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RULE OF LAW ASPECT OF THE JUDICIARY IN THE LEGAL SYSTEM OF BANGLADESH.

by

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Introduction

Evolution of the Rule of Law

It would be proper to trace the development of Rule of Law as enshrined in the International Bill of Human Rights as obtaining to-day, it being the foundation of all democratic values, universal for mankind.

The struggle for protection of human rights within the society is as old as humanity. Greek philosophers sought for legal ideas to protect individual against the strong under the concept of natural law, meaning the rule of reason, seers and prophets of great religions have challenged existing oppressive practices of exploitation of man by man and emphasized the dignity and worth of human person. In the Judaes-Christian tradition from Moses to Jesus there is a grand demand that society recognises fundamental human freedom. In Hindu Budhist conception there is the noble idea of divine in man. And in the Islamic tradition each can claim the right to brotherhood, equal justices and the equality before law.

Modern concepts of human rights and fundamental freedoms have taken shape during the long development of democratic society. Magna Carta of 1215, the Habeas Act of 1679, the Bill of Right of 1689, the American Declaration of Independence in 1776, the French Declaration of the Right of Man in 1789, were the milestones along the road in which the individual acquired protection against the repressive acts of kings and despots and the right to lead a free life in a free society. These documents made profound impact on the ebb and flow of the battle of personal liberty and have supplied inspiration for the acceptance as common standards for universal application.

The vast political, social and economic upheavals that followed two World Wars led to a realisation that the principles of the Rule of Law propounded by Dicey of England in the mid 19th century in the sense of absence of arbitrary power on the part of government and of equal protection to all, requird clearer definition and these democratic rights of man earlier conceived by Hugo Grotius as natural right were indeed of universal application and awakened world leaders to the need for concerted action to protect human rights under the Rule of Law which led to the adoption of the Charter of the United Nations and subsequently of the Universal Declaration of Human Rights formulated by the United Nations in 1948 which sets out a list of human rights which are similar to and include more important of the fundamental rights considered as essential for a society nnder the Rule of Law and as the Common standard that should apply to hnman race irrespective of race, religion, colour, sex, language, birth or other status. The provisions and ideals of the Charter and of the Universal Declaration have now been much more specific and obligatory in three international covenants :(1) The International Covenant on Economic, Social and Cultural Rights, (2) The International Covenant on Civil and Political Rights and (3) The Optional Protocol. After ratification by individual nations these covenants and the International Bill of Rights took on the force of International Law in 1976.

Apart from gaining the status of international law, the International Bill of Human Rights is also obligatory in its implemanatation by virtue of Article 56 of the U.N. charter which says : All members pledge themselves to take joint and separate action in cooperation with the Organisation for achievement of the purposes set forth in Article 55, and Article 55 includes as one of its purposes, the respect for and observance of human rights and fundamental freedoms declared by the United Nations. This article has created a sort of international accountability for all member states of U.N., so that we can say that a violation of human rights anywhere is the concern of democratic people everywhere, states not excluded.

Law is both an instrument of social control and social change. Like all other human institution, it is never static but dynamic. With the cnanging pattern of human relations resulting from technological change changing the productive forces of economy, Dicey's concept of the Rule of Law has undergone great changes with such

adaptation and expansion as was necessary to meet new changed circumstances. In this context the International Commission of Jurists and other international bodies undertook the task of defining the requirements of thy Law and elaborated the principles of the Rule of Law and Human Rrights at the Congresses and Conferences held from time to time from which there emerged the new dynamic concept of the Rule of Law which embraces a broader conception of justice than the mere application of legal rules.

An ananlysis of the thirty Articles of U.N. Universal Declaration of Human Rights reveals that the preamble postulates the basic aim of the International Bill of Human Rights to be the recognition of the inherent dignity and of the equal and inalienable rights of all members of human family and to provide a common standard of achievement for all people and all nations and that these rights are the foundation of freedom, justice and peace in the world.

