



# DARUL IHSAN CASE AND LLB

## Directives or Obiter Dicta?

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**Had the HCD envisaged all of its observations to be directions and not observations in the form of obiter dicta, then it is quite plausible to think that it would not have kept open the option for discussions.**

THE 13 writ petitions relating to the management of internal and external affairs of Darul Ihsan University (DIHU) which has led the High Court Division (HCD) of the Supreme Court to declare DIHU's academic activities as illegal; has in recent times been widely commented upon. The issues in the petitions mainly revolved around three key areas, namely: the dispute over the control of the Board of Trustees of DIHU between four contending factions, the appointment of the VC, and the operation of outer campuses of DIHU. The petitions depict a very sorry state of affairs in the management of DIHU. The issuance of memos and then sometimes the disowning of those memos by concerned officials of the Ministry of Education and their subsequent inaction compounded the problem. The HCD has very rightly noted that had the Ministry of Education and the University Grants Commission acted promptly, the issues could have been sorted out much earlier and that would have served everyone better. The HCD has very appositely determined that the disputed questions of ownership and control of the Darul Ihsan Trust and DIHU Trust are not amenable to its writ jurisdiction and rightly declined to adjudicate on them. In any case, they are beyond the scope of this brief write-up and this would only focus on the HCD's observations regarding the LLB (Honours) Programme administered by private universities.

The direct nexus between the directives regarding the LLB (Honours) programme run by private universities and the directives issued by the HCD is the Writ Petition no. 10398 of 2013. In this writ petition, some LLB (Honours) degree holders from DIHU sought the relief against the denial of the right to sit for the examination for enrolment as advocates conducted by Bangladesh Bar Council (BBC). At the outset, it would be submitted that the observations of the HCD in this regard have been misconceived by many. The HCD in the course of disposing of this writ petition has implied that many of its directions are in the nature of *obiter dicta*. This is clearly implied in the following words of the judgement: "[W]hen this Court [HCD] sits in

Constitutional jurisdiction and a Constitutional issue is brought to the notice of this Court in course of examining the other issues raised in a writ petition, it becomes this Court's bounded duty to make pertinent observations, albeit by way of obiter dicta, towards the Legislature in considering as to whether any law requires to be legislated for the interest of the nation and also guiding the executives to the right path." (At page 104 of the unreported judgement)

This point would be a *fortiori* if we read the

to be directions and not observations in the form of *obiter dicta*, then it is quite plausible to think that it would not have kept open the option for discussions. It is undisputed that judgements are to be obeyed, they are not left to be discussed with the parties on whom they are supposed to be binding.

The observations of the HCD regarding the LLB (Honours) Programme administered by private universities are quite lengthy and analysing them would take space far beyond that which is possible to take within the limits of this

is incomprehensible as to how an annual admission policy would be feasible. The envisaged control of the BBC over the admission process is clearly the outcome of a noble desire to uphold the integrity of admissions into and the award of LLB (Honours) degrees. However, there should be alternative ways to achieve these laudable objectives rather than impinging upon the institutional autonomy of universities. It may be pertinent to mention here that the Article 10(i) of the *Bangladesh Legal Practitioners and Bar Council Order, 1972* vests in the BBC the functions to take measures to 'promote legal education and to lay down the standards to such education in consultation with the universities in Bangladesh imparting such education' (emphasis added). A plain reading of the aforementioned Article indicates that the Parliament has intended an indispensable consultative role of the Universities regarding any measure impinging on legal education and thus, the BBC has not been envisioned as the sole or ultimate regulator of legal education.

It would also be humbly submitted that by the declaration that 'a degree in law' would mean *inter alia*, an LLB (Honours) course run by any Bangladeshi public university or any private university with a 'clearance certificate' from the BBC, a pointed distinction has been drawn between public and private universities and the basis for that distinction has not been substantially corroborated except for the fact that many (though not all) private universities allegedly award below par LLB (Honours) degrees. It would be submitted that an even more fundamental issue worth pondering would probably be, whether these observations with far-reaching impacts are in the nature of *obiter dicta* or mandatory directions. And whether the issues discussed above should ultimately be regulated through the directions of the HCD or would they be better regulated through Parliamentary legislation. It is accepted wisdom for centuries that the latter is by its inherent nature the outcome of a much more deliberative and democratic process (at least theoretically) involving all the stakeholders.

