

Fundamental Rights of Defence Personnel

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THE supreme law of the country is the Constitution. The Constitution of Bangladesh is widely respected all over the world as one of the well written Constitutions. Nonetheless, to match with the requirements of time, it has been amended a number of times. It is read by people who are interested and concerned. In recent days, a necessity has arisen to study one or two salient aspects of the Constitution in depth. This discussion is an attempt to generate interest in the subject and inaugurate the process of study which may take time and involve many more people in due course. The focus is on the following questions:

Are the fundamental rights described in Part III of the Constitution not applicable for the disciplinary forces? What about the fundamental right called 'Right to Protection of Law' for the members of the disciplinary forces? What are the remedies available to enforce the very disciplinary law in the event of any violation?

Before we proceed on the discussion an introduction on the Constitution itself and the disciplinary laws may be considered relevant here.

Constitution of Bangladesh

All discussions are on the printed Constitution available in the market with amendments upto 30th April 1996. There are eleven parts and four schedules in the Constitution. Part III of the Constitution deals with the Fundamental Rights. There are total twenty-three articles, seventeen articles deal with seventeen different rights; six articles deal with exceptions and indemnities.

Article 31 is RIGHT TO PROTECTION OF LAW. For the members of a disciplined force, the protection of law means PROTECTION OF THE ARMY ACT, even if no other law.

Article 44 is ENFORCEMENT OF FUNDAMENTAL RIGHTS. If a reader, while reading the Constitution stops at this point, then, no problem. All readers of the Constitution will feel happy to learn that he can go to the High Court for the enforcement of the fundamental rights. But once the reader proceeds further and reads Article 45, there is a big SHOCK for the members of the disciplined forces. In the Constitution, heading in the margin in respect of Article 45 is, modification of rights in respect of a disciplinary law. In reality it is not interpreted as modification but as total bar. Article 45 is quoted below in full:

"Nothing in this part shall apply to any provision of a disciplinary law relating to members of a disciplined force, being a provision limited to the purpose of ensuring the proper discharge of their duties or the maintenance of discipline in that force."

Therefore, in the light of Article 45, Article 26 to Article 44 (nineteen Articles) and Article 46 to Article 47 A (three articles) are not applicable to any provision of a disciplinary law. NOT A LEGAL EXPLANATION BUT A LAYMAN'S EXPLANATION OF THIS CONTRADICTION IS AS FOLLOWS:

The Army Act has many provisions. The Rules, Regulations and Instructions which have been made under the authority of Army Act also have many provisions. Whichever or whatever provisions of the Army Act are declared to have been made or applied for the

purpose of maintaining discipline or for the purpose of ensuring the proper discharge of duties, can not be challenged even if they are contradictory to any of the fundamental rights contained in Part III of the Constitution. Question that arises from this layman's explanation is, what will happen if the provision of a disciplinary law is not contradictory to the provision of fundamental right, but instead is complementary.

Bangladesh Army Act

Bangladesh Army is a disciplined force (Article 152 of the Constitution). The name of the law which regulates Bangladesh Army is the Bangladesh Army Act. This Act is actually the successor to Pakistan Army Act 1952, which in itself was a successor to the Indian Army Act, 1911.

Under Sec. 176 of Bangladesh Army Act (that is, BAA Sec - 176) the Government is empowered to make Rules for the purpose of carrying into effect the provision of this Army Act. In reality, the Government of Pakistan had made Rules and after inheritance by Bangladesh, these are called Bangladesh Army Act Rules (BAA Rules).

Under Sec 176-A of the Army Act, the Government may make Regulations "for the governance, discipline, recruitment, terms and conditions of services, rank precedence and administration" of the Bangladesh Army and generally FOR ALL OR ANY OF THE PURPOSES OF THE ARMY ACT OTHER THAN THOSE IN RESPECT OF WHICH RULES HAVE BEEN MADE UNDER SEC. 176. In reality, Pakistan Government had made Regulations which have been inherited by Bangladesh Government. This is called the Army Regulations. The Army Regulation has two parts or volumes. Part I or Vol. I of the Army Regulations (Rules) or in short AR (R) and is made by the Ministry of Defence. Part II or Vol. II of the Army Regulations is called Army Regulations (Instructions) or in short AR (I) and is made under the authority of Chief of Army Staff.

