



## REVIEWING THE VIEWS

# Curtailment of ACC power to sue public officials: A law to legalise corruption?

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THE ninth Parliament enacted on 10 November 2013 an amendment to the Anti-Corruption Commission (ACC) Act 2004 inserting section 32A that curbed the independent authority of the ACC to initiate investigations and judicial proceedings against any public officials for corruption and to do so the prior approval of the government was mandatory. This amendment became law following the Presidential assent on 20 November 2013 amid widespread criticisms and opposition. In response to a public interest writ, the High Court Division on 30 January 2014 held this amendment illegal, unconstitutional, and without the force of law. This amendment was found not only to be inconsistent with the constitutional guarantee but also undermined the independence of the ACC.

Prior to this decision, the High Court Division on 26 September 2013 also held certain provisions of the Contempt of Court Act 2013 exempting government officials (and journalists) from any contempt of court action invalid and unconstitutional. On both occasions, the Court reasoned that such exemption was discriminatory as it treated a particular group of citizens more equal than others in violation of Article 27 of the Constitution guaranteeing the equality of all citizens before the law. Seemingly the judicial message went unheeded by Parliament while amending the ACC law.

The Constitution is the supreme law of Bangladesh. Yet the history of constitutional defiance is being repeated in Parliament. Does Parliament have law-making freedom? The answer is absolutely negative. Parliament is the creation of a written Constitution which sets the legislative functional limits. Parliament under our written Constitution does not possess any intrinsic law-making power, which actually comes from the Constitution. This conferred law-making power, however extensively and passionately parliamentarians may assert, must remain within the given constitutional limitation. In an unequivocal recognition of the supremacy of the Constitution, its Articles 7(2) and 26(2) require all law-making bodies and government to be mindful of the constitutionality of their legislative acts, which would be void to the extent of their inconsistency with the Constitution. When Parliament goes beyond this set constitutional limit, its acts suffer from legitimacy crisis and cease to be the law.

Parliament must understand its non-sovereign law-making power to be exercised under a written Constitution. Parliament is therefore legally obliged to make law in compliance with the Constitution. Pursuant to the constitutional separation of powers, Parliament itself is not authorised to determine the constitutionality of its own act. The Judiciary, being the guardian and custodian of the Constitution, is entrusted to ascertain the constitutionality of any parliamentary acts. The interpretation of all constitutional provisions is exclusively within the domain of the Judiciary. The Supreme Court is empowered to judge whether a particular parliamentary act is consistent or not with the Constitution by virtue of, and in exercising, its judicial review power. The apex court is the final arbitrator of the constitutional validity of any parliamentary act.

Thus Parliament is not immune from any judicial review of the constitutionality of its act by the apex judiciary. This is what has precisely happened in the above two judicial decisions. By enacting these amendments, Parliament had elevated itself to a status not found or available in the Constitution and as such their illegality and unconstitutional became a foregone conclusion. These controversial legislative acts defy certain fundamental human rights enshrined in innumerable international human rights



instruments and national constitutions creating a *jus cogens* (peremptory) obligation for compliance. The legal position in favour of these two judicial decisions is so overwhelming that appealing against them is likely to be a losing battle and waste of public resources.

Another controversial amendment of the ninth Parliament with constitutional and corruption implications is the local government law entitling parliamentarians to be involved as advisers in Upazila development activities of local governments in their respective constituency. Local government administrators regard this as interference in the running of the local government system and have demonstrated their protests and resentments. This arrangement of inter-mingling national law-makers in the executive administration of the local government system compromises law-makers' full-time engagement in law-making, dilutes the constitutional separation of power, and goes against the basic structure of the Constitution. These local government development projects often serve as fertile sources of power abuses and financial corruption. Parliamentarian of the ninth Parliament also attempted to introduce an outrageous quota system in educational institutions to be reserved for the education of their children, which was abandoned on the face of mounting public criticisms.

