WRITING FOR EQUALITY

Delhi gang rape v Felani killing

UMME WARA MISHU

JUSTICE and Injustice- both have been demonstrated in two of the verdicts of the Delhi girl who was gang raped and killed on December 16, 2012 and Felani from Bangladesh who was shot and killed on January 7, 2011. Admittedly, both incidents are inhumane in nature but one case is decided within 09 months and the other one is after two and half years! In the Delhi rape case, four men are sentenced to death on 13 September 2013 while just one week back, a special Court in the Indian state of West Bengal ruled that BSF's 181 Battalion Constable Amiya Ghosh, a constable of India's Border Security Force (BSF) who was the lone accused, was acquitted of shooting Felani on September 06, 2013 because of "inconclusive and insufficient" evidence against him. Not only Felani's poor parents but the whole Bangladesh and the international community reject the flawed verdict strongly. However, this was the first time a BSF jawan had been put on trial for such border killing which was also happened as a result of Border Guard Bangladesh's (BGB) instant flag meeting with BSF on the incident followed by a protest letter by the BGB Headquarters and lastly the meeting between the two Director General of BGB and BSF in Dhaka.

The proceedings started on August 13 this year by a five-men BSF General Security Forces Court headed by its Assam-Meghalaya frontier DIG (Communication) SP Trivedi who conducted the hearings at Sonari BSF camp near Cooch Behar under Section 64 and 65 of the Border Security Force Act, 1968 and its Rules, 1969. The accused was charged under section 46 of the Act which states that any person subject to this Act who at any place in, or beyond India, commits any civil offence shall be deemed to be guilty of an offence against this Act. After one week of the astonishing verdict of the accused's acquittal, now BSF has decided to revise the trial once again. Now apparently the news seems to give rise a new hope to all of us but we need to assess the merit of the case with the light of the provisions of the concerned Act and the Rule.

The definition clause of the BSF Act defines "enemy" as all armed mutineers, armed rebels, armed rioters, pirates and any person in arms against whom it is the duty of any person subject to this Act to take action meaning it does not include an unarmed civilian against whom an action can be made. Though the victim Felani and her father were trying to cross the border illegally, being an unarmed civilian they are not under the purview of the definition of the "enemy" in this Act.

The provisions regarding the Revision trial has been stated under section 113 of the Acts as stated that the Revision Court shall consist of the same officers as were present when the original decision was passed, unless any of those officers are unavoidably absent and the Court may take additional evidence if requires. Since the Court is constituted with same set of people, the probability of reversing the verdict cannot be expected entirely. In connection with this sections, BSF Rule 105(4)(b) mentions that while reconsidering, the Court will conduct the case in closed manner meaning no person shall be present in closed Court except the members of the Court, the Law Officer (if any) and any officers under instruction(R 110.2)

If we then go through section 117 and 118 of the Act, it give the idea of any person considers himself aggrieved by any order or sentence passed by the Security Force Court

may present a petition and the confirming authority may take such steps as may be considered necessary to satisfy itself as to the correctness, legality or propriety of the order passed or as to the regularity of any proceeding to which the order relates. Not only that, The Central Government, the Director-General, or any prescribed officer may annul the proceedings of any Security Force Court on the ground that they are illegal or unjust. These sections clarify that even after any order or sentence passes by the Court both the parties can further file petition to the concerned authority and it can annul the proceeding upon their satisfaction of considering the trial as an unjust one. Besides, section 128 gives the right to a convicted person which states that an officer not below the rank of Deputy Inspector-General within whose command such person at the time of conviction was serving, or the prescribed officer may:-

(a) either with or without conditions which the person sentenced accepts, pardon the person or remit the whole or any part of the punishment awarded; or
(b) mitigate the punishment awarded; or
(c) commute such punishment for any less punishment or punishments mentioned in this Act;
(d) either with or without conditions which the person sentenced accepts, release the person on parole.

It clearly depicts that section 128 gives the power to the authority not only to mitigate but also to pardon the person unconditionally. But section 130 completes the circle of "accused friendly" Act of 1968 which states the Central Government, the Director-General or any officer empowered to convene a General Security Force Court may suspend the sentence whether or not the offender has already been committed to prison or to Force custody. Lastly, section 132 affirms that where a sentence is suspended under section 130, the offender shall forthwith be released from custody.

The gruesome crime committed by BSF not only violates the basic human rights of the 15 years old Felani Khatun, it also shook the basic norms and principle of international law portraying protection from torture or cruel, inhuman and degrading treatment. As the general rule is to have necessity and proportionality while using force in the border area, border guards must use force only when necessary. The accused in this case could detain poor Felani rather killed her and hung her from the border fence afterwards. The last but not the least issue is Felani was just a 15 years old girl who deserved a minimum treatment from the border guard while passing through the border. Schengen Borders Code and EU Action Plan on Unaccompanied Minors recommended border guards to pay particular attention to minors, whether travelling accompanied or unaccompanied and to act as far as possible in the best interests of child treating them as children at first rather than merely as, for example, illegal immigrants or asylum seekers.