The Rule of Law as understood today in its broadest connotation means a government of laws and not of men. It means that the exercise of power of government shall be coditioned by law and that the citizens shall not be exposed to the arbitrary will of the ruler i.e. the rulers are subject to laws, which means a Government controlled by laws framed by the people's representatives which uniformly binds the citizen and the Government as equal before law, where State powers are separate but co-ordinate into the executive, legislative and judiciary with emphasis on individual right to life, liberty, property and lastly of political participations, and where an independent judiciary has the right of judicial control over executive acts. In countries like Bangladesh where there is a written Constiution having entrenched Bill of Rights, the judiciary is also clothed with the power of juicial review of legislative enactments. In modern democracy, Parliamentry or Presidential, the executive and the legislature are either joint or separate but co-ordinate, but judiciary in either case is independent from interference in its function both from the legislature and the executive.

The Supreme Court's Appellate Division in a recent historic judgement on the Eighth Amendment of the Constitution in A. Hosain Chowdhury Vs. Govt. of Bangladesh on the decentralization of its High Court Division, has set aside the amendment of Article 100 along with consequential amendement of Article 107 on the ground that the basic structure of the Constitution cannot be altered by the

Legislature, since the impugned amendment is such an alternation, and thereby upheld the democratic structure of our Constitution deeming the expression of the will of the people.

BANGLADESH LEGAL SYSTEM UNDER THE RULE OF LAW.

While examining the aspects of our legal system under the Rule of Law, it should be noted, as to our legal heritage, that our system of law is partly the legacy from Islamic Fiqh and party from British jurishprudence, while remnants of Hindu and customary laws are also traceable, and much of the present judicial system of Bangladesh has its roots in that of the mediaeval Muslim period which was gradually anglicised during the British period but still the Muhammedan element did not disappear. In the family laws sector in respect of marriage, divorce, inheritance, guardianship etc the Muslims and Hindus follow the Islamic Law and Hindu Law respectively as well as the precedents laid down by the Law Courts. In respect of the procedural and other laws evolved due to advances in the commercial, industrial and other economic fields, we have, by and large, retained the British system.

As to the nature of the law of the land, unlike that of the U.K. having no written Constitution the main source of their law being unwritten common law as suitably amended and modified by Parliamentary statutes and supplemented by case law based on judicial decisions, in all other countries including Bangladesh having written costitution there are two kinds of law-(1) Constitutional law i.e. the law relating to and having its source in the written Constitution made by the Constituent Assembly and (2) Ordinary law made by the Legislative Assembly, (i.e. Parliament) in the ordinary process of legislation, which for its validity must be consistent with the Constitution, the Constitution being the supreme law of the land.

Bangladesh has been characterised in the Constitution of 1972 as a unitary, independent and sovereign republic to be known as the People's Republic of Bangladesh and is governed by a written Constitution which determines the framework and functions of the organs of the Government, distribution of powers between those organs, the principles governing the operation of these organs and relationship between them and the citizens. The Constitution proclaims sovereignty derived from the people and is the supreme law of the

Republic and if any other law is inconsistent with it, that other law shall be void to the extent of inconsistency (Article 7). It incorporates entrenched Bill of Rights known as the Fundamental Rights and any law inconsistent with those rights passed by the legislature shall be void to the extent of inconsistency (Article 26).. Article 31 proclaims Rule of Law and provides that to enjoy the protection of the law, and to be treated in accordance with law, and only in accordance with law, is the inalienable right of every citizen, wherever he may be, and of every other person for the time being within Bangladesh, and in particular no action detrimental to the life, liberty, body, reputation or property of any person shall be taken except in accordance with law. The Constitution maintains separation of powers between the executive, the legislature and the judiciary with checks and balances. Independence of the judiciary is proclaimed in the Constitution.

