Star LAW analysis

ANTI-HOPPING LAW IN ARTICLE 70

Constitutional change is a must

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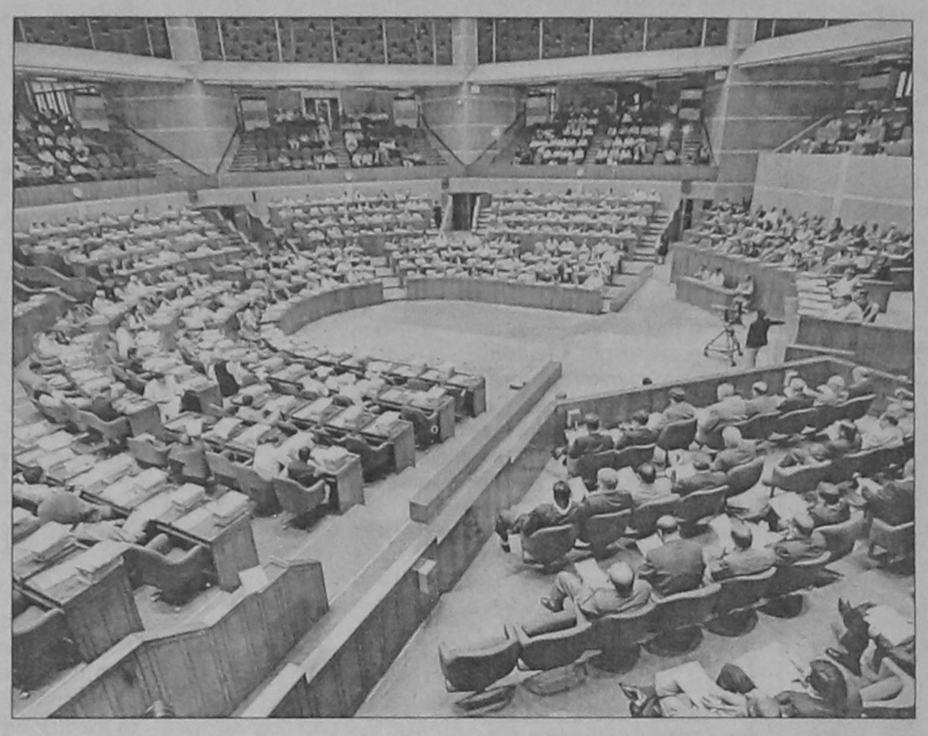

IN the wake of the 9th parliamentary election, with the Awami League winning an absolute majority, the issue of prevention of floor crossing under Article 70 of the Constitution of Bangladesh calls for amendment, with a view to making parliament more vibrant and an effective organ of democracy. Article 70 has relevance to 'floor crossing' or 'side swapping' which, in constitutional and political terminology, generally means to cross one's own party floor to another floor at the time of voting in the House. Before we go into a detailed discussion, it would be better to have a look at Article 70.

Article 70

Article 70 provides that an elected MP shall vacate his seat in the House if he:

i) resigns from his party; or

ii) votes in parliament against his party; or

iii) being present in parliament, abstains from voting; or

iv) ignoring the direction of his party, absents himself from any sitting of parliament; or

v) forms any group within his party; or

vi) if an independent elected member of parliament joins any political party, he will come under the purview of above provisions.

Of the six grounds mentioned above (ii), (iii) and (iv) are very important for the purpose of this write-up. Because of these three reasons it is often pointed out that Article 70 has been a stumbling block to the functioning of democracy in the country. Many of the veteran members of earlier parliaments have opined that Article 70 should be relaxed so that MPs can exercise their right of speech in the House. Why is that?

Implications of Article 70 in the politics of Bangladesh

Article 70 is contradictory to the fundamental rights of MPs namely, personal liberty, freedom of association, freedom of thought and conscience and of speech

From the broader point of view, political defection is a democratic right connected with personal liberty and freedom of thought and of speech. Right to vote against party decision, or to be absent in the House in protest against a party's undemocratic decision, or abstain from voting, is connected with the personal liberty of a member. People's mandate is reposed in him in the matter of raising his voice against whimsical or undemocratic decisions. But the provisions of Article 70 have made it mandatory for an MP to vote always on party lines. No MP can dare raise his/her voice against party decision. Though Article 70 is not a bar to free deliberation in the House or committee meetings, many MPs have opined that as a result of this provision they can neither speak their mind freely in parliament nor in the party meetings. By losing his/her right to vote, or to be present or absent in the parliament, an MP turns into a puppet of his party.

