"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 • dslawdesk@yahoo.co.uk

RIGHTS ADVOCACY

LEGAL STATUS OF *Bihari community*

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THE Urdu-speaking community living in Bangladesh, popularly known as *Biharis*, does not refer to a distinct group of people easily identifiable by race, religion or physical characteristics. The case of *Bihari* community in Bangladesh is different from the other minority groups. This community primarily focuses on a geographical location of Indian state of Bihar.

Biharis are non-Bengalees, who are waiting to repatriate to Pakistan. Those stateless people are living in refugee camps in Bangladesh without proper nutrition, poor drainage and sanitation systems, education and health care facilities. Usually *Bihari* community in Bangladesh falls under no conventional identity or category of international standard. The 1951 Refugee Convention declares that everybody has national identity; so the United Nations really needs to work hard to make it true.

Sir Humphrey Waldock, former President of the International Court of Justice (ICJ), once stated that "all of them should be adequately assisted and protected by international law and institutions." According to article 15 of the Universal Declaration of Human Rights (UDHR), everyone has a right to a nationality and that no one shall be arbitrarily deprived of his nationality. But *Biharis* in Bangladesh are currently de-facto stateless and in need of an effective citizenship. Under the tripartite agreement of 1974 between India, Pakistan and Bangladesh, Pakistan agreed that all persons who were employed in Pakistan Government service could be repatriated to Pakistan. After the agreement, Pakistan felt no legal obligation to grant citizenship to those *Biharis* who did not fall under the categories enumerated in the tripartite agreement.

In 2003, in the landmark decision of the Supreme Court of Bangladesh in *Abid Khan and others* v *Bangladesh* held that the ten Urdu-speaking petitioners born both before and after 1971, were Bangladeshi nationals pursuant to the Citizenship Act of 1951 and the Bangladesh Citizenship Order of 1972, and thereby the court directed the Government to register them as voters.

The right to return to one's own country is provided in article 9 of the UDHR, which prohibits arbitrary arrest, detention or exile. The office of the UN High Commissioner for Refugees is primarily responsible for pursuing repatriation agreements. Since most of the *Biharis* want to go back to Pakistan, the UNCHR could play a vital role to restart the repatriation programme.

Few important provisions on this issue like articles 34 and 134 of the Fourth Geneva Convention of 1949 are very clear about the right to leave and repatriate to last place of residence. These legal provisions state that all protected person who may desire to leave the territory to the outside or during a conflict shall be entitled to do so. In this regard, the contracting parties are mandated to ensure of all internees to their last residence or to facilitate their repatriation. However, an ongoing debate on the legal status of *Biharis* – whether to be determined as refugees under the Fourth Geneva Convention – is a vital question for taking into consideration by the concerned states because of their de-facto stateless status.

At present, more than 300,000 *Biharis* are living in various camps in Bangladesh. Still their citizenship issue is unclear. The question of *Bihari* citizenship is getting ignored in the name of repatriation. In this situation, Bangladesh which is already overburdened with managing Rohingya refugees, can start again the process of repatriation of *Biharis* to Pakistan for achieving durable solution.

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LAW LETTER

Voice for child domestic help

National cricketer Kazi Shahadat Hossain was denied bail and sent to jail on 13th of October, 2015 after completion of a three-day remand in the case filed for torturing his 11-year-old domestic help Mahfuza Akhter Happy. Prior to his indictment, the incident had received widespread attention through social media; the outcry subsequently led also to the arrest of his wife on charges of maltreatment of the household help.

This brings the question, what of Bithi, the child household help from Satkhira? Memories of the readers must have faded away since the news got published in The Daily Star on August 21, 2015. The accused judicial magistrate of Satkhira was stripped of his powers after a 10-year-old girl who bore marks of injuries was rescued from his residence. Is stripping of judicial power enough?

As appeared in the media, while working in the house of a Judicial Magistrate in Satkhira, the child apparently endured great physical and mental torture but her ordeal only came to light when she was found crying for water from the balcony of the house. Police later rescued her with the help of locals and found that different parts of her body bore many marks of injuries, including burn and beating. Child domestic helps are most vulnerable groups of extreme poor and they are often denied access to justice. This girl from Satkhira is no exception.

