



LAW opinion



FACT file



The Indemnity Ordinance 2003

Whither constitutional legitimacy?

M RAFIQUIL ISLAM

FOLLOWING an unprecedented surge of violent law and order problem since its assumption of power in October 2001, the incumbent coalition government of Bangladesh resorted to a number of measures to combat the problem. One of such measures was the deployment of armed forces to launch the "operation clean heart" designed to restore law and order. The armed personnel, along with the other law enforcing agencies of the country, conducted this operation continuously for 85 days between 16 October 2002 and 9 January 2003. During this anti-crime crackdown, the army made large-scale arrests (over 10,000), perpetrated brutal torture, inhuman and degrading treatment and cruel punishments that allegedly resulted in 42 deaths in custody and rendered many victims mentally and physically incapacitated. In most case though, the army sources attributed these custodial deaths to their heart failures. Disgruntled relatives of the victims disputed the army side of the story and some of them opted for legal action by instituting criminal proceedings. The government withdrew the army from the operation on 9 January 2003, followed by the promulgation of the Joint Drive Indemnity Ordinance 2003, exonerating all army actions arising out of and in course of the operation.

The Promulgation of the Ordinance

The President promulgated the Ordinance pursuant to his ordinance-making power under Article 93 of the Constitution. This presidential power is not unassailable, but subject to explicit restrictions. Article 93 prevents the President from enacting any ordinance with provisions (a) "which could not lawfully be made under this Constitution by Act of Parliament" and (b) "for altering or repealing any provision of this Constitution". The aim of the Ordinance not only abrogates the constitutional law, but also goes beyond it and encroaches onto other areas of law and justice. The Ordinance indemnifies those allegedly responsible for custodial deaths during the "operation clean heart" from facing the criminal charge. These deaths, if caused by others, would have normally triggered criminal proceedings and their perpetrators would have faced the full force of law. The assurance of immunity to certain individuals solely on basis that they acted on behalf of the state sets a double standard at its best and is blatantly discriminatory at its worse in providing justice to the people. This act of discrimination and double standard clearly infringed the principle of non-discrimination under Article 28 of the Constitution. The Ordinance has elevated those allegedly responsible persons to above the law in defiance of Article 27 of the Constitution. It artificially deprives the aggrieved relatives of the victims from invoking the available legal remedies, due process of law and natural justice, which are otherwise available to all citizens of Bangladesh. This intent of the Ordinance clearly violates constitutional right to equal protection of law (Art. 31) and protection of right to life (Art. 32). It coercively subjects the relatives of the victims to suffer grave injustices without any right to redress.

All extra-judicial killings are punishable offence under the criminal law of Bangladesh, which draws no distinction whatsoever between perpetrators. This position is quite consistent with the individual criminal accountability regime in international law. One can prepare an endless list of international instruments recognising the individual accountability of criminal offences committed by armed personnel even under superior orders. The 1945 Nuremberg judgement, the 1948 Genocide Convention, the 1949 Geneva Conventions on the Laws of War, the 1984 Torture Convention, the UN Ad Hoc Criminal Tribunals for the former Yugoslavia (1993) and Rwanda (1994), and the 1998 Rome Statute of the International Criminal Court testify to this posture. That the act of state or official act serves no defence against individual criminal responsibility has been established beyond doubt by the British House of Lords in Pinochet case (no. 3, per Lord Millett) in 1999.

The President is empowered to waive or reduce the punishment of an offender after facing trial according to the constitution. The President has no power to de-criminalise the recognised criminal acts of murders, rapes and tortures or exempt its perpetrators from their individual criminal responsibility.

ity and the full force of law. The President cannot supersede, take away or abridge the right of the relatives of the victims to get justice. The President simply cannot create by ordinance a right of impunity for those responsible persons merely because it contradicts the existing organic law of the land. Nor can he usurp the legal rights of the relatives of the victims beyond the authorisation of law. Instead of trying and punishing the offenders, the Ordinance has created a right of security and immunity for the alleged offenders from the court of law. In so doing, the Ordinance is violative of a number of fundamental rights of the citizens guaranteed in chapter 3 of the Constitution. In exercising his ordinance-making power under Article 93, the President is duty-bound not to promulgate any ordinance inconsistent with, and/or repugnant to any provision of the Constitution.

The Power of Parliament to Provide Indemnity

The power of Parliament to grant indemnity by enacting law under Articles 46 of the Constitution must be construed and understood both contextually and objectively. It must be read and interpreted in conjunction with other related constitutional provisions, notably Article 150 and clause 3 of the Fourth Schedule.



