"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

REVIEWING THE VIEWS

Introduction of separation of powers and checks and balances in the UK?

M Jashim Ali Chowdhury

THE recent *Parliament Prorogation Case* in the United Kingdom has generated a lot of curiosity across the globe. It is hailed by some as "the most significant judicial statement on the [UK] constitution in over 200 years" (Thomas Poole, 'Understanding what makes "Miller & Cherry" the most significant judicial statement on the constitution in over 200 years', *Prospect Magazine*, September 25, 2019). Scholars like Professor Richard Ekins, on the other hand, criticises it for encouraging "novel elevation of very general constitutional principles into actionable propositions of law" and "politically contestable" exercise of judicial power (Richard Ekins, 'Why the Supreme Court should reverse the Scottish Court's prorogation ruling', *The Spectator Blog*, September 11, 2019). Before going into the constitutional innovations of the case, a brief outline of the not-so-past developments in the UK's constitutional system in general appears necessary.

The UK is historically known as a system of fusion, instead of separation, of powers. Vigorous judicial review of statutory laws and political prerogatives was unheard of until recently. It is only in 1998 that the Human Rights Act marked the UK's sliding away from its long-held notion of judicial deference to statute laws. With a signalling-of-inconsistency rule in the 1998 Act, the judicial branch entered an era of 'democratic dialogue' where the court would signal parliament of any inconsistency of its laws with fundamental human rights of the citizens (Philip Norton, 'A Democratic Dialogue? Parliament and Human Rights in The United Kingdom', *Asia Pacific Law Review*, 21:2 (2013), pp. 141-166). Institutional separation of the executive, legislature and judiciary began with the Constitutional Reform Act of 2005. The UK Supreme Court was established by stripping the House of Lords off its highest Court of Appeal status. Also, the Lord Chancellor, a minister of the government, lost control over the judiciary.

Changes of 1998 and 2005 are very crucial to understand this case of forceful prorogation of an unwilling parliament by a minority government. If the reforms of 1998 and 2005 mark the UK's transformation from a system of fusion of powers towards one of separation of powers (Roger Masterman, *The Separation of Powers in the Contemporary Constitution, Judicial Competence and Independence in the United Kingdom*, Cambridge University Press, 2013), this *Parliament Prorogation Case* might have formally installed checks and balances and judicial guardianship over the UK's unwritten constitution.

Joanna Cherry and 77 other MPs, civil rights activist Gina Miller and ex-Conservative Prime Minister John Major joined in challenging Boris Johnson's attempt to prorogue parliament forcefully. Gina Miller and others lost their challenge in the Queen's Bench Division in London ([2019] EWHC 2381 (QB), hereinafter referred to as "EWHC"). Joanna Cherry

and other won their challenge in the Inner House of Scottish Sessions Court ([2019] CSIH 49 hereinafter referred to as "CSIH"). The matter reached the UK Supreme Court by way of appeal against both the decisions ([2019] UKSC 41, hereinafter referred to as "UKSC"). Significance of the unanimous judgment of the Supreme Court three-fold.

First, it marks a clear departure from the UK judiciary's long-standing position of avoiding adjudication of royal prerogatives of high policy or politics. Now the UK Supreme Court is convinced that an avowed high policy or politics behind royal prerogative is not "sufficient reason for the courts to refuse to consider it" (UKSC, para. 31). Exercise of prerogatives power, whether politics-policy oriented or not, are always subject to the test of legality, propriety and reasonableness (CSIH, paras. 91, 103, 104). The idea of non-justiciability being 'effectively jettisoned', the court claims that "every prerogative power has its limits, and it is the function of the court to determine, when necessary, where they lie" (Thomas Poole, *op cit*).

Second, the decision is an important development beyond the judiciary's so-far-held position of being mindful to 'institutional competence' while reviewing royal prerogatives (Lord Mance, 'Justiciability', *40th Annual FA Mann Lecture*, London 2017, p. 20-21). Earlier, the Queen's Bench Division shielded behind Separation of Power doctrine to adjudicate the prorogation (EWHC, para. 60). The Scottish Sessions Court and the Supreme Court discarded any such Separation of Power based restraint. It is argued that judicial review of Boris Johnson's reason-less prorogation (UKSC, para. 61) would uphold separation of power (UKSC, para. 34) and protect parliament from undue restriction (SCIH, para. 58).

Thirdly, the introduction of justiciable constitutional principles would potentially mark a new era of constitutionalism in the UK. Unanimous judgement of 11

The Parliament Prorogation Case takes the power of judicial review far beyond the constitutional dialogue model sanctioned in the Human Rights Act 1998.

Supreme Court judges in this case appears quite unequivocal in claiming a judicial guardianship of the constitution when it outright rejects any hesitation whatever in adjudicating constitutional principles. Prior to that, judges in the Queen's Bench Division felt lacking in any 'measurable standard' to judge the principle of executive accountability (EWHC, para. 57). Queen's Bench Division also called for judicial restraint in 'intruding' the territory of executive-legislature relations 'by recognising an expanded concept of parliamentary sovereignty' (EWHC, para. 64). The Supreme Court sharply disagreed and refused to see the government's political accountability to people and parliament as an absolute bar to judicial review (UKSC, para. 47). Instead, a prerogative will be bad if it prevents or negatively affects the discharge of parliament's political accountability functions and the court will intervene if required (UKSC, para. 50).