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following observations of the HCD: "It is expected that private universities with good reputation, both locally as well as internationally, such as North South University, Independent University, Brac [BRAC] University and a few more private universities, would be happy with the introduction of this system by the BBC. However, if appropriate suggestions are put forward by them, the same may be discussed in the forum of Legal Education Committee of the BBC." (At pages 99-100 of the unreported judgement)

newspaper essay. Hence, we look at some of the observations regarding the admission process. It would be respectfully submitted that the direction that the admission process should be controlled by the BBC does not sit well with the academic freedom of universities. It would also be respectfully submitted that the admission process in comparable disciplines such as medical and dental professions is regulated by a central authority because they are examinations for entrance into colleges, not universities. Again, most if not all private universities run their courses on a trimester system and hence, it



## Bangladeshi dream: a legalis sententia

'American Dream' basically refers to the belief of American people with regard to attainment of their own version of success in an 'upward-mobility' society. Like Americans, "We, the people of Bangladesh" have our own dream. We historically term it making 'Shonar Bangla'. Our 'Bangladeshi dream' can be described and analysed from different perspectives - the one of which is the legal one presented in this piece.

In the backdrop of colonial powers, from time immemorial, the people of Bangladesh have been struggling to be the 'master of our own fate' and 'captain of our soul'. The instance of this struggle is evident in the historical fact of 1971's liberation war which reflects the legitimate exercise of the peoples' right of self-determination. One can find the legal endorsement of this right in the 1971 Proclamation of Independence and the preamble of the 1972 Constitution.

To materialise the dream of the mass people, our founding fathers, i.e. the members of the Constituent Assembly, wrote in the Preamble of Constitution that the fundamental aim of the State is "to realise through the democratic process a socialist society, free from exploitation a society in which the rule of law, fundamental human rights and freedom, equality and justice, political, economic and social, will be secured for all citizens". This can emphatically be said to be the legal illustration of the 'Bangladeshi dream'.

Former Chief Justice of Bangladesh, Mr. Justice Latifur Rahman in his book *The Constitution of the People's Republic of Bangladesh with Comments & Case-Laws* has eloquently written about economic and social justice. To quote him,



"economic and social justice means, to remove economic inequalities to provide a decent standard of living to the working people and to protect the interest of the weaker sections of the people in the society." Justice Mr. Badrul Haider Chowdhury made it very clear in the Eighth Amendment Case decision that this concept of 'Rule of Law' contained in the Preamble, which is also a mandatory component of our Bangladeshi

dream and constitutes the basic structure of our Constitution. According to the above mentioned case, the amendability of the Preamble is rigidly protected and it can only be done by the people at referendum. This only purports to mean that our 'Bangladeshi dream'

can only be altered or amended by the direct participation of people at large. However, we have yet to achieve the dream that we had constitutionally pledged for ourselves. Rather the realisation of human rights has become a matter of concern in fulfilling the 'Bangladeshi dream'. At different transition points of history of democracy and justice, we have been

misled and as an apprehensible upshot, we are out of track. Our freedom fighters did not sacrifice their lives for this. We have time-honoured the emergence of a capitalist society to the highest extent which is exactly in opposition to our dream to build a socialist one. The upper class of the society is taking advantage of the lower class. Law and order system has been tampered in a way that it will take a lot of time to bring back everything on the right track. During the Constituent Assembly debate, there was extensive debate on the issue of justiciability of socio-economic rights in our constitutional framework. Making the excuse of 'resource limitation', the State for many years is not making the socio-economic rights to be judicially enforceable. In many cases, after 45 years of adopting the Constitution, our State is even failing to provide its citizens with the civil and political rights such as right to fair trial, equality before law, etc. as guaranteed by our Constitution.

Undoubtedly this is not the dream we were meant to cherish and pursue. We are taking our frustrations regarding faded dreams for granted which can never be a gateway to excellence. So as to put together and build up our nation, we must all go beyond our own expectations. A better Bangladesh is possible, indeed! Md. Azhar Uddin Bhuiyan Student of Law, University of Dhaka

## Olympics and right to protest

A judge blocked a provision in a law that has been used to throw antigovernment protesters out of Olympic venues, clearing the way for renewed political chants and messages at Games sporting events.

