"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

Eminent domain: Has the doctrine become futile?

LAW OPINION

K. SHAMSUDDIN MAHMOOD

People having legal title to lands are only eligible under the Land Acquisition and Requisition of Immovable Property Ordinance, 1982 for compensation which is not always adequate and there is no provision to provide assistance to the affected people to move or settle elsewhere.

THE power of the sovereign entity to take over or appropriate any land within its jurisdiction for any purpose that it seems necessary or beneficial would come under the doctrine of eminent domain. In other words, governments have the power and authority to appropriate land within their own borders for whatever use or uses that they see fit. However, in line with Fifth Amendment to the Constitution of the United States, most of the modern States used to place an important limitation on the power of eminent domain by adding a proviso in their legislative enactments that no private property be taken for public use, without paying just compensation.

Nevertheless, ironic though, seizing of private property for government use date back to colonial period, be that America or British-India. Colonial governments would appropriate private property to develop roads, accommodate their military and obtain numerous goods often even without compensating the owner and just compensation was not legally required as many believed that it was the duty of the property owner to forsake his property for greater good of the community. The principle of 'eminent domain' is the eventual outcome from such frustration that led to the incorporation of the clause of Bill of Rights in US Constitution in the 17th century.

Review of three landmark cases on eminent domain principle in the US will show that all of them resulted in the loss of private citizens property and how an abuse of power in relation to the application of eminent domain principle has expanded. In *Barman* v *Parkers* case, the property in question was in Washington DC, which is technically not considered as a state of USA and as such, over that area the Congress has such powers that were traditionally known as 'police power'. The Court in the District of Columbia opined that the requirement of having 'public purpose' did not exist in the taking of Barman's property and was therefore constitutional, since the redevelopment plan came from Congress. It seems they ignored the duty of the Court as the supreme judicial branch to interpret whether or not Congress is legislating in a constitutional manner and the fact that passing an Act by Congress (such as the Redevelopment Act of 1945) does not automatically guarantee that the Act is either in the best interest of the public or constitutional for that matter.

In the case of *Hawaiian Housing Authority* v *Midkiff*, the Hawaiian State Legislature passed the Land Reform Act, 1967 to seize property from 72 land owners who used to own around 51% land in the island by applying the principle of eminent domain and then sell them to those who were not able to buy property but to rent only. The Supreme Court endorsed such action holding that it would satisfy 'public purpose', but the provision only provides a guarantee that property will be used for public use only, thus 'use' is the term that is protected. However, the Court seems to employ the terms 'use' and 'purpose' as synonymous, but in fact, they are not and actions of the authority was endorsed by the Court on the basis of fulfilling of a public purpose or intent of the government, which is a flagrant attempt on the part of the State of Hawaii to take private property of someone and transfer it to others solely for their private use and benefit.

In the recent past too, in *Kelo* v *City of New London* case, the Supreme Court ruling (5:4) endorsed that economic development also qualified as valid public use. The dissenting judges were inclined to distinguish between the term 'use' and 'purpose'.

In the Indian sub-continent, there seems to be a clear trend on the part of the judiciary to come forward and mitigate the gap between legal requirements towards development and private rights. The Land Acquisition Act 1894 in India and the Land Acquisition and Requisition of Immovable Property Ordinance 1982 in Bangladesh grants governments with the power of having right of eminent domain. Above laws do not specifically include acquisition of land for a private company as a 'public purpose'.

However, in the last few decades, governments have been able to use the power of eminent domain to buy land for private industry by interpreting 'public purpose' to encompass development and industrialisation. But, judgments given by the Supreme Court of India that tend to uphold local peoples interest and struck down a number of acquisition moves by the government by holding that the manner of government's exercise of power (in terms of section 17 of the Land Acquisition Act 1894) are not tenable in law and in fact, those judgments along with widespread protests across India to some extent

bring land acquisition to a halt.

Acquisition of land from farmers in '*Singura*', in West Bengal of India raised a debate whether the principle of eminent domain should at all be used to get land for private companies. But, the Apex Court has opined that an attempt by the State to acquire land by promoting issues of public purpose to benefit a particular group of people and serve particular purpose at the cost of the interest of a large section of people, would defeat the very concept of 'public purpose'.

From Bangladesh perspective, the legal instrument to appropriate lands through eminent domain is the Land Acquisition and Requisition of Immovable Property Ordinance 1982. People having legal title to lands are only eligible under this law for compensation which is not always adequate and there is no provision to provide assistance to the affected people to move or settle elsewhere.

