"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 OPINION

August 15: A case against the doctrine of revolutionary legality

PSYMHE WADUD

Upon the murder of Bangabandhu Sheikh Mujibur Rahman, the Father of the Nation, on August 15, 1975, the office of the President of Bangladesh was seized and eventually, the government powers were assumed by the usurpers. The very act of usurpation of powers, among others that followed, was declared illegal in the judgment handed down by the Appellate Division in the case *Bangladesh Italian marble Works Ltd.* v *Government of Bangladesh and others* (2005), otherwise known as the 5th amendment case.

Professor Hans Kelsen with his doctrine of revolutionary legality implying that a successful revolution can amount to a law-creating act and can change the basic norm or the grundnorm, made his appearance in the said judgment. While both the High Court and Appellate Divisions expressed disapproval for illegal seizure of powers through unconstitutional means, the High Court Division made the observation that Kelsen can only be used to explain past incidents and that 'a Judge in deciding a case may call upon many a legal theory in establishing his own point of view but should not regard it as a precedent.' The Appellate Division declared that the 'will of the people' is the pole star of our Constitution and the same cannot be whittled down by any usurpers. However, unlike the High Court Division, the Appellate Division did not express its view with regard to the application of Kelsen as a normative principle, in specific. It will not be out of place to mention that the Appellate Division, seemingly in *arguendo*, went on to opine that there were no pretexts on August 15, 1975 (considering that the Vice-President was available and the parliament was in existence) that could justify the assumption of powers.

> As opposed to a normative principle, Kelsen's doctrine is a descriptive theory of law entailing a mere juristic proposition, which is neither beyond the pale of controversy and/or fallacy nor is to be taken as a legal norm presupposed to be relevant for judicial decisions.

PHOTO: **COLLECTED. PAINTING BY SHAHABUDDIN AHMED.**

Kelsen penned his theory of revolutionary legality in the book 'General Theory of Law and State' (1949). He observed that when a group of individuals attempting to seize power by force, succeeds in doing so, and when upon such seizure, the old legal order ceases and a new legal order begins to be efficacious, because the individuals whose behavior the new order regulates actually behave in conformity with the new order, then the new order is to be considered as a valid legal order. On the other hand, if the said group of people fails, if the order they have tried to establish remains inefficacious, then, their undertaking of seizing power by force is to be interpreted, not as a legal, law creating act for the establishment of a (new legal order) but as an illegal act, as the crime of treason, according to the old order.

As opposed to a normative principle, Kelsen's doctrine is a descriptive theory of law entailing a mere juristic proposition, which is neither beyond the pale of controversy and/or fallacy nor is to be taken as a legal norm presupposed to be relevant for judicial decisions.

The inherent fallacies of the doctrine of revolutionary legality were underscored in the landmark case of *Asma Jilani* v *Government of Punjab* (1972), a decision which was referred by both the Divisions of our Supreme Court in the 5th amendment case. In that case, the Pakistan Supreme Court iterated the futility of Kelsen or any doctrine or theory in order to validate or justify an unconstitutional act and unequivocally held that the said doctrine cannot be invoked in Pakistan.

The Court went on to refer to Professor Dias, Laski and Stone, among others, with the aim of rejecting Kelsen altogether. First, the Court observed that Kelsen postulated his theory on successful *coups d'etat* as law-creating acts from the perspective of international law and that his presumed hierarchy of norms does not apply to a dualist domestic legal order. Second, the Court thwarted the idea that the efficacy of a legal order would automatically confer validity upon it.

Interestingly, the Court also observed that "Kelsen [..] does not contemplate an omnipotent President and Chief Martial Law Administrator sitting high above society and handing his behests downwards" and that Kelsen did not intend to imply that every person who was successful in grabbing power could claim to be the source of law. While these well-articulated observations by the Jilani Court can be lauded, they imply a keen interest taken by the Court in interpreting Kelsen as well and this interpretation of what Kelsen's doctrine 'contemplates' or 'intends', in a way, presupposes that the doctrine is a legal principle/norm, pertinent/relevant for judicial decisions. What was advanced in *arguendo* by the Appellate Division in the 5th amendment judgment too, lends credit to the presupposition. This is something that Professor Julius Stone had feared more than half a century back.