To wrap up the analysis, the UK Supreme Court in this case appears to ostensibly endorse a basic structure tendency in judicial review when it required a royal prerogative to be consistent with 'fundamental principles' of parliamentary sovereignty and executive accountability (UKSC, paras. 41, 48, 50, 52). Seen in this light, the *Parliament Prorogation Case* takes the power of judicial review far beyond the constitutional dialogue model sanctioned in the Human Rights Act 1998. It effectively places the UK Supreme Court in position of guardianship over the UK constitution - unwritten though, separation of powers and checks and balances between the executive, legislature and judiciary. The UK has perhaps taken another significant step towards a codified constitution.

THE WRITER IS DOCTORAL CANDIDATE (PARLIAMENT STUDIES), KING'S COLLEGE LONDON.

WRITING FOR EQUALITY

MARRY-YOUR-RAPIST PHENOMENA AND LEGAL REALITIES

THE Parliament of Bangladesh passed the Child Marriage Restraint Act 2017 with a special provision allowing a boy or a girl to get married before reaching the statutory age in some exceptional cases. This provision stirred the civil society of the entire country. Controversial section 19 of the Act says that notwithstanding anything contained in the Act, if a marriage takes place, in the best interest of the underage boy or girl involved, with the permission of the parents of the underage boy or girl, and with an order of the court, upon following the due procedure as laid down in the relevant Rules, that marriage shall not be considered as an offence under the Act.

One of the major criticisms against this provision was that almost anything could come within the purview of the wide domain of 'special circumstances'. It could bring marriage of a child who happens to be a rape survivor with the rapist within its purview as well. Therefore, one of the main concerns was that this provision would turn the Act into a rape-marriage law and would exonerate the rapists from prosecution if and when he undergoes marriage with his victim. It was feared that even though the Penal Code of 1860 does not give any impression on marriage being an exonerating touchstone to absolve the rapists, the Child Marriage Restraint Act could prove to do something similar to what is done in certain North-African and Middle Eastern countries' rape-marriage laws.

The Child Marriage Restraint Rules were enacted in 2018 and they tried to clear the air a bit. Provision 17 of the Rules speaks of the procedure that is to be followed to marry an underage boy or girl off in accordance with the Act. According to the Rules, at the very beginning an application has to be made to the court. The court shall send the application of marriage made by the parents of the children involved, or the legal guardian thereof, or by both parties to the marriage including the minor or both the minors (when both of the parties are minors) to the Assessment Committee. Assessment Committee shall consist of the following members in the best interest of the minors in every Upazilla: Upazilla Executive Officer (as the president), medical officer nominated by Upazilla Health and Family Planning Officer, Union Parishad chairman, woman of the reserved seat of relevant ward of the Paurashabha or Union Parishad, two adolescent boy and girl nominated by the Upazilla Executive Officer and an Upazilla Women Officer (as the member secretary).

Upon investigation, if the assessment committee ascertains that the marriage applied for is in the best interest of the minors and is the ultimate (*sarbashesh*) alternative, it shall send a report to the court with an unambiguous opinion in that regard. The proviso to this rule says that when the marriage applied for is to take place out of coercion, or when the marriage applied for is to take place in connection with rape, abduction, coerced physical relationship, or when a case of rape, abduction or coerced physical relationship is under trial in connection with the marriage applied for, the Assessment Committee shall send its report to the court enumerating its opinion against the marriage.

There are provisions that have direct bearing on child marriage in cases where the girl child in question is a survivor of rape. In light of the Rules as enacted, we now stand with laws to protect girl children from such marriages. In no circumstances can the assessment committee opine otherwise given the explicit provisions of the law. However, a confusion may remain as to the law in case of marrying a woman who has passed the statutory age limit and has survived rape. There is no law to deal with such a scenario explicitly. And more often than not, in the veil of 'protecting the honour of the victim of rape', 'helping the woman deal with the stigma of rape' or at times in an attempt of covering up the crime itself, such marriages take place.

However, what escapes our notice is the basic requirement of marriages as civil contracts (under Islamic law) – which happens to be free consent on part of both parties. In cases where a survivor of rape is married off to her rapist, the basic requirement of marriage remains unfulfilled. Consent on part of the woman is merely a perceived consent and not consent in the actual legal sense of the term. Therefore, as a civil contract, marriage between a rapist and his victim is *void ab initio*. Even in cases of Hindu marriages, the most accepted form of marriage is one where there is mutual consent from both the sides. In Bangladesh, where the Hindus follow traditional law, perceived consent or consent obtained upon coercion, too vitiates the marriage.

FROM LAW DESK.

