GOVERNANCE *update*

PARADOX OF LAW AND POLITICS

Empowering Anti-Corruption Commission

The role of the ACC after 1/11 was an error of law and fact. But for those errors the ACC as an institution should not be obliterated instead of making it audacious, strong and independent enough to stand against any unlawful exploitation of its entity in future.

ERSHADUL ALAM

WHAT is the most talked about issue in our politics or in our everyday life? To me it is corruption. Blaming others in our politics is also as old as the corruption is. The corruptions done by the leaders, especially the leaders of the party in power, are disclosed after the formation of another government. The debate continues as to the responsibility of making the country a champion of corruption. But regrettably enough, no government took any realistic and effective actions to prevent corruption in the country. It is true that total prevention of corruption is not possible in any society.

After partition from India, we have got the Anti-Corruption Act in 1947 to get rid of corruption by the public servant. Enactment of this Act gave us an idea of the already prevailed corruption in the public service. So, the corruption we are within is the legacy of our predecessor, divided politically and geographically. The Act has been carried from Pakistan to Bangladesh. The Act was made applicable to whole Bangladesh and its citizens and the persons in the service of the republic as referred in section 21 of the Penal Code.

The offences as defined from section 161 to 165 and 165A of the Penal Code are punishable under this Act and are cognizable as referred to in the Criminal Procedure Code. The offences committed by an employee of any corporation or other body or organization or even by people's representative were also found place in this Act. The abettors are not exclusive of that Act.

To give effect to this Act the police officer not below the rank of Inspector was made authorized to investigate the cases of corruption, which is also present in the existing Act of 2004 in a different way. To initiate an investigation of an offence, an order from a first class magistrate, a public servant, was required. The present Act of 2004 does not contain that provision. Much could be done to give this Act an institutional framework, which was ignored by the subsequent governments. Little but expansion of offices at the provincial level was done to prevent corruption.

The limitations of the Act of 1947 were tried to overcome by the Act of 1957. Some other specific offences other than those covered by the Act of 1947 were included in the latter one. The dependency on some other state and regional authority was tried to minimize in this Act. A full-fledged office was formed at least to the investigation level of the offence. The officers were empowered to investigate the cases of corruption and related crime. The offices expanded from provincial level to district level in 1964 and the Bureau of Anti-Corruption had to depend on the district level administration for obvious reasons. Though a level of independence was ensured but dependency at the local level could not be evaded for lack of resources, cooperation and political stance by the then ruler.

The system of check and balance from the field level to the highest level was ensured to prevent unnecessary harassment of the public officials or the powerful leaders for which the present government is very concerned with. All political parties are now in silent mode and are observing the role of the government in reducing the powers of the ACC.

Shifting of the Bureau from the domination of one to another is another dilemma over the commission. After 1975 with the changing of the form of government the Bureau was brought under the President Secretariat, which was shifted to the Prime Minister Secretariat after 1992.

To give a fresh look on increasing corruption, the government has enacted the Act of 2004 with renewed vigour and views. More areas of offences were included in this Act with more specifications to deal with those. A sort of check and balance is maintained from the appointment of the commissioners to their discharging of duties. The commissioners are appointed by the President with the recommendation from the select committee consisting of five members. Three of those five members are from the executive organ of the state. The government has a very strong checkpoint in selecting the commissioners. Though the justice of the Appellate Division is the chairman of the select committee, he cannot take any unilateral decision in selecting the commissioners.

The select committee makes recommendation to the President for appointing commissioners and the committee select two commissioners against own post in this behalf. The President cannot go otherwise than the recommendations of the committee. One may be complacent enough to think that the commissioners are appointed by the President, not by the Prime Minister. The appointing authority of the commissioner is not as important as strengthening of the commission. In addition to this reference may be made to Article 48 (3) of our constitution where it is said that the President shall (not may) act in accordance with the advice of the Prime Minister in the exercise of all his functions except in appointing the Prime Minister and the Chief Justice of Bangladesh.

Like that of the select committee the commission cannot take unilateral decision in any case. All the decisions are to be taken in the meeting with the consent of at least two commissioners present and voting. The commissioners are answerable to the Chairman for their functions. The commission can appoint officers to perform it activities.

What is unique of this Act is the initiation of an investigation or case of corruption. The commission can initiate a case at its own desire or upon the application of the aggrieved. A checkpoint is needed to be established at this point of functions of the Anti Corruption Commission (ACC). The ACC was condemned for these shortcomings of the law. But what the commission could do but to be used in de-politicisation and minus-two formula. A check and balance is required in filing of cases, issuing of summons and ensuring presence of a person (before he is proved to be guilty) to avoid future harassment.

