"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

SPECIAL SUPPLEMENT ON DRAFT BANGLADESH LAND ACT 2020

Recently, the Law Commission of Bangladesh has published a draft legislation called 'Bangladesh Land Act 2020' on its website seeking opinion from all. The law has been drafted with an aim to bring uniformity in land management and land administration in Bangladesh. However, the draft law has conferred significant judicial powers on the executive officials of the State which has created a lot of controversy and the proposed law has been subjected to rigorous criticism by different stakeholders. In this background, Law & Our Rights of The Daily Star has approached the following legal experts for their comments on the proposed law. They were asked to evaluate (a) to what extent the proposed law upholds the idea of separation of powers between judicial and administrative organs; (b) whether the proposed law should be credited as it has conceivably aimed at easing the workload of the civil courts; and (c) whether different recourses could have been offered instead of vesting judicial powers on the administrative organs.

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The proposed law seeks to overtly handover judicial functions to the executive which is unquestionably a violation of the Constitution

The proposed land law is an ambitious attempt to codify and bring together in a single place the general body of the land related laws. The draft raises many concerns. Perhaps the most important one, which is discussed here, is the introduction of a quasi-judicial arrangement under section 264 to resolve land-related disputes. The proposed section 264 states that there shall be a Tribunal in each district which will settle disputes relating to the wrong record, partition, boundary disputes, unlawful possession and forceful possession.

The Constitution of Bangladesh is designed to ensure separation of powers among the executive, the legislature and the judiciary. Article 22 of the Constitution declares that this is a fundamental principle of state policy. Judicial decisions over the years have respected, endorsed and enforced this system of checks and balances. Now the proposed law seeks to overtly handover judicial functions to the executive. It is unquestionably a violation of the Constitution and nothing but the dismantling of the very fabric of an independent judicial system.

The issue is not a mere theoretical one, it has profound practical significance. It is, for example, much easier for a local political leader to influence, pressurise, dominate or purchase an Additional Deputy Commissioner (ADC), Assistant Commissioner (AC) or an Assistant Settlement Officer (ASO). In spite of today's weak judiciary, it is still difficult to sway an Assistant Judge. The new system will be intrinsically biased in favour of the rich and the powerful. Specially, if the land-dispute is against the executive government, the same person, the executive government, shall be a party and the judge.

In most cases, it will not be possible to determine disputes relating to record of rights or possession without considering the title. The Tribunal will have to spend considerable time to resolve these issues. On these complicated legal matters, decisions will be given by officers of the administration, having no legal training or background. The new system will increase rather than decrease the overall number of proceedings. A party who has lost in the Tribunal will next file a title suit. Two government organs will decide on the same dispute.

Situations will inevitably arise where disputes will be intentionally kept alive in the Tribunal, thereby barring the civil court to issue interim orders. Also, under section 271, any decision on record of rights or possession taken by the Tribunal cannot be overturned by any other court. This is contradictory to the proviso of section 264 which states that the civil court will decide on title. A decision on title without consequential relief on record of rights and possession will be meaningless.

It is wrong to assume that all disputes will be resolved in sixty days because it says so in the law. This provision is directive and there is no consequence if the Tribunal fails to resolve in sixty days. Thus, these proceedings will take months and years to get resolved. The decision of the Commissioner will be final and the road ends there. This will result in thousands of writs further chocking the High Court Division.

Delay in civil courts is prompting proposals of new mechanisms without realising that the civil courts and judges are being systematically ignored. Less than 1300 judges are expected to deal with more than 3.6 million pending cases. There has been no significant attempt by any government to equip the civil courts in proportion to the increasing population, economy and progress of the country. Hence, I think the solution lies in strengthening the civil courts.

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The proposed law violates the fundamental principle of natural justice and the constitutional pledge of separation of powers

I suppose the draft Land Act, 2020 has been prepared by the Law Commission on its own volition and the same has tried to take a comprehensive approach towards land law in general in Bangladesh, which is currently scattered in different statutes and executive orders. From that point of codifying them in one legislation, this endeavour is commendable. However, there are certain issues that cannot be overlooked.