Since justice is administered according to law, constitutionality of legislative and executive acts are derermined and administrative actions are also controlled by the judiciary. While considering the relationship of the judicial system with the concept of the rule of law, it will be convenient to consider in brief the relationship of the executive and the legislative with the concept of the rule of law. Attempt will also be made to summarise the position and to draw certain general conclusions incorporating suggestions.

While considering the rule of law aspect of the executive and legislature it is observed that the Government of Bangladesh is a Combination of Presidential and Parliamentary forms of Government. There is a Prime Minister of Government and Speaker of of the legislature. Thus the Presidential system is not exclusive in that the Prime Minister is appointed by the Presideut from among the elected members of the legislature and is partly responsible to it. It envisages a democratic system of a Presidential form with a written Constitution, where the legislature has plenary power within its legislative field. Except the question of excluding the the Parliament's power from making the executive accountable to it, the Parliament is the supreme law making body and its Acts, subject to the constitufional restrictions, are binding on all Courts, taking precedence over all other sources of law.

Judiciary under the Rule of Law.

The Judiciary occupies a very important position in the political system of democratic country. It is everywhere one of the three principal organs of government and is closely associated with the other two organs of government and with the rights and duties of the governed. According to the resolution of the Internaiional Commision of Jurists as well as the Universnl Declaration on the Independence of Justice unanimously held at Montreal in 1983, an independent Judiciary is an indispensable requisite of a free society under the Rule of Law. The maintenance of independence and impartiality of the Judiciary both in letter and spirit is the basic condition of the operation of the Rule of Law, and as such ensuring the liberty of the people and human progress. Such independence implies freedom from interference by the executive or legislature with the exercise of the judicial functions but does not mean that the judges are entitled to act in an arbitrary manner.

We may here cite a passage from the noted activist Judge of India, V.R. Krisna Ayer of the Supteme Court : "I may briefly deal with the fascinating and fashionable topic of 'judicial 'independence'. A dependent judiciary, like a powerless power, is a contradiction in terms, but what is the judiciary independent of ? Is it independent of the nation? No. Is it independent of the Constitution ? Emphatically no. Is it independent of accountability of the people in the final analysis as a court ? No. Is arrogance independence ? No. Is improper yet unpunishable conduct independence ? Is concealed social philosophy at war with constitutional sympathies independence ? Justice being taken away then what are kingdoms but great robberies ?" One or two observations of our Suppreme Court will not be out of place. The Appellate Division of the Supreme Court in Abdul Latif Mirza vs. Govt. of Bangladesh observed: "It is now well-recognised that the principle of natural justice is a part of the law of the country." A further observation is there that interpretation of the statute or law which preserves a fundamental human right is to be given rather than one which destroys it. In the true sense of justice no judge has the right to be independent of the social philosophy if he wants to serve under

Let us now turn to the constitutional provisions on Judiciary specially the superior Judiciary. Bangladesh has a hierarchy of courts in three tiers, with the Supreme Court at the apex, comprising two Divisions-the Appellate Division and the High Court Division. In the lower Judiciary in civil side there are District Judges, Subordinate Judges and Assistant Judges Courts, and in Criminal side, Sessions Judges, Assistant Sessions Judges and Magistrates Courts.

The Supreme Court which is a court of record has the contempt of court powers. The law declared by the Appellate Division shall be binding on the High Court Division, and the law declared by either Division of the Supreme Court shall be binding on all Courts subordinate to it, a provision setting up a centralized judiciary. Under Article 94(4) of the Constitution the Chief Justice and other Judges shall be independent in the exercise of their judicial functions. Article 147 protects some of the constitutional incumbents of whom a Judge of the Supreme Court is one, as to his remuneration, privileges and other terms and conditions of service by saying that they shall not be varied to his disadvantage during his term of office. This relates to the econmic independence of the Judges. The Supreme Court Judges satisfy almost all the rules of independence, economic, political and administrative. We find that the constitutional provisions with regard to appintment, tenure, rumuneration and removal correspond substantially and compare favourably with the declaration of the World Congress on the Independence of Justice at Montreal relating to national judiciary.