The power vested to the officers to arrest a person accused of corruption need to be given a second though unless a check and balance is established at this point. The offences are cognisable and non-bailable. The provision of the Act of 1957 was retained in the Act of 2004. If a person is arrested by the officer without his case being vetted, he has to stay in custody and to prove himself innocent.

We do not see any initiative from the government to work on those issues. We observe no sign of concern to make the commission independent and impartial to prevent corruption. The Awami League (AL) manifesto prioritised five issues which included eliminating corruption from the society. It is the second priority of AL election manifesto. Effective actions against corruption are pledged in the manifesto. We failed to see any multi-pronged measures to fight corruption as pledged in the manifesto to put into place. What about submission of wealth statement annually by the powerful people? What about Vision 2021; where a society free from corruption was dreamt.

The proposal that the government is considering for the Act of 2004 will make the commission a mere witness of corruption in fact. Taking permission from the government for initiating any case against the government officials is not a realistic proposition for any authority to make it functional. The democratic government should not match it with the undemocratic one. The role of the ACC after 1/11 was an error of law and fact. But for those errors the ACC as an institution should not be obliterated instead of making it audacious, strong and independent enough to stand against any unlawful exploitation of its entity in future.

To make the commission independent, impartial and strong implementation of the commitment made before the election is mandatory. Social resistance alongside the legal steps can promote the drive against corruption. But only an institution cannot prevent corruption in the country. Playing of positive and cooperative role by all institutions and organization is important factor in this regard. A concerted and coordinated approach by and amongst the ACC, Information Commission, Human Rights Commission and the Judiciary cannot be ignored in any way. But for doing so an institutional framework is prerequisite. The ACC is that institution. The government does not need to do more beside its manifesto to prevent corruption in the country. To quote from there: "All possible steps will be taken to stop corruption such as Charter of Citizens' Rights, Right to Information, Computerization of Official Documents, and Decentralization of Power." If the government concentrates on the implementation of those promises with genuine spirit, corruption will be prevented at a significant level earlier before 2021.

Ershadul Alam is an advocate and researcher.

Star JUDGMENT *review*

Pre-emptive(!) hartal: Ill-legal if not illegal

M. JASHIM ALI CHOWDHURY

AS a student of constitutional law, I feel stunned to see the fashionable way in which the main opposition party in the Parliament has called for a hartal almost one and a half months before its observance. Perhaps this pre-emptive hartal (analogous to George Bush's pre-emptive self defence) might have been called with an illegitimate expectation that in the meantime some 'issues' may arise to justify it! However, this does not make me stunned, as I'm a bit familiar with the volatile power politics in my motherland. It is the fashionable way of calling hartal that makes me uneasy. At the end of write up I shall make it clear. For now I shall try to show the ill-legality of hartal as a political weapon with reference to a decision of the Supreme Court.

Abdul Mannan Bhuyian v. *State* 60 DLR (AD) 49

The background of this appeal may be summed up as follows:

A Division Bench of the High Court Division issued a suo moto rule in 1999 asking the Secretary Generals of AL and BNP and the Government of Bangladesh to show cause as to why the pro-hartal and anti-hartal activities being cognizable offence should not be stopped. Barrister Md Shawkat Ali Khan and Barrister Md. Jamiruddin Sircar were requested to brief the Court as *amicus curie*. The Secretary General of BNP appearing before the Court submitted that hartal was a historically recognized democratic right of the people to express their disapproval of governmental activities (Para 6). The High Court Division made its role absolute by declaring violence and coercion for or against hartal a criminal offence. Interestingly, nowhere in the judgment, calling for a hartal was declared unconstitutional. The *stare decisis* of the judgment was that all activities in favor or against the hartal were cognizable criminal offence and accordingly the law enforcement agencies and courts are bound to take legal action against those who would force anybody in favor or against hartal (Para 7-8).

The verdict was appealed against and the Appellate Division (AD) found that the HCD Bench disposing the *suo moto* rule was lacking in jurisdiction. As per Section 561A of the Code of Criminal Procedure, to take *suo moto* cognizance of a matter, the concerned HCD Bench must have a related issue pending before it. Since there was no such related issue pending before the concerned Bench, the AD found the Court lacking in jurisdiction (Para 19). Though it might have stopped at this stage, the Appellate Division continued into the merit of the HCD judgment in consideration of the constitutional implications and importance of the issue before hand.

The Appellate Division confirmed an earlier decision of the HCD in *Khandker Mudarresh Elahi* v. *Government of Bangladesh* 54 DLR 47. Hartal or strike *per se* enforced through persuasion unaccompanied by threat, intimidation, force or violence is a democratically recognized right of the citizens guaranteed under the Constitution (Para 34). In fact the AD was willing not to explore in the way of defining a new offence which is the job of the legislature. Separation of power demands some self restraint on the part of the judiciary. Since the provisions are already there in criminal laws for legal action against any person for any law and order infringement, there was no need to declare such infringements criminal offences (Para 43). Again, lest this should be taken as a green signal for calling hartal, the Appellate Division endeavored further to held that: "We have no hesitation in holding that enforcing hartal by force leading to violence, death and damage to the life and property of the citizens is not only illegal but also liable to be detested and punished as per law of the land in existence. These are already cognizable offences under the Penal Code and other penal laws of the land" (Para 34).