It will be noted or observed that the BAA (Rules) have effect as if enacted in the very Bangladesh Army Act. The Regulations do not have such an effect. However, as per explanation of the word "law" given in Article 152 of the Constitution, the BAA (Rules), Army Regulations or other Legal Instruments having the force of law will be included or understood as law.

Discussion about Defence Services have taken place at Chapter IV under Part IV of the Constitution. Part IV of the Constitution deals with THE EXECUTIVE. Under the Executive, Chapter I discusses THE PRESIDENT. Chapter II discusses THE PRIME MINISTER AND THE CABINET. Chapter III discusses Local Government and Chapter IV discusses DEFENCE SERVICES. It is difficult to understand as to why the matter was not included under Part IX of the Constitution: "THE SERVICES OF BANGLADESH", but, often Article 134 of this Part is quoted as relevant in terminating the services of the members of the Defence Services. Articles 62 and 133 both sponsor the idea that the services shall be regulated by law, but Authorities in the Defence Services and Government seem to take advantage of the 'doctrine of pleasure'

of the President (In days bygone the pleasure used to be prerogative of the Crown; however, although the Crown has gone away in favour of democracy, the pleasure seems to make an unhappy co-existence with democracy, consultative process and accountability).

Going back to Article 62 of the Constitution, Parliament is supposed to make the law for regulating various aspects of the defence services. In Bangladesh, there are three separate laws for the three services namely Army Act, Navy Act and Airforce Act. For easy reference and understanding, only one law will be referred to here, namely, the Bangladesh Army Act. All officers, junior commissioned officers, warrant officers of Bangladesh Army and persons enrolled under the Army Act are subject to the Army Act. Although the text of the Army Act or in the Notes, there is nowhere mentioned that:

a) The law cannot be reviewed, or

b) One cannot approach the Judiciary for proper interpretation and clarification in respect of any provision, or

c) That an aggrieved person cannot take help of the Judiciary for enforcing the provision of the Act.

Yet however, in reality these do not take place often.

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The Army Act has aims and objects. In the Manual of Bangladesh Military Law 1982 edition, at page 133, it is printed as follows:

"For Statement of Objects and Reasons, see Gazette of 1951, Part V dated the 23rd November 1951, page 71 and for Report of the Select Committee, see Gazette Extraordinary, 1952, PP 347-400."

This reference cannot be checked easily but, using my common sense as a former member of the Army, I can visualize the basic objects to have been something like the following:

a) Ensure the maintenance of discipline in the army.

b) Facilitate the discharge of duties by various member of the army - also being in the Service of the Republic.

c) Optimize the operational and other functional efficiency of the army of creating an environment of trust, confidence and high moral.

Therefore, the Army Act is a tough law which provides for speedy decision-making and disposal of cases. However, it is not a "draconian law". An effort has been made to minimize objection towards the implementation of the law by way of appeals, stay orders, injunctions etc.

Section 131, 132 and 133 of the Bangladesh Army Act describes the Procedure of Remedy against findings and sentence of Court Martial, Annulment of Proceedings of Court Martial and Bar of Appeals. The summary is that, no appeal shall lie against any decision of a Court Martial save as provided in this act and no appeal or application shall lie in respect of any proceeding or decision of a Court Martial to any court exercising any jurisdiction whatsoever. Nonetheless, the Appellate Division of the Supreme Court of Bangladesh has given

(if not more, at least on two occasions) amplification to this. One occasion is, case of Khondker Ehteshamuddin Ahmad Iqbal vs State reported in 33 DLR (AD) 154. (This particular DLR - has neither been seen nor gone into - have taken the reference from 34 DLR (AD) (1982). The other occasion is, case of Col. Md Hashmat Ali (Retd) of Bangladesh Army Medical Corps Vs Government of Bangladesh and Another as reported in 47 DLR (AD) (1995); paragraph 16 and 17 at page 5 are the most important.