These provisions were embodied to cater for certain transitional and extraordinary situations occurred during the 1971 war of national liberation and immediately after the liberation of Bangladesh leading up to the adoption of the Constitution. In order to maintain continuity of Bangladesh as an independent state and its governmental authority from the date of its proclamation and to avoid any legal vacuum, all interim measures and arrangements of the government during the pre-constitutional period were regularised retrospectively as validly executed by the lawful authority. An intent-based contextual interpretation of these constitutional indemnity provisions suggests that there is no room for indemnity to any unconstitutional act in the post-constitutional period. The Constitution, being in force as the supreme law of the land, takes precedence over all other law to be made in compliance with the Constitution.

Parliament is empowered to enact and amend law for Bangladesh. This empowerment is not unassailable. The Parliament is the creation of a written Constitution, which has expressly imposed certain restrictions on Parliament's law-making competence. Parliament does not exist in the absence of the Constitution. Parliament lacks any intrinsic law-making power, which legally comes from, and is operative under, the Constitution. It is therefore pretentious to argue that the Parliament is a sovereign law-

making body like the British Parliament. The UK, unlike Bangladesh, does not possess a written constitution, which makes the difference. The Bangladesh Parliament is non-sovereign in that the range of its law-making power, however widely and passionately asserted, must reside within the limits of the Constitution. Any parliamentary act enacted beyond the set limit is deemed to be ultra vires due to the lack of constitutional legitimacy. The test of such legitimacy is Article 7 of the Constitution, which overtly prevents Parliament from making any law or amendment, which is inconsistent with, and/or repugnant to, the Constitution. Any such law, if enacted, should be invalid to the extent of its inconsistency to the Constitution. For good governance, it is imperative that Parliament performs its law-making functions in compliance with the specified constitutional order.

The present Ordinance contains a saving clause in that it can not be challenged in or before any court, tribunal and authority on any ground whatsoever. As a necessary mechanism to ensure proper checks and balances between government organs and to avoid abusive exercise of their separate powers, the Constitution has conferred the judicial review power and jurisdiction on the Supreme Court to ascertain the constitutionality of acts of Parliament. This precisely happened in Anwar Hossain Chowdhury and Others v Bangladesh (vol. IX, BLD 1989), where the Supreme Court exercised its judicial review power to assess the constitutionality of the Eighth Amendment and the authority of Parliament to enact it.

The legal issue is whether Parliament possesses unlimited legislative competence. Parliament, whose authority to legislate is subject to the constitutionality of its legislation under Article 7 of the Constitution, cannot change an unconstitutional act constitutional. It cannot operate beyond the constitutional arrangement of checks and balances to remain immune from the jurisdiction of the judiciary. Nonetheless, the incumbent Minister for Law and Parliamentary Affairs said that the Ordinance would duly be approved in the ensuing session of Parliament. Through the endorsement of the saving clause in the Ordinance, Parliament will reverse its constitutional status by elevating itself over and above the judiciary and by rendering the Constitution subservient to its will. Parliament will thus invent a legislative power not available in, rather expressly forbidden by, the Constitution. This tendency of parliamentary arrogance in total disregard of the organic law militates against good governance.

The culture of parliamentary unconstitutional acts may be attributable to a number of factors. Due to widespread familiarity with the British sovereign parliamentary system, there is a misunderstanding among the Bangladeshi MPs and people in general that the Bangladesh Parliament, like its British counterpart, is sovereign enough to enact any law it deems appropriate. In so doing, they tend to ignore the fact that, unlike Bangladesh, the UK has no written constitution to follow. The due process of parliamentary democracy was inoperative in almost half of the life of Bangladesh between 1975 and 1990, when military dictatorship through subversive and rubber-stamp parliaments. The effect of historic legacy of undue influence on Parliament has not been dissipated with the reintroduction of multi-party parliamentary system in 1991. Such influence now comes from political parties in government, which seek to legalise their selfish power politics. By generating a climate of political polarisation in Parliament, the executive takes policy decisions on critical issues of public interests by using Parliament as a legalising tool. The parliamentary approval of the Ordinance will be yet another instance of such practice. This practice dilutes the constitutional separation of powers and interrupts the checks and balances between the organs of the government, the fundamental corner stone of the Constitution.

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Zambia: Hunger and pride

EXHILDA SIAME

For the most part of this year, Jane has been worried about her family's condition - the maize crop in her field has been dying. The reality of yet another famine year looms large on her horizon. If the famine really comes to pass, this would be Zambia's second bad season and Jane knows exactly what that means.

When the reserves are used up, she would definitely have to sell her goats and chickens - her most treasured possessions - for a little bit of money to keep her family of eight going. Even wild fruits like mangoes, which grew just about everywhere in her village of Mwense, in northern part of Zambia, failed this year. The rains were just not enough to help anything grow, and when- ever it did rain, it did so in excess.