The District Courts' Judicial officers from Munsif (now Assistant Judge) to District Judge enjoy substantial safeguard to their independence being mostly under the Control of the High Court Division. The Magistracy is the weakest point of our judicial system. They are executive officers dischaiging judicial and executive work interchangeably and are under executive control. However, there is a part separation of judicial function from the executive at the metropolitan level and an attempt at district and upazila levels. The Constitution however, is not oblivious of this draw back and so Article 22 of the Fundamental Principles of State Policy Chapter has commanded : 'the state shall ensure the separation of the judiciary from the executive organ of the state." In fact since the passing of the East

Pakistan Act XXIII of 1957 providing for separation of thn executlve from the judiciary, the law is hanging calling for its application. The sooner it comes into operation the better for the Rule of Law in this country.

With regard to the appointment of Judges, the present Constitutional position is that the President is the sole authority to appoint a Judge, though previously there was a constitutional provision of prior consulation with the Chief Justice. Apparently there is a deviation, but as briefly mentioned, the consultative practice followed earlier is conventionally followed, and if convention is entrenched firmly, it will furnish more effective safeguard than a mere written precept. It is therefore, suggested that the appointment of the Judges of the Supreme Court except the Chief Justice may be made by the President after consulation with the Chief Justice, and the appointment of the Chief Justice be made on the inflexible rule of seniority as this method is likely to be independent of popular influence as well as of political and sectional consideration and is considered to be the most common and best method. Article 95 of the Constitution should be amended accordingly to restore the same to its original position as it was before the amendment of 1977.

Similarly with regard to the control and discipline of the subordinate courts, Article 116 of the Constitution should be amended and restored to its original position as it was before the amendment of 1975 and the supervising authority over the subordinate judiciary as to control including the power of posting, promotion, grant of leave and discipline of persons employed in the judicial service and the Magistrates exercising judicial functions should vest in the Supreme Court instead of the executive authority.

Criminial Justice

Now a word may be said with regard to the administration of of criminal justice. Besides the existence of the enlightened and independent judiciary, ultimate protection of the individual in a society depends also upon acequate provision for speedy trial of accused. But if we turn from judicial interpretation of laws and the principles enunciated in the Constitution to actuality, we find wide gap between the ideals and the actual in respect of trial and treatment of prisoners. Under Article 35 of the Bill of Rights every person

accused of a criminal offence shall have the right to speedy trial and none shall be subjected to cruel, inhuman and degraded treatment. But accommodating 20 thousand under-trial prisoners in place of only 17 thousand registered accommodation, excluding convicted prisoners and political detenues, as found in 1979-80, shows a very dismal picture about the condition of undertrial prisoners of criminal cases. Morever, the prison custody goes upto four/five years, even for petty crimes, where the custodial sentence would not exceed more than three months. One of the reasons for this diplorable state of affairs is the appalling poverty of most of the prisoners which stands on their way to find bail when they are brought before the Magistrate after their arrest, as a result they continue to rot in prison for indefinite period, till the delatory machinery of law puts them on trial after long delay. In many a cases of appeals by the convicted prisoners the judgment of acquittal is passed by the superior courts long, some times several years, after the expiry of the period of sentence passed by the court below. These are cases of massive denial of rights inasmuch as, it is not only that the liberty of the prisoner is denied, but in many cases he being the only earning member of his family of several members, it brings misery to untold number of people.

Writs.

The High Court Division of the Supreme Court, which is otherwise the highest court of appeal, civil and criminal, and only from High Court Division appeals, some as of right and the rest by special leave lie to the Appellate Division, which is the highest court of law, specially in constitutional matters, has specified criminal jurisdiction in some company and Admiralty matters and a special jurisdiction commonly known as Writ jurisdiction, in that it has the power of judicial review of executive acts by issuing orders analogous to the high prerogative writs of Mandamus, Prohibition, Certiorari, Habeas Corpus and quo Waranto. But under the relevant Article 102 of the Constitution only an aggrieved person can apply, and the High Court Division of the Supreme Court can issue writs and no other person interested in any such matter can move a writ petition for public benefit except the writ of Habeas Corpus in which case any person can

move a petition for release of a person under detention and of Quo warranto against usurpation of a Publie office.