Article 70 is a great hindrance to ensuring rule of law

Rule of law, as distinguished from rule of man or party, means rule of that law which is passed in a democratically elected parliament after adequate discussion and deliberation. When there is scope of adequate deliberation and discussion over a bill, it creates the environment to remove undemocratic provisions from it. But because of Article 70, no dissenting opinion can be made by the members of the ruling party, and as a result, every bill, however undemocratic it may be, gets quickly passed. The government has also a tendency to promulgate ordinances and later get them passed as laws under the sweeping power of Article 70, without any detailed discussion or debate.

Article 70 is the result of the bitter and very sordid experience of political defections in the pre-1971 Pakistan politics. Unchecked political defections and widespread floor crossings were the only cause of the fall of parliamentary governments in erstwhile Pakistan.

Comment and suggestions

Anti-defection law is a political reality in Bangladesh, howsoever undemocratic it may be. In the national interest, a stable and effective government is always more important than the system. At the same time, it should not be forgotten that in the name of stable government the spirit of responsible government and rule of law can be negated. Therefore, what we now have to do is to find a compromise whereby floor-crossing can be prevented and the spirit of responsible parliamentary government can also be sustained. The existing provision in Article 70 is quite destructive to the spirit of parliamentary democracy. The prevention of floor-crossing and defection is essential only for the stability of the government. The stability of the government is tested only by a motion of no-confidence or confidence. The application of the anti-defection law i.e. the provision of Article 70 must, therefore, be restricted to a vote on a no-confidence or confidence motion only. A normal or general bill is not necessarily connected with the stability of the government. The government may fail to pass a bill be it a money bill or cut-motion or any other bill. But failure to pass this bill or even defeat it in a cut-motion does not mean the fall of the government. The government has to face a no-confidence motion and lose before it falls.

If the anti-defection law is applied only to motions of no-confidence, MPs will have freedom to oppose an undemocratic bill. As a result, the rule of law and the spirit of responsible parliamentary government will not be hampered.

Parliamentary democracy should be allowed to grow in its natural way. Its success depends on democracy and discipline within the political parties. It is difficult to maintain democracy at the governmental level if there is no democracy within the party. And democracy within the party is a matter of gradual development; it cannot be made by force of law. It is owning to disciplined party system that no government with a majority has even fallen in the House of Commons since 1895. An instance like voting against the party or being absent in the House with a view to defeating the government for selfish ends can never be found in developed countries. There is no need to pass motion of censure, no-confidence motion or cut motion in a well-developed parliamentary polity. Whenever any such possibility appears in the House, the cabinet or the minister concerned willingly resigns. Here lies true political spirit and culture of responsible government.

Like the Awami League, the Congress in India after its independence led the journey to parliamentary democracy with an absolute majority. This Congress-dominated one party system in no way hampered the functioning of the Indian parliamentary system. The success of the Indian parliamentary system was possible because of the leadership qualities of Nehru, the democratic structure of the internal organisation of the Congress party, clear-cut policy preferences, and criticisms and suggestions put forward by parliamentary committees. The Nehru government, in spite of having an absolute majority, treated and behaved with the opposition with the respect a parliamentary opposition deserves. This is why parliamentary democracy in India has taken an institutional shape. We hope that, in the light of massive changes in the attitude of voters and people, Prime Minister Sheikh Hasina will develop and nourish the culture of parliamentary democracy because, as stated by Montesquieu, 'at the birth of societies it is the leaders of the Commonwealth who create the institutions; afterwards it is the institutions that shape the leaders.'

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FACT file

Save Darfur

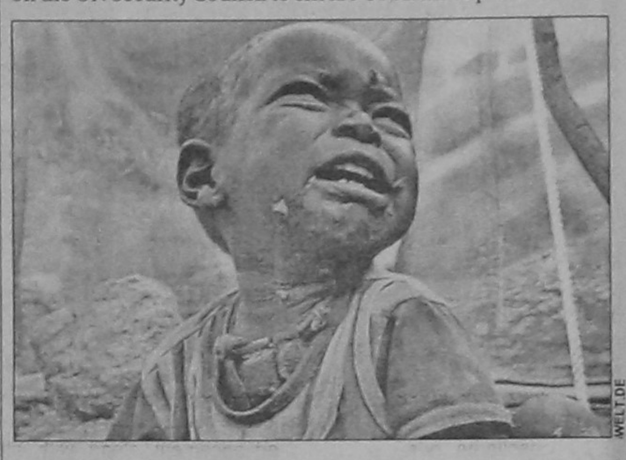
AMNESTY International hopes the reported agreement marks a turning point in the human rights situation in Darfur. However, the organisation has demanded action, rather than words, to end six years of suffering for millions of Darfuris. The military strategy employed by all sides to the conflict in Darfur has left more than 300,000 people dead and more than 2.2 million displaced. Amnesty International has repeatedly urged all warring parties to stop targeting civilians.