Jane for one has never seen anything like this in all her 42 years; to her, the abrupt weather changes defy explanation. But weather experts - including the United Nations Framework Convention on Climate Change (UNFCCC) - seem to have an idea about what might be causing the weather to behave thus, not only in Zambia but in most countries in Southern Africa and other parts of the world.

The world, says UNFCCC, is getting warmer and over time, major climatic changes will lead to famines and floods. These in turn will leave a hard impact on the health and livelihood of most people - especially in developing countries.

Zambia is one among several Southern African countries experiencing extreme famine. At least 2.5 million people in Zambia alone are expected to face a major shortage of food. The



crop of maize - the staple food in the country - has completely failed this year, forcing the government to call for help from western nations.

The call of help was heard, and for a while, Jane and millions of other Zambians welcomed the news and the impending arrival of 'relief maize'. But their joy was short-lived. Soon, word broke out that the maize being sent to Zambia - through the United Nations and USA - was genetically modified.

Consequently, and fortunately, the government, non-governmental organisations and all interested parties went through lengthy explanations to educate the people. Much as they were hungry, they said, the genetically modified maize could bring even more harm. In all probability, major consequences would mean damage and destruction of the local breeds of the crop, and an increase in diseases in human beings. And tough though the exercise was, women, men and children realised it would be foolish of them to accept the food and die later, because of it.

John Mwale from 'Save the Breeds', a local NGO, travelled up north to various villages. He talked to women and children, explained the dangers of the promised modified maize, and encouraged them to say no to it. It's not easy, he said, to ask a starving person to resist food because it is harmful.

"But eventually, people reasoned and promised they would not take it," says Mwale. He also spoke of the drought between 1978 and 1980, when the 'borer' worm was introduced into Zambian soil through the yellow maize and cottonseeds that arrived in the form of aid, from the US and Argentina. And of how the good, indigenous white maize died. According to Mwale, villagers in some parts of the country are still struggling - and failing - to grow a local variety of maize. At the Natural Resources Development Centre near Lusaka, scientists are still trying to devise a chemical that would help kill the borer worm, which makes it difficult for local farmers to grow cotton, to this day.

However, the culmination to the efforts of NGOs came when President Levy Mwanawasa announced recently, that the government had turned down an offer of 60,000 tonnes of genetically modified maize. The reason: the government did not want to expose people to various health risks.

Most hands in Zambia clapped when the President said, "Yes, we are hungry and starving, but we shall only accept safe donations."

Meanwhile, USAID Administrator Andrew Natsios - based in the US - said after his tour of Zambia recently, that his country would not get rid of the donated maize. Instead, it would re-direct it to other starving countries, if Zambia maintained its stand on not keeping it.

Michael Sata, a political leader of the opposition, hopes the turned-down maize is sent back to its source, and not sold under a different guise by unscrupulous people in the country. He called for honesty and sincerity among the leaders in dealing with this issue.

He also hoped that the leaders would safeguard the integrity of millions of starving Zambians who said 'thank you, but no thanks' to the US offer.

WFS

LAW campaign



Gram Sarkar: An ill-conceived idea

DR. BADIUL ALAM MAJUMDAR

THE Cabinet has recently approved the Gram Sarkar (GS) Bill and the government, it is reported, will introduce it for approval in the present session of the Parliament. The draft Bill apparently calls for a 15-member Gram Sarkar in each Union Parishad (UP) ward, chaired by the elected member of the respective ward. The woman member elected in reserved seats will serve as advisor to each of the three wards representing her constituency. The Gram Sarkar, it is further reported, will not be designated as a new tier of local government and thus it would not be a local government body under Article 59 of the Constitution. Rather it would be considered as an associated body of the UP. The membership of the Gram Sarkar will represent different groups of the community. They will include three women representatives, two farmers, two landless agricultural workers, one Ansar-VDP member, one teacher, one physician, one businessman, one member of cooperatives, one freedom fighter and one from other professions. The Upazila Nirbahi Officer (UNO) will nominate the members of the GS, other than the chairperson, on the basis of a consensus of the voters of the ward. If the voters fail to reach a consensus, the UNO on his/her own will make the nomination. The terms of Gram Sarkar will be five years and each GS body will hold general meetings every six months. The UP chairman will be invited to these meetings. On the surface, the idea of Gram Sarkar is good. It is intended to harness the local leadership for mobilizing people and resources at the grassroots for solving the problems they face. Through periodic general meetings, it is also expected to ensure people's participation in decisions making that affect them. These outcomes are indeed very desirable. However, on close examinations, the concept of Gram Sarkar loses much of its attractiveness. In our present context it may even be a very self-defeating idea. It is likely to make our only on-going local government body, the Union Parishad, totally redundant. It may also institutionalise cadre-based politics at the grassroots and further spread corruption. More seriously, the whole idea is contrary to the bold commitment on local government enshrined in our Constitution, and is, in fact, a violation of its Article 59.