So, what I want to submit is that the Army Act is neither beyond discussion or evaluation; and more importantly it is necessary to establish how to avoid miscarriage of justice because of non-application of the Army Act or Rules made there under. At this stage, it is relevant to ask a question as to why this particular matter or question has come up?

Members of disciplinary forces have been making attempts to redress their grievances by going to the High Court Division on various occasions.

a) First known case is that of Major (retd) AFM Hafizur Rahman Vs Government of Bangladesh as reported in 29 DLR (1977) page 34. Judgement by Justice Shahabuddin Ahmed

was delivered on 21st January 1977. This was the first of its kind, i.e. a member of a disciplined force going to the High Court under Article 102 of the Constitution. The maintainability of the petition was the most important issue having bearing on posterity. Paragraph 21 at page 44 (29 DLR) is very relevant.

b) Next case is that of Rear Admiral AA Mustafa Vs Bangladesh as reported in 46 DLR (AD) (1994) page 43.

c) The third case is that of Col Md. Hashmat Ali (Retired) Vs Government of Bangladesh as reported in 47 DLR (AD) (1995), paragraph 16 page 5 (47 DLR) is very relevant. It is important enough to be quoted here:

"a) A member of the disciplined force can be an aggrieved person.

b) A member of the disciplined force can also move (like other citizens) the High Court division, subject to article 45 of the Constitution, for enforcement of a fundamental right.

c) A member of any disciplined force of Bangladesh will not be entitled to any remedy under article 102 of the Constitution if he is aggrieved."

(i) By any decision of a court or tribunal established under a law relating to the defence services unless that decision is coram non-judice or mala fide.

(ii) By an order affecting his terms and conditions of service, passed by or by order of the President.

(iii) By any violation of fundamental right resulting from application of a disciplinary law for the purpose of ensuring the proper discharge of duties or the maintenance of discipline in the disciplined force.

Referring to sub-paragraph (c) that I have quoted, questions that emerge are:

a) Members of a disciplined force also have Fundamental

Rights.

b) Subject to Article 45 of the Constitution, they can be enforced by the High Court.

c) A Fundamental Right could be violated because of application of a disciplinary law (No Remedy) - but if violation is because of non-application of disciplinary law, then what? (Answer not given clearly anywhere). We need to discuss.

It is time to go for examples so as to clarify or elaborate what exactly is being sought for.

An Example

Let us see Rule 157 of the Army Act Rules.

What is a Court of Inquiry, why is it ordered, when are these ordered - and such like questions have been answered in the very Rule (Rule 157). A reading of BAA Rule 157 and BAA Rule 158 indicates that. Courts of Inquiry are classified into three categories (based on subject of Inquiry) namely, a Court of Inquiry as to Illegal Absence under BAA Section 78, a Court of Inquiry in the case of a Prisoner of War who is still absent, and all other matters that could be reasonably conceived. Kind attention is drawn to sub rule (6) of rule 157 and clarification provided under notes at note-3, note to subrule (6). The words character and military reputation have wide ranging meaning in the mili-

tary context.

Sub Rule (6) and Note-3 to the Rule are quoted in full:

"157. Courts of Inquiry, other than a court of inquiry held under section 78, (6) Save in the case of a prisoner of war who is still absent, whenever an inquiry affects the character or military reputation of a person subject to the Act, full opportunity shall be afforded to such person of being present throughout the inquiry and of making any statement, and of giving any evidence he may wish to make or give and of cross-examining any witness whose evidence, in his opinion, affects his character or military reputation, and of producing any witness in defence of his character or military reputation. The president of the court shall take such steps as may be necessary to ensure that any such person so affected, and not previously notified, receives notice of and fully understands his rights under this rule."

NOTE: 3. Sub-rule (6). Whenever it appears possible that the character or military reputation of a person subject to the Act may be affected as the result of the court of inquiry, the authority who assembles the court will take all necessary steps to secure that the provisions of this rule are observed. The ultimate responsibility of ensuring that they are observed in every case will, however, rest upon the president of the court, and should it transpire during the sitting of the court that the character or military reputation of any such person is affected by the evidence put forward, the president will immediately arrange for such person to be afforded the full facilities of a court, by adjourning the court if necessary for the purpose of securing his attendance."

