Law and Our Rights

The Commission of Inquiry: Some Observations

by Abdullah Al Faruque

According to newspaper report, about forty commission had been formed so far to probe such kind of events, but in terms of its intended purpose and objectives, these commission can hardly produce significant impact on our national life. As a result, there is a genuine belief among the conscious section of the people that governments use the commissions to camouflage their misdeeds and reach the same conclusion to the commission as like ordinary mechanism.

VERY often, national life experiences many events of such magnitude and importance that ordinary and existing administrative and judicial machinery can hardly cope with these and offer solutions up to people's expectation. In such situation, the larger interest of the public requires that these events and eventualities will be resolved through independent and impartial authority whose findings can command the confidence of the people. The commission of inquiry is such mechanism which is constituted in every democratic society, on temporary basis, to undertake independent inquiry into the events which may affect the public well-being largely.

In recent times, the formation of the Judicial Inquiry Commissions in the wake of Rubels murder has attracted the considerable public attention in view of the fact that law enforcing agency's deliberate deviation from the law and gross abuse of power conferred on them. The ramifications of this incident and consequent formation of the commission reflects the fact that people are not satisfied with the existing state of affairs and some thing should be down with extra-ordinary measures to remedy the evil found. The formation of commission reflects this concern and despair of people about the existing condition and it is seen as silver lining in the darkness. However, past experience shows that the reality is different.

According to newspaper report, about forty commission had been formed so far to probe such kind of events, but in terms of its intended purpose and objectives, these commission can hardly produce significant impact on our national life. As a result, there is a genuine belief among the conscious section of the people that governments use the commissions to camouflage their misdeeds and reach the same conclusion to the commission as like ordinary mechanism.

So far as law is concerned, the existing law 'The Commission of Inquiry Act, 1956' which deals with powers and commission of the commission is sufficient enough to carry out it's purported aim. The problem, obviously, lies elsewhere. According to see 3 of the Act, the government may appoint a commission of inquiry only for the purpose of making an inquiry into any definite matter of public importance. What constitutes a matter of public importance is always a subjective determination of the government. There is no clear guidance in the Act in this regard. Regarding the power of the commission, the Act provides that it shall have the Code of Civil Procedure, 1908 so far as summoning the attendance, discovery of documents, issuing commissions. But the statements made before the commission and findings of the commission is wholly inadmissible in evidence in any future proceedings, civil or criminal. Thus, it is clear that the commission is purely a fact-findings body and has no power of pronouncing definitive judgment. However, the commissions has power to regulate its own procedure and it can decide whether it will sit in camera or in public. This provision is concomitant with commission's unique nature and objectives it wants to serve.

Usually, the commission takes evidence and findings of the commission is incorporated in the report which apart from the mere facts, contains recommendations for future course of actions to be undertaken. The report is purely recommendatory in nature, offering guidelines to prevent the recurrence of the same kind of incidents in the future. Thus, ultimate significance of the commission lies in making report and recommendation. Although this report has no binding authority, it has significance for several reasons. The recommendation is based on thorough investigation of all facts, consideration of all aspects involved in the issue and inevitably, moral strength of the commission stands on the quality of the recommendation. It also clarifies general expectation of the people regarding functioning of the commission and acts as an actual indicator of the effectiveness of the commission. All these facts about report of the commission is translated into reality when the report would be published for the general public. Hence, the question of implementation of the report also comes. Since the report is recommendatory in nature, ultimate sanction behind it remain public concern for it's implementation. Unfortunately, there is no single instance of the publishing report of the commission for the public scrutiny in our country. Strict measure of the secrecy regarding the report of the commission frustrates the whole purpose of the commission. When whole world is moving towards openness, we are constantly hiding ourselves in the secrecy and confidentiality. Sine the most of the commissions had been formed concerning government's agencies, latter's reluctant approach towards the report is quite understable. There is no denying that political consideration outweighs compelling factors of public concern, openness and transparency in these circumstances. Moreover, since the commissions is generally short-lived, it is the report of the commission that reinforce the justification of formation of commission. Non-disclosure of the report of the commission does not only deprive the people from the valuable information of the report, but also excludes them exercising sound and rational judgment about the contents of the report. Thus there, always, exists gap between public perception and actual merit of the report of the commission. The importance of seeking, receiving and imparting information is increasing emphasised as vital norms of the democratic governance. To be informed about government's activities affecting public are regarded as their legitimate interest and their claim for justice. In this context, receiving information of the report of the commission may also be categorized as pure interest of the public but confidentiality, secrecy and exclusionary rules and restrictions repudiate this legitimate expectation, and consequently, public claim to justice. In this connection, it may be relevant to mention here about the formation of judicial injury commission for the incident of Yasmin's murder, but the report of the commission is yet to be published although three years have elapsed since the incidents. Although the perpetrators were punished by the court, non-disclosure of the report frustrates this 'legitimate expectation' of people who are wholly unaware of the recommendations of the judicial commission. We expect that same thing would not be happened regarding the commission on Rubels' murder case and growing concern for the ordinary people that this kind of malaise would not be repeated.

