"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

LAW ANALYSIS

Analysing the draft Elimination of Discrimination Act

MOHAMMAD GOLAM SARWAR

THE recognition of the principle of equality and non-discrimination along with human dignity and social justice has been recognised under the Constitution of Bangladesh. Article 27 of the Constitution guarantees 'equality before law' and 'equal protection of law' while article 28 prohibits any differential treatment only on the grounds of race, caste, religion, sex or place of birth. Despite these constitutional guarantees, the manifestations of political, economic and social discriminations are rampant particularly against marginalised communities of Bangladesh. Given the backdrop, the Law commission of Bangladesh has recommended the government to formulate a law for preventing discrimination and accordingly they prepared a draft Elimination of Discrimination Act in 2014. Different rights bodies, the National Human Rights Commission (NHRC) Bangladesh, representatives of the underprivileged communities have expressed their views and comments on the Draft Act on different occasions. Currently, this piece of law is under review by the Law Ministry.

The definition under the draft Act is wide and exhaustive, and encompasses both direct and indirect discrimination. It includes discrimination against any individual and community also. The grounds for discrimination among others include religion, faith, community, race, caste, custom, culture, occupation, ethnic originality, gender (including transgender) sexual orientation, disability, pregnancy, marital status, birth place, etc.

The draft Act provides an exhaustive list of discriminatory acts which will be considered as punishable offence. The discriminatory acts include, among others, deprivation from public service, creating obstacles in celebrating festivals of respective communities, prohibiting any individual or community in accepting an occupation or conducting business, compelling any individual to perform a particular occupation, imposing stringent conditions while renting house, forcing any individual or community to perform or not to perform any particular religion, etc.

The principle of non-discrimination has been developed from the jurisprudence of international human rights law. The concerning point here is that if discriminatory acts are treated as crime, then the principle of non-discrimination comes within the premise of penal law which is significantly different from the idea of human rights law. In addition, the draft law also criminalises personal matters (marriage related discrimination) and civil matters which might create contradiction with personal laws and civil laws of the land. In India, under the Anti-discrimination and Equality Bill 2016, all sorts of discrimination create civil liability.

Regarding the forum of complaint and investigation, the Law Commission suggests that any victim of discrimination or any person on their behalf can lodge a written complaint with the NHRC or with the Court. A discrimination offences investigation cell would be created under the NHRC which shall conduct the investigation proceedings. However, this provision has been revised by the Law Ministry where the investigation power of the NHRC has been taken away. Under the revised provision, a victim can file a FIR to the police station or can file a complaint to the Court of Magistrate. If the police station refuses to take FIR or fails to take action under applicable law, then the victim can file a complaint to the NHRC. In a way, the revised provision goes back to the traditional form of investigation and court proceedings.

The NHRC should be given the power of investigation so that we can avoid being trapped into our traditional investigation method and justice delivery system which often fail to ensure justice due to case backlog, lengthy trial, faulty and corruptive investigation by police, low conviction of criminal cases. Vesting the power of investigation in the hands of police officials might hamper an effective investigation and smooth trial proceeding. The Indian anti-discrimination law suggests for an Equality Commission to inquire into any matter or issue and have the same powers as are vested in a Civil Court under the Code of Civil Procedure 1908.

The draft law provides a separate chapter of punishment for the commission of discriminatory acts. A careful reading reveals that punishment for the discriminatory acts is disproportionate and excessive. For example, for creating obstacles in getting inheritance property rights, punishment is up to ten years imprisonment or ten lac taka fine or both; while for creating obstacles in getting public service, punishment is up to two years imprisonment or fifty thousand taka fine or both. Here it is to be noted that if the degree of punishment becomes disproportionate and excessive in comparison with the degree of discriminatory acts, then it might create a new form of discrimination. In this regard, the Indian law suggests for different types of civil liability including boycott, segregation, and exemplary damages and in case of aggravated forms of discrimination and violation of protection order, the punishment would be one year imprisonment or with fine which may extent up to the annual salary of the President of India.

The draft law suggests that the government may set up an anti-discrimination court headed by a District and Sessions Judge in every district to try such cases. The court will have to complete a trial in 60 working days after the framing of charges. However, the revised draft law excluded the provision of anti-discrimination court and suggests for conducting trial under existing court structure in accordance with the Code of Criminal Procedure (CrPC).

