

INSTITUTIONAL DEVELOPMENTS

This chapter first examines how continuing restraints under the SoE affected the functioning of institutions of justice, including shifts in the direction of the anti-corruption drive as the impetus to the holding of elections gathered momentum. It then discusses the progress of institutional reform initiatives undertaken by the Caretaker Government in 2008 in respect of the Judiciary, Police, Election Commission, and steps taken regarding new institutions, including the Human Rights Commission. Regarding the Judiciary, it notes how reform efforts relating to the judiciary – for example regarding long standing demands for amending contempt laws, or appointments of superior court judges – ultimately raised new controversies regarding both their content and manner of adoption.

Impact of SoE on the Judiciary

Although Article 141A of the Constitution states that a proclamation of emergency ‘shall cease to operate at the expiration of one hundred and twenty days, unless before the expiration of that period it has been approved by a resolution of Parliament,’ with the continuance of the CTG until almost year end and in the absence of Parliament, the Emergency continued to operate till 17 December, barely two weeks prior to the holding of elections.

The continuance of the SoE and the consequent suspension of certain fundamental rights, as well as the right to enforce such rights through the Supreme Court, severely limited access to justice for all. A major shift was seen in the course of the year, however, at least in relation to so called ‘VIP’ accused, when the High Court initially issued a raft of orders releasing such persons, particularly those associated with political parties, on bail and hearing their applications (whether brought as writs or criminal petitions) on a priority basis. This shift coincided with the Government’s declaration that it would seek a rapprochement with the two main political parties and their leaders, in order to create an environment conducive to the holding of elections, raising widespread questions about the Government’s back tracking on its goal to address widespread abuse of power and corruption.

Corruption Cases

While hearings of corruption cases before Special Courts located at Sher-e-Bangla Nagar, Dhaka appeared to proceed relatively swiftly, those outside Dhaka received less attention. Reportedly, upto 26 November 2008, 112 persons in different courts of Dhaka and five persons in other parts of the country were found guilty and convicted on charges of corruption,¹ and, appeals of 41 convicted persons were pending in the High Court under the EPR. Such appeals could not be heard in the absence of paper books (containing all the records), but reportedly the ACC only prepared three paper books at its own initiative, possibly due to fears that mass acquittals might follow the pattern of mass bails. On the other hand, the convicted also showed little interest in starting appeal hearings, possibly in expectation of impending political change. Ultimately by year end, a few “VIPs” were convicted, and among them, several obtained bail and one or two ran for elections under last minute interim orders obtained from the Chamber Judge of the Appellate Division.

The manner of issuance of bail orders in certain cases generated public comment. In July 2008, a single bench of the HCD granted bail to 76 persons accused under the EPR. Press commentators noted that in such cases there was no sequential link. A Division Bench of the High Court Division (HCD) on 28 August, in about 315 minutes, issued orders in some 298 cases. These included some cases filed by the ACC under the

¹ On file with the author.

Emergency Powers Rules and a majority of cases concerning ordinary criminal offences. In some cases anticipatory bail was granted even after the accused had been named in a charge sheet, which, although not unprecedented, was unusual. In a number of cases, there appeared to be a departure from the established High Court practice, of not transferring an interim application pending before one Bench to another Bench.²

BOX I.1: 315 minutes, 298 cases

A Division Bench of the High Court Division (HCD) on 28 August, in about 315 minutes, issued orders in some 298 cases. These included some cases filed by the ACC under the Emergency Powers Rules. In the majority of cases bail was granted to persons accused of among others, murder, terrorism under the Penal Code and various other criminal offences. In some cases anticipatory bail was granted even after the accused had been named in a charge sheet, which, although not unprecedented, was unusual. In a number of cases, there appeared to be a departure from the established High Court practice, of not transferring an interim application pending before one Bench to another Bench.³

Many writ petitions were filed by politicians accused of corruption on the ground that crimes committed before 11 January 2007 could not be brought under the purview of the Emergency Powers Rules. However none of them directly challenged the powers given to the Government under the SOE to curtail the court's power to enforce fundamental rights.⁴