It is therefore, suggested that suitable provision should be made in the Constitution so as to enable a person to move the Supreme Court's High Court Division for such writs on the ground of pro bono publico for the public good in order to sefeguard public interest and thereby to meet the ends of justice or the Supreme Court may put an extended interpretation to include public interest matter on the article as the Indian Supreme Court has done.

Legal Aid

A society that requires its citizens to live within law must ensure that they have access to the remedies of legal system regardless of their economic conditions. In an unequal society, equality before law implies rendering of legal aid to the poor litigants. Equal access to law for the rich and the poor alike is essential to the maintenance of Rule of Law. But in a poor country like Bangladesh common man can ill efford to pay the high costs of getting justice and as such the highly expensive judicial procedure keeps justice beyond their reach. But the problem is not irremediable though formidable. The remedy lies in legal aid by the State, law associations and individual lawyers.

The reasons behind the idea of legal aid is that judicial machinery for redress or defence should not be denied because of financial need. Achievement of justice, social, economic and political and of equality of status and opportunity are the aims enshrined in our constitution but financial inability of a poor person to obtain access to a court either for redress of wrongs or for defending himself makes justice unequal as he is denied equality of opportunity to seek justice. Legal aid to the poor litigant is therefore, not a minor problem of procedural law but a question of fundamental character. The solution of this problem lies in legal aid by the state, law association and individual lawyers. It is, therefore, essential to provide adequate legal advice and representation to all those threatened as to their life, liberty, property and reputation who are unable to pay for it.

In Bangladesh the provision for state legal aid is very inadequate. In criminal matters only in death sentence cases a poor accused is

given state defence free of costs. There is of course rule for jail appeal, where a convicted person can file appeal through jail authority for consideration of judges sitting in chambers without the presence of a lawyer or the prisoner. In such appeals however, the accused persons do get relief. In civil matters a pauper who is unable to pay court fees and does not own property exceeding one hundred taka can, on establishing his pauperism, bring civil action, but all other legal costs have to be borne by him.

As regards institutional efforts the Bangladesh Bar Council, the statutary body of lawyers, Bar Associations, and voluntary non-governmental legal aid societies have shown an awareness of necessity for rendering legal aid to the poor and some steps have been taken in this regard, but the efforts are not substantial as to have any impact on the litigant public as a whole. Individual efforts are there but not very extensive.

Reconciliation of the freedom of the citizen with the authority of the state has been the recurring problem of civilization throughout the ages. The struggle for freedom against arbitrary power and unjust laws has always been to secure self-governnwent, which lie at the very foundation of democratic society. Democracy is the structural or constitutional parameter of state power for the preservation and protection of universal human right of today under the Rule of Law. So in a modern welfare democracy, law is the opinion, reason and will of the society as expressed and formulated through their representantatives, the legislatures, and it took its birth with the birth of man and has grown with the growth of the society, its function being always to regulate the conduct of human affairs so as to balance the competing rights and freedom of those who comprise the socity.

The ultimate protection of individual in a society governed by Rule of law depens upon the existence of on enlightened and independent judiciary and upon adequate provision for the speedy and effective administration of justice. It may be noted that although duty of the judge is not to make law be but to apply law made by the legislature, yet the judiciary has to play a very important role in making case laws by way of interpretation of ambiguous statutory provisions and by enunciating principles of law which is translated into the fact of recognised and enforced law. We may quote here

a seminal observation of a political personality like Roosevelt : "The chief law makers in our country may be and often are the judges because they are the final seat of authority. Every time they interpret the contract, property, vested rights, due process of law, liberty, they necessarily enact into law, a part of a system of social philosophy and, as such interpretation is fundamental, they give direction to all law making, and we shall owe most to those judges who hold a twentieth century economic and social philosophy." So the role of judiciary will not merely be legal interpretation but to serve as an instrument of social engineering.

