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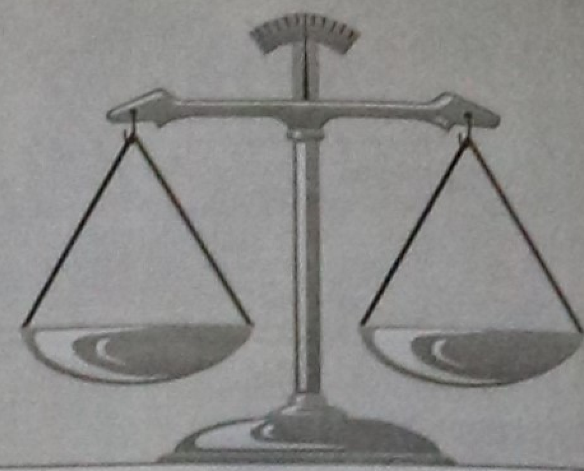

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REVIEWING the views

The 5th amendment to the constitution: A legal appraisal

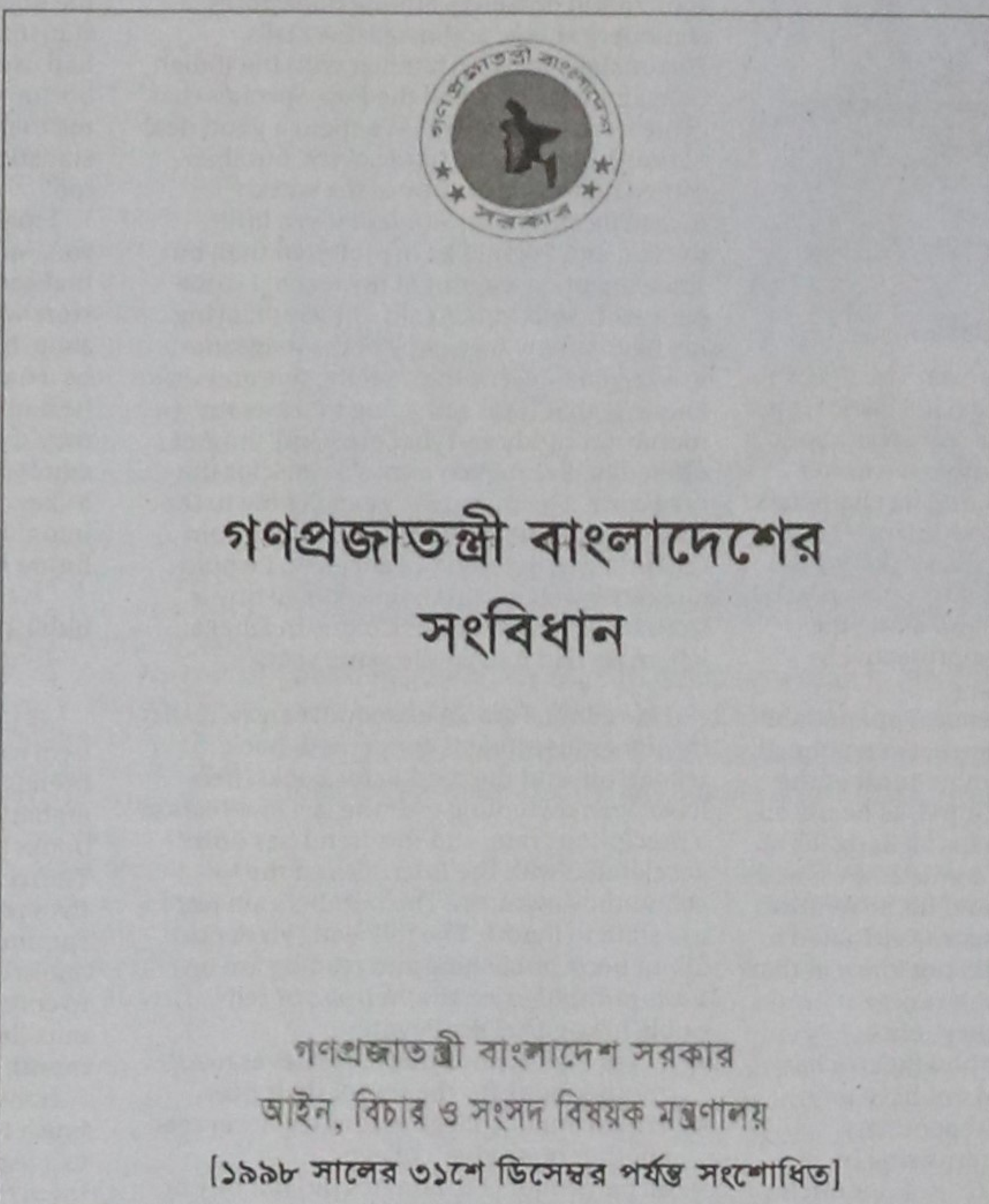
PROFESSOR M RAFIQUL ISLAM

THE Fifth Amendment of 9 April 1979 ratified all martial law regimes from 15 August 1975 to 9 April 1979. The Amendment was declared unconstitutional by the HCD on 29 August 2005, stayed by the AD on 1 September 2005 and is now the subject of a leave-to-appeal.