Another Academic Example: TERMINATION OF SERVICE OF OFFICERS OF ARMY

The relevant provisions of Law and Rules are under:

a) Dismissal and Removal;

i) By administrative action:

quired by law?

a) Violation of sub-Rule (6) of Rule 157 amounts to a violation of a provision of a disciplinary law. This particular provision protects a fundamental or basic right of a citizen or a soldier-citizen. Is the provision of sub-Rule (6) contradictory to Article 31 of the Constitution or any other fundamental right as given out in Part III of the Constitution? If the protection is not provided as per sub rule (6), does it amount to "denial of the Right of Protection of Law" - to some degree, less or more? What do you do? Can you suspect malafide in the action of the President of the Court of Inquiry who did not ensure this? Is the President liable to answer his failure; if yes, then to whom? If not why?

Let me recollect or recount here the seniority or hierarchy of the Laws and Rules:

a) Bangladesh Army Act (BAA)

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c) The Army Regulations

d) Volume I: Rules [AR(R)]

e) Volume II: Instructions [AR(I)]

Attention is drawn to Instruction 330 or AR(I)330. What do you do when Authorities who order a Court of Inquiry violate the provision at 330(a) and appoint somebody who was himself involved in an incident as a member inquiring into the incident? To whom do you complain? If one loses his job as a result of the said inquiry then the person who has lost his job, of course, will be aggrieved, but how does he obtain redress?

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The questions that need pondering are:

a) What happens when the Court of Inquiry, or to be more specific, the President of the Court of Inquiry violates the provision of sub rule (6) of BAA Rule 157 (has happened in the enquiry following incidents of May 1996)? To whom do you lodge complaint or 'redress of grievance'? Where does the chain end? You complain to the Chief of Army Staff & nothing happens, you complain to the Head of the Government & nothing happens - then what do you or we do? Army Act Section 168, at page 262 (photocopy available in the booklet) lays down the method of submitting redress of grievances.

b) With respect to the questions in sub paragraph (a) above, the implications are likely to be different - in case of a serving person and in case of a retired person.

c) With respect to the question put forward in sub-paragraph (a) what do you do if you were, reportedly, found guilty of an offence (or offences) under the Army Act by this said Court of Inquiry and the Authorities decided to terminate your service based on the findings, opinion and recommendations of this Court of Inquiry which VIOLATED sub rule (6) of BAA Rule 157, that is to say, where you could not defend yourself as re-

quired by law?

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BAA Sec 16 & 17

i) By sentence of Court Martial: BAA Sec 60 (d)

b) Retirement, Release and Discharge: BAA Sec 18, BAA Rule 12

As an academic case, we will discuss Retirement. RETIREMENT is allowed under Section 18 of the Act, but it has to be in conformity with such Rules as may be prescribed in this behalf. Which are the Rules then? It is the Army Act Rules. Please see Chapter III of the BAA Rules. Please see Rule 9D where further reference is given to Regulations. Which are the Regulations then? It is the Army Regulations (Rules). BAA Rule 12 talks about Authorities empowered to authorize retirement, release or discharge. In note 1 (ii) the procedure to be observed in case of compulsory retirement is given; attention, drawn to Regulations. Which are the Regulations?

Chapter III of the Army Act is headed TERMINATION OF SERVICE. Chapter III of the Army Act Rules is also headed TERMINATION OF SERVICE. In the case of Army Regulations (Rules), Chapter IX is headed TERMINATION OF SERVICE. Section I under Chapter IX talks specifically about officers. On top of the paragraph (or Rule 262) as well as paragraph (or Rule 269 A) was (up to 1988) headed the words "Procedure" in bold type. AR (Rule) 262 was changed or amended once in 1988 and again in 1996. Before amendment or upto 1988, the spirit of the said AR (Rule) 262 was the limits of age and service upto which one could serve. In 1988, a new paragraph or sub Rule 4 was added, in addition to changing the age and service limits. In 1996 the new (as of 1988) sub Rule