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LAW VISION

Discretionary power: is it conceit or necessity?

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It is high time to set a guideline to ensure a confined, structured and checked discretionary power to control its misuse.

IN Bangladesh, the judges decide cases using their discretionary power imposed by the statutes. The laws of Bangladesh have articulated the word 'discretion' many times but have not defined its perimeter specifically. However, according to Lord Justice Bingham, 'an issue falls within a judge's discretion, if being governed by no rule of law, its resolution depends on the individual judge's assessment of what it is fair and just to do in the particular case (Bingham, 1990).' Ahron Barak sees discretion as choosing one from more alternatives within the legal purview (Barak, 1989). Maurice's view is that when there is no fixed principle, then the judges lie on their discretion (Maurice, 1972). Dworkin confined the periphery of discretion at the time of deciding 'hard cases' when the statutory laws are not clear enough (Dworkin, 1975).

Discretionary power applies differently in civil cases than from criminal cases in Bangladesh. In civil cases, discretionary power is applied at the time of deciding interlocutory matters and also at the time of awarding cost. In the latter case, the court has to decide 'who will pay' and 'to what extent'. The 'costs follow the event' rule is broadly being prescribed in the statutes in deciding who will pay but 'to what extent' is something that entirely rests upon the judge's decision, though the laws specify a ceiling of maximum costs. As the law has not any mandatory provisions of awarding cost, therefore, the picture of the uneven imposition of costs is very common even when the nature of the case is similar.

For criminal matters, the discretion applies at the time of granting bail or sentencing the offender. While sentencing, the law made a boundary of maximum and minimum punishment. But at the time of granting bail, even if it is a non-bailable offence, the judges exercise entire freedom.

It has been discussed in a case that the court usually acts like rubber stamping the punishment that is prescribed by the statute (*BLAST and Others* v *Bangladesh & Others* (2015) 1 SCOB (AD)). However, it has been discussed in the said case that our penal provisions allow the judges to exercise their discretion at the time of awarding sentence considering the facts and circumstances of each case. To make it clearer, an example was given that the judges should not give the same sentences if a fracture of a finger is caused by a sharp cutting weapon and if the eyes of the victim are gauged by the similar type of instrument, though both the offences are grievous in nature and punishable under 326 of the Penal Code 1860 (Bangladesh). The general accepted rule is to fix a maximum penalty for the worst cases and to apply discretion only while reducing the same. However, to consider a case as worst also depends on the judge's discretion.

If judges step aside from the law following personal, moral and political views, we may risk judicial lawlessness (Barak, 2002). As the judges' logic, emotion, personal experiences are different from each other, therefore it would not be illogical to say that they would not apply their discretion evenly. Therefore, a guideline in applying discretion both for civil and criminal cases is an utmost need. Davis also argued for confining, structuring and checking discretion (Davis, 1970). He explained how the discretion should be exercised within the borderlines of the statutes, rules. Injustice may be reduced by properly confining, structuring and checking discretion. However, it should be kept in mind that maximising confining, structuring and checking of discrimination might introduce new evils, such as rigidity, inadequate individualising, expense awkwardness.

It is settled that judges can barely ensure justice without discretion, but a wide range of discretion may give the scope of wide discrimination as judges' personal experience and views influence him at the time of exercising his discretion power. It causes inequality at the time of delivering judgment. Some countries are following a guideline to check inequality. In Bangladesh, the discretionary inequality is not very uncommon. Therefore, it is high time to set a guideline to ensure a confined, structured and checked discretionary power to control its misuse. The need for discretion in no way justified the vast scope of misapplication of discretionary power.

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COURT CORRIDOR

ICC's jurisdiction & response of Myanmar

ON September 06, 2018, the International Criminal Court (ICC), composed of three judges, decided by a majority that it has jurisdiction to investigate officials of the Myanmar Government for committing acts of violence towards the Rohingya minority.

Following the Prosecutor's request under Article 19(3) of the ICC Statute, the Court decided this on the basis that although the coercive acts underlying the alleged deportation of members of the Rohingya people occurred on the territory of Myanmar (which is not a party to the Statute), the Court may nonetheless exercise its jurisdiction, since an element of this crime (the crossing of a border) occurred on the territory of Bangladesh (which is a State party to the Statute), as well as pursuant to the principle of la compétence de la compétence or Kompetenz Kompetenz– a well-established principle of international law according to which any international tribunal has the power to determine the extent of its own jurisdiction.

In relation to the central question contained in the Prosecutor's request, the Chamber decided, first, that Article 7(1)(d) of the Statute contains two separate crimes (namely forcible transfer and deportation) and, second, that the Court may exercise its jurisdiction if either an element of a crime mentioned in Article 5 of the Statute or part of such a crime is committed on the territory of a State that is party to the Statute, under Article 12(2)(a) of the Statute.

