

A Letter from Dhaka

Dear Editor,

Late in October 1995, Brian Donovan QC asked if I would be interested in joining the team of counsel visiting Bangladesh in January 1996 to participate in a clinical legal education program. After a moment's reflection I agreed. Bangladesh is not usually on my itinerary and this sounded like an adventure.

I knew that Bangladesh was a Muslim country, had had a bloody breach with Pakistan in 1971 and that its heroic revolutionary leader and first Prime Minister, Sheikh Mujibur Rahman, had been assassinated by army officers in 1975. I knew the country was overcrowded, plagued by floods and subject to frequent changes of government, not necessarily by democratic means. That was about the extent of my knowledge of the country.

The *Lonely Planet Guide to Bangladesh* painted a gloomy picture, spending far too much time on the country's diseases for my liking. A helpful friend told me that the right-leaning American, P J O'Rourke, had included Dhaka in his book *Holidays in Hell*. As it happened, he had not done that, but he had in fact visited Dhaka and had written about it in another book called *All the Trouble in the World*, in a chapter immediately before one on Somalia. I read his chapter on Dhaka and saw that he had found many matters there worthy of praise. Once I read that the hard-to-please O'Rourke had found good there, I knew this visit would be a success.

For weeks before our departure we were being warned Bangladesh was experiencing political strife, with life being made especially difficult by a series of "strikes".

We all know that it was Ghandi's idea to harass the British with civil disobedience. This concept became part of the Indian (and now Bangladeshi) way of life. In Bangla, they call an episode of civil disobedience, a "hartal". It is a kind of a general strike, with chaps acting as picketers, ensuring that factories do not operate and that roads remain blocked. Well, Dhaka has been having a run of these. The Opposition (Awami League) led by Sheikh Hasina, the daughter of the late Sheikh Mujibur Rahman, says the current ruling party is incapable of holding an uncorrupted election. She says the Prime Minister should step down and allow a caretaker government to take over and only then can a free election be held. The Prime Minister disagrees. Anyway, the Opposition has just boycotted the election, with less than 10% of registered voters voting. (When I was there, a member of the Bangladesh Bar told me of a client being offered a large sum of money by the government party to register as a party so as to give the then forthcoming election some form of verisimilitude.) The Opposition has been using the hartal in its campaign. We experienced one at first-hand. But let us go back a little.

I felt uneasy as the plane landed in Dhaka. We had been warned that a hartal was to be held on the following day. I know the *Sydney Morning Herald* usually gets its facts wrong, but I was concerned that it had reported riots and the

odd deaths during hartals held in Bangladesh shortly before Christmas.

Within a minute of our arrival, it was clear to me that most of our fears were misplaced. A large welcoming committee headed by the Bangladesh Bar Council's Chairman of its Executive Committee and Legal Education Committee, Md Amir-ul Islam, and Dr Mizanur Rahman, Associate Professor of Law at the University of Dhaka, gave us garlands of flowers and speedy conduct to the VIP lounge.

Allocated to minivans, our main transport for the week, we fairly soon found ourselves in the Dhaka Sheraton. I don't want you to think we then sat around drinking beers. In fact, the whole time we were in Bangladesh, I think I drank two beers. Drinking alcohol, whilst not forbidden, is not part of Islamic culture. It's amazing how quickly you get used to not having it at functions.

The next few days were a bit of a blur of teaching (9.00am - 1.00pm; 4.00pm - 7.30pm) and social activities (1.00pm - 4.00pm; 8.00pm - 10.00pm or so). There were lunches, formal and informal, but always lengthy because almost always distant or through difficult traffic. Ditto for dinner. Every lunch and dinner was the subject of generous hospitality, whether by members of the Bar in their homes, or by the Metropolitan Bar Council (where, I am sorry to say, some members of our party, when served at table by female members of the Dhaka Bar, compared this service somewhat favourably with what occurs in own Bar common room).

During our time there all eight of us (Brian Donovan QC, Clifford Einstein QC, James Glissan QC, Sydney Tilmouth QC, Geoff Lindsay SC, Anne Ainslie-Wallace, Greg Laughton and your correspondent) confessed to having had qualms, but having resolved within 24 hours of arrival, that we must return, and more, that this must become an annual event.

On the last night I was there, those of us remaining (Donovan, Tilmouth, Glissan and this writer) were entertained at the Dhaka Club, a slightly run-down reminder of the Raj. It was at that club we were told by our hosts that until 1947 a sign was erected warning: "*No dogs, women or natives past this point*". The dinner was reflective. All of us made short speeches of farewell. A number of our hosts did too. James Glissan captured the mood of the relationship which had developed in the past week. In his speech he said that he thought the Bangladeshis may not like to hear him say this, but all present at that dinner owed it to the British for having imposed their legal system on Bangladesh and Australia, respectively, so that we had the British to thank for this beautiful friendship (or words to that effect). That night, and on every previous night, when speeches were made, by Bench and Bar, the importance of Bangladesh maintaining an independent judiciary was the recurring theme, with this workshop supported by the NSW Bar, playing such an important practical and symbolic role.