To bridge the gap that exists between a weak legal regime of land acquisition and the issues of resettlement of affected people, it has been seen in the recent past, the Bangladesh government has come forward to implement projects that safeguard the affected ones. In case of both Jamuna and Padma Bridge projects, the government realises that compensation alone but rather restoration of affected people's livelihood is also equally important. Be that as it may, controversy around the principle of eminent domain is as strong today as it was years ago. What is called for is to stop abuses of power by government officials in the application of the doctrine before it goes any further.

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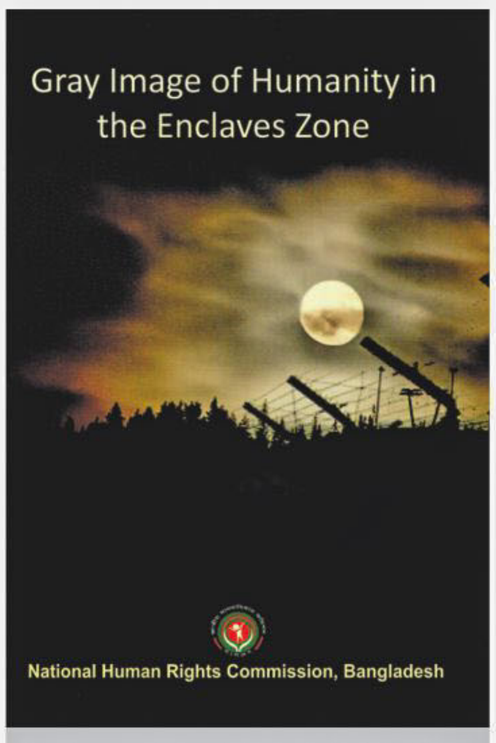
BOOK REVIEW

Ballad of 'enclaved' humanity

MOHAMMAD GOLAM SARWAR *and* EMRAAN AZAD

LET'S imagine a scenario where a husband with his pregnant wife is denied by the border security personnel to cross the border in the dark hours of mid-night, only because they do not have any valid identity card or citizenship of a particular country to visit the medical center on the other side. Imagine a scenario where population of a particular territory for meeting daily needs has to follow a 'time-fixed' twelve-hours (restrictive) freedom of movement in order to visit its own territory walking through a 'foreign territory', i.e. the corridor of another state. For them, the entitlement to use the passage of corridor living in the forgotten lands of enclave is not a matter of 'right', but of 'day-dream'.



Gray Image of Humanity in the Enclaves Zone
Sushmita Choudhury and Maria Hussain
Dhaka: National Human Rights Commission, 2013. 48 pp.

The current book under review titled Gray Image of Humanity in the Enclaves Zone, jointly authored by Sushmita Choudhury, IVLP alumna USA and former Human Rights Program Specialist, Relief International-USA (Bangladesh Country Office), and Maria Hussain, Lecturer at the University of Dhaka, explores such inhumane scenarios with umpteen practical references to the problematic human rights issue of the Bangladeshi population 'enclaved' within the territory of India. Published in 2013 by the National Human Rights Commission of Bangladesh, the book is an outcome of empirical research conducted in some of the enclaves of Bangladesh and India, namely Kochua, Falnapur, Masaldangja and Nolgram.

Factually, the problem of enclaves had been in existence since the partition of British India in 1947. Immediately after the liberation war of Bangladesh, the then independent government ratified the Land Boundary Agreement in 1974 through a constitutional amendment to accommodate the implementation of it. India took almost forty-one years to ratify and eventually implement the same. However, since 2015 at the completion of 'enclaves-exchange', Bangladesh and India have now the control of governance over their respective enclaves.

The celebration of 'enclaves-exchange' is already meant to bring stability and peace in the friendly relations of Bangladesh-India. The plight of the 'enclaved' population encountered during the pre-exchange years, should also be remembered to respect their saga of sufferings. Considering this, the present book explores how the population of enclaves used to face problems while enjoying their basic human rights. This work also depicts how traditionally the issue of enclave had been ignored by the state authority. A historical reference shows that these enclaves once used to be treated as 'currency' in a series of chase game between the Maharaja of Kuch Bihar and the Maharaja of Rangpur (p. 11).

