

LEGAL ASPECTS OF Felani's murder

SALMA ALI

JUSTICE hasn't been done in case of Felani, as BSF jawan Amiya Ghosh, an accused of killing 15 year old girl at the Indo-Bangla border in January 2011, was acquitted by the BSF court in retrial. When a security force favours its staff in trial, it is quite difficult to even think of getting justice. The killing of Felani raised a huge outcry across the world. Judgment of BSF court will encourage its border guards to violate human rights along the borders with impunity. Even laws in India including BSF Act do not approve killing people indiscriminately during crossing border illegally. In other words, India could easily prosecute alleged trespassers on the basis of its own laws instead of killing them. As Felani was a minor girl, it is clearly violation of child rights. Though in various international conventions and treaties there are restrictions on cross border killing without lawful ground, it is continuously occurring in the name of security and sovereignty of country.

The United Nations Basic

Principles on the Use of Force and Firearms by Law Enforcement Officials calls upon officials to apply, as far as possible, non-violent means before resorting to the use of force and firearms. Officials are required to exercise restraint and "act in proportion to the seriousness of the offense."

In the perspective of killing of Felani, seeking fair trial and compensation a writ petition (Writ Petition (Criminal) No. 201 of 2013) has been filed by myself Salma Ali accompanied by Felani's father with the Indian Supreme Court on September 27, 2013 which is now pending. Meanwhile, previously in a rape case (The Chairman, Railway Board & others v Chandrima Das & others, C.A. No. 639 of 2000) of Bangladeshi woman Hamida Khatun (fictitious name), who was gang-raped by many including employees of the Railways in a room of Yatri Niwas at Howra Station of the Eastern Railway, Indian Supreme Court delivered a landmark judgment. Through that judgment the rights of foreign nationals was established, under

the Indian constitution. It was held by the Hon'ble Court that although the victim wasn't a citizen of India was nevertheless entitled to all constitutional rights available to a citizen so far as "Right to Life" was concerned. As a national of another country, she couldn't be subjected to a treatment, which was below dignity, nor could she be subjected to physical violence. Moreover, in that rape incident Indian trial court sentenced the accused persons for 12 years imprisonment. In the writ petition on killing of Felani that reference of the rape case was brought before the court. We expect a substantive result from the apex court.

Question has been raised whether security forces have a right to kill a person even if the person is found to be committing an act that is presumably illegal but unarmed. BSF constable by shooting has infringed of several international convention or treaty.

- It is gross violation of the spirit in the preamble and the Articles enlisted in the Universal Declaration on Human Rights (UDHR). The preamble of the UDHR depicted that recognition of the inherent dignity and the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world. According to Article 1 of UDHR all human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood. Article 3 of UDHR stated that everyone has the right to life, liberty and security of person whereas Article 5 exposed that no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.
- There has been gross violation of the Articles enlisted in Convention on Child Rights (CRC) to which both Bangladesh and India are signatories of. In accordance with Article 3 of CRC, in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative

bodies, the best interests of the child shall be a primary consideration. Moreover, Article 6 of CRC explained that states parties recognize that every child has the inherent right to life.

- The Schengen Borders Code and the EU Action Plan on Unaccompanied Minors recommended border guards to pay special attention to minors whether travelling accompanied or unaccompanied and to act as far as possible in the best interest of the child treating them as children first rather than criminals.
- Under Article 21 of the Indian Constitution guarantees the right to live. In the case of Lous De Raed v Union India (1991) 3 SSC 554, it was held that the right to life and liberty extends to a foreigner as well.

It is noteworthy that victim was unarmed and didn't pose any danger to the security of India. The general principle is to have necessity and proportionality while using force in the border area, border guards must use force only when necessary. Furthermore, the principles on the treatment of minor with special attention to minors and treat them as children before considering them as illegal immigrants.

It is significant to respect human rights and dignity through practicing tolerance, living together in peace with one another as good neighbours and maintaining international peace and security. Killing in border have to be stopped to ease tension at the border and to uphold human rights. Any kind of impunity is not acceptable at all. Instead of biasness, exemplary punishment has to be ensured for arbitrary killing violating international laws and norms. We don't want to see travesty, rather we expect that no perpetrator will be escaped from the purview of law merely in the name of security and in the long run justice will be ensured.

THE WRITER IS EXECUTIVE DIRECTOR, BANGLADESH NATIONAL WOMAN LAWYERS ASSOCIATION (BNWLA).