A contentious practice entailing ample scope for corruption is the withdrawal of the so-called 'politically motivated' cases upon the recommendation of the national inter-ministerial review body. The government that came to power in 2008 inherited it, which was practiced and abused during the BNP-led coalition government that withdrew 5,888 cases and released 73,541 accused during its tenure 2002-2006 (Daily Star 23 February 2010). During 2009-2013, the inter-ministerial body recommended for the withdrawal of over 7000 cases including many cases concerning murder and torturous deaths in police custody (Daily Star, 6 August 2013).

These withdrawn cases included even privately lodged specific complaints of torture leading to custodial death (Home Ministry withdrawal order No 5/2010/2563 of 29 April 2010). Code of Criminal Procedure in force already provides a judicial approach to the withdrawal of names of any accused by public prosecutors with the consent of the court during trials and before the judgement (s 494). No case can be withdrawn by prosecutorial executive order without the permission of the court. Withdrawal should be sought on a fair and genuine ground in the interest of, not extraneous to, the administration of justice.

The withdrawal of cases and release of accused by executive, particularly the Home Ministry, recommendation as political expediency to free supporters and allies on the pretext of politically motivated cases without judicial determination and permission is preposterous at its best and an interference in the independent functioning of the judiciary at its worst. Let the court decides the matter. The

executive policy of withdrawing trivial and politically motivated cases to reduce excessive case loads amounts to curing headache by chopping off the head instead of using paracetamol. The executive job is to address the systemic problem of delaying tactics and endemic corruption that justice-seekers face every day. The constitutional separation of power is premised on the presumption that the executive is not meant to be competent to take decisions in judicial matters. Therefore the executive should be barred from withdrawing cases involving the inalienable constitutional guarantees, including the right to life, which has violently been denied in custody by the state apparatus through inhumane torture, prohibited in both national law and international law. These withdrawals inflict irreparable harm not only to victims and their relatives, but also deny the constitutional right of citizens to the protection of law guaranteed in Article 31 of the Constitution.

These kind of parliamentary acts and executive actions are susceptible to legal challenge and judicial review in the Supreme Court. It would not come to the wonderment of those apologists who see these avenues vulnerable to corruption if ACC investigations find some ministers and MPs' alleged undue wealth has been obtained from these sources. Any governments accountable to the public are better-off and can augment their clean image of good governance if steps are taken to reduce the possible sources of potential corruption.

Media reports are littered with corruptions in the form of power abuse, embezzlement, and enrichment by individuals in position of power during the immediately passed government. These reports also highlight the resolve of the new government to enhance its image tarnished by some of its previous ministers, state-ministers, and MPs who have been excluded from the new ministry and that the ACC is investigating some of them for their alleged corruption.

This is a welcoming new political wisdom and initiative that deserve congratulations. Obviously if these individuals are precluded from the ministry for their past questionable conducts surely they deserve to face the full force of law, which should have been brought to bear during their tenure but allowed to continue. It is difficult to appreciate how these ministers and MPs could have served their full term with such questionable conducts in a responsible government. However, late is better than never and the new government must extend its full cooperation with the ACC to investigate independently all ministers and MPs, past and present alike, who have allegedly accumulated undue wealth through corruption.

For good and responsible governance, it is imperative for Parliament to perform its legislative functions in compliance with due regard to constitutionalism. Regrettably, the history of parliamentary law-making is littered with unconstitutional enactments to immunise self-serving agenda. Parliament is a sacred and authenticated norm set for legislative functions to achieve a sustained orderly regulatory regime expected of a good government. Parliamentarians must understand and appreciate the ethos and spirit of the constitutional rule of law.

The utility of holding periodic educational workshops for MPs to improve their constitutional knowledge and role in a responsible parliamentary form of government may not be gainsaid. New parliamentarians must learn lessons from the past arrogant mistakes of using Parliament as a tool to deny constitutional guarantees and legalise corruption with impunity. They must not see Parliament as a touchstone that touches anything, however discriminatory, unwarranted and prohibited, becomes inviolable law. Be aware of the Supreme Court, the Constitution, and the holder of 'All powers' - the people.



