in respective laws. For example, though every Muslim woman is entitled under Muslim law to claim all of her unpaid dower on divorce, to avoid delay and uncertainties in recovery, a divorcee woman in family court ADR may give up a part of her unpaid dower but claim for a cash payment on settlement. As parties settle for a mutually agreed outcome, ADR ensures permanent settlement without a possibility of appeal. Early disposal also reduces cost to resolve disputes.

Therefore, a part of the claim may be sacrificed in ADR to ensure quick realization. To exploit such benefits, an active practice of ADR with some reformed agendas was first introduced in few pilot family courts of Bangladesh in 2000. Within few years of its reformed initiation, success of ADR was observed through a significant reduction of case backlog in family courts and a simultaneous increase in the realization of decree money by women. Realizing its potentials as a low-cost, quick dispute resolution mechanism, ADR has been introduced in various other civil courts of Bangladesh including Labour Courts, Money Loans Recovery Courts, Income Tax Tribunals, Village Courts, and Municipality Conciliation Boards.

However, one problem to practice ADR is that the 'quality' of outcome mostly depends on the negotiation capacity of parties attending ADR. For example, in our society still the image of an ideal woman is depicted as diffident, non-aggressive, and minimalist i.e. satisfied with minimum rights, and willing to sacrifice most of her rights to attain harmony. On the other hand, an ideal man is represented as valiant, conscious about maximum rights, and having power to gain command and control. This kind of social ideology creates 'power' differential between men and women that affects their negotiation capacity while attending ADR. Similar types of power disparity may also exist between other groups of the society like employers and employees, contractors and day labourers, village money lenders and borrowers, and social oppressors and oppressed. Therefore, to safeguard the interest of comparatively weaker parties in ADR, one or more unbiased and non-partisan third party hear the dispute and try to attain a settlement between parties that would ensure a fair outcome for both



of them. For example, in resolving family disputes through ADR, family court judges act as an unbiased third party between a husband and a wife. As observed in one of my earlier research, while conducting ADR, family court judges not only try to settle disputes but also promote women to express their views. Third party mediators may interfere when husbands try to restrain women from expressing their views. Similar practices were also observed among third parties resolving disputes in different NGOs like MLLA, BLAST and BRAC.

However, there is no assurance that third parties will always be unbiased and non-partisan while performing their function. For example, village shalish is a century long institution in this sub-continent where one or more respected and elderly persons hear a dispute to dispense justice at the local level. However, shalish has lost its glory as the composition of the people administering shalish has mostly changed from respected elderly people to politically motivated local leaders. Because of their strong political ties, along with the influence of their money and political affiliation, newly emerged leaders superseded the traditional respect towards the age, reputation and lineage of the elderly leaders who prefer to uphold moral conduct rather than narrow political and personal interests.

The problem of maintaining unbiased position for third parties conducting ADR is not unique to Bangladesh rather is similar to the problem faced by many other countries using ADR. Therefore, different countries adopted various standards of ADR including the qualities of a third party, steps to be followed in conducting ADR, rights of parties attending ADR, responsibilities of a third party conducting ADR, and so on. However, despite the active practice of ADR in formal courts of Bangladesh for more than one decade, its development is mostly limited to some 'quantitative' aspects like quick disposal of cases and quick realization of decree money.

While conducting one of my recent studies on the quality of family court ADR in Bangladesh, I found virtually no literature that discussed comprehensively about the quality of ADR in Bangladesh. Further, various laws that deals with court connected ADR are at their primitive stage and are not comprehensive enough to address various qualitative factors. For example, the Family Court Ordinance discusses ADR minutely in two tiny sections.

Although the latest amendment of the Civil Procedure Code (CPC) included a detailed discussion on ADR, still such discussion is mostly limited to the process of conducting ADR and not much have been discussed about the duties and liabilities of a third party conducting ADR, and rights of disputing parties attending ADR. Similar trends can be observed in other laws admitting court connected ADR in Bangladesh. While court connected ADR lacks meticulous guidelines, out-of-court ADR conducted by NGOs remained totally out of the purview of any laws or regulations on ADR. Pertinently, though many of the developing countries including our neighbouring country India and China have detailed laws to control and regulate the quality of both in-court and out-of-court ADR, unfortunately, we are still running with a great vacuum in this regard. Therefore, despite the fact that some of the family court judges and other renowned NGOs are doing well in ensuring fair justice through ADR, lack of necessary regulations always poses a risk that such good practices on ADR may not be replicated in every corner of our society. While we are in the formative stage of adopting ADR in civil cases, one recent issue getting much attention from policy makers is whether we may introduce ADR in resolving criminal cases as well.

to be continued

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