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YOUR ADVOCATE

This week Your Advocate is Barrister Omar Khan Joy, Advocate, Supreme Court of Bangladesh. He is the head of the chambers of a renowned law firm, namely, 'Legal Counsel', which has expertise mainly in commercial law, corporate law, family law, employment and labor law, land law, banking law, constitutional law, criminal law, IPR and in conducting litigations before courts of different hierarchies.

Query
I am working in a private organisation and am currently pregnant. I have seen that, whenever any female employee becomes pregnant the organisation terminates her to avoid providing maternity benefit. I am quite worried about my employment with the organisation as my family is largely depended on this job. What is our right in relation to maternity benefit and leave and how the employer is bound to provide the same to us? It is legal in Bangladesh to terminate a staff for becoming pregnant?

Salina Hossain
Dhaka

Response
I would like to thank you for soliciting my advice in relation to very important topics of maternity benefit and leave. It is really unfortunate to know that the organisation where you are working has indulged into immoral and illegal practice of terminating pregnant employees. Adding to the dismay, I must say that your organisation is not the only one; there have been many. It is important that the employees of the organisation, particularly the pregnant employees shall strongly protest such illegality.

Maternity benefit is the right of a working woman and the employer of the establishment is legally obliged by the Bangladesh Labour Act, 2006 to provide such benefit towards its female employees. Chapter IV of the Bangladesh Labour Act, 2006 specifically deals with 'Maternity benefit'. This Chapter clearly stipulates the right, benefit, leave etc. of a female worker during the maternity period.

As you are working in a Private Organisation you should be entitled to have sixteen (16) weeks maternity leave, which are eight weeks before delivery and eight weeks after your delivery. On the other hand, someone working in a Government organisation, i.e. a female public servant is entitled to six (6) months' maternity leave.

Besides, during the leave period, the employee

is entitled to receive benefit amount. This is slightly higher than her actual basic wage. Section 46 and 48 of Bangladesh Labour Act 2006 specifically address the payment and amount of maternity benefit and also liability of the employee in this regard.

Bangladesh Labour Act 2006 has, however, imposed certain pre-conditions for availing the said benefits from the organization. To qualify for maternity benefit, the female employee has to work in the said organization for a period of at least 6 (six) month. Another condition is, if the female employee already has two or more surviving children then, she will only get leave in relation to maternity but no payment of benefit is compulsory for her third or more number of children.

I hope the above mentioned sections can help you to understand that, maternity leave and benefit is the right of a female employee and the employer is bound in the eye of the law to provide the same. If the organization does not want to provide any sort of maternity benefit towards its female employee then, they will be held liable for violation of the Bangladesh Labour Act 2006. The same shall be brought to the attention of the Inspector General, Ministry of Labour and Employment. If situation warrants, action shall have to be brought before the court.

You will be relieved to know that, there is specific law for not firing pregnant woman during her pregnancy. Section 50 of the Bangladesh Labour Act, 2006 is about the 'Restriction on termination of employment of women in certain case'. As per this provision, if a female employee is terminated during her pregnancy without any reason, she shall still be entitled to the maternity benefit.

I hope that your employer will be prudent enough to abide by the very important provisions of law from a legal and social point of view. I wish you good luck!

FOR DETAILED QUERY CONTACT: OMAR@LEGALCOUNSELBD.COM

RIGHTS COLLUM

Combating illicit transfer of children



OLI MD. ABDULLAH CHOWDHURY

THE story of 14-year-old Absaruddin is simply grimmest as it appeared in The Daily Star on May 17, 2015. The title, 'I want to go back to my mother' says it all. In the previous day (May 16, 2015), there were faces of children appeared in the front page of The Daily Star. They were children of Bangladeshi and Rohingya people who were rescued from sea as mentioned in the report, entitled, "900 Rohingya and Bangladeshi trafficking victims survive". As appeared in the report, there were at least 61 children who were ferried to shore by Indonesian fishermen. Both Bangladesh and Myanmar are parties to the Convention on the Rights of the Child (CRC), the most venerated human rights convention and they are accountable to fulfill their obligations under this convention.

It has been stated in Article 11 (1) of CRC, "States Parties shall take measures to combat the illicit transfer and non-return of children abroad". Duty of state parties has been elaborated further in Article 11(2), "To this end, States Parties shall promote the conclusion of bilateral or multilateral agreements or accession to existing agreements". Arrangements, therefore, must be made by respective countries to bring those children back home.