The Commission of Inquiry Act is silent about it's power of making report and publishing and circulating it. But in practice, the commission's function ends with preparing report. In the last analysis, it is apparent that lack of 'political will' only remains stumbling block for opening the report for public scrutiny. In this regard, some amendments of the Act may be suggested to obligate government to circulate it:

a. The report of the commission will be submitted to the Parliament which will decide what possible legislative and administrative action will be undertaken to implement the recommendations of the commission.

b. The report will be accessible for the people for the inspection and will be treated as a public document and will be available for anyone on payment of the prescribed fee.

These suggested amendments may initiate process of transparency of the functioning of the commission and accountability of the government to the people. To conclude with the worlds of James Madison who wrote in the 19th century: "A popular government without popular information or the means of acquiring it, is but a prologue to a farce or a tragedy; or perhaps both. Knowledge will forever govern ignorance; and a people who mean to be their own governors must arm themselves with the power which knowledge gives."

The writer is a Research-Lawyer of legislative Advocacy and Participation of Civil Society Project, BLAST.

State of Law and Order : September 1998

ACCORDING to the news, published in the National Newspapers during September 1-30, 1998, the highest cases of human rights violation were rape. Then comes, women murder for general reason, women murder for bride wealth, acid throwing, women oppression for general reason, kidnapping, death by mass beating, child murder after rape, death in hospital while under thana/jail custody (reason unknown), fatwa, oppression outside Thana, rape by the members of the Law Enforcing Agencies, death in hospital for oppression outside Thana, oppression in Jail, injured by the firing of the Law Enforcing Agencies, killed by the firing of the Law Enforcing Agencies and imprisonment without trial respectively. In the cases of acid throwing and kidnapping, the female victims were considered only.

Type of Violation	Case filed	Case not filed	Not mentioned	Accused arrested	Accused not arrested	Not mentioned	Total cases recorded
Rape	64	4	9	29	26	22	77
Murder after rape	5	0	1	0	2	4	6
Kidnapping	8	0	0	3	3	2	8
Acid throwing	3	2	6	0	2	9	11
Women murder (bride wealth)	9	0	2	1	5	5	11
Women murder (general)	25	1	5	5	7	19	31
Women oppression(general)	7	0	3	1	4	5	10
Child murder	6	0	1	1	1	5	7
Oppression outside Thana	1	1	0	0	2	0	2
Death in hospital for oppression in Thana/Jail	1	0	0	0	0	1	1
Death in hospital while under Thana/Jail custody (cause unknown)	0	0	3	0	0	3	3
Oppression in Jail	0	0	1	0	0	1	1
Injury by firing by the Law Enforcing Agencies	0	0	1	0	0	1	1
Death by firing by the Law Enforcing Agencies	0	0	1	0	0	1	1
Rape by the members of Law Enforcing Agencies	2	0	0	1	1	0	2
Imprisonment without trial (general)	1	0	0	1	0	0	1
Fatwa	1	1	1	0	1	2	3
Killed by mass beating	7	0	1	0	4	4	8
Others	4	2	0	1	2	3	6
Total	**144**	**11**	**35**	**43**	**60**	**87**	**190**

*Data collection & compilation : Information & Documentation Center, Advocacy Programme, GSS.

Nuclear Weapons : Their Legality in International Law

by M S Ahmed and Shuva Mandal

The citizens of the world have a right to life as recognised by their constitutions, indeed it will be difficult to envisage a legal rule permitting the use of nuclear weapons. This is something which the N-powers of this poverty ridden sub-continent should not fail to recognise.

ON May 11, 1998 and May 13, 1998 as the sands of Pokhran in the scorching heat of the Thar desert were ruffled, in simultaneous nuclear explosions, the world arose from its slumber that it had chosen to slip into. The tests at Pokhran have brought into focus the issue that the world community has always conveniently avoided: The legality of the threat or use of nuclear weapons. The International Court of Justice was asked to decide precisely on this issue in an advisory opinion sought through resolutions made by the World Health Assembly (WHA) of the World Health Organisation (WHO) and the General Assembly of the United Nations. On 8 July 1996 the International Court of Justice delivered its verdict which was unfortunately sharply divided, deficient in progressive reasoning and sadly a desperate balancing act to appease the global superpowers who are also members of the nuclear club.