The accused, however presented a different version of the story. He claimed that the marks resulted from a fall on the bathroom floor and electrocution. Even if the statement is correct, isn't he guilty of criminal negligence?

Moreover, there is an apparent violation of directives provided by the High Court Division in Writ Petition No. 3598 of 2010. A bench comprised of Justice Md. Imman Ali and Justice Sheikh Hassan Arif directed: "In order to make the provision and concept of compulsory primary education to be meaningful, we direct the government to take immediate steps to prohibit employment of children up to the age of 12 from any type of employment, including employment in the domestic sector, particularly with the view to ensuring that children up to the age of 12 attend school and obtain the basic education which is necessary as a foundation for their future life."

Oli Md. Abdullah Chowdhury
Human rights worker

GLOBAL LAW UPDATES

PIL on 'Marital Rape' dismissed in India

A Public Interest Litigation (PIL) seeking quashing of exception to section 375 of the Indian Penal Code that exempts sexual intercourse or sexual acts by a man with his own wife, she not being under 15 years age from the definition of rape, was dismissed by Kerala High Court last month on 28 October 2015.

Sitting in a Division bench of Kerala High Court, Chief Justice Ashok Bhushan and Justice A M Shafique dismissed the PIL saying that the Parliament in its wisdom has exempted marital rape from the definition of rape with regard to prevailing circumstances in the country. Therefore, the Court cannot see it as arbitrary and strike it down as violative of constitutionally guaranteed fundamental rights.

The State had contended that though there is prohibition for child marriages, being a country of such diversity, child marriages are still happening which can be curbed only by creating awareness among the public at large. It said that most of the villagers in and around India are illiterate people who are not even aware of the restrictions imposed under various statutes and they continue with the custom and practices that are being followed over a long period of time and provisions being made under various statutes to prevent child marriages cannot be treated in comparison with an offence of rape.

This public interest litigation was filed by a lawyer practising before Kerala High Court pointing out certain inconsistencies in the statutory provisions specially the punishment imposed for committing sexual intercourse with minor female. "A person, who had married a girl and had sexual intercourse with her, if she is above the age of 15, is not treated to be rape. Whereas, sexual intercourse with or without the consent of a girl aged below 18 years is considered to be rape", the petitioner had highlighted the dichotomy in section 375. However, the Court said that the restrictions imposed by the statute for a legal marriage cannot be equated with a penal provision under the Indian Penal Code. "The drafters of Indian Penal Code were conscious about the customary practices, the religious rituals and the ground realty in such a vast country where people live in diverse situations having different cultural and social background and had consciously created an exception to the general rule in regard to rape", the Court held and wrote in a 5-page verdict.

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LAW VISION

DIGITALISATION OF COURTS

IMRAN ANWAR

PERHAPS the biggest challenge for the judiciary in the country is to reduce the delay in the court process and remove the backlog of cases. The judiciaries in most countries however face similar problems. Cost, delay and complexity in the court system were identified in the UK as the major problems with civil justice process in 1997, which eventually resulted in the subsequent reforms and the overture of the Civil Procedure Rules (CPR), 1997.

In Bangladesh, the digitalisation of courts, primarily with an aim to remove the backlog of cases, make the justice process swift and keep abreast with the fast-moving world, started in 2009. Not only that the digitalisation of court is 'environmentally friendly', but also it ensures quick disposal of existing cases. Digitalisation of court is a broad term and may be understood as referring to digitalisation of both records and court process. As part of the digitalisation process, the court documents – if hand-written or computer composed – have to be scanned and produced in a portal, which should be password secured in case of private and confidential information.

A lot of information, however, has to be made public for the better access to justice and facilitate the litigation process and outcome. This can be ensured by uploading every court order in the respective portals or websites. Search terms should not be confined to case numbers and may extent to contents of the documents including the names of the parties to a particular case. Thus the court records must be scanned, indexed, catalogued, archived and at times hyper-linked in order to navigate through the available materials.