The Amendment approved martial law immediately after its withdrawal on 6 April 1979. Were these martial law regimes illegal so that they needed validation at the time of withdrawal? If these regimes were legal in the first place, why did they require subsequent validation? If these regimes were illegal, could Parliament turn them legal which were otherwise illegal?

Moshtaque assumed the presidency with the proclamation of martial law at the aftermath of the military coup of 15 August 1975. He did not suspend or abrogate the Constitution, which remained in force and contained no provisions for the promulgation of martial law under any circumstances whatsoever.

In defiance of the Constitution, the presidential proclamation of 20 August 1975 announced that the President "may make" martial law regulations and orders "notwithstanding anything contained in the Constitution". Moshtaque was forcibly removed on 6 November 1975 following the second coup on 3 November 1975 and Sayem became the President. Sayem declared the Chief of Army Staff Zia as the Chief Martial Law Administrator on 29 November 1976. Sayem resigned on 21 April 1977 and nominated Zia as the President, who was sworn in on the same day.



গণপ্রজাতন্ত্রী বাংলাদেশের
সংবিধান

গণপ্রজাতন্ত্রী বাংলাদেশ সরকার
আইন, বিচার ও সংসদ বিষয়ক মন্ত্রণালয়
[১৯৯৮ সালের ৩১শে ডিসেম্বর পর্যন্ত সংশোধিত]

Moshtaque in his first proclamation of 20 August 1975 entitled the outgoing President to nominate his successor. It was ironic that Zia arrested, convicted, and imprisoned Moshtaque for the abuse of powers on 24 February 1977.

Yet Zia did not find any contradiction to be the nominated President of Sayem according to Mushtaque's proclamation. The assumption of presidency by Zia resembled with that of Yahya in 1969.

Ayub stepped down as the President of Pakistan and out of his own free will and accord wrote a letter on 25 March 1969 to Yahya, then Commander-in-Chief of the Army, handing over the presidency to Yahya as if the presidency of Pakistan was the personal estate of Ayub. In a similar vein, Zia became the President as the personal choice of Sayem.

The 1972 Constitution was in force after the coup of 15 August 1975 and at the time of the abdication of Sayem. The Constitution provided for filling the vacuum of presidency by the Vice President under Article 51(3) or by the Speaker in the absence of the Vice resident under Article 55(2) to be the Acting President under Article 55. Parliament was also authorised under Article 55(3) to make provisions to discharge the functions of the President in any contingency not provided in the Constitution.

Unlike Moshtaque, Sayem unilaterally abdicated and nominated Zia as the President. This act arbitrarily prevented the constitutional machinery from playing their mandated role in constitutional impasses.

The Pakistan Supreme Court held Ayub's martial regime in 1958 valid in the Dosso case because the 1956 Constitution was annulled. The same Court in Asma Jilani case in 1972 held Yahya's martial law regime illegal because it did not abrogate the 1962 Constitution.

The promulgation of martial law did not by itself revoke the Constitution, which Yahya was bound by his oath to defend. Like Yahya, but unlike Ayub, the Constitution remained in force in Bangladesh. The martial law authorities introduced a legal regime that ran not only parallel to, but in contravention of, the Constitution. It is this parallelism and contravention that rendered these martial law regimes unconstitutional. These regimes were well aware of their unconstitutionality following the Asma Jilani case, which led to obtain parliamentary endorsement.

Zia held the presidential election on 3 June 1978 and parliamentary election on 18 February 1978 amid martial law. It was this Parliament that enacted the Fifth Amendment. The President had unlimited power to dissolve Parliament at any time by public notification (Art. 72). He utilised this weapon to hold Parliament hostage to validate all actions as a condition of lifting martial law.

Presumably Parliament would have been dissolved and martial law would have been continued indefinitely had Parliament refused to pass the Amendment. Parliamentary sanction to martial law was indispensable not only to legitimise the regimes but also to legitimise Parliament itself constituted by elections held under martial law. Parliament had no other choice but to validate the martial law regimes, simultaneously validating its own existence.