The first efforts to obtain a legal ruling on the validity of nuclear weapons as a whole, were made by international legal scholars writing on the topic in the 1980s. These moves were accompanied by the formation of an association called the Lawyers' Committee on Nuclear Policy in New York to promote awareness about the illegality of nuclear weapons. In 1989, another organisation the International Association of Lawyers Against Nuclear Arms (IALANA) was formed. In 1992, the IALANA along with the International Physicians for the Prevention of Nuclear War and International Peace Bureau formed the World Court Project to generate opinion in order to persuade the World Court to give a ruling on the illegality of nuclear weapons. In this respect the activists of the World Court Project lobbied members of the General Assembly through the First Committee of the General Assembly. This movement had the active support of the Non-Aligned Movement, the efforts of which culminated in the General Assembly passing a Resolution (GA Res 75, 49th Session UN Doc. A/699 (1994) asking the International Court of Justice to give an advisory opinion on the legality of use or threat of nuclear weapons.

The decision of the International Court on the legality of use or threat of nuclear weapons could be summarised into: (a) There is neither in customary nor conventional international law any specific authorisation of the threat or use of nuclear weapons. (b) There is neither in customary nor conventional international law comprehensive and universal prohibition of the threat or use of force of nuclear weapons (c) A threat or use of force by means of nuclear weapons that is contrary to Article 2 (4) of the United Nations Charter and that failed to meet all the requirements of Article 51 is unlawful. (d) A threat or use of nuclear weapons should also be compatible with the requirements of international law applicable in armed conflict, particularly those principles and rules of international humanitarian law, as well as with specific obligations under treaties and other undertakings which expressly deal with nuclear weapons.

In this advisory opinion the Court undertook the task of expounding the "unique characteristics of nuclear weapons." According to the Court nuclear weapons are "explosive devices whose energy resulted from the fusion or fission of the atom. As a consequence, large a mounts of heat, energy and radiation were released. This being so, the destructive power of the weapons could not be contained in either space or time. They had the potential to destroy all civilisation and the ecology of the planet.

In answering the question whether international law permitted the use of nuclear weapons the court was faced with the daunting task of choosing the law which it considered applicable.

From the Humanitarian law aspect the Court examined both the International Covenant on Civil and Political Rights (ICCPR) and the Genocide Convention. On examination of these two treaties the Court averred that they were not very impressed with the ability of these precepts to serve as a genesis for the extermination of nuclear weapons.

In the process the Court expounded two principles which it said constituted the fabric of international humanitarian law (a) States must not attack civilians and therefore must not use weapons incapable of distinguishing between civilian and military targets. (b) Causing unnecessary harm to combatants is prohibited and therefore the use of weapons that causes such harm or aggravates their suffering is prohibited. Both these conditions will be violated if any kind of nuclear attack is undertaken under any circumstances. In its final pronouncement the Court averred In view of the present state of international law viewed as a whole as examined above by the court, and of the elements of fact at its disposal, the Court is led to observe that it cannot reach a definitive conclusion as to the legality or illegality of the use of nuclear weapons by a state in an extreme circumstance of self defence, in which its very survival would be at stake. If the use of nuclear weapons is generally contrary to the rules of humanitarian law, how can this view change when it comes to the question of self defence? It is rather unfortunate that the Court has tried to engage in a balancing act trying to accommodate the positions of both the nuclear haves and the have-nots.

The Court also examined the applicability of international environmental law and ruled that there was a general duty on the states to ensure that activities within their jurisdiction and control respect the environment of other states or of areas beyond national control. The Court also ruled significantly in relation to the law governing warfare, that the respect shown to the environment was one of the elements that would go to assess whether an action was necessary and proportionate in meeting military.

An unrecognised concern that the threat of nuclear weapons pose is the abrogation of the principle of inter-generational equity or the rights of future generations to inherit the earth in no worse or perhaps even an improved manner from that being enjoyed by current generations. The International Court of Justice recognised that the use of nuclear weapons would be a serious danger to future generations. This is especially so because of the disastrous effects of nuclear fallouts in the form of radiation, exposure to sweltering temperatures and unprecedented large scale contamination of food, especially water.