While the Rohingya are fleeing persecution, the Bangladeshis are trying to escape deep poverty. A high proportion of the poor in Bangladesh are children, and the incidence of poverty among children is invariably higher than in the adult population. The long run impacts and irreversibility of poverty suffered during childhood are well documented in terms of nutrition, stunted growth, delayed school enrolment and reduced grade completion. Story of Absaruddin and other stranded children clearly reminds us to address child poverty comprehensively despite gains made by our country in combating abject poverty as a whole.

Recently, South Africa's Archbishop and Nobel Peace Prize laureate Desmond Tutu called for international aid to Myanmar to be linked to the plight of the country's persecuted Rohingya Muslim minority. He suggested international community to adopt a common position making funding the development of Myanmar conditional on the restoration of citizenship, nationality, and basic human rights to the Rohingya. His call is very significant and international community must make Myanmar accountable to address basic human rights issues.

Rights of the children must be realised including rights of minority children of Myanmar.

THE WRITER IS A HUMAN RIGHTS WORKER.

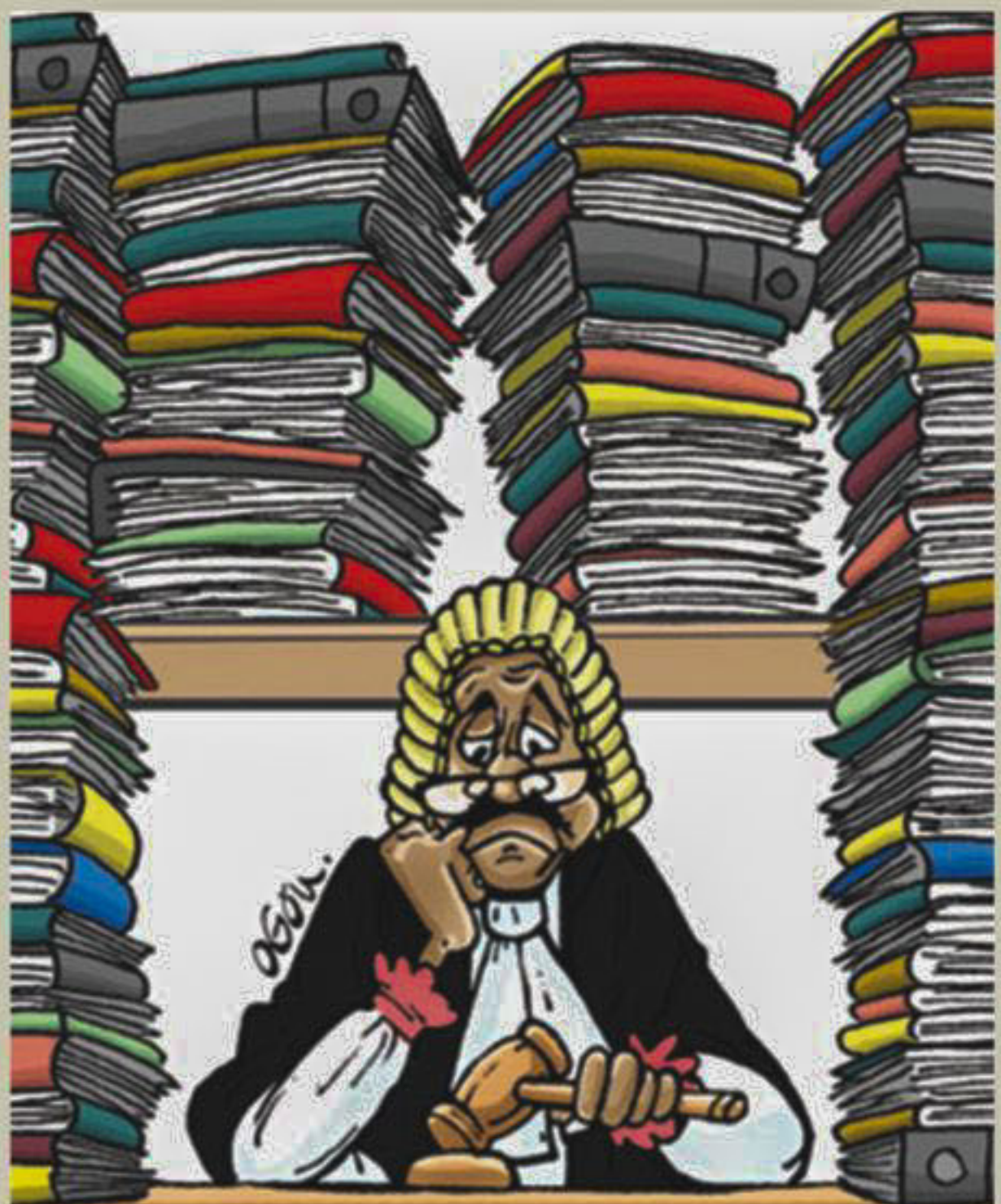
COURT CORRIDOR

Let's generate clerkship institution

SAIFUZ ZAMAN

BENGALI educated class have typical aversion to the word "clerk" and the class it denotes, so to appease their anxiety we would like to clarify at the beginning that, contrary to the word "clerk" is used, law clerks do almost no clerical jobs. The institution of law clerkship originally developed in the United States. In 1882, US Supreme Court Justice Horace Gray appointed a new law graduate as "secretary," and almost instantly the practice was greatly welcomed by other judges and these secretaries—later termed as law clerks—have become indispensable to the US judges ever since. They are bright young men and women in their 20s, fresh out of the top law schools, trained in cutting-edge developments in the law, provide research assistantship to a single judge mostly for one or two years.

The most compelling reason for the exponential rise of clerkship institution in American courts—and later in other countries' courts was the increasing workload during the industrial growth occurring at the late nineteenth century. By doing the "drudgery of judging," law clerks helped the judges effectively reduce their judicial time invested in every case. With almost 2.9 million pending cases, Bangladeshi judiciary has been suffering from a colossal caseload. The bleak side of this statistics is that in 2.9 million cases, justice is pending. Our judiciary has considered a multitude of strategies to tame this monstrous caseload, even making the



number of judges "at least double" has been expressed in a "five-pronged strategies" by the Honorable Chief Justice Surendra Kumar Sinha. But no one ever considered introducing the clerkship institution which is an effective antidote to caseload in many countries. Mr. Chief Justice offered a statistics that if all administrative business and meetings are not held during office-hours, backlog of cases will be reduced "by an extra 10%." But if we offer extra time to Judges' by providing them two law clerks, how much backlog will it reduce?

