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THE ROLE OF JUDICIARY IN THE PROMOTION AND PROTECTION OF HUMAN RIGHTS.

by

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Introduction.

Human rights are those universal, inalienable and fundamental rights and freedoms of all members of the human family which they shall equally enjoy freely I. e. free of arbitrary public or private interference. A common observation in all human societies has it that people may treat each other "well' or "badly", depending on whether they are motivated by love, generosity, gratitude, co-operation and creativity, or by hatred, greed, envy and destructiveness. Deeply buried somewhere in that observation are the origins of what are today called 'human rights' and the legal rules associated with them.

All human beings display certain needs which must be satisfied if they are even to survive, let alone to grow, develop their potential, and contribute to the development of the potentials of others. These needs are often painfully frustrated by unavoidable causes like disease or natural calamities and man-made interference. It is the paramount objective of human rights law - both national and international - to seek to protect individuals form man - made suffering inflicted on them through deprivation, exploitation . oppression, persecution, and other forms of maltreatment by organized and powerful groups of other beings. For that purpose human right law uses the classical transformations of philosophy from needs to moral claims, and from those claims to 'rights', founded first on morality and ultimately on positive and enforceable law.

Now, human rights are based on certain principles i. e. (1) the principle of universal inherence i. e. every human being has certain rights capable of being inumerated and defined, which are not conferred on him by any ruler nor acquired by purchase, but which inhere in him by virtue of his humanity alone. (2) The principle of

inalienability i. e. no human being can be deprived of any of those rights, by the act of any ruler or even by his own act; and (3) The rule of Law i. e. where rights conflict with each other, the conflicts must be resolved by the consistent, independent and impartial application of just laws in accordance with just procedures.

The Rule of Law therefore is a fundamental principle of human right law, since law is the condition of human rights and freedoms, said by James williard Hurst. Within a state, rights must themselves be protected by law; and any dispute about them must not be resolved by the exercise of arbitrary discretion, but must be consistently capable of being submitted for adjudication to a competent, impartial and independent tribunal applying procedures which will ensure full equality and fairness to all the parties, and determining the question in accordance with clear, specific and pre-existing laws, known and openly proclaimed. So, the Rule of Law is of particular importance for establishing the boundaries of the different human rights.

The International Bill of Human Rights.

The struggle for human rights and freedom is as old as humanity and reconciliation of the freedom of the subject with the authority of the state has been a problem throughout ages. The struggle for freedom, to start with was against arbitrary power and unjust laws. Since political power remained with the king, or with an oligarchy, the attempt of the people was to secure self-government, which lies at the very foundation of the democratic society.

These democratic rights of man earlier conceived by 'Rule of Law' propounded by Dicey required clearer definition after the vast political, social and economic upheavals that followed the World Wars which awakened the word leaders to the need for concerted action to protect human rights under the dynamic Rule of Law which led to the adoption of the charter of the United Nations on 26 June, 1945 and subsequently of the Universal Declaration of Human Rights formulated by the United Nations on 10 December 1948, which was viewed as the first step in the formulation of an international bill of human right that would have legal as well as moral force, and 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 under the Rule of Law and as the common standard that should apply to human race irrespective of race, religion, colour, sex language, birth or other status. Three decades thereafter in 1976 the provisions and ideals of the Charter and of the Universal Declaration became more specific and obligatory with the entry into force in the three significant instruments : (1) The International Covenant on Economic, Social and Cultural rights; (2) The International Covenant on Civil and political Rights; and (3) The Optional Protocol to the latter Covenant. After ratification by individual nations these Covenants and the International Bill of Human 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 implementation by virtue of Articles 55 and 56 of the UN Charter. And by adhering to the charter, states expressly "pledge themselves to take joint and separate action in co-operation with" the U. N. Organization to promote "universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion." This article has created a sort of international accountability for all member states of the U. N. so that we can now say that a violation of human rights anywhere is the concern of democratic people everywhere, states not excluded.

The Universal Declaration of Human Rights is as its title implies, truly universal in its application and applies to every one of the human family, everywhere, regardless of whether or not his government accepts its principles or ratifies the Covenants; while the Covenants, by their nature as multi-lateral Conventions, are binding only upon those states which have accepted them by ratification, accession or otherwise. Nonetheless the standard is there.

It is to be observed that there are some activities like aparthy, slavery, genocide, which are declared to be crime against humanity applicable to all in all circumstances, and that some rights like right to life, freedom of thought, conscience and religion, and freedom from

torture are non-derogable human rights, in that they could at no time and by any form of government be abrogated though may be regulated within the parameter set by the U. N.