The International Court also made a pronouncement on the principle of neutrality in relation to nuclear weapons. Neutrality is an important fact dealing with an important question whether nuclear weapons could be used in a manner that would affect non-belligerent third states. The Court upheld the fact although rather skewedly that the principle of neutrality applied to all kinds of warfare including nuclear warfare. The above principle has important bearing especially after the N-Tests in the Indian sub-continent considering the fact that there are several smaller states such as Bangladesh, Nepal who might unwillingly be exposed to the hazards of nuclear warfare. This is especially true considering the devastating potential of nature of nuclear weapons, which makes it extremely difficult to restrict the area of intended damage or contamination. In addition to this, it must be remembered that once a state declares itself to be a nuclear power, neighbouring states have to constantly live with the risk of a nuclear threat. This is especially true in the Indian Sub-Continent where there exists three declared nuclear powers with extremely strained relations between two of them. Unfortunately the International Court did not deliberate much on the principle of neutrality.

The proponents of nuclearisation have always maintained that through one states superiority in weapons and their capability to use them, other states will be dissuaded against attacking them for that will result in mutual destruction. This is the principle of deterrence which has been repeatedly practised by USA and erstwhile USSR during the cold war, which was perhaps best demonstrated during the Cuban missile crisis. However, the nuclear state have failed to recognise that the principle of deterrence rests on a threat of massive retaliation which would invariably lead to a lack of proportionality resulting in a digression from the customary rule of self-defence. It must be remembered that nuclear weapons are qualitatively different from conventional weapons and their effects were so devastating that there never is much time for mediation or negotiation or even some kind of evacuation.

As regards the status of nuclear weapons in customary and conventional international law the International Court averred that there was no specific authorisation either in customary international law or in treaty law for the threat or use of nuclear weapons, nor was there a necessity that there had to be a specific authorisation for this purpose. The Court went on to add that State practice indicated that illegality of certain weapons did not result from any absence of authorisation, but was instead premised on prohibitions. In the process the Court examined a number of treaties and reasoned that (a) A number of states had agreed not to use nuclear weapons in specific regions of against specific states. (b) Nuclear weapon states had reserved the right to use nuclear weapons in certain circumstances. (c) Reservations to treaties on nuclear prohibition have met with no objections from parties to the treaties or from the Security Council.

The court thus concluded that there was a growing awareness of the need to liberate the international community of states and in the international public from dangers resulting from the existence of nuclear weapons. The Court was not convinced that a comprehensive universal prohibition had emerged with respect to use of nuclear weapons objectives.

The most formidable challenge to the International court was to determine the validity of the use and threat of use of nuclear weapons in the light of Article 2 (4) of the UN Charter that Prohibits states from using threats or use of force against the territorial integrity or the political independence of another state or in any other manner inconsistent with the purposes of the UN. The Court discovered that none of these provisions referred to the use of any specific weapon, including nuclear weapons. It was argued before the Court that if the use of force through nuclear weapons is proportionate and necessary as an act of self defence, it would be in compliance with the dictates of customary international law. However, the Court vacillated in pronouncing a definite verdict on this point and merely stated that the proportionality principle could not by itself exclude the use of nuclear weapons in self-defence in all circumstances. It has also been argued by commentators that there is no warrant for suggesting that the use of nuclear weapons can be ever described to be proportionate because of their devastating potential. The second set of tests carried out by India on 13 May 1998 has weakened such arguments as these tests were of the nature of sub-critical tests meant for testing out field devices typically launched from shoulder held weapons in battlefield operations.

On the use of nuclear weapons as a reprisal to belligerent actions on the part of enemy states the Court ruled rather ambiguously that such reprisals would be governed by principles of proportionality. Therefore, the Court in inextricably linked the question of self-defence to acting within proportional means.

The writers are the students of National Law School of India University, Bangalore, India.

Drive For Women-Only Seats Runs Into The Buffers

by D K Joshi

THE parliamentary row that erupted when the Indian government tried to reserve a third of seats for women in the Lok Sabha (lower house) and in state assemblies underscores the bitterness with which the measure is opposed.

A government move to introduce the Bill in mid-July ended in uproar, and the Speaker said another attempt would not be made "for the time being."

If approved, the legislation would produce at least 181 female members of parliament and 1,500 state assembly women. There could be even more, because women would also be able to contest other constituencies.

Such reform requires a constitutional change, but three major political groups — the Hindu-nationalist Bharatiya Janata Party (BJP), Congress and the Marxist-led Left Front — have promised support. Together they have 371 MPs, nine more than the two-thirds required for an amendment. But it is not easy keeping their members in line on the issue.

Before the government tried to introduce the measure, Sonia Gandhi, Italian-born widow of former premier Rajiv Gandhi, led a demonstration by Congress women to demand government adherence to its commitment to female seats. She said her late husband had led the way by pushing for reforms which reserved a third of panchayat seats in village councils for women.