Supreme Court

The question of appointment of efficient and capable judges of the Supreme Court is related to the question of separation of judiciary and establishment of human rights. A nine member Supreme Judicial Commission was formed under the Chief Justice, and with the Law Secretary as a member. In the face of criticism, the law establishing the Commission was amended, to reconstitute the Selection Committee, which had initially been executive-heavy. However, the continuing role of the Law Ministry in making the primary list of nominees raised some controversy, as did the provision which allowed the Government to bypass the recommendation of the Commission. At year end, new judges were appointed to the High Court, with the Supreme Court Bar Association President, one of the Selection Committee, ultimately expressing his dissent with the selection.⁵

In the same process which had led to the resignation of the highly controversial former CEC and ACC Chiefs in early 2007, several judges were reportedly invited to the *Bangabhaban* to meet the President. One judge resigned during this period.⁶

Lower Judiciary

Despite formal separation of the judiciary having been established under law in 2007, many practical obstacles remained to its full implementation, including in particular the continuing influence over the Ministry of Law regarding judicial appointments and promotions. So, for example, although according to the LR Manual, the Solicitor is required to be appointed from among senior District Judge, the Law Ministry appointed a non-judicial officer in the Solicitor's office. Further, the DPC formed under the leadership of the Secretary of the Law Ministry for the promotion of judges of the lower court remained in place. Further, government officers remained responsible for discipline of judicial officers. For example, although the Supreme Court directed that investigations be carried out against Mr. Rafiqul Islam, former District Judge of Dhaka and Mr. Shamsul

2 Mizanur Rahman Khan, "315 minithey 298 manlar adesh", *Prothom Alo*, 9 November 2008. See also "Durnitir manlai ek bench-e ek mashey 76 jon-key jameen", *Prothom Alo*, 20 August 2008.

3 *Ibid.*

4 All citizens are equal before the law and are entitled to equal protection under the law.

5 On file with the author.

6 *Ibid.*

Haque, judge of the Nari o Shishu Nirjaton Tribunal, the Law Ministry only took initiatives to investigate the former.

On 16 November the Mobile Court Ordinance 2008 was further amended, to include within its schedule election related offences under the Representation of People Order (RPO) within its schedule. As a result, executive magistrates were empowered to try electoral offences, impose instant fines or penalties of two to seven years' imprisonment. Some legal experts noted that this development was a serious breach of the apex court's judgment on separation of the judiciary, as according to the Code of Criminal Procedure, only judicial magistrates can try electoral offences and impose punishments such as imprisonment, while executive magistrates can only fine individuals for offences. Despite this, the EC on 27 November decided to empower executive magistrates to try electoral offences. It requested the establishment ministry to secure permission from the Supreme Court for implementing its (EC's) decision. On 7 December, the Home Ministry issued a circular instructing divisional commissioners and district magistrates to take necessary steps to engage executive magistrates once the SC permits the Establishment Ministry to exercise the authority of judicial magistrates.⁸

In a case which raised further questions regarding the interpretation of separation, the High Court declared unconstitutional and void the appointment of Kazi Habibul Awal in the post of the Law Secretary (in charge), following a challenge by a person from the Judicial Officers' Association (questioning why Judicial Officers should not obtain such posts in the executive on deputation). The Government's appeal against that order (relying on the Masdar Judgment) was pending hearing at year end.⁹

Attorney General's Office

The Attorney General, Fida M Kamal, resigned from his position after the Attorney Service Ordinance was promulgated. Under this Ordinance, the Attorney General and the Additional Attorney General would have been placed under the supervision of a Joint Secretary.

Law Commission

Under the SoE, as under the previous regime, the Law Commission was virtually non-functional, and was not consulted prior to framing any laws.

Police Reform

A draft law formulated to replace the Police Act 1861, aimed at improving accountability and quality of service of the police force,¹⁰ was posted on the Government website for public comment.¹¹ The draft Ordinance outlined duties of the police, including to treat the general public, in particular women and children with care, protection of fundamental rights of citizens and guarantee of security of citizens, with particular regard to the underprivileged members of society.¹² The draft ordinance further provided for respect for freedom of religion and protection of the rights of an arrested person.¹³ It provided for complaints procedures against police officers and for establishing a body to investigate such complaints.¹⁴

⁷ *Ibid.*

⁸ Shakhawat Liton, "SC to settle who to try poll offences: Govt to go to court for letting executive magistrates do job of judicial ones", *The Daily Star*, 16 December 2008.