After setting out the historical background of enclaves (from pre-1947 till 1971) and related post-independence development, the book demystifies the idea of 'enclave territory' from a theoretical perspective of international law (pp. 11-28). The book then extensively explains the causes for the disempowerment of the enclaved population in the affairs of the society including politics, economics, culture and justice system (pp. 24-30). With case studies obtained from field survey, problems relating to the enjoyment of rights to education, health, work, vote and freedom of movement have also been highlighted in this book (pp. 35-46).

Besides featuring the enclave-related security threats and potential cross-border criminal movement, this book particularly presents the complex issue of citizenship (concerning the people of Bangladesh 'enclaved' in the territories within India) which remained an unresolved bilateral issue until 2015 settlement. The case-studies placed in this book relating to the denial of their right to nationality by the state establishment clearly show that they were citizens neither of Bangladesh nor India (pp. 27 & 30). The European University Institute (EUI)-funded study on the citizenship law of Bangladesh (December, 2016), authored by Professor Dr. Ridwanul Hoque has impliedly endorsed this finding that the enclaved peoples used to live in a situation of 'virtual statelessness'. Anyone can now assume that such a situation of statelessness had negative ramifications on the exercise of their civil, political and socio-economic rights.

As the scarcity of sufficient socio-legal research concerning the crisis of enclaved population of India-Bangladesh exists in the maximum books of international law written by authors with global repute, the present book seems to be an unorthodox research contribution in the field of human rights relating to the distress of those human beings.

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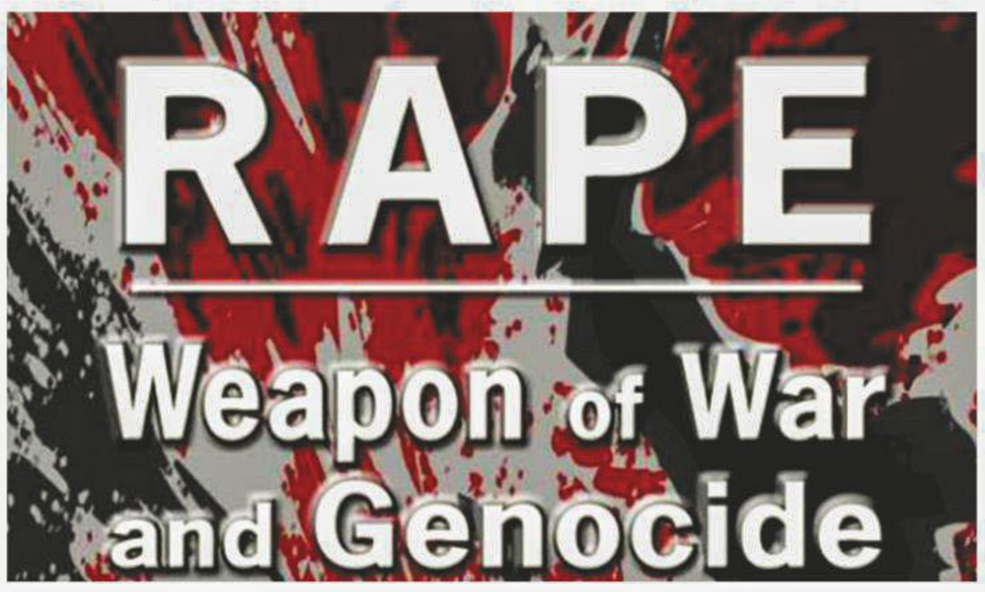
GLOBAL LAW UPDATES

Redefining rape in war crime

ON 4 January 2017, the Trial Chamber VI of the International Criminal Court (ICC) in the case of *Prosecutor* v *Ntaganda* came out with an extended interpretation of war crimes of rape and sexual slavery. The Court opined that it has jurisdiction over the crimes of rape and sexual slavery allegedly committed against the child soldiers who are the combatants from the same armed forces as the perpetrator. The ICC reasoned that the prohibition of rape has attained jus cogens status under international law. Rape is prohibited at all times, 'both in times of peace and during armed conflicts, and against all persons, irrespective of any legal status', and it does not, therefore, need to determine whether the victims were 'members' of the armed forces at the relevant time.

The Court rejected the argument of the Defence who suggested that such crimes would come within the ambit of domestic law and human rights, and were not covered by the war crimes prohibition.

