



LAW letter

Legalising killings by an ordinance



rights. And human rights are the indispensable norms in a democratic society. Violation of human rights is a flagrant threat to the ethics of democracy.

Recently government infringed the fundamental rights of the people, seeking justice against the misdeeds, in an unprecedented manner. They indemnified all the tyranny, the army inflicted during their operation clean heart. There might be extenuating circumstance, when it comes to torturing the criminals mercilessly, although law says "no one will be punished unheard".

An international magazine defended the army drive by saying "sacrificing human rights may be necessary for safety of the majority". But the rights of the people of enforcing their complaints cannot be snatched in a country like Bangladesh. The democratically elected government put the country in an embarrassing position. The people all over the world now know, Bangladesh is a country where accused are beaten to death in custody, and their near and dear ones can not enjoy the rights even of filing the case.

Following the promulgation of this ordinance, a wave of resentment and indignation has been prevailing among the conscious people. All the distinguished lawyers termed this ordinance as a violation of constitution. It is the duty of our lawyers to fight for rendering this ordinance void through legal procedure.

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It is being claimed that Joint Drive Indemnity Ordinance-2003 has clearly violated Articles 31, 32 and 35 of the Constitution, as it provides for that no one can seek justice and no complain can be lodged against any person involved with the joint drive for any arrest, death, torture, violation of rights. It also provides that no compensation can be made for any damages of physical or mental or financial nature and if any cases or proceedings are filed in any court regarding any act done during the joint drive it will automatically be cancelled.

The Govt. is boastfully resisting that the ordinance is not unconstitutional as it is promulgated as per provision of Article 46 of the Constitution. It claimed that the ordinance is not violating any fundamental rights since all fundamental rights are not same valued or unrestricted. It argued that without violating the Constitution some restrictions can be imposed or some fundamental rights can be snatched away for the maintenance or restoration of order, or for the greater interest of the country and so on.

Thus, the interpretation of the Constitution seems very tough and as well as ambiguous. I find strong reasons both in the supportive and contradictory statements regarding the Ordinance. I postulate both the pros and cons are beyond rebuttal. Hence, I wonder in which principle the govt. believes? Is it the principle of 'rule according to law' or 'rule of law'?

'Rule according to law' means administration through the help of law, be it rational or irrational. In this respect it is enough that the law has been passed by the parliament, or has been enacted following a procedure. This type of rule is, in a word, legal; how much damnable or immoral is immaterial. (As a matter of fact, 'rule according to law' is not any doctrine, though it has been followed in ages. Our govt. has now been the exponent of the doctrine.)

On the other hand, 'rule of law', according to Dicey, includes three things -- (i) absence of arbitrary power i.e. no man is above the law and the person in authority do not enjoy wide, arbitrary or discretionary powers. (ii) Equality before law i.e. every man, whatever his rank or position, is subject to ordinary laws and the jurisdiction of ordinary courts. And (iii) individual liberties. In *Bachan Singh V Punjab* (AIR 1982 SC, 1325, 1337) it is observed, 'Law in the context of the rule of law does not mean any law enacted by the legislative authorities... What is a necessary element of the rule of law is that the law must not be arbitrary or irrational...' Rule of law, therefore, demands not only that the powers exercised by the State authorities must have a legal basis, but also that the law should conform to certain minimum standards of justice; it should be fair and reasonable, not capricious.

The Operation Clean Heart has taken, so far been claimed not less than 44 lives. Hence, indemnifying joint force's activities, how is the govt. serving the countrymen? Apparently the govt. follows the doctrine "rule according to the law".