The deployment of peacekeeping troops by the UN more than one year ago has failed to improve the security of people in Darfur. In a new report, Amnesty International has exposed the continuing crisis facing the people of Darfur and called for the joint United Nations-African Union peacekeeping force (UNAMID) to be provided with troops and essential resources, such as helicopters, that will enable it to fulfil its mandate.

Despite the signing of the agreement the international community needs to redouble its efforts to protect the people of Darfur.

"Promises made to the people of Darfur that they would be protected through the deployment of a peacekeeping force ring hollow; UNAMID remains chronically under-resourced and attacks against civilians, including killings, continue," said Tawanda Hondora, Amnesty International's Africa Deputy Programme Director. "Women are still exposed to rape and other acts of sexual violence. A climate of insecurity prevails and perpetrators act with impunity."

"The recent fighting in Muhajeriya is the latest in a series of clashes between government of Sudan forces and armed opposition groups, which led to the displacement of thousands of civilians and left scores dead." Amnesty International has called on the UN Security Council to ensure UNAMID is provided with



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the essential resources that were pledged when UNAMID took over from the African Union Mission to Sudan (AMIS) at the end of 2007.

"Words alone are not enough. It is of no use to deplore violence in Darfur and deploy a force that is under-equipped," said Tawanda Hondora. "UNAMID must be enabled to protect itself as well as the people of Darfur. It is simply unacceptable that more than a year after the deployment of UNAMID, civilians still live in peril." Amnesty International has called on countries that pledged troops and other essential personnel to UNAMID to ensure that they are adequately trained and promptly deployed to Darfur. It has also called on the wider international community, and particularly the country members of the Friends of UNAMID group, China, South Africa and Egypt, to use their influence and ensure that UNAMID is immediately provided with the military equipment it urgently requires.

Source: Amnesty International.

LAW interview

Trial of war criminals: Some issues

The movement to bring war criminals of '71 to trial has resurfaced with unstoppable vigour and continues gaining momentum at an unprecedented rate. Positive gesture by the government makes us believe that the incessant popular demand has yielded some results at the end. Our interview with **Professor Rafiqul Islam** will shed some light on the practical aspects of such trial. Dr. Islam is a Professor of Law at Macquarie University, Sydney, Australia. He teaches and has published extensively in the area of international criminal law and court. First part of this interview was published in the immediate preceding issue of Law & Our Rights. Today we publish the concluding part of it.

SYED ZAKIR HOSSAIN, STAR

Law Desk(LD):Some suggest that the possibility of a truth commission modelled on South African experience can be given a serious consideration as an alternative of tribunal, which necessarily represents 'retaliatory system of justice', so as to heal the mental and emotional scars of war rather than aggravating them. What is your opinion?

Professor Rafiqul Islam(RI): Truth commission and tribunal are totally two different institutions, serving two diverse objectives. And one cannot be a substitute for the other. Truth commission is reconciliatory by nature and orientation while the tribunal is adjudicative through the application of law. Truth commission may offer rehabilitation and a tool for removing the social stigma but does not provide justice. Tribunal tries crimes on the basis of right and wrong without necessarily addressing the issue of rehabilitation. It is the tribunal or court, not a truth commission, which can try and render justice for the war crimes committed during the liberation war 1971.

LD: In a country like Bangladesh the issue of sexual violence is seen with extreme sensitivity. The three women from Kushtia that testified their sufferings during the liberation war before the people's tribunal in early '90s had a bad time on their return to home. Social stigma haunts them ever since. If more such testimonies surface, what will be the social repercussion and how we shall negotiate that?

RI: Rape is internationally recognised as a grave and indefensible crime. In my view, the systematic rape of 1971 must be brought to justice. In the past, rape was seen as a spoil of war and ignored. This is no longer the case. Systematic rape can constitute crimes against humanity and genocide. The Bosnian and Rwandan tribunals, the Special Court of Sierra Leon, and Article 7 of the Statute of International Criminal Court recognise this criminality and culpability of rape. In view of the social stigma that haunts rape victims in Bangladesh, provisions for witness protection and camera evidence in confidence would go a long way in addressing this concern. Both legal and moral value judgment on the prohibition of rape is so compelling that not to prosecute the 1971 perpetrators of rape would be a denial of both national and international public policy of ensuring justice and human dignity.