Felani deserved more than what she got from this cruel world. Now her soul wants justice, so do her parents, the Bangladesh, and the world community. In spite of all apprehension and uncertainty, we still look forward for a just verdict from the Revision Court.

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LAW OPINION

Arbitration – the possibility and the challenges

NABIL AHSAN

THE concept of Arbitration is nothing new in our legal system. The Arbitration Act 1940, drafted in the colonial period provided an option for resolving disputes by alternative means without bringing it before a court of law. Nonetheless, arbitration was always seen by lawyers and judges as an unimportant feature of the legal system. Traditionally, the primary focus of dispute resolution mechanism in common law countries is 'court centered'. That is to say courts hold the image of absolute neutrality and impartiality; the clients and the lawyers alike prefer courts as the forum of dispute resolution. While the advantage of courts as the ultimate forum of choice for dispute resolution cannot be denied, one must also bear in mind the severe back log of cases, the cost and complexity of legal procedures associated with litigation. The recent trend in many common law countries is for the courts and the legal system to provide impetus to divert cases to alternative dispute resolution mechanism thus circumventing the need to resort to court resources which in effect is expected to make dispute resolution cost effective and efficient. In the UK, the civil procedure code was completely revamped in 1998 taking into consideration Lord Woolf's recommendation that the courts the legal system ought to divert cases to a different stream of alternative dispute resolution in order to solve the entrenched problem of cost, complexity and delay. Courts in that case are fee to deal with the more grave matters following the thorough scrutiny of the 'Adversarial system'.

In this respect Bangladesh is also following the footstep of the international community. In 2001 it enacted a new Arbitration Act laying down a modern framework in order to give fresh impetus to Arbitration practice in Bangladesh. Initially it was taken positively by the legal community.

Most important contracts these days contain an arbitration clause in it and inevitably a significant portion of these agreements result in disputes being referred to an Arbitration tribunal. Arbitration has become a niche area of practice for a handful of lawyers although the ambit of arbitration practice is increasing rapidly.

While arbitration is becoming increasingly popular, unfortunately, the experience over the last decade has not always been a pleasant one. The Arbitration Process is generally expensive taking into account the fees of the Arbitrators (usually comprising of retired Supreme Court Judges and senior lawyers) , the legal fee of the counsels and the cost of the conducting the process. With regard to saving time, again arbitration has been somewhat of a failure. More often than not, parties are locked up in matters of interim measures with interim applications filed before the courts. Appointment of Arbitrators is a common problem when parties make application to courts to appoint arbitrator in situations where the other party is not co-operating. Unfortunately, a simple application like this usually takes a long time to be disposed of in the local courts. The arbitration process itself is quite lengthy dragging on for years until an award is passed and even then there is the uncertainty with enforcing the award, as losing parties as a matter of practice routinely make applications to set aside the award.

In my view, the fundamental spirit of Arbitration as a quick and efficient mechanism of dispute resolution is missing so far as Arbitration practice in Bangladesh is concerned. Lawyers, Arbitrators and clients alike, perceive arbitration as a form of 'privatised litigation' rather than a flexible mechanism of alternate dispute resolution. If arbitration is to flourish in Bangladesh, one needs to address the 'litigation culture' which is predominantly 'court centered' and bureaucratic in nature. Advocacy on alternative dispute resolution is of course one important element. In consonance with that, the Arbitration Act should be reformed to cut down the scope for 'delay tactics' and further to give finality to an arbitration award by limiting the scope of appeals/setting aside awards. The courts should also understand its role as a guardian to support the Arbitration process. The present role of the court causes more hindrance and impediment to effective arbitration. Judges dealing with Arbitration needs to understand that the essence of Arbitration is defeated if the courts regularly intervene and question the jurisdiction of the tribunal. Similarly, the back log of pending applications in relation to arbitration matters should be disposed of as quickly as possible. Perhaps having a separate tribunal or court for dealing with arbitration applications may be an effective solution.

The idea of introducing alternative dispute resolution (ADR) in the legal system is generally accepted as a positive change although there are some who think otherwise. Nonetheless, it is widely accepted that merely having an 'arbitration code' will not solve the problem or make the system 'ADR' friendly. What is needed is a holistic approach to the application of ADR and a comprehensive whole sale reform in our civil procedure to accommodate and facilitate ADR.

THE WRITER IS A BARRISTER –AT-LAW.

FOR YOUR INFORMATION

Slum dwellers face higher risk of domestic violence

WOMEN living in the slums in Dhaka, Bangladesh's capital of 15 million people, face a higher risk of domestic violence than women in other parts of the country, say researchers. Nationwide, recordkeeping and data collection on the extent and types of violence against women are still scarce, according to an expert panel in 2011 monitoring the country's progress on eliminating violence against women. But the UN Special Rapporteur on Violence against Women, Rashida Manjoo, found ample evidence in a recent visit to Bangladesh that "discrimination and violence against women continues in law and practice".