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In every civilised society people are entitled to seek justice. As per our constitution, any misdeed is triable by law. This is a prerequisite to human

COURT corridor

The Bar and the Bench: Harmonious relationship needed

MD NUR ISLAM

Professional legal representation is a feature of the formal justice system and the same is regarded as required. The Bar, which is the association of the advocates/lawyers who represent themselves in legal arena on behalf of their respective clients before the Bench. The Bench normally denotes here the court of law, the place of justice. The advocates are known as the champion for law and the Bar is regarded to be "conscience keeper of the nation". I can utter without reservation in this respect that the profession of lawyers is a noble profession. Accordingly, this profession is attributed, decorated and adorned throughout the world that depends upon the honesty, sincerity, integrity, decency and courtesy of the members of the Bar which they owe towards their clients. The lawyers of the country do form a community of their own. They are the officers of the court and outside, the lawyers are regarded as conscientious people. It is their honor-bound duty to handle the client's briefs properly and to assist the court legally for correct decision. The lawyers by dint of their hard labour, cannot only earn name and fame in their profession but also can contribute a lot to the country. In this context I want to quote a saying "A lawyer must be prepared to live like a hermit and to work like a horse."

But in fact what is prevailing in the reality. Because of some professional dishonesty by a section of lawyers, the entire lawyer's community is suffering from professional ill reputation. Especially, it is noticed in the mufasil Bar that there is a section of advocates, who do not like to minimally maintain the decorum of the Bench. Even they do not bother to follow their courtesy in submissions, create unnecessary sounds sitting in the back row in the courtroom. Some are found to be not properly dressed. When asked by the court they simply and sometimes in disgusting attitudes, replied, "It does not necessitate." This is not an exaggeration but a reality.

Nowadays, the two terms 'Judicaring' and 'Law caring' are often pronounced by the different quarters in different seminar, symposium and talks. They would like to say that the judges should be of judicaring minded, they have to apply the strong sense of judiciality while administering justice. On the other hand, the lawyers should be of law caring when they deal with their cases, something which goes beyond the domain of law must be avoided. Actually the Bench delivers judgement and the Bar dissects them in its all essence.

A judge is a much a human being as an Advocate or any other person. He is a man of flesh and blood with all human sentiments. The only difference is that he is the arbiter of the fate of your client. Advocates must always presume that the judge is fair and impartial and eager to seek the truth. In the court house there may be divergence of opinion between the judge and the lawyer. He or she needs not however suspect that the judge is unfriendly to you. In order to present the case, lawyers have to communicate with judge. This communication is made not through the common talks of the problems or an emphatic demagoguery. It is through putting up before the court a well-prepared case factually and legally and with graceful body language. A quarrelsome attitude is disastrous. Good advocates are unassuming, they have local accent and informal demeanor and a pleasant approach. Adverse expressions and off-putting manners are never appreciated by the courts.

Similarly, a judge is to administer justice with all his conscience within the bounds of law devoid of personal feelings, allegiance and learning towards any side. The robe is not only to attire the judge physically but also to attire his unquestionable honesty and integrity. Islam also attaches great importance to the system of justice. There is a hadith which says that on the final day of judgement seven categories of people will be seated in an exclusive enclosure under a canopy for Allah's blessings. Among them will rank high those who in the discharge of their duties have given fair judgement based on justice and truth. No court system can function justly or effectively without built-in-safeguards to ensure, as far as possible, the highest ethical standards for judges, attorneys and others involved in the process. This fair-mindedness, professionalism and integrity are absolutely essential to public confidence and support.

Finally, I would like to conclude this work with the saying of Mr Justice V R Krishna lyre, which goes like this "The Bar and the Bench must prove their professional patriotism." Only then the maxim of equity which goes to say that justice should not only be done but must be shown to have been done will come into reality.

Mid Nur Islam is an Assistant Judge

LAW news

Human rights experts express concern over indemnity ordinance in Bangladesh

Two experts of the United Nations Commission on Human Rights have expressed serious concern over the proposed "Joint Drive Indemnity Ordinance 2003" for soldiers allegedly involved in recent killings and cases of torture in Bangladesh.

Asma Jahangir, the Commission's Special Rapporteur on extrajudicial, summary or arbitrary executions, and Theo van Boven, Special Rapporteur on torture, note with concern in a communication sent to the Bangladesh Government on 23 January that if the ordinance is approved by Parliament on 26 January, soldiers will not be investigated or brought to justice for the deaths in custody and the alleged torture of persons detained as part of a recent crackdown on crime in the country.