In mid-1960s Professor Stone and Professor Kelsen got involved in a scholarly debate. In a 1964 book 'Legal System and Lawyers' Reasoning' and a 1963 article 'Mystery and Mystique in the Basic Norm', Stone critically questioned Kelsen in general and in a way persuaded him to clarify his position.

Finally, Kelsen made out his points with regard to his theories through yet another article 'Professor Stone and the Pure Theory of Law' (1965)-

"Never, not even in the earliest formulation of the Pure Theory of Law did I express the foolish opinion that the propositions [..] 'bind' the judge 'in the way in which legal norms bind him.' Insofar as the judge in performing his function of applying and creating law adopts a theory of law, his position is the same as that of any lawyer. And as far as the lawyers are concerned, I tried, of course, to convince them that my theory is correct.... But this does not mean that I considered the propositions [..] as legally binding."

While finding fallacies in Kelsen's doctrine of revolutionary legality is fine and can indeed be lauded as a judicious exercise, rejecting it altogether is what seems appropriate. Considering Kelsen as just another jurist's thought and not a normative principle for guiding judicial decisions, is also immensely necessary. Moreover, search for pretexts in not justifying the necessity (of invoking Kelsen) (even if as an *arguendo*, as was done by the Appellate Division in the 5th amendment case) needs to be done away with.

THE WRITER IS LECTURER IN LAW, BANGLADESH UNIVERSITY OF PROFESSIONALS.

LAW LETTER

THE SHOCKING CULTURE OF EXTRA-JUDICIAL KILLINGS

MEHADI HASAN

Extra-judicial killings have allegedly been carried out by our law enforcement agencies for many years now. The law enforcement officials have all along maintained that the deaths in the incidents are results of either 'gunfight' or 'crossfire' and are not intentional at all. Section 97 of the Penal Code, 1860 entitles every person with the right of private defence. It lays down that every person has the right to defend his life and properties against any offence affecting the human body. Accordingly, section 96 of the Code states that nothing shall constitute an offence which is done in the exercise of the right of private defence. It has been alleged that the law enforcement agencies abuse this provision to hide the true nature, intent and extent of the so-called crossfires.

Extra-judicial killings do not have any kind of legal basis, and thus, are entirely unlawful. Extra-judicial killings are unconstitutional too for they violate Articles 27, 31, 32 and 35 of the Constitution of Bangladesh. Article 27 states that all citizens are equal before the law and entitled to equal protection of the law. Article 31 states that it is the right of all citizens to be treated only in accordance with the law. In the same vein, Article 32 unequivocally says that no person shall be deprived of life or personal liberty save in accordance with law. Article 35 lays down provisions for legal protection in respect of trial and punishment. It expresses that every person accused of a criminal offence can be punished only after a fair trial in a court of law. Therefore, anyone suspected of being involved in crime has the constitutional right to defend himself and to fair trial. But it appears that, instead of trying suspected criminals, the law enforcement officers themselves tend to act as judges and executioners of capital punishments. This culture of extra-judicial justice not only challenges the rule of law but also weakens the justice dispensation system.

Extra-judicial killing in the disguise of crossfire violates international human rights obligations of Bangladesh as well. Bangladesh has ratified all the core human rights treaties, including, the International Covenant on Civil and Political Rights (ICCPR), International Covenant on Economic, Social and Cultural Rights (ICESCR) and Convention against Torture (CAT). According to articles 2 and 6 of the ICCPR, the Bangladeshi authorities have the obligation to ensure the exercise of the right to life of the country's people and not to arbitrarily deprive them thereof. As ancillary to the obligation, there is also the obligation to provide for prompt as well as effective remedies in cases where any violations take place. But this international obligation is being repeatedly violated due to the extra-judicial killings by the law enforcement agencies.

Unfortunately, the authorities appear to be reluctant to take effective steps to stop extrajudicial killings. This inactivity of the concerned authorities contributed to the development of a culture of impunity and non-accountability.

In the extra-judicial justice system that goes by the name 'crossfire', suspected criminals do not get any chance to prove their innocence, and consequently, many innocent persons get punished for crimes they did not commit.

We must understand that crossfire is not the solution to any kinds of criminal activities. Real solutions require real efforts. Violence can only beget more violence. Justice has to be done, but not at the cost of denying the systematic legal framework.