However, there was a dissenting opinion by Judge Perrin de Brichambaut on procedural grounds. In his opinion, rendering the ruling requested by the Prosecutor would amount to an advisory opinion, which the Court is not allowed to do. For these reasons, Judge Perrin de Brichambaut believes that the Court cannot rule on its jurisdiction in relation to the alleged deportation of members of the Rohingya people from Myanmar to Bangladesh at this stage, but that it remains open to the Prosecutor to present a request for authorisation of an investigation to a Pre-Trial Chamber under Article 15 of the Statute.

In response, the office of Myanmar's President Win Myint on September 07 dismissed the ICC ruling, calling it "the result of faulty procedure and of dubious legal merit" and said that as the country is not a State party to the Statute, the country is "under no obligation" to respect it.

Earlier on August 28, the UN Fact Finding Mission accused Myanmar's top military generals for genocide of Rohingya people in the north of Rakhine State in Myanmar. As expected, the Myanmar government rejected that report as well.

COMPILED BY LAW DESK (SOURCE: WWW.ICC-CPI.INT).

GOOD NEWS

ELCOP brings glory to the nation

DHAKA based Empowerment through Law of the Common People (ELCOP) has received the "South Asian Excellence in Legal Education Award" from Indian Vice-President M. Venkaiah Naidu on 1 September 2018. The acknowledgement was given in New Delhi on the occasion of 10th Law Teachers Day symposium, organised by Society of Indian Law Firms (SILF) and Menon Institute of Legal Advocacy Training (MILAT).

The SILF-MILAT noted ELCOP's contribution to human rights education through its summer schools and community law reform programs for long 19 years. ELCOP founder and the 2011 SILF-MILAT Best Law Teacher, Professor Dr. Mizanur Rahman attended the function along with a Bangladeshi team. Ten law institutes and individuals of India, Bangladesh, Nepal and Sri Lanka were also awarded for their outstanding contribution to legal education in India and beyond.

Professor Dr. Mizanur Rahman has been advocating for the kind of legal education the aim of which should be to produce "rebellious lawyers" as opposed to litigant lawyers who would empower the poor to fight the discriminatory legal system. In his speech, Professor Dr. Mizanur Rahman recalled how he came in contact with Professor Madhava Menon in the early 1990s and then dreamt to inculcate the "Menonic Vision" of legal education. With a design to achieve that target, Dr. Rahman established Empowerment through Law of the Common People (ELCOP) back in 2000. Since then,

ELCOP has been running human rights summer school, community law reform and street law programs in order to realise the social functions of law. Dr. Rahman added that legal education cannot achieve its purpose unless law students are taken out of the class room to show the socio-legal grievances of the downtrodden community and therefore, unless and until the law students are taught to motivate, mobilise and organise the poor, poverty cannot be effectively fought with. Dr. Rahman reiterated his arithmetic dream that some 100 pro-poor lawyers that he would produce, may change the goal of a legal system with their innovative interpretation of law and justice.

This year, the prestigious SILF-MILAT Prof NR Madhava Menon Best Law Teacher Award was received by Prof R Venkata Rao of the National Law School of India University, Bangalore. Amongst others, Padmashree Professor Madhava Menon, Chief Justice of India Shree Deepak Misra, NALSAR VC Prof Faizan Mustafa spoke on the occasion. Recognising the importance of law teachers Shri Venkaiah Naidu said that even in the age of information technology, Google cannot replace a Guru. He underscored the importance of legal education in fashioning rule of law and based on that premise, Naidu opined that to reform, perform and transform should be the trinities of a Government. Justice Misra, while delivering his inaugural speech, said that law schools are the hatcheries for supplying legal professionals who act as sentinels for the implementation of rule of law. Professor Madhava Menon stressed on establishing more law universities in line with the Bangalore model.

FROM LAW DESK.