The Fifth Amendment could not be called in question in any court on any ground. Article 150 of the Constitution contains indemnity provisions for transitional purposes categorically and exclusively enumerated in the Fourth Schedule. Bangladesh proclaimed its independence on 26 March 1971 and achieved its liberation on 16 December 1971.

During this period and until the commencement of the Constitution, the Bangladesh government made laws, orders, and ordinances, performed functions, and exercised powers without a constitution. All these interim measures of the pre-constitutional period were ratified to have been duly made, exercised, and done according to law. The indemnity provision overtly says that it is applicable only "in the period between the 26 day of March, 1971 and the commencement of this constitution". It further states that the Bangladesh government exercised all these powers "under authority derived or purported to have been derived from the Proclamation of Independence". Since there was no constitution to follow, those acts could not be held unconstitutional anyway. With the commencement of the Constitution, every such act should be performed within the constitutional ambit. Article 150 and the Fourth Schedule (clause 3) do not allow the validation of any unconstitutional act in the post-constitutional period.

Hence no unconstitutional act of the post-constitutional period could validly be indemnified under, and appended to, the Fourth Schedule to accord constitutionality. Despite this clear constitutional restriction, the Zia regime amended the Fourth Schedule by adding a new clause 3A by the Proclamation Order No. I of 1977 in a bid to validate various martial law acts.

The Constitution professes its supremacy and outlaws any constitutionally inconsistent acts of any authorities (Art. 7). Being the procreation of the Constitution, Parliament is legally obliged to enact constitutionally valid law or amendment. The Judiciary is entrusted to determine the constitutionality of an act passed by Parliament. The martial law regimes were evidently unconstitutional. It is difficult to appreciate how a Parliament, whose power to legislate is contingent upon the constitutionality, can convert an unconstitutional act into a constitutional one. Parliament also insulated the Amendment from judicial scrutiny by excluding the jurisdiction of courts. Such a self-made immunity for Parliament is totally unavailable in the Constitution. Parliamentary ballots cannot legalise those martial law regimes that were introduced and maintained unconstitutionally by bullets in the first place.

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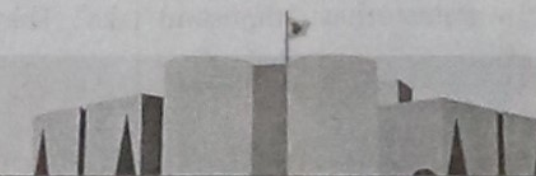
PARLIAMENT scan



PARLIAMENTARY STANDING COMMITTEES

Privileges, immunities and limitations

KIBRIA MAZUMDAR

THERE is a mass debate in our country on whether a particular Standing Committee of the Parliament can summon any body to attend before the Committee to explain something and whether the person so summoned is bound to attend before it. The issue has been geared up by a recent summon served by the Committee on Public Undertakings to Anti-corruption Commission's (ACC) acting Chairman along with other Commissioners to attend before it.

However, upon receiving the notice all ACC Commissioners replied to the Committee that they would not appear before it as the notice was sent beyond the jurisdiction of the Committee and that they were only accountable to the President of the Republic. Accordingly, they did not attend the scheduled meeting.

Now, the issue is whether the Committee has gone beyond its jurisdiction. Before drawing any conclusion let us see the sphere of jurisdiction of the Standing Committees of the Parliament. As per Article 76 of the Constitution the Parliament has the authority to appoint Standing Committees stated in the Rules of Procedure of the Parliament. Article 76(3) clearly states that the Standing Committees appointed by the Parliament are authorized to enforce the attendance of witness and examine them on oath, affirmation or otherwise compelling the production of documents through any other law.

Now we can look into the provisions of 'Rules of Procedure'. It is also a legislation/law enacted to make Article 75 of the Constitution effective. As per this Article the Parliament is authorized to make its own Rules of Procedure. As per Rules 202 & 203 a Committee has the power to summon the person concerned for witness and the person shall produce such documents as are required for the use of a Committee.

As per Article 7, the supremacy of the Constitution is 'The Constitution is the supreme law of the Republic, and if any other law is inconsistent with the Constitution then other law shall, to the extent of the inconsistency, be void. So it can be said that no other law can supersede the provision of Constitution.

Some times it is claimed that the jurisdictions of each Standing Committee are confined to its concerned Rule. But as per Rule 208 a Committee can work and report to the Parliament on such matter that is not directly connected or does not fall within its terms of reference.