Many countries including Bangladesh have in their Constitutions not only pledged the respect for International Law and the principles enunciated in the U.N. Charter, but included entrenched Bill of Rights in their written Constitutions in substantial agreement with the International Bill of Rights, and so the Bill is as much as part of the International Law, as part of our Constitution. Unfortunately, however, Bangladesh has not yet become party to the aforesaid international Covenants and protocol nor any regional Convention of Asian Countries has been formed like those of Europe, America and Africa providing means for protection of human rights namely, (1) The European Convention on Human Rights and Fundamental Freedoms, 1950 coming in force in 1953, (2) The American Convention on Human Rights, 1969, and (3) The African Charter on Human and Peoples Rights, 1981.

United Nations recognize non-governmental organizations to aid and advise the world body on matters of international concern and on legal matters. International Commission of Jurists,Law Asia, International Lawyers Association, World Peace Through Law Centre etc are such organizations which are deliberating and adopting many resolutions in amplification of Human Rights in many congresses and conferences. The World Conference on the Independence of Justice held in Montreal in 1983, adopted resolutions on the pre-condition of independence of justice relating to judges, international and national lawyers, jurists and assessors, and made recommendations to the U. N. for acceptance.

The Role of Judiciary.

The role of the judiciary in a democratic country, no doubt, is to administer justice according to law, and in a country governed by laws and not by men, the laws are framed by the elected representative of the people. In other words we have to combine democratic right with sovereign right, to unite the value and dynamic power of a common

will, with the stability and control of a common rule of reason. And that is not all; not only the laws are to be framed by the chosen representatives, but they will be for the people's interest. Law in the ultimate analysis must reflect the values of the nation and bind both the citizen and the government. When values are joined with laws and they are so administered by courts, then we get administration of justice in the real sense of the term, and that is the ultimate and solemn purpose of the judiciary. Such a country is known to have a government under the Rule of Law.

With regard to the solemn purpose of judiciary in administering justice, Henry Sidwick says :"The importance of judiciary in political Constitution is rather profound than prominent. On the one hand, in popular discussion of forms and changes of government, the judicial organ often drops out of sight, on the other hand, in determining a nation's rank in political civilization, no test is more decisive than the degree in which justice defined by law is actually realised in the judicial administration, both as between one private citizen and another, and as between citizen and members of the government."We can supplement this profound observation by another telling expression of Laski : "The men who are to make justice in courts, the way in which they are to perform their function, the methods by which they are to be chosen, the terms on which they shall hold power, these and other related problems lie at the heart of political philosophy and when we know how a nation state dispenses justice, we know with some exactness, the moral character it can pretend." The judiciary, therefore, is not a mere instrument of conflict resolution. but citadel of justice, where the values of the nation are preserved, protected and expressed. An independent judiciary in preserving and protecting human rights serves a barometer of national values.

Rights imply existence of the institution "judiciary" for their protection. Although the International Bill of Human Rights has not amplified but has referred to competent, independent and impartial tribunal in Article 10 thereof, the International Commission of Jurist and other international bodies have identified an independent judiciary as the best organ of the state to guarantee the protection of

human rights. When human rights are codified in international legal system and entrenched in domestic law,they become legal rights of the citizens enforceable in a court of Law.

It is to be observed that in the world conference leading to the Universal Declaration on 'Independence of Justice held in Montreal in 1983, an independent judiciary was proclaimed to be an indispensable requisite of a free society under the Rule of Law and a detailed rights and duties of judges and other law agencies have been adopted and recommended to U. N. General Assembly for adoption. Like non-derogable human rights, an independent judiciary, under no circumstances, by any government, could be intermeddled, since it is the only instrument for the protection of human rights.

Under Article 10 of the Universal Dcelosation of Human Rights everyone is entitled in full equallty to a fair and public hearing by an independent and impartial judiciary, in the determination of his rights and obligation out of every criminal charge against him which proclaims protection of rights and personal liberty by an independent judiciary. But the pre-conditions of impartial judiciary contemplate a representative or democratic government with emphasis on the sovereignty of the people, which means a government deriving its power and authority from the people. And this sovereign power exists for protection of their democratic rights, which we can now say, Human Rights, which according to the International Commission of Jurists could be best protected by laws made by the people through legislature freely chosen by a government governed not by men but by and responsible to them and the justice administered according to that law will be tempered with real justice.

To understand the implications of law with justice. we must observe that by law we understand rules of external human behavior enforced by the organized power of the state. The rule may be given by one supreme authority of the state, but the rule and the authority may or may not be the representatives of the people or the authority holding the power may not be with the consent of the governed. Similarly the rule of conduct may not be for the benefit of the people and may be

for the perpetuation of the rule of a despotic ruler. The law will only become just or wedded to justice when the rules of conduct will be framed for the benefit of the individual or the society or both. We may have justice under the rule of law, where the authority of law will hold power with the consent of the governed. It is not enough that law should be wedded to justice, but to realize justice it is to be interpreted and applied by impartial judiciary.