The "Joint Drive Indemnity Ordinance 2003", issued by the President on 9 January 2003, gives immunity from prosecution to armed forces and government officials for their involvement in "any casualty, damage to life and property, violation of rights, physical or mental damage" between 16 October 2002 and 9 January 2003. The crackdown on crime, known as 'Operation Clean Heart', started on 17 October 2002 in response to growing domestic and international concern about increasing lawlessness in Bangladesh. Several people are reported to have been tortured or killed during the crackdown.

In their communication, the Special Rapporteurs call on the Government to ensure that all allegations of torture and death in custody are promptly, independently and thoroughly investigated by a body capable of prosecuting perpetrators in accordance with relevant international standards.

Star LAW review

Encyclopedic Compendium: A handbook for lawyers

DR. SHAHDEEN MALIK

THIS Encyclopedic Compendium is surely one of those rare books which can not but be the product only of the most prolonged commitment to a cause and readiness to devote years to realise the commitment. As the authors have mentioned in the Preface, their's was not 'writing a book'. I must add, it would have been more appropriate if they said "not merely writing a book", in the conventional sense of the term. Everybody who even only skims through the hundreds of pages of these volumes can easily see and agree with the authors that their effort "was more laborious, time-consuming and tedious than writing a book." And, understandably, it took the authors almost six years to finish this massive book.

We generally know that there are laws a plenty. However, until the publication of this book, there was no way of knowing or even finding out all the laws on neither any given topic/subject/issue nor the numerous amendments to the laws even if one managed to find a law on any given subject.

The four volumes of the book, covering more than 2,000 pages, contains the title of our laws, their amendments and rules and where these can be found, i.e., the volume and page number of Gazettes, law reports and other publications, as appropriate and applicable. These basic information took, as already indicated, more than 2,000 printed pages to cover.

The laws of Bangladesh have been arranged under three major headings; first the laws in force have been arranged chronologically, i.e., the laws enacted are listed under each separate year, starting from 1799. The earlier official publication, Bangladesh Code, starts with laws from 1825, giving the wrong impression that there are no law prior to 1825 which are in force. The oldest law in force is The Wills and Intestacy Regulation, 1799 (Bengal Regulation V of 1799), as recorded in this Compendium. This Act can be found in East Pakistan Code, Vol. Bengal Code, Vol. I, at pp 5-8, I, at pp. 81-85. The footnote to this entry indicates that this Act was last amended in 1982. In some years, such as 1984, as many as 78 Ordinances were promulgated whereas in other years such as 1998, there is no entry under Ordinances. We all know about the Criminal Procedure Code, 1898 but surely no one knows that this Code was amended more than 70 times, the first amendment brought about by the Currency Notes Forgery Act, 1899 and the most recent amending Act was The Code of Criminal Procedure (Amendment) Act, 2000.

The laws are then arranged alphabetically. The footnotes here indicate the number of sections of the law and, more importantly, whether the law confers any rules making power. If rules have been framed, relevant foot-

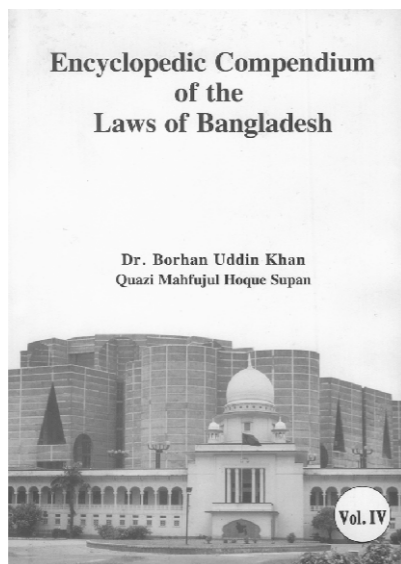
notes indicate as to where in the Compendium can one find these rules. For example, footnote 10 to Acquisition and Requisition of Immovable Property Ordinance, 1982 (p.303) states that section 46 has conferred rule making power and that rules framed under this Ordinance can be found in Chapter 6, among the rules framed in 1982 (chronological listing of Rules) and in Chapter 7, under alphabets 'A' and 'R' (under alphabetical listing of Rules). Therefore, going through alphabetically, under 'A' in Chapter 7, we find that Acquisition of Immovable Property Rules, 1982 (S.R.O. 172-L/182) was framed and this Rule was published in Bangladesh Gazette dated 5 June, 1982.