The conclusion that members of the same armed force are not per se excluded as potential victims of war crimes is a very expansive interpretation of Article 8 of the ICC. According to Yvonne McDermott, the Co-Director of the Bangor Centre for International Law, the justification for the decision appears to be the widespread prohibition of rape and sexual violence under international humanitarian law. The Court considered that to limit the protection against rape to exclude members of the same armed group would be 'contrary to the rationale of international humanitarian law, which aims to mitigate the suffering resulting from armed conflict, without banning belligerents from using armed force against each other or



undermining their ability to carry out effective military operations.'

Given that there could be no military objective or justification to engage in sexual violence against any person, regardless of whether or not that person was a legitimate target under the law of armed conflict, the Court considered that the prohibition of sexual violence under international humanitarian law was not limited to certain categories of persons, and that anyone could be a victim of this war crime.

This decision is clearly founded in a desire to offer the greatest level of protection to victims of sexual violence in armed conflict, regardless of their status. A similar argument was made in the ICRC's updated commentary to Common Article 3 of the Geneva Conventions, which stated that 'all Parties to the conflict should, as a minimum, grant humane treatment to their own armed forces based on Common Article 3.'

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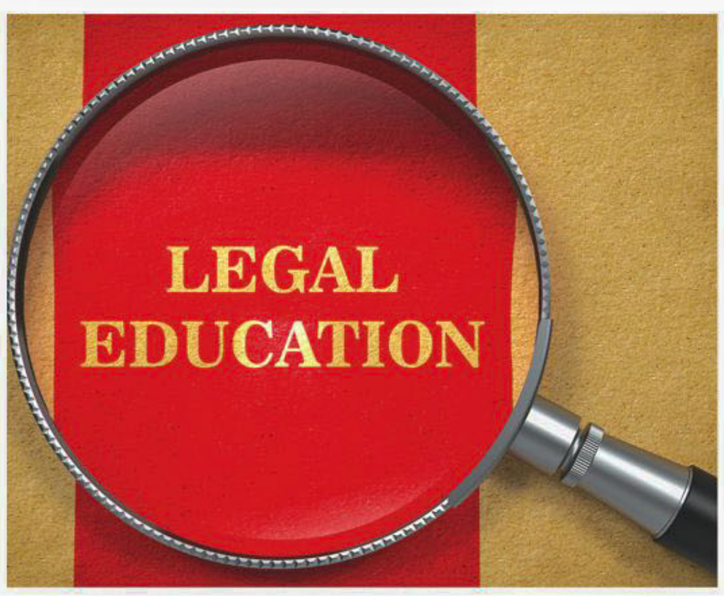
LAW LETTER

To bring interdisciplinary turn in legal education



In the beginning of the 20th century, Rosco Pound's idea of conceptualising law as 'a means of social engineering' informs the deep-rooted necessity of designing legal education to enable a particularly important kind or participation in the affairs of social life. The International Law Commission believes that legal education should include the diffusion of education about law in society to stimulate reforms in the legal system.

In arguing for an interdisciplinary turn in legal education in India, Professor N R Madhava Menon uses a quite illuminating analogy that the purpose of legal education should be understood with reference to the relationship between medical science and health science: medical science teaches to cure the disease but health science speaks for how to attain and maintain good health. By this analogy he thus claims that the purpose of legal education should not be confined only to the development of technical skill of solving legal dispute, it should also be defined to include the aspect of how to build a just society. The truth of this analogy has found place in the Indian curriculum of legal study which now prescribes the requirement of studying some interdisciplinary courses alongside.

In this respect, the position of American Professor Ulen is also noteworthy who has taken the law and economics movement as a way to bring the scientific method into legal education that better serves to educate the students about the practice of law.

The interdisciplinary approach has very limitedly placed in the legal education of Bangladesh and the traditional legal education is mainly designed to produce lawyers who are comparable to the technicians, because of having only the technical knowledge of solving the legal problems. On the other hand, the lawyers educated in interdisciplinary curriculum can really contribute in 'social programming' by using the knowledge of social context and the effect of law in the society. Such an approach can take us away from the cave of legicentrism - a cave where students are not allowed to look beyond the the black letters of law.

Richard Posner has identified the ideal of '*in medias res*' (that is, taking a particular law and legal system as correct without further inquiry) as one of the basic problems associated with traditional legal education. And an interdisciplinary turn in legal education is more likely to offer a wider avenue of searching the truth of it.

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