First, the definition clause as laid down in Section 2 seems inchoate. For instance, the term 'land' is defined in isolation of other laws; definition of the terms 'agricultural land' and 'non-agricultural land' is not harmonised with reference to previous laws, especially the State Acquisition and Tenancy Act (SAT Act) 1950 and the Non-agricultural Tenancy Act 1949, and the judicial precedents.

Considering the inherent nature of land administration and the intricacies that it offers, the administrative organs cannot but be involved with the process. The laws having bearing on land-related issues and currently in force in Bangladesh, envisage the said involvement. In many cases, to expedite the processes making up land administration, administrative organs need to be given a margin of appreciation as well. For instance, while the record of rights gets prepared, the civil courts cannot be taken resort to (Section 144B, The SAT Act 1950). This in fact makes the entire process convenient and speedier in getting rid of delays in civil proceedings. However, there needs to be scope for checks and balances too. For instance, upon publication of the record of rights, the Land Survey Tribunal can exercise its jurisdiction and adjudicate thereon accordingly (Section 145A, The SAT Act 1950). This jurisdiction has been ousted by the proposed Act.

Additionally, Section 264 seems problematic inasmuch as it vests administrative bodies with judicial powers. It says that there shall be a Tribunal in every district constituted with an Additional District Magistrate nominated by the Deputy Commissioner as the Head, with the Assistant Commissioner (Land) and Assistant Settlement Officer, to dispose of suits with regard to amendment of record of rights, boundary disputes, illegal possession, among others. Now, according to Article 152 of the Constitution, 'the State' includes the parliament, the government, and statutory public authorities but not the judiciary. The judiciary has been created as a neutral organ to ensure justice. Further, the State may be a party to a civil suit. The executive body, including the Assistant Commissioner (Land), Additional Deputy Commissioner, Deputy Commissioner, or the Divisional Commissioner, is the representative of the government. In many cases, they represent the government as a party. If the person who is interested in a suit, becomes a judge of his own cause, it will lead to serious injustice. It is the fundamental principle of natural justice that no one should be made a judge of his own cause. If the executive is given judicial power under the Land Act, it will seriously violate the fundamental principle of natural justice and the pledge regarding the separation of powers that permeates our constitutional jurisprudence.

Instead of diluting the constitutionally envisioned separation, we need to focus on the more pertinent problems. Our judicial administration system is the legacy of colonial rule and needs substantial reforms. To ensure efficiency in the settlement of land disputes, separating criminal and civil courts is essential. Further, we have to emphasise on alternative dispute resolution and efficient case management system. To do this, certainly, we need to increase judicial posts. We have to establish a separate land court at the Upazilla and district levels; there should be land appellate courts, and finally a specialised bench with the High Court Division for dealing with land issues which comprise about 80 per cent of civil suits in the country. Furthermore, we need to create an efficient land administration system. The judicial and administrative posts dealing with land-related issues must be filled with persons having required expertise; persons having academic backgrounds in law should be given preference.

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Political mobility and a degree of legal creativity are foremost to address the land issue

My impression is that the proposed Act needs to be tested in the light of constitutional principles. In key provisions, the proposed law has suggested the curtailment of judicial powers of the civil courts about the land question and vesting the same in the hands of the executive bodies. To mention certain examples, the provisions tend to postpone a relevant land dispute proceeding if a decision to conduct a land survey is made, exclusion of judicial scrutiny, the assumption of civil courts by the Deputy Commissioners and other field-level bureaucrats, the finality of administrative decisions, immunity for the bureaucrats on the ground of vague "good faith" doctrine, the division of land disputes between the so-called "Land Dispute Settlement Committee" and the Civil Court, etc.

The draft law precariously proposes that the issues of the wrong records, land allocation, boundary dispute, illegal possession are to be dealt by the Tribunal (Committee) composed of the ADC, ADM, AC land, ASO nominated by the DC, while the ownership and partition issues are to be dealt by the existing civil courts. These all are serious propositions. How do we separate, for example, an issue of ownership from the question of record of rights? The sections are devoid of the foundational norms of separation of powers and arguably, will not win the test of constitutionality. If accepted, they would be a dangerous servant of a fearful master. Montesquieu would have felt shy for championing the idea of separation of powers, and Mustafa Kamal CJ would have lamented for writing Masder Hossain, had they seen this draft! Should we call the exercise a colossal national wastage?

