Justice A.K.Badrul Haque

‘’Human Rights - Their Enforcement: Judicial Activism’’

Justice A.K. Badrul Huq.

Human Rights are the Charter of Rights for mankind. Human Rights are those Rights which are inherent in the nature of human beings and without which human beings can not live in the world. The concept of Human Rights is not a new one but an ancient. From the earliest time human history is a history of long struggle to protect Human Rights. Scholars like Plato and Aristotle Championed the thought that the people were not subject who are exclusively made to bow but also were human beings who needed to be taken care of. With the dawn of mid Twentieth century, the struggle was directed mainly to secure social, economic, political and civil justice from within the own Government and persuade the Government to respect people's Fundamental Rights which are Human Rights. On the conclusion of the Second Great World War, a process of internationalization of Human Rights took place. In addition to the struggle for Human Rights in their own countries launched by the people of those countries, the international community expanded its involvement in its efforts to achieve respect for Fundamental Human Rights and this internationalization of the quest for Human Rights led to the modification of the traditional concept of sovereignty of the state. As a result, various codes embodying universal principles of Human Rights to be observed throughout the whole world transcending state boundaries were adopted by various International bodies. The first of these Codes was the Universal Declaration of Human Rights adopted by the United Nations General Assembly on 10 December, 1948. Two other Covenants quickly followed it. They are the International Covenants on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR). These three documents are together referred to as the "International Bills of Rights".

The enforcement of Human Rights has both a Domestic as well as an International aspect. On the one hand a state enforces Human Rights as part of its own Domestic law and Constitution, and on the other, in pursuance of its International obligations under Customary International law and Human Rights treaties. Most of the states of the SAARC region and in fact a large number of States the world over (approximately 138 as of July 1997) are parties to the two Covenants on Civil and Political rights, and Economic Social and Cultural Rights, which set out the basic Human Rights. It may be noted that the Protection of Human Rights Act of 1993, defines Human Rights as the rights relating to life, liberty, equality, and dignity of the individual, guaranteed by the Constitution or embodied in the International Covenants and enforceable by courts. Other rights not specifically set out in the Constitution have been incorporated by judicial interpretation as

facets of the Fundamental Rights. It is significant that not only the concept of the rights but also its growth and development and in shaping them into enforceable norms the Judges in all ages and in all jurisdiction played the most significant and commendable role in the history.

The Constitution of the People's Republic of Bangladesh like the Constitution of India and Srilanka embodies special provision for Fundamental Rights, and~ Directive Principles of State Policy, which incorporate many of the basic Fundamental rights set out in the Universal Declaration of Human Rights as well as in the two Covenants on Human Rights.

A chapter of Fundamental Rights is provided under part III of the Constitution, while Fundamental

principles of State policy is provided under part II.

Equality, human and social Justice, are the main aims of Bangladesh as being part of her Proclamation of independence and these are embodied in the Preamble of the Constitution in which the Rule of law, Fundamental Rights and freedom, equality and Justice-political economic and social need to be secured for all citizens.

Right to move to the High Court Division of the Supreme Court of Bangladesh has also been made part of the Fundamental Rights. This has conferred upon the Supreme Court unequivocal power for giving direction and orders to any person or authority for the enforcement of the Fundamental Rights conferred by Part III of the Constitution (Art. 44)

Bangladesh Constitution has thus made Rule of law and its enforcement a part of Fundamental Rights, thereby ensuring the right of every person to be treated only in accordance with law (Art. 31) which is part of his or her Fundamental Rights enforceable under Article 102(1) of the Constitution.

Judicial activism

In search of justice for the enforcement of Fundamental Rights I Human Rights Judicial activism can be permissible to what extent is now the question before the Judiciary in Bangladesh in the light of other countries of the world. In India anxiety about social justice and the removal of discrimination on all irrational grounds has caused Judges like Krishna lyer to become pioneers of a kind of judicial activism that is often in tune with the deeply felt emotions of ordinary citizens. It is concerned about torture, cruel, inhuman and degrading treatment or punishment. In S.P. Gupta V Union or India2 it has been unanimously ruled that where judicial redress is sought for legal injury to a person, or a determinate class of persons who, by reason of poverty, helplessness, social or economically disadvantaged position or disability are unable to approach the Court for relief, any member of the public, acting bona fide and not for oblique considerations, may maintain an action on their behalf. Such a person may seek judicial redress for the legal wrong or injury caused to such other person or determinate class of persons. Perhaps it is the special needs of India which propels its courts into radical refashioning of the instruments of the common law and reconceptualisation of the role of a modern judiciary in a free society.