The Parliamentary Committees are recommending bodies, but our Rules of Procedure do not clearly state whether the Committee recommendations are obligatory for the institution or person for whom they were made. Though people's perception is that as the Committee is considered mini Parliament and except enacting legislation it has some mandate from the House to oversee the activities of the ministry and recommend on the issue which falls within its jurisdiction, so its recommendations is obligatory for the executing agency. Another limitation is that as there is no specific Privilege Act for the Committee, so the Standing Committee cannot take any remedial measure to implement its recommendations.

As per Article 78, the Committee meeting proceedings can not be questioned in any court of law. It can be concluded that the privileges of the Committee of the Parliament can be made by the Parliament through enactment. Provision can also be made for remedial action in case of breach of recommendations made by the Committee?

Kibria Mazumdar, Committee Officer, Private Secretary to the Hon'ble whip Mazibul Houque, Bangladesh Parliament.

HUMAN RIGHTS monitor

Labour migration cuts will hurt developing countries, says WB

SEVERAL industrialised countries, including Spain, the United Kingdom and Italy, are cutting foreign worker migration quotas, which migration experts call a "mistake" for the economies of both developing and industrialised countries.

Khalid Koser, migration specialist at the Geneva Center for Security Policy told IRIN: "These hits come on top of the 2008 global food crisis and high commodity prices, as well as [slow] progress on the Millennium Development Goals, accentuating some already negative trends for the developing world."

Much of sub-Saharan Africa has yet to see the full impact of the global financial crunch, but in the coming months higher unemployment and cuts in investment and aid will combine with a cut in remittances to show "the real impact", Koser said.

Quotas

The number of would-be migrants affected is unknown, World Bank chief economist Dilip Ratha said. Meanwhile more countries are announcing cuts. The UK has introduced a points-based system favouring highly skilled over unskilled migrants, Australia has reduced skilled migrant intake by 14 percent and Spain has introduced a migrants "voluntary return" programme.

Italy will soon introduce tougher requirements for residency permits, according to International Labour Organization (ILO) and World Bank staff. And in the United States the February 2009 stimulus package makes it more difficult for beneficiary firms to hire high-skilled foreign workers.

A UK Home Office spokesperson told IRIN: "We've always said we would run our immigration system for the benefit of the UK and that is why we introduced a points system." She continued, "We have already demonstrated that flexibility by putting a stop to low-skilled labour entering the UK from outside Europe."

But the World Bank's Ratha told IRIN: "A crisis is the worst time to impose immigration restrictions both for the sending and the destination country."

Migration specialist Koser agrees: "Reducing quotas are a mistake because governments are responding to public pressure rather than the reality."

Government officials in Liberia say the cuts will increase poverty. Liberia's deputy Finance Minister, Samuel Marwolo told IRIN, "Remittances from legal labour migrants have already slowed, and should governments enforce quota cuts, it would contribute to the level of poverty in the country."

In 2007 remittances to developing countries surpassed official global development aid by 60 percent, according to the World Bank.

Remittances from migrants to developing countries are set to drop by five to eight percent in 2009 according to the latest World Bank research, in contrast to double-digit growth in the last five years.

"As a result, a large number of poor households in developing countries, especially poorer remittance-dependent countries, will suffer," economist Ratha said.

Unemployment

Quota cuts stem from a rapid rise in unemployment in industrialised countries, according to ILO migration specialist Patrick Taran. The unemployment rates in the UK, Italy and Spain are 6.7 percent, 7 percent and 17.4 percent, respectively, and rising. Spain's rate is currently the highest in the European Union.

But some sectors that are highly dependent on migrant labour such as agriculture are not expected to see a significant decline in demand, though others such as construction, manufacturing, hospitality and retail services are facing sharper cuts, according to Taran.

Former shea nut exporter Joseph Attah (not his real name) in Ghana's capital Accra said his business recently collapsed partly because exports have dwindled. He said the migration quotas could push people to move illegally. "My family and friends are pushing for me to travel. [They mention Libya]. With more pressure from governments some might be forced to use these dangerous means to get to Europe."

Unemployment rates for the formal sector are 20 percent in Ghana and 85 percent in Liberia, according to the most recent World Bank figures.

Lower legal migration generally means lower clandestine movement according to Ibrahim Awad, chief of ILO's migration branch. Nonetheless tens of thousands of Sub-Saharan African migrants are expected to attempt to travel to Europe, without papers, in 2009.

"Migration is rational. Migrants estimate costs and benefits of staying and moving," Awad said. "At times they may over-rate benefits and under-rate costs, which is at the origin of the tragedies we see of people making attempts and ending up in dangerous situations."

Attah in Ghana is not making the move yet. "I would have loved to enter a developed country with a visa, to help my family, but for now I will not try as it is not realistic for me. I am still looking for another job here...and I will keep going until I drop dead."

Source: IRIN, a UN humanitarian news and information service.