Our visit was by no means the country's first contact with Australian lawyers. I learned when I was there that one

of the great heroes of the Bangladeshi judiciary and Bar is our Court of Appeal's new President, Mahoney P. He had visited there through Law Asia in the early '90s, at a time when that country's judiciary was going through a difficult time and he had spoken up for its judiciary and the importance of its independence. The country's judiciary and Bar have never forgotten that and they never will. Sir Ninian Stephen also is highly regarded, having helped supervise the country's last free election. So with those links, perhaps it was not surprising that the Bangladeshis welcomed us as warmly as they did.

Despite Bangladesh having had a series of military coups over the years, it occurred to me, reflecting on the histories of Britain and Australia, that we should not be so surprised about the survival of Bangladesh independent judiciary, nor smug about our own.

After all, Britain's judiciary survived the time of Oliver Cromwell, and an independent judiciary emerged in New South Wales under a totalitarian military régime last century.

It occurred to me, too, that there was little that had occurred in Bangladesh and which had threatened the independence of its judiciary that had not already occurred to a greater or lesser extent in Australia.

During Bangladesh military régimes there have been attempts to interfere with the judiciary. Section 96(2) and (3) of the Bangladesh Constitution provides that a judge of the High Court division of the Supreme Court (the Bangladesh equivalent of our High Court) can only be removed for "incapacity or gross misconduct", on a report by the Supreme Judicial Council consisting of the Chief Justice and the two next most senior judges. This is a relatively new provision. The original one was similar to ours. (It is to be recalled that s.72(2) of our Constitution provides a High Court judge "shall not be removed except by the Governor General in Council on an address from both Houses ... on the grounds of proved misbehaviour or incapacity"). In the second of the three versions, passed by a military régime, it was provided a High Court judge could be removed by Presidential order.

In the second edition of his work on the Bangladesh Constitution: *Bangladesh Constitution: Trends and Issues* (published by University of Dhaka 1994), Mustafa Kamal J said (at page 31) that the current grounds of removal are on a more sophisticated plane and that a judge who holds a high constitutional office is now saved from holding an office removable by the chief executive and the ignominy of public exposure in a popular forum. He goes on to say:

"The ... provisions accord more with the constitutional scheme of separation of powers. No judge has, however, been removed from office following the procedure in Article 96, but some judges have been removed under Martial Law ..."

As I read that, I wondered whether the late Murphy J would have survived a council consisting of his Chief Justice, Sir Harry Gibbs, and the then two most senior High Court Judges, Sir Anthony Mason and Sir Ronald Wilson. How would they have conducted such an enquiry? How much better might it have been for such an enquiry to be held by the judiciary and not politicised in the way it was in Parliament? Would less or more damage have been done to the High Court's standing?

The Bangladesh Constitution has undergone another, most significant, amendment concerning its judiciary. It is the 8th Amendment. Originally s.100 read:

"The permanent seat of the Supreme Court shall be in the capital, but sessions of the High Court division may be held in such place or places as the chief justice may, with the approval of the president, from time to time, appoint."

This was amended in 1988 by a substituted article, making High Court judges transferable to a permanent bench in whichever part of Bangladesh the President decided, after consultation with the Chief Justice. So the High Court judges could be separated and not cause as much mischief. This meant, as Mustafa Kamal J noted (p 98), that the plenary judicial power of the High Court was effectively destroyed. The judges of the High Court were less than happy. A constitutional challenge¹ was brought and succeeded. The Court (the then Chief Justice dissenting) struck down the amendment. The Court continues to sit as one and we are assured that at the moment its power remains uneroded.

When looking at Bangladesh 8th Amendment, I had in mind what not uncommonly occurs in this country for a "troublesome" judge or magistrate to be given a jurisdiction where he/she can cause more/less harm depending on the point of view of the person with power to assign that role. I reflected too on the recently demised Conciliation and Arbitration Commission and the assignment of one of its former members to a career of not sitting, and, after a change of government, of Victoria's Accidents Tribunal disbanded, its members sent packing. It idly crossed my mind that the plenary powers given to our courts/tribunals dealt with in that way are no less interfered with than occurred under a military régime in Bangladesh.

These and other random thoughts came to me on my way to the airport in a minibus packed with police, blowing whistles, followed by an army truck containing our luggage and chaps in army uniforms bearing sten guns. For this, our last day in Dhaka, coincided with a hartal. Our hotel manager had warned us to stay indoors. Some of us had not taken that advice. The city had been quiet. The smog had cleared a little. We took a last look at Dhaka from around the side of the army truck and headed for the airport lounge.

To those of your correspondents who have a chance to join another delegation, my advice is: don't go. There won't be room. The original team will want to return again, and again. □

Stephen L Walmsley

1. *Chowdhury v Bangladesh* 1989 BLD (Spl) 1 - 41 DLR (AD) 165.