These chronological and alphabetical arrangements of laws comprise Volume I of the Compendium.

The third arrangement of laws is under 'subject matters', Volume II. In Chapter 4, in this Volume II, the authors have introduced a novel category, that of "Parent Laws". The authors explain: "... the term 'parent laws' has been used to mean the laws which were enacted first on any issue or subject, as opposed to subsequent amendment/s of these laws at later periods." (p. 561) The authors have found 961 such 'parent laws'.

In the beginning of this Chapter 5, the authors have mentioned that "In this chapter the laws have been categorised according to subject matter and then presented in alphabetical order. Needless to say that the subject head categorisation of laws by the authors has been subjective, reflecting the perception of the authors." All told, the laws have been categorised under 1596 different subject headings. Laws on major subjects such as Agriculture have been further categorised under such headings as agricultural bank, agricultural census, agricultural debtors, agricultural development and so on including agricultural research and agricultural university. There are such uncommon subjects for laws such as dargah or decimal coinage and very common ones such as Corporation, which includes a list of 61 laws, including the repealed one. This subject categorisation is extremely useful if one is trying to find laws on a subject which is not commonly invoked in courts and for researchers this is almost a gold mine. From now on any researcher (lawyers and judges as well) looking for laws on any particular subject, topic and so forth can pick up this Volume II and find all the relevant laws and other volumes would indicate the amendments and rules framed under the laws found.

Volume III is on rules, again arranged chronologically and alphabetically. This Volume also contains list of Regulations, Orders and other Bye-Laws in



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LAW week



SC court's direction to Govt.

The full bench of the Appellate Division of Supreme Court has modified the draft bills submitted by the government relating to the separation of judiciary. The amended bills were the Judicial Service Commission Rules, Judicial Service Pay Commission Rules, Judicial Service Composition Rules, Judicial Service Control Rules and bill relating to amendment to the Code of Criminal Procedure. The amended bills will be treated as the part of the 12 point's direction of the court relating to the separation of the judiciary from the executive. The court gave three months time to implement the court's order and directed the government to submit the report to the court within this time frame. It also directed to include the matter in the cause list for hearing on 27 April this year. In 1999 the court gave 12 points directions to the government for the separation of the judiciary. The final draft for the separation was made during the caretaker government. But they failed to complete the task due to lack of time. The present government took time to examine the draft bills for several times. Finally the court come forward to modify the bills to make the process for the separation promptly. However the court directed the government to submit the progress report before the court. The government seek time for 5 times earlier. The court also expressed its dissatisfaction over the progress of the government. *Jugantor, 27 January.*

AI to Bangladeshi parliamentarians

The Amnesty International urged to the Parliamentarians of Bangladesh not to support the bill of Joint Drive Indemnity Ordinance 2003. The bill was placed in the on going session of the parliament in order to make it as law. The law is aimed to give immunity to the troops for all of their actions during a controversial anti-crime drive, which reportedly claimed 40 lives. Bangladeshi parliamentarians must not allow such a sever blow to the future of human rights safeguards in the country, according to the statement of the Amnesty International. It also said that it is now up to the Parliamentarians to demonstrate their commitment to the future of the human rights in Bangladesh by opposing this bill. If the bill is passed it will provide impunity to army personnel for the deaths of innocent people after their alleged torture in army custody. It also expressed its concern that if the bill is passed no civil or criminal procedures could be invoked against the disciplinary forces or any government official for any violation of human rights. *Independent, 26 January.*