The situation is even worse in the capital's sprawling slums, Ruchira Tabassum Naved, a researcher with the Centre for Equity and Health Systems at the International Centre for Diarrhoeal Disease Research, Bangladesh (icddr,b), told IRIN. In a 2012 survey of almost 4,500 women and some 1,600 men living in 19 of the capital's slums, conducted by icddr,b and the international NGO Population Council, 85 percent of the women reported their husbands restricted their access to healthcare, while 21 percent reported being physically abused by their husbands during pregnancy.

"Our studies suggest that education, household wealth, attitudes regarding gender and violence against women are important factors associated with this violence. Unfortunately, the slum population has lower education and wealth and higher violence, [as well as]… traditional [attitudes] about gender [that condone violence]," Naved, a co-researcher for the report, told IRIN.

Shamsun Nahar, 20, thought when she married Abdus Salam, 25, a rickshaw puller, her suffering would end. She stopped going school after grade eight when the family could no longer support her and her sisters' expenses. But in her husband's house, in a slum in a sub-district of Dhaka, Mirpur, some 100km north of her childhood home, she faced something worse than just poverty: Her husband beat her almost daily, mostly over how she carried out housework.

In 2012, with the help of a local NGO, she left him and moved to a neighbouring slum. She now works in a garment factory where she earns US$55 monthly on average. Though she knows the notorious reputation of Bangladesh's garment industry, including the long hours and building safety concerns, she said this risk feels safer than her previous life.

Ishrat Shamim, president of the local research NGO Centre for Women and Children Studies, said poverty increases a woman's vulnerability to violence. "I am not saying that domestic violence does not take place among the high income group. But when a woman has a source of income, she can protest undue treatment from her husband… In many cases a wife does not complain as she fears she will lose her shelter," Ishrat said.

Though adopted in 2010, the "Domestic Violence (Prevention and Protection) Act" remains unenforced, mainly due to lack of awareness and women's fear of reporting, said Ishrat. "There should be adequate shelter facilities so that women get shelter after complaining about their husbands," she added.

State Minister for Women and Children's Affairs Meher Afroz Chumki said that the government is working to end gender violence and to implement laws related to women's protection. The country adopted in 1997 a national policy for the advancement of women, aimed at eradicating gender disparities. The country's "Vision 2021" programme aims to "revive" the 1997 policy. In 2009, the government established the National Council for Women and Child Development, headed by the prime minister, and "gender-responsive budgeting" for 2009-2011 in 10 of the country's 40 ministries.

In addition to the 2010 law on domestic violence, sections of the following laws mention women's protection: the Bangladesh Labour Act (2006); the Representation of People's (Amendment) Ordinance (2008); the Citizenship (Amendment) Act (2009); the Right to Information Act (2009); and the National Human Rights Act (2009). But these legislative reforms are still largely unhelpful for women, noted UN Special Rapporteur Manjoo, reflecting on her recent visit: "The absence of effective implementation of existing laws was the rule rather than the exception in cases of violence against women." Manjoo has called on Dhaka to take more steps to comply with the Convention to Eliminate All Forms of Discrimination against Women, which the country ratified in 1984.

SOURCE: IRIN. (HTTP://WWW.IRINNEWS.ORG/REPORT)

LAW EVENT

SEU clinches the championship of 9th Henry Dunant Moot Court

EMDADUL HAQUE

THE Department of Law & Justice, Southeast University (SEU) has clinched the championship of the 9th National Henry Dunant Memorial Moot Court Competition-2013 while the Department of Law, Dhaka University (DU) has become runner up. The competition was jointly organised by the International Committee of the Red Cross (ICRC) in collaboration with DU held at the DU Senate Bhaban from September 5 to 7, 2013. A total of 19 teams including four observer teams comprised of public and private universities took part in the competition.

In the grand final of the competition, the three member panel of judges was former Appellate Division Judge of the

Supreme Court of Bangladesh and chief election commissioner Mohammad Abdur Rouf, Syed Muhammad Dastagir and Md. Miftah Uddin Choudhury, incumbent judges of the High Court Division. The participants from SEU were Kazi Parvez Jibon and Farzana Sultana Zahid Hussain Sarah as mooters and Md. Shihabuddin as the researcher. The team was mentored by ABM Imdadul Haque Khan and Tahsin Khan, lecturers of the Department of Law & Justice of SEU.

The national champion team representing Bangladesh will participate in Regional Henry Dunant Memorial Moot Court Competetiton-2013 at New Delhi, India in the upcoming October 18-19, 2013 to be organised by ICRC and University of Delhi. The champion and runner-up team from the regional competition will get the opportunity to participate in international competition to be held in Hongkong. It is to be noted that National Henry Dunant Memorial Moot Court Competition started its journey in Bangladesh from 2001.

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