The nature of the draft law is found to be preventive not protective. The draft law only provides preventive measures against discrimination and does not provide any protective measures for the victims of discrimination. Under the Indian law, there is a provision for protective order under which the court may ask to refrain from committing or encouraging others to commit any acts prohibited under this Act.

It is undeniable that the aim of this time befitting law is to prevent discrimination particularly against marginalised communities and such type of law would be a milestone for legal protection against all sorts of discrimination in Bangladesh. However, considering the above-mentioned issues, this draft law needs to be revisited before its enactment.

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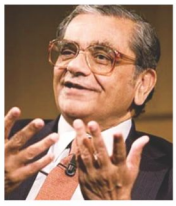
LAW TRIBUTE

REMEMBERING JUSTICE BHAGWATI

RAIHAN RAHMAN RAFID

SADDENING the legal fraternity all over the world, Justice Prafulchandra Natwarlal Bhagwati, the former Chief Justice of India, breathed his last at the age of 95 on 15 June 2017. Hailed from Gujarat, the legal luminary in the judicial history of India started his career as a practitioner in Bombay High Court. For a short period of time, he acted as the Governor of Gujarat before being appointed as a judge of the Supreme Court of India, in 1973. Justice Bhagwati served as the Chief Justice from 12 July 1985 to 20 December 1986.

While litigation was still in its rudimentary form, Justice Bhagwati first introduced Public Interest Litigation (PIL) in 1981, which opened the pathway to inexpensive legal remedy for public rights, consumer welfare and environment. Along with Justice V. R. Krishna Iyer, Justice Bhagwati is known as pioneer of judicial activism in India. In *S. P. Gupta* v *Union of India* (1981), Justice Bhagwati held that, "Where a legal wrong or legal injury is caused... any member of public can maintain an application for an appropriate direction, order or writ in the Courts." Many remarkable social changes that reformed India came through PIL cases, and the person to be grateful to in this regard, is none other than Justice Bhagwati.



The case of *ADM Jabalpur* (1976), famously known as the *Habeas Corpus* case, was the most controversial decision of his entire career where the court allowed the government to suspend all fundamental rights during the emergency. However, later in 2011, he admitted that the judgment was against his own conscience. Interestingly, Justice Bhagwati went on to expand the idea of right to life in 1978, two years after the *Jabalpur* case. In the passport impounding case of *Maneka Gandhi*, he ruled that one's freedom of movement cannot be restricted.

Justice Bhagwati was a promoter of human rights and condemned death penalty. In *Bachan Singh* v *State of Punjab* (1980), he observed that such punishment should be used only in the 'rarest of rare' cases. In *M. C. Mehta* v *Union of India* (1987), he introduced the tort law principle of absolute liability. As a leader of judicial activism in India, Justice Bhagwati brought about revolutionary changes into the Indian judiciary which have been followed in many South Asian courts.

As a visionary, he led an exemplary life, those eventful days are reflected in Justice Bhagwati's memoir 'My Tryst with Justice'. Justice Bhagwati believed that people themselves must utilise law for the purpose of bringing justice at the doorsteps of large masses of the country. Albeit, the legacy of a revered veteran and lauded jurist came to an end, his footmarks remain to be followed by the lawyers and judges of this generation and the ones yet to come.

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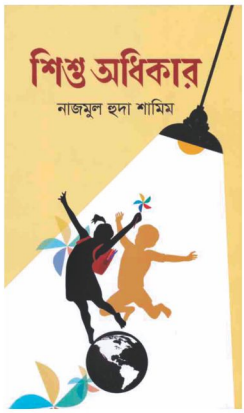
BOOK REVIEW

VOICE FOR *child rights*

TASHMIA SABERA

THE concept of treating childhood as a special phase of life and the recognition that children need a special and different treatment than adults is a major achievement of modern human rights jurisprudence. The reluctance of our society to accept this idea has often been of negative consequence towards ensuring child rights. The issue of child rights is perhaps dealt with less seriousness is evident today as the literature on child rights in Bangladesh is very scant. A recent book namely *Shishu Odhikar* (Child Rights) by Nazmul Huda Shamim demands an attention. The book, written in Bangla and published in January 2017, covers many areas concerning child rights.

The book contains ten descriptive chapters and relevant legislations, policies and international conventions have been added in the appendix of the book. Readers might face a slight difficulty in understanding the organisation of chapters of the book. Chapters V and VI deal with nurturing and flourishing of children. Chapter V, bearing the spirit of child rights conveys an important message about the relation between children and development. It argues that development should not be measured by economic gain solely. Rather, the contemporary sustainable human development thoughts call for 'flourishing lives' where people, especially children can fully develop their potentials to be the ideal development agents.