Proposed HR commission bill is weak

Speakers at a seminar said that the proposed Human Rights Commission Bill is so weak that it will be a puppet commission. The seminar was organised by the Ain O Shalish Kendro. The speakers of the seminar also demanded public debate before finalising the draft. They demanded the inclusion of the representatives from the women and children, as they are the worst victims of the violation of human rights. The draft bill for the proposed human rights commission designed that the president will appoint the chairman of the commission upon the recommendation of the Parliamentary Standing Committee related to the Law Justice and Parliamentary Affairs ministry. If no such committee exists then president will appoint the chairman of the commission upon consultation with the Chief Justice. But the accountability of the chairman is not clear from the draft bill, the speakers alleged. They proposed that there should be the schedule time in the bill to submit yearly report of the commission on human rights situation in the country and the report must be made public. The speakers also suggested for a retired judge of the Supreme Court to be the chairman of the commission. *Daily Star, 22 January.*

89 working women raped last year

At least 89 working women working in different places were raped in the year of 2002. Of the rape victims 8 were killed after being raped, according to the survey made the Bangladesh Institute of Labour Studies (BLS). Of the victims 43 were garment workers, 20 domestic workers, 6 NGO workers, 3 processing company workers, 2 nurses and 12 from other sectors. *Daily Star, 25 January.*

Call for speedy disposal of election cases

Speakers at a seminar called for the speedy disposal of the election cases. They also alleged that the election agents of the MPs have not yet submitted statements of their election expenses, which is the gross violation of the electoral laws. The seminar was organised by the legislative support service project on Manabich Shahajaya Sngstha (MSS) titled "Status of Election Disputes and Return of Election Expenses". It was observed in the seminar that due to absence of time frame in the disposal of election petition relief came very late or not at all to the aggrieved party during the term of the parliament. They suggested for the set up of a shorter time limit for the disposal of the election petitions, which will be an important reform of the present electoral laws in the country. Former Chief Election Commissioner Mohammad Abu Hena said that unless the election commission is not adequately empowered, as he experienced, it is not possible to address these issues. *Daily Star, 23 January.*

RAF is on the drive

The Rapid Action Force (RAF) of police started its drive against terrorism from January 25 in the capital city. RAF has been formed as a following measure to continue the anti crime drive after the withdrawal of the joint forces. The RAF members will work in plain cloth to hide their identity. The first batch of RAF consists of 133 members has completed its 10 weeks commando training under the command of Army Para Commando Battalion at Rajendrapur cantonment, Gazipur. The second batch of the RAF consists of 150 energetic policemen will join their 10 weeks training at the same venue on the first week of February. An independent building has been hired for the setting up of the office of the RAF. Residential arrangement for the RAF has also been completed. The members of the RAF includes one Deputy Commissioner, one Assistant Deputy Commissioner, 11 Assistant Commissioners, 8 Inspectors, 8 Sub Inspectors, 12 Sergeants, 2 head Constables, 22 Nayaks and 68 constables. *Independent, 25 January.*

Two draft bills okayed by cabinet

The cabinet has approved two draft bills named Code of Civil Procedure 1908(amendment) Bill 2003 and Gram Sarker Act 2003. The approval was given at the regular meeting of the cabinet chaired by the Prime Minister on 27 January. Other members of the committee were the State Ministers on charge of the concerned ministries, Cabinet Secretary, Principle Secretary to the Prime Minister and the concerned Secretaries. The Code of Civil Procedure Bill provides for establishing alternative dispute settlement system to dispose of certain cases through arbitration. The Gram Parishad Act of the Awami League Government is replaced by the Gram Sarker Act. According to the Act the Gram Sarker will consist of 16 members including a chairman. The elected member of the Union Parishad will be the chairman of the Gram Sarker. Every ward of the union will be treated as the gram, according to the Act. *Law Desk.*

EC cries for army

The Election Commission (EC) again requested for the deployment of army in the face of widespread of violence and rigging during the on going Union Parishad elections. It has sent a letter to the Armed Forces Division. Reports of killing, violence, intimidation and security lapses have embarrassed the Election Commission. This is the second time that the EC requested the government for deployment of troops during the election. *Daily star, 28 January.*

Corresponding Law Desk

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