Today what we need to do is to ease the civil courts from the huge burden of land litigation. But that does not mean we will advance a preposterous idea offending the known cannons of law and jurisprudence which will arguably translate the famous Edmund Burke's sage "power corrupts, absolute power corrupts absolutely" into a craftsmanship. Remember Barack Obama, "a good compromise, a good piece of legislation, is like a good sentence; or a good piece of music. Everybody can recognise it. They say, 'Huh. It works. It makes sense." Does this proposed law make sense?

The land question is a constitutional and politically emotive issue. It cannot be addressed properly without fixing a constitutional approach first. Political mobility and a degree of legal creativity are foremost to address the land issue. However, I must say that appointment of more judges, making special and efficient land courts, introducing digitised land record system, effective case management, resorting to meaningful ADR system and the formulation of a pro-poor land policy are the probable solutions. The creation of a bureaucratic-burdened parallel judiciary will make the confusion more confounded.

The proposed law is yet another example of our callousness about environmentalism and environmental justice. In an age when the rivers are being accorded the status of a legal person, we are leaving them at the mercy of a "provided that" clause. Who will then decide that a particular brick field would not pose a threat to the right of the environment? I call this approach a good example of drafting politics – the habitual style of legal draftsmanship conferring unfettered power to the administration. I sometimes wonder why the draft of a Law Commission should exhibit the executive syndrome. Should I then suggest that a very reform of the Law Commission Model of Law Reform is needed?

It is also noted that the draft law makes a "non-obstante" clause (section 3). It overrides the effect of earlier laws in case of any conflict. In fact, the proposed land law overuses the "non-obstante" clause, as I see it in several parts of the draft text. As we know, the role of such a clause is to remove any difficulty raised by any unforeseen situation. Such clauses are used by the drafters by way of abundant caution. I see no problem with the power to protect the fragile habitats, but I fear the non-application of mind in legislative drafting. The pharisaic formalism in the proposed land enactment will obscure the clearer, creative and curative remedy for land problems. An oft-quoted cliché, perhaps relevant here, states that the drafting practice of a country is the reason for half of the litigation produced.

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Investing judicial power on administrative organs is not a solution to the existing problems of civil courts

An attempt to consolidate the scattered land laws of Bangladesh is a praiseworthy effort. But in the process, it proposes to override the CPC 1908 which is the heart of all civil litigation. Matters covered by land laws are mainly civil in nature and proposal to oust the jurisdiction of civil court in the draft law is a shock and surprise. As we all know, the CPC 1908 is a law being applied for over 100 years (112 to be precise) and enriched through amendments and judicial decisions over this long span of time. Defects of the CPC are well identified and can easily be cured. It is in no way sensible to discard such a well matured law.

Article 22 of the Bangladesh Constitution declares separation of the judiciary from the executive organs of the State. But separation does not mean seclusion. For a democracy to function efficiently, cooperation between the organs is important. Sadly, the draft law contains several sections (17, 48, 61, 152, 176, 231, 264, 271) curtailing the power of civil courts and vesting judicial functions on administrative officials. This sort of provisions would create room for misuse of power, corruption and arbitrariness. Given the history of corruption among administrative officials and lack of confidence by general public, judiciary is still the best option for those seeking justice. Besides, interpretation of the mentioned sections reflects concentration of power rather than separation.

I think ousting the jurisdiction of civil courts in land related disputes is not a solution for easing the workload of civil courts. There are already several research findings on the problems of case backlog/workload in civil courts. Instead of taking into consideration recommendations made by such studies and amending/restructuring civil courts, the draft law abruptly comes up with the solution of curtailing jurisdiction of civil courts.

Even, investing judicial power on administrative organs is not a solution to the existing problems of civil courts. Rather steps should be taken to set up special civil courts with exclusive jurisdiction on land matters. Presently both civil and criminal jurisdiction are exercised by District and Sessions Courts. If the civil and criminal judiciary can function separately and more judicial posts can be created, workload will automatically be reduced.

On a different note, as per section 231 of the draft law, action taken by the DC is not challengeable in the civil court and also any action taken in "good faith" by a public servant cannot be challenged in civil or criminal court under section 232. The term "good faith" is a matter of interpretation and has to be decided on a case to case basis. Therefore, any objection as to an action based on good faith needs to be open to interpretation by the courts.