SHISHU ODHIKAR
Nazmul Huda Shamim
Muktochinta; pages: 352
ISBN: 978-984-91789-5-7

Chapter VI enumerates the idea of primary care of the fetus to children ageing six years (pre-school level), considering this period particularly sensitive for the overall development of children. It introduces World Bank's idea of different packages of primary care for different stages of childhood. Author's advocacy for age appropriate treatment of children in this chapter seems impressive.

Chapter VIII is a well written description of Children's Courts under the Children Act 2013. The following chapter is dedicated to probation which is a reformative disciplinary method applied to children in conflict with the law (those in breach of criminal laws).

Chapters II and VII respectively deal with the child rights and right to education. Special attention to the children's right to education or more specifically 'education in its real sense' is appreciable. Two most crucial problems of children of Bangladesh, child labour and child marriage, as discussed in chapters III and IV, draw a better focus on problems of children. Chapter III discusses about many concepts associated with child labour including the concept of the worst form of child labour or hazardous work for children.

Regarding child marriage, the author could have done better by combining two distinct chapters (chapters IV and X) together. Moreover, the discussion on child marriage is based on the old legislation, i.e. the Child Marriage Restraint Act 1929. In the context of the newly enacted Act of 2017 on child marriage which controversially has introduced a lenient age restriction, the book's new edition is expected to deal with this issue from a critical perspective.

The author tried to relate different contemporary incidents involving children to the existing laws and international instruments such as the Convention on the Rights of the Children, the National Children Policy, the National Labour Policy, and the National Education Policy. It was a commendable work indeed. A concluding chapter summing up the whole book and synthesising the arguments could, however, be useful for the readers.

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LAW WATCH

An untold odyssey of prisoners

ENAMUL KABIR SHADHIN

NO one would deny the need for punishments as a consequence of offences. Thereby, the compromise of certain rights in case of prisoners is often thought to be justified. In Bangladesh, though the slogan of the Central Jail is "We shall keep you safe and guide you towards enlightenment", the reality is exactly the opposite. Basic rights in prison are often at stake in the prisons in Bangladesh.

According to International Centre for Prison Studies, the total prison population of Bangladesh as of October 2016 was 78,578 against an official capacity of 36,614. Section 129 of the Bangladesh Jail Code illustrates that there should be enough space for sleeping for the prisoners. However, prisoners often sleep in shifts. Among the total 68 prisons across the country, according to IG of Prisons only six doctors remain functioning in 5 prisons. As a result, medical needs mostly remain unattended. Additionally, according to the Jail Code, every prisoner is entitled to a certain amount of food, when in fact the prisoners often do not get any food to eat at all. Bangladesh is yet to ensure the basic rights of prisoners let alone other rights which are no less important to which the world is heading towards.

Section 40 of the Prisons Act 1894 makes provision for inmates to meet with persons he desires to meet. In effect, there is a facility in the prison for the relatives to see the prisoner by purchasing a ticket from the prison authority. However, the room is often so overcrowded that the visitors and the prisoners can barely see each other. In this regard, a conjugal visit can be the way through which the inmates can spend private time in designated room in the prison with their relatives, usually with their legal spouse where they may engage in sexual activity. In Canada, inmates are allowed to have conjugal visits for 72 hours once every two months. In USA, only 4 states allow such visits. There are a number of justifications for such visits and the focus is usually on rehabilitation. The visits allow the inmates to stay in close contact with family to whom they can return to once they are released. Moreover, in the UK, the prisoners are allowed home visits few months before their release in order to help them reestablish community tie.

Moreover, in Bangladesh, prisoners do not have right to vote in national elections. The prohibition is based on an outdated conception of punishment. In many European Countries, prisoners enjoy a right to vote, though the extent of this right is different in various countries. In Australia prisoners serving a sentence of less than 3 years can vote in Federal elections. Though the approach of the world is divided towards prisoners' right to vote, it is high time the position be reviewed in Bangladesh. It is argued that while right to food and medical needs are respected in the prisons, a ban on voting rights is an unjustified course of action in consequence of the wrong committed. The denial of right to have a say on deciding the policies that will govern the nation, often termed as "civil death" can prove out to be harsh on the prisoners.

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