LD: It is found in some war crimes literatures that no inquiry was undertaken under the 1973 Act into rape issues and such omission was not a result of oblivion or mere coincidence. Do you really think that we live in an era different from before?

RI: Culpability and criminal responsibility of rape are markedly different now than what was its status before. Rape is regarded as a crime against humanity as well as a crime of genocide, unequivocally endorsed by the Statute of the International Criminal Court and mandates and decisions of various ongoing war crimes tribunals/courts.

LD: There is a popular speculation that trial of war criminals in Bangladesh may leave some Muslim countries unhappy resulting in negative impact on our economy. Do you see any substance in such speculation?

RI: The objective of the tribunal is to render justice to the victims and their relatives and to end the continuing impunity to the perpetrators of war crimes in Bangladesh. Normally, there is no nexus between this trial and the economy. However, I will not be surprised if some Muslim countries are unhappy about this trail. Indeed, about thirty countries abstained from voting when the Cambodian trial in the UN General Assembly was put to vote. The government must embark on serious diplomatic negotiations with these countries, if any, to explain the gravity and intensity of the situation and the formidable popular demands for this trial. The Liberation War was in part to resist any brand of theology that condones and/or perpetrates those crimes committed in 1971. Not to try these crimes for the sake of economic consideration may be seen as a contemptuous betrayal of the cherished ideals of the liberation war.

LD: Theoretically there exists no bar to try Pakistani perpetrators. But is there any practical possibility of bringing them to justice?

RI: I think ought to be done and it is possible. The trail of Pakistani nationals accused of committing war crimes in 1971 is comparatively complex, though Section 3 of the 1973 Act provides for such trials. The main problem is likely to be custody and extradition issues and the Shimla Pact 1973. For custody and extradition issues, Bangladesh may negotiate with the UN for its involvement in the trial process. Bangladesh can easily make a legal case by arguing that the Shimla Pact that exonerates of perpetrators of heinous war crimes contradicts the non-derogable international obligations of the Pact states. The Pact is inconsistent with, and repugnant to, the peremptory international law of the prohibition of genocide, crimes against humanity, and war crimes. Therefore, the Pact-parties are released from the Pact obligations banning 1971 war crimes trial. Moreover, some of the alleged criminals of Bangladeshi origin are living abroad. Some form of international cooperation, preferably through the UN, may well be necessary for bringing them to justice. In a similar vein, any surviving Pakistani troop members and generals responsible for the 1971 war crimes, such as General Niazi now about 86, deserve to be brought to justice.

LD: Can you please give us some insights into the possible involvement of the UN in our efforts to try war criminals?

RI: Bangladesh needs to make a formal request to the UN Secretary-General for its and international assistance. Following such a request, the Secretary-General through the General Assembly usually sets up a kind of fact finding advisory committee composed of legal/judicial persons to investigate and report to the Secretary-General on the commission of the designated crimes during the Bangladesh liberation war in 1971. In other words, Bangladesh will have to make a case before this committee, which will, if satisfied, make a recommendation to the Secretary-General for UN involvement. The Secretary-General will present such recommendation to the General Assembly for approval. This would be followed by an agreement or memorandum of understanding between Bangladesh and the UN on mutually agreed upon terms and conditions. If Bangladesh can make its case to the committee, its endorsement by the General assembly is almost guaranteed because of its simple majority decision-making and there are too many UN member states consistently supporting war crimes trials in all forms and manifestations. Albeit, Bangladesh will have to engage in ceaseless diplomacy for such support. Before embarking on such a move, Bangladesh must put its acts together particularly in evidence gathering to such an extent that would establish a prima facie case before the UN committee. In addition to government's efforts, there are many TVs, radios, organisations, committees, centres, bodies, and individuals scattered nationally and internationally possessing materials of evidentiary values may be collected and compiled. In the case of Cambodia, some crucial evidentiary documents that once thought missing or lost were discovered by the Yale University Cambodian Genocide Research Centre, which made a significant contribution to the collection of other evidence too in launching the Cambodian trial. Bangladesh must explore all such possibilities to prepare its case for the UN committee.

These evidence are perfectly admissible in war crimes trials, the commission of which is treated differently from that of ordinary crimes under the national criminal justice system. In short, Bangladesh must accomplish two interrelated tasks: making its case factually and legally to the UN committee and diplomatic manoeuvring to UN members simultaneously.

–Law Desk.