Controversies exist in India about Judicial activism. Judicial activism requires judicial restrain. In India from the highest level of judiciary there has been recognition that excessive or ill-judged activism may damage to the very Institution which gives birth to it. Weather judicial activism is a good thing or a wise or fraught with peril or positively damaging to the judicial institution are questions exclusively for the Indians to Judge.

In the United States of America, the tension between judicial activism and judicial restrain has been presented since the foundation of the Republic and the creation of the Supreme Court. The history of the Supreme Court of the United States teaches that judicial activism is not confined to a particular ideological or social viewpoint. It may be liberal. But it may also be quite conservative. In the early years of this century the "judicial activists" on the Supreme Court of the United States impeded legislation enacted by the Congress, or the legislatures of the States, dealing with social or economic affairs. Thus legislation governing child labour, worker's hours and workers' rights were consistently struck down as being violations of the commerce clause of the US Constitution or the judicially created doctrine of "liberty of contract" under the due process clause of the 14th Amendment. A well known example of this kind of judicial activism is the decision of the Supreme Court in Lochner v New York3. In that decision, the court invalidated legislation of the State of New York regulating the hours that bakers could work. The Court held that this was a violation of "liberty of contract".

Some of the controversies which have arisen in the United States and India have also presented themselves to the Australian judiciary more urgently in recent times. For a long period the established doctrine of the courts of Australia was that expressed by the Chief Justice Dixon in a passage known to every Australian lawyer and law student of this generation. Although stated in the context to

In a letter addressed to Yale University in 1955 Concerning Judicial Method. Chief Justice Dixon accepted that judges do develop the law. But he was at pains to emphasis that it was a very limited function . It is one thing for a court to seek to extend the application of accepted principles to new cases or to reason for the more fundamental to settle legal principles to new conclusions or to decide that a category is not closed against unforeseen circumstances which might be subsumed there under but it was wrong for a judge; who is discontented with the result held to flow from a long accepted legal principle, deliberately to abandon the principle in the name of justice or of social necessity or of social convenience.

Judicial activism in Bangladesh like Indian judicial activism has not yet got momentum. Recently an encouraging and outstanding initiative had been taken by a Division Bench of the High Court Division resided over by Mr. M. M. Haque J in State Versus Deputy Commissioner, Sathkira and others6. On the basis of a news item published in Daily Ittefaq under the caption "

Suomoto Rule was issued upon the Government, the Deputy Commissioner Satkhira, and the relevant jail authority. Rule was made absolute and Nazrul Islam who suffered unlawful detention in the jail was directed to be set at liberty forthwith. In Dr. Mohiuddin Farooque Versus Bangladesh and others7. a Division Bench of the High Court Division presided over by Kazi Ebadul Hoque J it has been posited that a citizen can be dispossessed of his poverty if public interest and State necessity required with Just compensation for taking the property and no person shall be deprived of his life and property except according to the procedure established by law.

Fundamental Rights guaranteed by the Constitution and Internationally adopted Human Rights are rarely translated into reality. The Society has fallen in the grief of a few terrorist and corrupt people and the ordinary people particularly the poor became hostages in their hands. Justices is disadvantageous to the poor. Law is said to be arrested

in the hands of few powerful persons. The judiciary got a significant role to meet the aspirations of the suffering humanity even showing judicial activism.

The judge of the common law in the region is controlled in any temptations to activism. The judge's boldest ambitions are held in check by the judicial method. But there is not clear divide which marks off the limits of judicial creativity and activism. The communities have come to understand that some measure of "judicial activism" is not only permissible but is traditional in our system of law. Moreover, it is beneficial to the noble cause of justice under the law. The challenge for judges is to find where the line lies in a particular case, at a particular time and place. Each judge knows that limits exist. Most would agree with recent remarks of Justice Anthony Kennedy, of the United States Supreme Courts that a society that leaves all or most of its hardest decisions to the courts is a weak society. The burden which society casts on its judges are greater today than ever before. The judges are the servants of the law and of the societies. They must continue to find the sources of discipline in legal authority. But when new problems arise, when the common law has no exactly analogous decision or. where the Constitution or the legislation is ambiguous, they must also lock to legal principle and legal policy. Judges do not usually have the privilege to decline the obligation of decision. Sometimes they will commit error, for that is inherent in the human condition. But if the judges search for the solution to the particular case with the illumination of legal authority, legal principle and legal policy and are sometimes called "Judicial activists", the Judges must accept that appellation with fortitude. Judges activism has limits as every on of them knows. But in a real sense, the common law itself is the product of "Judicial activists". The most Judges can hope is that they are successors, worthy in their time, to the great spirits who have preceded them.

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