⁹ On file with the author.

¹⁰ "Draft of Police Ordinance 2007 Prepared", *New Age*, 10 April 2008.

¹¹ "Govt Invites Public View on Draft Police Law", *BD News 24*, 2 December 2008. See <http://www.bdnews24.com/details.php?id=70173&cid=2>.

¹² Section 3, Draft Police Ordinance 2007, at: <http://www.mha.gov.bd/pdf/policeord08.pdf>

¹³ *Ibid.*, section 4.

¹⁴ See Chapter 2 on Legislative and Policy Developments for more detail, p27.

Election Commission

The Election Commission introduced a set of new disqualifications for candidates for parliamentary elections and also set down criteria for registration of political parties.¹⁵ The former now apply to convicted war criminals,¹⁶ to former members of the civil service, defense forces or any public authority, to members of the defense services, or former chiefs of NGOs (for three years from their resignation/retirement),¹⁷ and financial loan defaulters including those defaulting on utility service bills.¹⁸ Such persons would also not be eligible to serve as Advisors to a CTG.¹⁹ Earlier proposals for the Election Commission to bar candidature by any person convicted of an offence of moral turpitude were not carried through following protests from political parties (with both political parties ultimately fielding persons, who had been convicted of such offences but obtained bail pending appeal).²⁰

The EC also imposed requirements for registration of political parties. While these were applied somewhat selectively in practice, enabling major political parties to be registered despite failure to comply, or in some cases to be registered following hurried hearings of objections.²¹ In one case, a political party represented by indigenous peoples was denied registration and challenged this decision.²²

New Institutional Mechanisms

Truth and Accountability Commission

The Truth and Accountability Commission was established during the year to address financial crimes, primarily corruption and provide for a means to recover the proceeds of such crimes. The Commission reportedly succeeded in recovering millions of illegally acquired funds. However, the Ordinance establishing the TAC was held on 13 November to be unconstitutional and void by the High Court; an appeal against the judgment by the Government was pending hearing at year end.²³

Human Rights

The National Human Rights Commission was established by year end, with three Commissioners appointed and an office allotted, but it had yet to become fully operational. In December, the HRC was suddenly faced with the removal of its furniture and possible dislocation from its offices, but was able to remain in its allotted premises following prompt intervention by the concerned authorities.²⁴

Information Commission

Although the Right to Information (RTI) Ordinance promulgated in 2008, has excluded 20 subjects from its purview (section 7) including cabinet papers. The Official Secrets Act has not been withdrawn.

Local Government

Major changes were introduced in the Local Government (Amendment) Ordinance 2008, and an Election Appellate Tribunal was constituted with one judicial and one administrative officer. The impact of these changes will become evident in the next Upazilla election.²⁵

15 Representation of People (Amendment) Ordinance 2008, promulgated on 19 August 2008.

16 Article 12(a), Representation of People (Amendment) Ordinance 2008.

17 *Ibid.*

18 *Ibid.*

19 *Ibid.*

20 Such persons included Mohiuddin Khan Alamgir, former Planning Minister of the Awami League and Lutfuzzaman Babar, former State Minister for Home Affairs of the BNP. For more detail, see Chapter 3 on Legislative and Policy Developments.

21 "Jamaat skips EC's war crime hearing: 11 organisations submit proof, ask not to register Jamaat as party", *The Daily Star*, 2 November 2008.

22 Naeem Mohaiemen, "Chittagong Hill Tracts and the missing *Pahari* vote", *The Daily Star*, 1 December 2008.

23 Filed by Odhikar, a human rights group, and others. See Chapters on Legislative Developments and on Fair Trial.

24 "Bid to remove NHRC office from PWD building", *The Daily Star*, 29 December 2008.

25 Local Government (Upazila Parishad) (Correction) Ordinance 2008.