So it is accepted that the calling hartal is not illegal *per se*. But given the painful observation of the highest Court it definitely becomes ill-legal.

Hartal by public acclamation?

Before calling the hartal, the opposition leadership is reported to ask the public at large what type of program they wanted and the gathering overwhelmingly demanded calling of hartal. And so there was no alternative to 'respect' the will of the 'people'. To understand this way of calling hartal to its fullest extent let us go back to 1958. After the proclamation of Martial Law, President Iskander Mirza and Chief Martial Law Administrator Ayub Khan were in search of a way to adopt a new constitution for Pakistan. Mohammed Asgar Khan, once the Chief of the Air Force of Pakistan, is making a reminiscence of those initial Martial Law days (Quoted in A.K.M Shamsul Huda, The Constitution of Bangladesh, Volume 1, p. 102):

"The following day or the day after, I attended a meeting presided over by Iskandar Mirza, at which Ayub Khan, the Chief Justice of Pakistan and the newly appointed members of Ayub Khan's Cabinet were present. In this meeting, the Chief Justice of Pakistan Mohammed Munir was asked by Ayub Khan as to how he should go about getting a new constitution approved by the people. Justice Munir's reply was both original and astonishing. He said that this was a simple matter. In olden times in the Greek City States, he said, constitutions were approved by public acclaim and this could be done in Pakistan as well. Ayub Khan asked as to what was meant by 'Public Acclaim.' Justice Munir replied that a draft of the Constitution that has been published a few days earlier was to be followed by Ayub Khan addressing public meeting at Paltan Maidan in Dhaka, Moochigate in Lahore, Nistar Park in Karachi, Chowk Yadgar in Peshwar at which he was to hold up the draft constitution and seek public approval. The answer, the Chief Justice said, would definitely be in the affirmative and then there would be a constitution approved by Public Acclaim. Every one present in the meeting burst into laughing. Perhaps Ayub Khan laughed the loudest."

Now, what should we do? Burst into laugh or tears?

The writer is Assistant Professor, Department of Law, Northern University Bangladesh (NUB), Dhaka.

LAW *news*

Universal ratification of treaties protecting children needed

GOVERNMENTS should act quickly to ensure universal ratification of key international treaties protecting children from use in war and from sexual exploitation, Human Rights Watch said. May 25, 2010, is the 10th anniversary of the adoption by the United Nations General Assembly of two treaties prohibiting the use of child soldiers, the sale of children and child prostitution and pornography.

The treaties - both optional protocols to the Convention on the Rights of the Child - have won wide support, but 44 countries have yet to ratify either protocol. The optional protocol on the involvement of children in armed conflict has been ratified by 132 countries, and the optional protocol on the sale of children, child pornography, and child prostitution has been ratified by 137 states.

"The children's rights treaties have helped to reduce the number of child soldiers and protect children from sexual exploitation," said Jo Becker, children's rights advocacy director at Human Rights Watch. "Countries that have not ratified them should do so quickly so that no child will be without these basic protections."

A group of 12 international human rights, humanitarian, and child rights organizations, including Human Rights Watch, Amnesty International, Save the Children International, and World Vision sent joint letters today to the UN ambassadors of countries that have not yet ratified one or both protocols, urging them to do so as soon as possible in order to strengthen an "unequivocal norm" against the use of child soldiers, and the sale and sexual exploitation of children.

In 2000, children were being used or had been used recently as soldiers in an estimated 36 armed conflicts, according to the Coalition to Stop the Use of Child Soldiers. A new report issued Friday by the UN secretary-general, found that child soldiers are actively participating in armed conflict in only 16 countries. While the decline is in part due to a smaller number of conflicts, it also reflects a change in laws and practices. Some countries have demobilized children from their armed forces, adopted national legislation to raise the minimum age for voluntary recruitment, or changed policies to prohibit the deployment of children into hostilities.

Some countries also have taken legal and other measures to prevent the sale of children, child prostitution and child pornography. They have criminalized such acts, taken tougher measures to punish offenders, established specialized law enforcement units to deal with sexual exploitation of children, and ensured that child victims are rehabilitated and reintegrated in society.

"It's remarkable that nearly two-thirds of the world's countries have ratified the children's rights protocols in just a decade," Becker said. "However, the remaining countries should act to make clear their commitment to abolish these terrible forms of child exploitation."

Source: Human Rights Watch Press release.