## LAW ANALYSIS

## If the children not provide maintenance?

M.D.MONIR

ALL parents expect the welfare of their children. No parents want to go against their children, circumstances are that any child compels his/her parents against their will to go to parents care or any other place for living. Or if any child does not maintain his/her aged parents without any logical cause, then what should be the remedy? In this context remedy might need. And the parents may get their rights of maintenance under the law. Recently such a welfare Act has been passed in Bangladesh. The details are hereinafter.

## What is Parents Maintenance Act?

Recently the Government has passed a welfare Act named as the Parents Maintenance Act 2013. Under the Act, if any child does not provide his/her parents maintenance without any logical reason or compels them to live in any parents care or any other place, they may get remedy by complaint. And the offender shall be held liable under the Act.

## Who to whom maintain?

In the Act both male and female children are responsible to maintain their parents. Thus equality has been made among them. And maintenance responsibility is not for any specific child rather for all. But if there is more than one child they may ensure maintenance by consultation among themselves.

No child can compel his / her parents to go to parents care or any other place for living jointly or separately. And every child must take care of his/her parents regularly and provide medical facilities. Every child must maintain communication with their parents within their capability if they live separately.



## How much is the maintenance?

Every child must provide a logical amount of money for maintenance from their earnings if the parents do not live with the children.

## To whom are to maintain except parents?

The Act is not confined to the maintenance of the parents. It has also given emphasis on the maintenance of the grandparents both from father and mother. In the absence of father and mother, parents of both father and mother will be entitled to the maintenance, as the case may be.

If the children do not comply with the provisions of the Act, it shall be an offence.

## What Punishment for offence?

The Act has also enumerated provisions on the crime, punishment and the justice system. Such as if any person violates any above provision he/she shall be entitled to the highest punishment of 1(one) lakh taka and in default of money he/she will be liable to the highest imprisonment of 3(three) months. Besides, if the wife or husband of any child or any other relatives, hamper or non-cooperate in providing maintenance, they shall also be liable to the same punishment.

## What type of offences they are?

The offences under this Act are cognizable, bailable and compoundable. Any person may get bail under the Act and the offence may be resolved in private; out of the formal Court system.

## Where is to complain?

The complaint shall be filed and adjudicated in the court of First class Judicial Magistrate or Metropolitan Magistrate. The written complaint must be filed by the parents. Otherwise the court will not accept. But who will complain in written in the absence of parents is not specified in the Act. The Act has also not specified any provision specifying the amount of maintenance.

## Any alternative solution?

Yes! The court may send the complaint to the concerned chairman, member of the Union Parishad or Mayor, Counselor of the city corporation or any other competent person to resolve the complaint. But the both sides must be given the scope of hearing and thus any decision provided, deemed to be declared by the competent court.

## Any complaint under the Act?

In the meantime a complaint has been filed in Chandpur by a father named Md.Liakot Ali against his son Md.Yeasin Rana for not providing him due maintenance.

Last but not least, the social norms and ethics must be explored besides the law. And this Act must be done by the parents themselves. The children must remember that they will also face the consequence of their acts one day in future. If it is perceived so soon; the family, society as well as the country will be a beautiful place to live in.



## Improving the effective functioning of Juvenile Courts

DR. NAHID FERDOUSI

LIKE many countries in the world, the juvenile justice administration started functioning in Bangladesh with the enactment of the Children Act, 1974 and the Children Rules, 1976. The Children Act was enacted in 1974 and was enforced in 1976 only for Dhaka District and for other districts, it was enforced in 1980. At the same time, according to section 3 of the Children Act, 1974 the first juvenile court was established at Tongi correctional institution in 1978 for male child. But there were no juvenile courts (both male and female child) for other districts in Bangladesh. In fact, there was hardly any focus on the juvenile justice until 1990s in the media, administration and judiciary.