The BJP, which leads the ruling coalition, says it wants the principle of reservation to stay in force for only 15 years, although parliament could decide to extend it.

Women from what are known as "scheduled castes" and "scheduled tribes" (underprivileged groups singled out for affirmative action) would be allocated a third of the reserved parliamentary seats.

The idea of women-only seats was first mooted in a 1976 report by the Committee on the Status of Women in India. Twelve years later a proposal for a 30 per cent quota in all elected political bodies was opposed by women's groups, who insisted on restricting reservation to village level to encourage grassroots participation in politics. This was enshrined in the constitution in 1993.

The parliamentary quota issue was raised again in 1995. At first, most parties seemed to agree. Then the doubts began to be expressed more openly, and a Bill was scuttled by a parliamentary committee in 1997.

In a new book, *Women in Parliament : Beyond Numbers*, Shirin Rai, a lecturer in politics and women's studies at Britain's University of Warwick, argues that even women's groups had objections at the time : they felt that most female MPs had been middle-class professionals and that it would be wrong to give such a relatively privileged group another boost by ensuring them places in parliament.

The idea was kept alive, but as the latest row has proved, implementation is dogged by the opposition of many MPs — including some in parties committed to the measure — and the tactics of leaders of the Muslim community and other underprivileged groups who are not "scheduled" for special treatment. They fear loss of dominance over their people, and have been pressing for a parliamentary quota for women from their communities. This is opposed by Prime Minister Atal Behari Vajpayee and many MPs.

A former MP and diplomat, Syed Shahabuddin, has formed "a committee for the empowerment of Muslim women.... in view of the pathetic condition and backwardness". He points out there are only two Muslim women in the Rajya Sabha (upper house) and none in the 543-seat Lok Sabha or in the state assemblies.

Overall, Muslims comprise about 12 per cent of the population, but less than five per cent of the Lok Sabha.

In early July, Vajpayee said the government would press ahead with the quota Bill "even if there is no unanimity". Support among major parties is driven partly by fear of being penalised by women voters at the next election if they opposed the measure.

Despite the latest setback, backers of the measure still hope it can succeed. They believe that an increase in the number of female legislators would focus more attention on the plight of many women and children. A recent official report quoted figures showing there was a rape every 54 minutes (up to three-quarters of them against girls under 16), a dowry death every 92 minutes, a molestation every 26 minutes and some other cruel act every 33 minutes.

In addition, because of neglect and discrimination, 44 per cent of women are illiterate, many undernourished and a quarter of girls die before they are 15.

Sceptics, however, doubt that even the emergence of a large number of number of female MPs would be enough to eradicate deep-rooted prejudices.

Lecturer Shirin Rai says : "Women's representation in parliament, while important on the grounds of social justice and legitimacy of the political system, does not easily translate into improved representation of women's various interests." — *Gemini News*

The writer is a freelance journalist who formerly worked for the Bombay Free Press Journal. He is the author of two books.

LAW WATCH

Stop Religious Persecution In India

ODHIKAR, a coalition for human rights based in Dhaka, Bangladesh, expresses its deep concern and outrage at the recent incidents of religious persecution towards Christian and Muslim minorities in India by the fascist Bishwa Hindu Porishod (BHP) and the Rashrtiya Shayang Shebak Shangha (RSS) in the following words:

We have learnt from recent press information released by the Nishanta Nattya Mancha (NNM) and the Progressive Organisation of Women (POW) that a Christian nun had been raped by a Hindu youth and that the incident was applauded by leaders of the BHP, who allegedly stated that the youth was a 'patriotic Hindu outwardly expressing his hate towards those acting against national interest.'

Again, on 7 October 1998, the British Broadcasting Corporation, in its radio news bulletin, reported that four Catholic nuns were raped by persons belonging to the RSS. We have already seen that during the Babri Mosque incident, and its aftermath, these fascist groups were committimg acts of violence against the Muslim minority almost all over India.

India is a country where almost one-third of the population comprise of religious minorities. Their persecution and other acts of human rights violations against them shows symptoms of ethnic cleansing, an occurance the world has come to recognise after observing the same in Bosnia and Kosovo.

We urge the Honourable President of India, the South Asia Forum for Human Rights (SAFHR), Indian human rights organisations and activists and all other non-communal, democratic and progressive people in India to come foreward and unite in a fight against such human rights violations and against religious hatred so that potential symptoms of ethnic clensing can be checked in order to prevent this gross violation of human rights from occurring in South Asia.