Federal Judge João Augusto Carneiro Araújo ruled that expelling protesters from Olympic venues violates the right to free expression, which is guaranteed in Brazil's constitution. According to Brazil's Olympic law, which bans political demonstrations at venues, spectators can't "use flags for ends other than festive and friendly displays."

A number of spectators were expelled from events in the opening days of the Rio Games for displaying antigovernment slogans. Much of the ire has been directed at Brazil's acting President Michel Temer, who backed impeachment proceedings against suspended President Dilma Rousseff, who is currently on trial in the Senate. The Federal Government appealed the injunction, but decided to drop its move last Tuesday. A spokesman for the federal court said

that neither the International Olympic Committee nor the Rio de Janeiro State Government, both of whom were also implicated in the ruling, have appealed, but they could still do so.

The injunction will allow "people inside the stadiums to demonstrate peacefully through the use of signs or shirts, or other means that do not disturb the peace," according to the spokesman.

Rio 2016 organizers said that they would honor the ruling, but will still ask for it to be reconsidered.

In his decision, Mr. Araújo wrote that interpreting the law to restrict peaceful political protest is "an affront to the inviolable core of the fundamental right to freedom of expression."

He said any violations of his decision to allow protests to continue would result in fines of 10,000 reais (\$3,165).

A similar measure restricting protest in World Cup stadiums was upheld by the Supreme Court when Brazil hosted the tournament in 2014. At the time, Justice Gilmar Mendes noted that the right to free expression wasn't "insusceptible to

restriction." The Olympic Law was approved in May by Ms. Rousseff, who was suspended from office two days later. The protest restrictions were passed to support so-called Rule 50 of the International Olympic Charter, which prohibits political, religious or racial "propaganda" at Olympic venues.

The Olympic Law, like the World Cup Law, contains a package of measures designed to protect the Olympic Committee's brand and commercial interests, as well as codes of conduct for the venues. The same article of that law that limits the use of flags is qualified to protect "the constitutional right to free expression."

"I hope everyone understands that the Games should not become a platform for political debate," International Olympic Committee spokesman Mark Adams said. "I think a lot of people appreciate that. But absolutely, we respect the rule of law."



## Exercising judicial mind

OLI MD. ABDULLAH CHOWDHURY

A MIDST a time of turmoil testing our unity, a good news on rights and justice appeared in the front page of The Daily Star on August 11, 2016. It was about the recent *suo moto* rule issued by a bench of high court on public humiliation of Narayanjanj school teacher Shyamal Kanti Bhakta. It brings renewed hope for human rights defenders as they struggled to ensure justice for the victim head teacher. Earlier, there was little hope as the investigation officer made a report without implicating the masterminds responsible for the degrading treatment of the headmaster of Piyar Sattar Latif High School in Narayanjanj. Interestingly, senior

wherever he may be, and of every other person for the time being within Bangladesh, and in particular no action detrimental to the life, liberty, body, reputation or property of any person shall be taken except in accordance with law'. This *suo moto* rule has truly reflected the spirit of fundamental rights enshrined in the constitution of People's Republic of Bangladesh.

Moreover, constitution has provided high court controlling power over all courts and tribunals subordinate to it. 'The High Court Division shall have superintendence and control over all courts and tribunals subordinate to it' - said in Article 109 of the constitution. One of the observation made by the bench is that judicial magistrate in



judicial magistrate in Narayanjanj accepted the police report. In the *suo moto* rule, the bench of high court not only rejected the probe report, but directed chief metropolitan magistrate of Dhaka to conduct a fresh inquiry in order to find out the offence committed in its entirety and identify the real perpetrators.

It has been stated in Article 27 of the constitution, 'All citizens are equal before law and are entitled to equal protection of law'. It has further been stated in Article 31 'To enjoy the protection of the law, and to be treated in accordance with law, and only in accordance with law, is the inalienable right of every citizen,

Narayanjanj accepted the police report without properly applying judicial mind. "Psychologists have learned that human beings rely on mental shortcuts, which psychologists often refer to as 'heuristics,' to make complex decisions. Reliance on these heuristics facilitates good judgement most of the time, but it can also produce systematic errors in judgement"- observed in Inside the Judicial Mind published by Cornell Law Faculty Publications.

Good thing is that a fresh inquiry has already been ordered.

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