Though we cannot precisely fathom the backlog that law clerks could reduce if we introduce the institution in our judiciary, we can inform our readers what duties they perform in the court of other countries. The duties and responsibilities of law clerks depend on multiple factors, such as the court, the judges, and even on the season of the year. But universally law clerks perform research and related works. They read case files, prepare case summary and notes, chronology of events, find legal questions in the fact, search for case laws, articles, papers and other materials, sit in the court during hearing and take notes of arguments, crosscheck the references used in judgments, and any other job his judge may entrust upon him. Sometimes they help the judge prepare speeches and academic writings. By doing these, they save valuable time of a judge, and thus, by saving their time—to rephrase the old adage—law clerks save the judges' lives.

In contrast, a bulk of the time of our judges' life is spent in doing research work for each individual case, especially in appellate cases. They alone have to perform all of the tasks we mentioned above, which is, to say the least, a waste of judicial time. On this count, our judges are falling behind their counterparts in India and Pakistan where law clerks successfully provide research assistantship to judges in both Supreme Court and High Courts. In India, law clerks are called "law clerk-cum-research assistant," who are selected through a highly competitive National Level Written Examination. In Pakistan, the system is taken to be a policy of "inducting fresh blood into the system."

As clerkship is a performance-based job, the demand for better performance will eventually push law schools and related institutions into pressure to ensure quality education. When law school produces skilled graduates, it is obvious that these graduates as law clerks will keep our court abreast with cutting-edge research into law.

Now we will consider two important arguments that may arise against clerkship institution. Firstly, a legitimate question regarding the quality of law graduates—from whom law clerks are to be selected—can be raised. We argue that in every year we appoint assistant judges from these same young men. If we appoint them as judges, then why not as law clerks? As a clerk, they are not writing judgments, they are just providing research assistance to the judges. Secondly, it is a concern that law clerks may influence judge's decision and the legal process. We do not deny that there is truth in the objection. But law clerks being like the apprentice in Goethe's The Sorcerer's Apprentice, the scope of their influence in judgment as well as legal process are limited. Apprentices can do many things on their own, but can never go beyond their master, in our case their judges.

A robust clerkship institution can be the better cure to our judiciary's caseload problems. It can also be a good help to our judges—the "lone rangers" in our fight against injustice.

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