However, the benefit of digitalisation can be accrued by litigants only if the online citation is taken by the courts as authoritative as paper references in case law journals. The digital system therefore has to be taken as effective on the parties to whom the orders are addressed, such as the prison authority who should be able to release a prisoner based on the order found online in the appropriate portal. While digital records are normally free of charge and accessible without restriction, a proper regulation of digitalised court system would ensure that only appropriate authorities are capable of making necessary changes, such as amending or uploading court orders, in the portal with a view to preventing online fraud.

As far as the digitalisation of process is concerned, the litigants should be able to keep themselves updated with court schedules online. Filing of cases and submitting e-documents will reduce the pile of papers in lawyer's chambers and court offices. This will consequently increase efficiency and reduce delay and complexity.

Witness depositions may be recorded and in cases of urgency video recording of witness testimony may be admitted. This will fill the time gap of witness summoning, rendering the disposal of cases quicker. In addition, the case filing and management process, if found online through a digitalised system, will become more transparent and automatic, thereby reducing the possibility of individual adverse influences on a particular case.

However, what is more difficult than the concept of digitalisation is its implementation. It will overturn hundreds of years practice in legal arena which is heavily reliant on paper based model. This will require uninterrupted internet connection throughout the courts and appropriate training for the judges and staffs for the new system. It will be difficult at the outset to make everyone familiar with the digitalised court system, for the concept is relatively new and requires technical knowledge; also it will start off as costly.

It is indeed a matter of great success that the digitalisation of courts in Bangladesh has already started, while many western countries are still in the process of transformation to the digital model. The daily 'cause list' of both High Court Division and Appellate Division cases can now be found in the website of Supreme Court of Bangladesh together with the judgment and orders in the same place, allowing litigants and lawyers to access the requisite materials themselves. It will take time before the entire court system becomes digital. There are some upcoming websites which are trying to compile all the precedents and judgments of the Supreme Court. Until then, the lawyers, litigants and judges should adapt to the new system and provide constructive feedback for the better management and development of the digital model. Those days are not far for the judiciary of Bangladesh when it should all start with a mere click of the mouse.

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RIGHTS WATCH

The plight of minorities in criminal justice systems

IN criminal justice systems, minorities face discrimination ranging from excessive and sometimes lethal use of force, torture by police, to longer periods of stay in pre-trial detention, discrimination during judicial procedures and biases influencing sentencing, according to the UN human rights expert on minority issues.

"The disproportionate targeting by law enforcement officers of individuals for identity checks, stop and search or other forms of coercive or privacy invasive police powers which are related purely to identity-based minority group characteristics, continues to take place around the world," said Rita Izsák, the UN Special Rapporteur on minority issues.

Presenting her fourth report to UN General Assembly's Third Committee – the Organization's main body dealing with social, humanitarian and cultural issues, Ms. Izsák assessed the situation of the human rights of persons belonging to national or ethnic, religious and linguistic minorities in the various stages of the criminal justice process, from before arrest through to sentencing.

"The Special Rapporteur is alarmed by the many allegations that she has received of human rights violations committed against minorities in the administration of criminal justice, owing to their minority status," the report said.

The report highlights the following areas of concern for minorities in the administration of criminal justice, including: excessive and sometimes lethal use of force, torture or other ill treatment by police, including in detention; the overrepresentation of minorities in pre-trial detention, and longer periods of stay in pre-trial detention; discrimination against minorities during judicial procedures; and biases influencing not only on the outcome of a criminal trial itself, but also on sentencing for accused minorities.

"Although remedying the discrimination that minorities face in criminal justice system is not an easy task," the expert said, "it is paramount that States address the underrepresentation of minorities in law enforcement agencies, including judiciaries, prosecution services and legal professions."

Saying that measures to eliminate discrimination and ensure equality before the law are more likely to be effective if undertaken with a minority rights-based approach, the report outlined a series of recommendations to address discrimination in the administration of justice.

Ms. Izsák was appointed as Independent Expert on minority issues by the Human Rights Council in June 2011 and subsequently her mandate was renewed as Special Rapporteur on minority issues in March 2014.

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