BOOK REVIEW

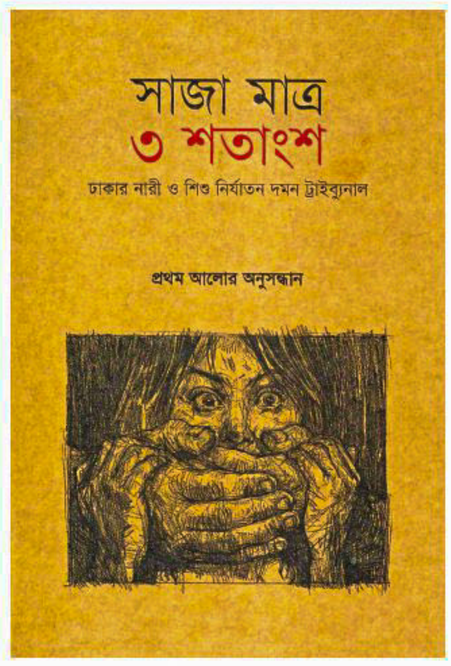
Crimes against women and the issue of justice

UNDER the Prevention of Oppression against Women and Children (Special Provisions) Act 1995 which is now an obsolete law, the special tribunal was established across the country. When the Prevention of Oppression against Women and Children Act 2000 came into effect, the name of the tribunal changed to the 'Prevention of Oppression against Women and Children Tribunal'. The remaining pending cases of the previous special tribunal were transferred to the new tribunal established under the 2000 Act. The new law was meant to speedily dispose of the cases relating to oppression against women and children. According to the 2000 Act, at least one tribunal is to be established in each district.

We have stringent laws and relevant judicial forum, yet the rate of commission of crimes against women and children is largely prevalent. And it is often argued that many, if not all, cases filed under the 2000 Act are of frivolous nature. Resultantly, conviction rate under the applicable law is significantly low.

In this context, the national Bengali daily Prothom Alo in 2016 took an initiative to launch a comprehensive research into the matter to understand the complex situation of our justice system relating to the trial of cases under the Prevention of Oppression against Women and Children Tribunal Act 2000. For this purpose, the research team collected and examined a total of 7864 cases of last 15 years (2002-2016) filed under the 2000 Act from Dhaka district (including Dhaka Metropolitan area) as sample. The cases collected by the research team concerned six specific offences under the 2000 Act. These are the offence of rape (section 9), causing death in consequence of rape (section 9), gang-rape (including murder and rape) (section 9), dishonouring and instigating women to commit suicide thereafter (section 9A), sexual oppression (section 10), and causing death (or attempting to cause death) for dowry.

During the time of research, there were five special tribunals in Dhaka district for trying the cases under the 2000 Act. Through two phases, the



researchers took primary information relating to the above-mentioned six offences from the annual judicial registration book of the tribunal. Primary information related, among others, to the year of filing cases in the police station and of presenting the cases in the tribunal, the relevant provision of the law referred to the cases, the then status of the cases, date and year if the cases were finally decided, and description of conviction (if any).

At the conclusion of the research, Prothoma Prokashon, in 2018, published the significant findings of the research with associated analysis titled as *Saza Matro Tin Sotangsho: Dhakar Nari O Shishu Nirjatan Daman Tribunal* [Trans. *Only 3% Conviction: Dhaka's Prevention of Oppression against Women and Children Tribunal*].

One of the major findings of the research suggests that the rate of filing of cases under the 2000 Act has annually increased while the rate of conviction in those cases remained significantly low. From 2002 till 2016, the number of disposed cases was 4277 (54%) and of pending cases was 3587 (46%). Throughout all these years, conviction was awarded only in 109 cases which constitute only 3% of the total number of cases. On an average, around four years were taken to finally dispose of the cases.

Statistically, the number of rape related cases was 5502 comprising 70% of the total number of cases filed. The allegation of provocation to suicide was made in at least 9 cases. The number of sexual violence/harassment related cases was 1885 (24%) and of murder or attempt to murder for dowry related cases was 354 (4.5%). In general, there were 100 cases on the allegation of provocation to commit suicide (1%). A total of 17 cases was found where reference to legal provision was incorrectly or mistakenly made either by the investigating officer or the public prosecutor.

Another significant finding of the research shows that many of the cases remain pending in the tribunal for years after years. The researchers found that around 22% cases relating to murder or attempt to murder for dowry, 21% cases relating to rape and rape related murder, 17% cases relating to gangrape and murder, 16% cases relating to provocation to commit suicide, 7% cases relating to rape and 8% cases relating to sexual harassment were found pending in the tribunal on an average for 11-15 years.

The researchers extensively looked into 65 cases relating to rape (18 cases), murder after rape (8 case), gang-rape and murder (26 cases), sexual oppression (3 cases), provocation to commit suicide (5 cases) and murder for dowry (5 cases). Among all these cases, the alleged perpetrators were convicted in 5 cases, acquitted in 34 cases and excused from the final charge sheet in 11 cases. 15 cases were found pending till the time of research.

For years, the low conviction rate and the increasing number of false cases have undoubtedly been a matter of concern for the stakeholders associated with the prevention of crimes against women. The researchers proposed to strengthen the investigating mechanism, produce relevant, appropriate and timely evidences or witnesses, coordinate with the function of the police authority and public prosecutor, and enhance the capacity of the tribunal judges.

FROM LAW DESK.