But fair and equal dispensation of justice demands more than equality between parties to individual law suits. It requires that all be equal before law. It does not mean that all should enjoy equality of legal rights, it rather means that persons having legal rights should be given equal protection by the court. It further means that to-days plaintiff and tomorrow's receive the same sort of hearing and that judges should meet out justice without fear or favour and without distinction between high or low, rich and poor. This again entails that like cases be treated alike both as regards hearing and in respect of finding. That means there should be the rule of judicial precedent.

The ultimate protection of individual in a society governed by Rule of law depends upon the existence of an enlightened and independent judiciary and upon adequate provision for speedy and effective administration of justice. It may be noted that although duty of a judge is not to make law 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 the principles enunciated by judiciary is translated into the fact of recognized and enforced law. We may quote here a seminal observation of a political personality like Roosvelt:

"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 interprete 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" as propounded by Roscoe Pound of the Sociological School of Jurisprudence.

Conclusions and Suggestions.

Since the rights and freedoms of some may and, do clash with those of others singly and collectively, the reconciliation of individual liberty and social or government's authority has been the perennial problem of a democratic state. After centuries of trials, errors, bloodsheds, upheavals and catastrophic wars, our generation has evolved the Universal Declaration of Human Rights on balancing diverse conflicting forces in 1948, which is now recognized as the Magna Carta of all mankind. The Declaration, however, has not clearly articulated the system of government of a state in which the human rights can be realised,but is not silent either.

Human Rights, it need not be emphasized, is nothing but the reconciliation of the eternal conflict between the liberty of the individual and the authority of the government, and in so doing it has attempted, in the broadest outline, in Article 21 of the Universal Declaration of Human Rights, to define the basis of authority of the State and may be set out as follows :

"21. (1) Everyone has the right to take part in the Government of his country directly or through freely chosen representatives; (2) Everyone has the right of equal access to public service in his country; (3) The will of the people shall be the basis of authority of government expressed in periodic and genuine elections by universal suffrage. Therefore, a democratic government shall be governed and justice administered according to the law made by the people though their freely chosen representative according to their aspirations.

As to the mature and character of Bangladesh as an independent state, it may be stated in brief that the government of Bangladesh is a multi-party democracy and with the restoration of the parliamentary executive by the twelfth Amendment in 1991, a Westeminister type

of parliamentary system or Cabinet form of government headed by the prime Minister has been reintroduced. The Constitution is written, rigid and supreme law of the land and envisages a democratic system where the legislature has plenary power within its legislative field, and proclaims sovereignty derived from the people and incorporates entrenched Bill of Rights known as the Fundamental Rights with provision for enforcement thereof. Independence of Judiciary is also proclaimed in Article 94(4) read with Article 116 A of the Constitution with a directive in Article 22 to ensure its separation from the executive.

But the problem with Bangladesh like other developing countries lies in effecting the formulation of the basic principles of the Rule of Law, more or less entrenched in the Constitution, in the real life of the people. The principles, in fact, exists as ideals rather than real. So great hiatus is left between the ideal and the actual. The great impediments to democracy reaching its highest expressions and fullest realization are illiteracy, ignorance, poverty and other factors akin to illiteracy of the great majority of the people who are unable to form an independent opinion in national issues at the time of election, thereby making the democracy undemocratic and meaningless and rendering the government of the people into that of the interested group resulting in group tyranny. But that does not shake our faith in democracy. We are to wait for desired changes through trial and error process.

With regard to the Constitutional provisions on judiciary, we find that the Supreme Court Judges satisfy almost all the rules of independence which correspond substantially with the declaration of the World Conference on the Independence of Justice in Montreal relating to national judiciary. But the provisions relating to preventive detention and proclamation of emergency as subsequently introduced in Art. 33 and 141A of the constitution in 1973 are contrary to the concept of democracy and have been misused undermining the constitutional safeguards as to arrest and detenation and suspending the fundamental rights off and on by declaration of emergency for political reasons depriving of one's liberty except upon a charge of specific criminal case and preventive

detention without trial are contrary to rule of law, as indiscrimate use of power, vague suspicion by the police and callous disregard of the detenue are the chronic and common causes of such detention. Living democracy cannot allow such an undemocratic law to live in the present form without suitable and specific provision for protection of the right of representation of the detenue. The maintenance of independence and impartiality of the judiciary both in letter and spirit is the basic condition of the operation of Rule of Laws for protection of human rights and human progress ensuring liberty of the people. Such independence implies freedom from interference by the executive or legislature with the exercise of judicial function, but does not mean that the judges are entitled to act in an arbitrary manner.