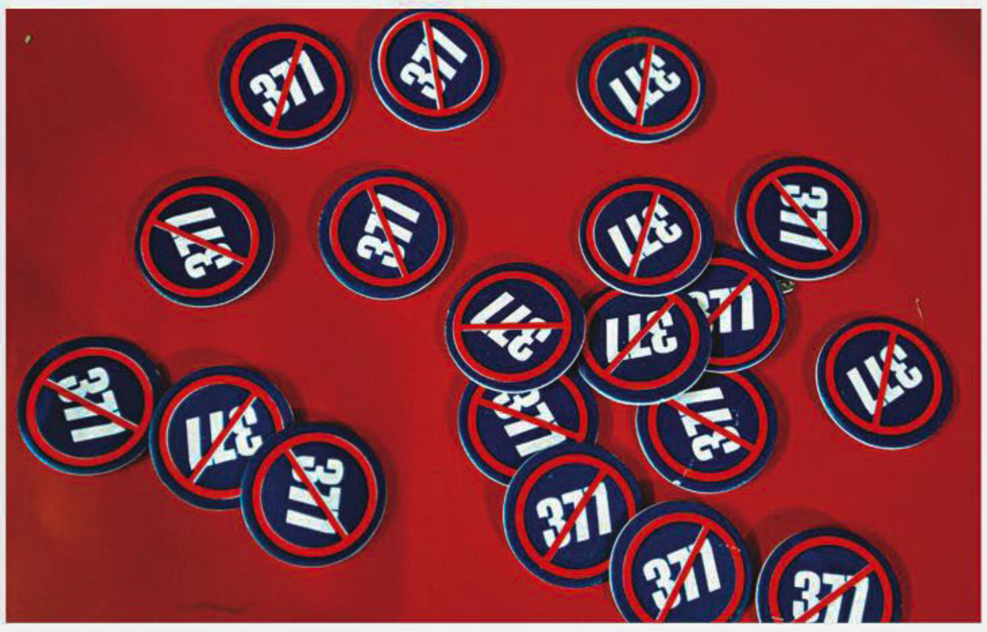
JUDGMENT REVIEW

Decriminalisation of consensual adult same-sex intimacy

RAISUL SOURAV

A five-judge bench of the Indian Supreme Court (SC) has scrapped section 377 of the Indian Penal Code (IPC) unanimously in four different judgments on 6 September albeit the same section will still stand on the statute to deal with the 'unnatural' sexual offences against non-consensual sexual relationship between adults, minor and animal like sodomy and bestiality. This revolutionary judgment rewrites the history of the Indian minority LGBTQIA+ community and observed 'it cannot wait for a majoritarian Government, if the fundamental right of the citizens are getting violated in the process and make it no longer illegal to love'. The century old Section 377 of the IPC, 1860 actually contains Victorian Christian morality that criminalises all sorts of sexual activities those are 'against the order of nature' and not penile-vaginal including homosexual and heterosexual behaviors, oral or anal sex etc.

However, Dipak Misra, the Chief Justice of India, opines that individual autonomy and liberty, equality for all sans discrimination of any kind, recognition of identity with dignity and privacy of human beings constitute the cardinal four corners of the Indian constitution. He agrees with the view that a person who has come of age and has the capability to think on his/her own, has a right to choose his/her life partner. No one can escape from their individuality....look for the rainbow in every crowd, CJ Misra added and according to him denial of self-expression is like death.



Justice Chandrachud has pointed out that constitutional morality, not societal morality, should be the driving force for deciding the validity of Section 377 while Justice Indu Malhotra remarked that "history owes an apology to the members of the LGBT community and their families for the delay in providing redressal for the 'ignominy' and 'ostracism' they have faced through the centuries". They also held that homosexuality is 'not an aberration' but a 'variation of sexuality' and sexual orientation was an innate attribute of one's identity which cannot be altered.

Furthermore, the Court went on to question the rationale behind how criminalising consensual sex between two adults in private under section 377. Same sex acts of intimacy, according to the Court, require the same constitutional protection as heterosexual intimacy and it is the responsibility of the State to ensure that freedom. The right to privacy and dignity is enumerated in Art. 21 of the Indian Constitution and infringement of that right only because of sexual orientation is purely discriminatory. The Court further affirmed that it is not a mental disorder but something innate to one particular human being. The verdict also confirmed these people's right to marry and to have families.

Bangladesh also has the same S. 377 in the Penal Code which stipulates that whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal, shall be punished with imprisonment for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine. Consequently, the members of the LGBTQIA+ community are compelled to live under the constant fear of reprisal, persecution and unjustified hostile discrimination only because of their inherent sexual orientation despite the fact that now it has been scientifically recognised that sexual orientation of an individual is natural and part of a range of human sexuality which is not under the control of anyone.

There is no large-scale movement against this archaic law in Bangladesh due to numerouys and multifaceted reasons including restricted freedom of expression on this issue, social taboo, cultural stigma, religious restriction etc. Furthermore, unlike India, the law has never been challenged before the Court in Bangladesh even though it clearly violates the fundamental rights of equality, of non-discrimination, right to life and privacy enumerated in the Articles 27, 28, 32, 39, 43 of the Constitution. Hence, the exemplary decision of the Indian constitutional court brings a golden opportunity for Bangladesh to test the constitutionality of the controversial S. 377 through the prism of the judiciary.

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