Hence, extra-judicial killings or so-called crossfires need to be stopped. And to that end, the government must show willingness to end crossfires and take proper steps. The culture of non-accountability needs to be checked. Proper and independent departmental inquiry must be conducted in every incident of crossfire and torture in order to make the law enforcement officers accountable for their wrongdoing. Lastly, the Torture and Custodial Death (Prevention) Act 2013 must be strictly enforced by the Court to punish the police officers found guilty thereunder.

THE WRITER IS STUDENT OF LAW, NORTH SOUTH UNIVERSITY.

RIGHTS ADVOCACY

Copyright protection in literary and artistic works

MAZHARUL ISLAM

Copyright law protects the interests of creators by giving them property rights over their creations against those who copy, reproduce or otherwise take or use the form in which the original work was expressed. According to Article 27 of the Universal Declaration of Human Rights, everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author. For governing copyright, an international agreement namely, 'the Berne Convention for the Protection of Literary and Artistic Works' was adopted in 1886 which formally mandated several aspects of modern copyright law. The convention introduced the concept that a copyright exists the moment a work is 'fixed'.

According to the Berne Convention, copyright protection is obtained automatically without the need for registration or other formalities. According to section 15 of the Copyright Act (the Act), 2000 copyright subsists in original literary, dramatic, musical and artistic works; cinematograph films; and sound recordings. Copyright registration under the Act is not mandatory in Bangladesh. Registration of any work under this Act establishes only a *prima facie* evidence of ownership in case of disputes. Copyright is an automatic right which exists the moment a work is fixed, first published or recorded and no formalities are required for acquiring such exclusive right under the Act.

Copyright subsists in any literary or artistic work published within the lifetime of the author until sixty years after the author dies. To qualify for copyright protection, a work must be original. Anything done like others do or with others' direction cannot be treated as an original work. . In the case of ***Donoghue v. Allied Newspapers Ltd [1938] Ch. 106,*** the UK High Court held that a mere amanuensis does not, by taking down word for word the language of the author, become in any sense the owner of the copyright.

According to section 17 of the Act, the author of a work shall be the first owner of the copyright. However, if any author works as an employee of a publisher, according to section 17(a) of the Act, the publisher shall be the first owner of the copyright in the work in so far as the copyright relates to the publication of the work or to the reproduction of the work. But in all other respects the author shall be the first owner of the copyright of the work unless there is any agreement to the contrary.

The author or publisher of, or the owner of, or other person interested in the copyright in any work may file application to the Registrar of the Copyright Office for registration of the work. There is no limitation period for filing such application of copyright registration under the Act.

There are two types of rights that derive from copyrights such as— economic rights, which allow the owner of rights to derive financial benefit from the use of his works by others, and moral rights which allow the author to take certain actions to preserve the personal link between himself and the work.

It is pertinent to mention here that the moral rights can never be transferred in any way and always remain with the original author of the work. However, economic rights can be transferred or assigned to others usually for a sum of money or royalties depending on the proposed usage of the work. If the period of the assignment is not stated in the deed of assignment, according to section 19(5) of the Act, the duration of assignment shall be deemed to be five years from the date of assignment.

The owner of the copyright shall have the right to claim legal remedy against any infringement or offence occurred from the date of publication of the work under the Act. According to section 81 of the Act, the owner of the copyright can institute civil suit claiming compensation for infringement of copyright in the court of District Judge within the local limits of whose jurisdiction he actually and voluntarily resides or carries on business or personally works for gain. As per section 92 of the Act, the copyright owner can file complaint to a Court of Sessions regarding offences, as mentioned in the Act, if occurred.

Though we have strong legal framework for copyright protection in Bangladesh, due to lack of awareness about copyright protection, many authors lose their first ownership of copyright working under employment and, on the other hand, many publishers lose their rights failing to establish employment relationship — as they neither execute written agreement nor issue appointment letter.

It is therefore, the protection of copyrights has been a matter of great concern in the context of Bangladesh. The Government and concerned authority should take more initiatives to raise awareness about the IP rights, because otherwise, creative persons and creativity will not flourish.

THE WRITER IS CORPORATE LEGAL PRACTITIONER.