The angelic law of Habeas corpus evolved in the 17th century in England to free the citizen from arrest without legal warrant, from unlawful detention without trial and from punishment without a conviction, was overpowered by the ghost of subjective consideration as for detention according to the majority view in the *Liversidge* V. *Anderson* (1942 AC 206) (Lord Atkin dissenting and observing that reasonable grounds should be assigned and judicial serutiny is necessary for objective satisfaction) which had an adverse effect and influence over the Colonial Courts including those of this sub-continent for a long period. But the "hands off" approach to the exercise of subjectively worded powers by ministers and other administrative bodies no longer pertains. Subsequently in *IRC* V. *Rossminster* (1980 A C. 952) Lord Scarman of the House of Lords stated that "the ghost of *Liversidge* V *Anderson* casts no shadow; it need no longer haunt the law and that it is now beyond recall." At the same time we are proud of a number of cases decided by the Pakistan Supreme Court, namely *Malik Ghulam Jilani, Mir Abdul Baki Baluch, Begum Shorish, Kashmiri and Jibendra Kishore,* as well as of some of the decisions of the Indian Supreme Court in the famous *Keshavanda Bharate's* case and in *Minerva Mills Ltd* case all of which upheld the fundamental rights and liberties of the people.

The Supreme Court of Bangladesh also upheld the glorious tradition of judicial independence in protecting and safeguarding the

fundamental rights and liberty of the people in several cases, namely, *Habibur Rahman, Mrs. Aruna Sen, Firoz Ahmed, Nurunnahar Begum, Amaresh Ch. Chakraborty, Mrs. Saleha Begum, A. K. M. Shamsuddin, Asmat Ullah Mia,* and *Abdul Latif Mirza,* holding that power has been expressly given under Article 102 of the Bangladesh Constitution to prove into the exercise of public power by the executive how highsoever and to see whether they have acted in accordance with law. In a recent historic judgment (in *A. Hossain Chowdhury V. Govt. of Bangladesh*, popularly known as the 8th Amendment Case) the Supreme Court of Bangladesh held in line with the Indian *Keshavanda Bharate's* case, that basic structure of the Constitution cannot be altered by the legislature and aptly played the role of a guardian of the Constitution.

The decision of the Pakistan Supreme Court in the leading *Malik Ghulam Jilani's* case overruling the *Liversidge*, which was referred to and envoked by the Bangladesh Supreme Court in the cases mentioned above, had the effect of eliminating the ghost of *Liversidge's* majority view, following the famous minority view of Lord Atkin enunciating the 'objective test' which has become the most respected guiding principle for judicial independence.

Even then in *Dosso's* case Pakistan Supreme Court invented and applied the doctrine of necessity and political reality to legalise otherwise illegal coup d'etat only on the basis of expediency. It is interesting to recall that the same Supreme Court under changed circumstances overruled *Dosso's* in *Asma Jilani's* case in 1972 holding the Martial Law by General Yahya Khan in 1969 as illegal.

The foregoing discussion about the judiciary in a democratic state shows that fundamental human rights and liberties have been substantially provided in the constitution and the superior courts played their role as guardian of the Constitution in safeguarding and protecting these rights whenever necessary. But it may be reminded that although under Article 56 of the U. N. Charter and the Bill of Rights each nation has pledged to achieve and uphold those noble objectives, how many of us have honoured that solemn pledge given to the world organization?

More than forty years have now elapsed since the adoption of the Universal Declaration of Human Rights but the thing which has unfortunately become more and more conspicuous is the politicization of human rights. Attention of violation is focussed if it is found politically expedient, otherwise we shut our eyes, no matter how cruel and serious the violations are.The tragic plight of our unfortunate palestanian, Kashmiris and Bosnia-Herzegovina brethren who are victims of supreme power veto are the glaring examples in recent time of gross violations of U. N. Charter and Human Rights. The judiciary in this sad state of affairs can only regret but has little power and scope to help. That is why Justice Robert Jackson who in *Board of Education* case observed : "one's right to life, liberty and other fundamental rights may not be submitted to vote; they depend on the outcome of no election, " later exclaimed;

> I know of no modern instance in which any judiciary has saved a whole nation from the great currents of intolerance, passion, usurpation and tyranny which have threatened liberty and free institution."

Therefore, if Human Rights under the Rule of Law is to prevail, people must come out into the open to talk, work honestly to reason together, and to help and support each other. Then alone can public opinion has a chance to form, then alone can the public restore its confidence in the authorities to enforce the law; then alone can we restore our respect for the Rule of Law for protection of human rights and allow it to rule, guide and govern us. 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 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 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 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 rests the peaceful and civilized existence of the society.

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