Achievement of justice, social, economic, political and of equality of status and opportunity are the aims enshrined in our Constitution and full judicial powers have been conferred by the Constitution on the judiciary as an independent organ of the state, but the financial inability of a poor person to obtain access to a court makes justice unequal as he is denied equality of opportunity to seek justice. Hence the necessity of legal aid which has been discussed earlier. We also find a wide gap between ideals and actuals in administration of criminal justice. Crtminal offence is regarded as an offence against the society and the law is set in motion as soon as an F.I.R. (First Information Report) is lodged in the police station and the state becomes the prosecutor. But information gathered from daily newspapers reveals that the complainants don't dare filing an FIR out of fear and even if they can manage to do so under compelling circumstances, the police officers refuse to record the FIR and sometimes they record the case of dacoity as that of simple theft and no step is taken in some cases to apprehend the criminals, who, on getting scent of the F.I.R., fall on the complainant who cannot even stay at his home under threatening circumstances, resulting in punishment of the complainants instead of the criminals. If the criminal law cannot even be set in motion, the question of justice by redressing wrong does not arise and the very existence of law, lawyer and courts becomes meaningless, and the judiciary quite helpless. In this situation effective steps must be taken by the Government to tighten the the executive machinery at lower levels in order to provide safeguards against any abuse or misuse of power and to ensure security and protection of the fundamental right to life, liberty and property of the citizen as guranteed by the Constitution.

As regards delay in administering justice, the formidable criticism against the existing common law judicial system is that its procedure is delatory and expensive, the legitimacy of which cannot be denied. But it is however, to be admitted that certain minimum procedural rules of 'due process' according to American terms, or of 'natural justice' according to English phrase are to be observed if the judges are to render justice according to law and that while dispensing justice the judges cannot dispense with justice. The use or abuse of procedural delay, however, depends upon how the Bench and the Bar behave. An earnest desire on the part of both with an understanding will surely curtail procedural delays. All the blame of delay cannot, however, be laid at the door of procedure or the lawyers. In most countries like Bangladesh inadequacy of the number of judges is the chief cause of accumulation of cases and delay in their disposal. To crown all is the torrent of new legislations, both civil and criminal, which bring the fresh crop of law suits but no increase in the existing strength is made. But the problem of delay though endemic is not incurable.

The foregoing discussion about the judiciary in a democratic state, where human dignity is protected in terms of the U.N. Human Rights Declaration, shows that they have been substantially provided in Bangladesh. The problem with us, like many other developing countries, is not so much with providing the basic formulation of the principles of Rule of law, but the real problem is to translate them into actuality in the life of the people, but that does not mean that we are going to abandon our adherence to or lose faith in the Rule of Law. In our attempt to state in rough outline the Bangladesh's experience like many other developing countries about the aspect of legal system under the rule of law in an immature political and economic background, we have observed that problems are many, intractable in some, but not insurmountable. Development in reality means economic growth and social change and the legal institution like an independent, enlightened and courageous judiciary, in our experience, is an indispensable instrument to achieve peaceful transition from a traditional rural society to a modern industrial society, and our courts pretty obviously have a job of formidable proportions on their hands to strike a balance balance between the private interest and public need and thereby to maintain its creative role to mould the system of justice to respond

the aspiration and needs of the common man keeping in view the promotional role of an welfare state.

Let objective reasons shape all of our state activities, under the Rule of Law, so as to as to strike the balance between the authority of the state and the fundamental human rights of the citizen by proper and prompt application and enforcement of the law on which rest the peaceful and civilized existence of the society.

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