of the bureaucracy in the affairs of local bodies. The judgement clearly stated: "If Government officers or their henchmen are brought to run the local bodies, there is no sense in retaining them as Local Government Bodies." This is an unequivocal position taken by the guardian of our Constitution, against the role of the government officers and their designated persons (termed as henchmen) in local bodies. Although the proposed Gram Sarkar is supposed to create a local government system outside Article 59 of the Constitution, it is nevertheless a local body managing local affairs at the lowest level. We may show cleverness to call GS an associated body of the UP, but it is a distinct entity with specific functions and responsibilities and hence, we submit, a new tier of local government. The difficulty arises in this context is that there cannot be two classes local government bodies - one under the Constitution and the other outside it. The Supreme Court on Kudrat-E-Elahi Panir Vs. Government clearly stated that "this will lead to a situation not contemplated by the Constitution ... (and hence a) mis- chief of the Article 7(1) of the Constitution." Ironically, this was an argument used by the Court for upholding the government's



decision to disband the Upazila system.

The hidden scenario

Institutionalisation of Cadre-Based Politics One of the sad developments in Bangladesh over the past couple of decades is the dominance of hooligans and unsavoury characters - come to be known as cadres - in our national life. Unfortunately our political system breeds such cadres. The mass entry of the rich and the owners of black money in our politics provided the much-needed lifeblood for the cadres. Government programmes and services are now in most cases used as patronage for supporting them. In the last few years, we have institutionalised the cadre-based politics, with ominous consequences, by spreading it to the grassroots. In Bangladesh, we traditionally have had a dual administrative system - the dominant bureaucratic structure and the feeble local government structure. The involvement of the Members of Parliament (MPs) in the local development activities in recent

years has introduced a new element - the so-called "MP government" in our system of governance. The "MP government," composed of party functionaries and cadres, in most areas of the country now implement all local infrastructure projects and distribute relief goods. Although UP chairmen and members are required by government circulars to be the chairpersons of the implementation committees and are legally responsible for the proper implementation of these projects, they in most cases are mere bystanders. Thus much of the development and humanitarian programmes at the grassroots are now used as patronage with almost no questions asked. It should be noted that the present patronage system is run indirectly without any legal sanction. However, the situation will change with the implementation of the Gram Sarkar, as it is likely to absorb in it all party functionaries and cadres. This will give the unscrupulous elements a legal cover to continue to do with impunity what they have already been doing bypassing the UP body. This will also largely reduce the importance of chairmen in UP bodies. Thus the Gram Sarkar, if implemented, is likely to turn the only surviving local government body, the UP, a totally redundant, if not a dead, institution. This is not a very desirable scenario.

A related issue

The local government institutions are to provide a fertile ground for democratic practices, providing a strong foundation for our democratic polity at the national level. However, by providing for a system of nomination, the proposed Gram Sarkar will be counterproductive to our goal of creating a vibrant system of grassroots democracy. "Exclusion" of Women There is another serious argument against the concept of Gram Sarkar, as is presently laid out. It is instead of enhancing or strengthening women's leadership at the grassroots would be discriminatory to them. The present reservation system clearly "excludes" women from the main decision-making authority involving the UP. This is an inherent weakness of the system now in place. Designating women members as advisors to GS bodies would not solve this problem of "exclusion." As advisors, women would continue to be "outsiders" with little or no authority and responsibility other than to give advice, if and when sought. The GS body would have the option to take the advice or not. Besides, the designated role of women UP members with respect to dealing with the issue of women's repression in the proposed GS Bill, while very important, is not at present a mainstream function of local government institutions. Thus, the creation of Gram Sarkar would perpetuate women's peripheral role in our local government system and would be contrary to the goal of empowering half of our total population.

Concluding remarks

The proposed Gram Sarkar was perhaps a great idea at a different time period. However, in our present context it is likely to do more harms. It may make our present UP body totally irrelevant, if not a dead, institution. This is not good news for those who think that the UPs could be the hubs of socio-economic resurgence of our society starting from village. Furthermore, the GS would make little contribution, if any, to introduce women's leadership at the grassroots. There are also serious constitutional issues underlying the proposal. Therefore, we respectfully request the government to reconsider the proposed Gram Sarkar Bill.

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