In 1990, after signing the Convention on the Rights of the Child (CRC), 1989 juvenile justice issue was focused by the GOs and NGOs as an international issue. Thereafter, two juvenile courts established at Pulerhat, Jessor in 1995 for male child and the other at Konabari, Gazipur in 2003 for female child. It can be said that until 1995, there was only one juvenile court for male children. Similarly, until 2002, there was no such court for girl child in Bangladesh. Accordingly, there are only three designated juvenile courts for six divisions in the country yet. Except for the three juvenile courts, there is no separate juvenile court which ensures that juveniles are separated and treated differently from adults at all stages of the criminal proceedings. It demonstrates that existing legislation and practices do not fully comply with international standards and that there remains a significant gap between the law and its implementation to protect the best interest of the children.

Some limitations of juvenile courts eventually delay the legal process which is mentioned below:

## Inadequate Sitting:

Session of juvenile courts is scheduled twice in a week from 3 p.m. to 5 p.m. as per the Children Rules, 1976. Even this poor schedule is not regularly maintained. It is not appropriate for juvenile's welfare considering the high number of cases. Moreover, there are no full time judges in the juvenile courts. The judge executes the trial of children as an additional responsibility. So, they cannot give proper attention to the cases. Because the judicial magistrate is busy in multifarious functions generally s/he

of those delinquents whose files are sent from the ordinary court to juvenile court.

## Geographical Limitation:

Geographical jurisdictions of juvenile courts are very limited within selected districts. According to the Gazette Notification dated 23rd June 1999, the juvenile court of Tongi covers Dhaka, Chittagong and Sylhet divisions while the juvenile court of Jessor covers Khulna, Rajshahi and Barisal divisions. The Konabari juvenile court for female children covers six divisions (now seven

overburdened by the duties of probation officers. So, juvenile justice process is delayed.

However, due to insufficient number of juvenile courts (with limited jurisdiction) throughout the country, children are tried in ordinary courts and get punishments like adults. Although as per section 4 of the Children Act, 1974, ordinary courts are also responsible to protect juveniles. As of today no ordinary court has been set-up exclusively as juvenile court and establishment of separate juvenile court in each division has not been focused properly in the independent judiciary in Bangladesh. The ordinary court is wide and elaborate that cannot afford close observation towards juvenile delinquents regarding their trial, correction and rehabilitation is not smooth and complete.

In the context, it can be said that the juvenile courts do not function at the optimum level in Bangladesh. Children are not tried in separate juvenile courts; confidentiality is not maintained and the social enquiry reports of probation officers are seldom considered fairly. Consequently juveniles are deprived of their right to return to normal life. Recently the Government has finalised of the Children Act 2013 which is a positive step and will gradually pave the way for the best interest of the children in Bangladesh. However, to make juvenile justice more effective and least time consuming more juvenile courts should be established in each division. It should be clearly ensured that any offence committed by a juvenile defined under any law whether special or general shall be tried by juvenile courts. Therefore, juveniles need separate court for special trial where they can enjoy their basic human rights. We hope this new law would be implemented as soon as possible.

does not preside over the court regularly. As a result, the children are deprived of required rights and facilities and due to lack of regular disposal of cases, the number of under trial offenders are increasing day by day. Also, there is no follow-up mechanism after the release of the juveniles from the correctional institutions.

## Limited Jurisdiction:

The juvenile courts cannot take into consideration the cases of children who are convicted of serious offences under section 5(3) of the Children Act. For example, the case of robbery, theft and murder etc. are under the jurisdiction of judges of the session courts and it is not under the jurisdiction of judges of the juvenile courts in correctional institutions. Judges of the juvenile courts usually conduct petty offences and guardian cases. They also conduct cases

divisions) of Bangladesh. It is very difficult and expensive for the guardians and juveniles from remote areas to come and stay. For this reason, witnesses are not interested to come to the juvenile

court. In juvenile justice, the judge makes decisions based on the report submitted by the probation officer. Immediately after arrest of a child, it is the duty of the police officer, effecting the arrest, to inform the probation officer. The benefit of probation is generally given to an offender by the court after social investigation to judge the suitability of the offender to be released on probation. So, s/he may, after being released, have the probation benefit in the real sense. Unfortunately, there are no adequate permanent probation officers in the country, rather social welfare officers are

