



LAW *interview*

'Govt owes an explanation why it is so slow in implementing separation of judiciary' - Dr. Kamal Hossain



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But I know there is wide spread concern that the legislature is not functioning effectively because of the "confrontational" approach adopted by the govt and the opposition in order to make the parliament an arena of effective participation of all members... Democracy comes to us after years of struggle. Democracy was restored in 1990 after a united movement of the people where many people lost their lives and many suffered a great deal. We, therefore, had a reason to hope that parliamentary democracy which was restored through the sacrifice of the lives of many people would now be functioning in a healthy way to give the result to the desires of the people. But people feel today that they had been denied.

A Rahman: Did you face any problem while drafting the Constitution?
K Hossain: No. We did not face any problem. There was a general consensus about the basic institutions of the state. What will be the nature of the state, what will be the power of the different organs of the state. You know we struggled against the oppression of an authoritarian minority. So there was a huge consensus among the people against such oppression, and the strongest possible sentiment in favour of democracy, which was viewed as a government by elected representatives of the people.

A Rahman: You mention that Bangladesh is a peoples republic. Do you think that people are duly represented?
K Hossain: You know we have formal institutions as envisaged in the constitution are now functioning. For a number of years we observed different types of interventions in the functioning of the Constitution. Such "suspension" of the Constitution has had negative effects not only in terms of the growth of a democratic culture and democratic values, but also the formal institutions. There was presidential system of govt. for number of years, which was replaced by a parliamentary system. Now since from 1991 we have a formal parliamentary democracy, which requires an active and effective parliament. Three elections have been held under the caretaker govt. So in a formal sense we can say that a democratic, representative legislature which provides under the Constitution and has been constituted through election under the caretaker govt.

But I know there is wide spread concern that the legislature is not functioning effectively because of the "confrontational" approach adopted by the govt and the opposition in order to make the parliament an arena of effective participation of all members in a way which it could make it effective, its committees must be effective and Government and opposition must both contribute to debate and be able to engage in dialogue on material issues. We have seen the boycott in each of the parliament by the opposition. The result of the boycott seriously affects the proper functioning of the parliament. Multiparty parliamentary govt. is so designed that effective participation is required both by the govt and opposition party. Both the parties play an important role.

The opposition is expected to point out the weakness and the deficiencies of the government and to keep the govt under continuous scrutiny and pressure so that the govt feels that it is subject to scrutiny and has to be answerable for its performance, and for its failures. Equally in parliamentary committees, if there is any failure of the part of the govt or there is need thorough debate to resolve different problems of the country or for alternative suggestions to be put forward, all these can be only achieved when the govt and the opposition are both functioning effectively. If one party is not functioning, if the opposition is not able to contribute, if it is complaining that it is not given an opportunity to participate in the parliamentary committees and so on, parliamentary democracy cannot achieve its goal. Both parties when they have been in opposition have resorted to boycott. The opposition has resorted to boycott, and played a negative role. This is really why the representative govt has not been able to function effectively as people had hoped. Democracy comes to us after years of struggle. Democracy was restored in 1990 after a united movement of the people where many people lost their lives and many suffered a great deal. We, therefore, had a reason to hope that parliamentary democracy which was restored through the sacrifice of the lives of many people

people. But people feel today that they had been denied.
A Rahman: It is the constitutional duty of the govt to separate the judiciary. Do you think that the govt is violating the constitution by neglecting the directions of the Supreme Court effect?

K Hossain: Yes. I feel certain something for which the govt owes an explanation to the whole people of the country why it is so slow in implementing the direction of the Supreme Court. The previous government and the present government together taken sixteen extensions. Two years have gone by since the present govt. assumed power. There is no justification for such delay. India and Pakistan had inherited the same judicial system, as we had from the British. Pakistan and India have by now separated their judiciary from the executive. It has been effected in most of the democratic countries. This is a colonial legacy to keep a very large part of the judiciary under control of the executive. The British left more than 50 years ago. So there is no justification for the delay in implementing the separation of the judiciary.

A Rahman: What will be the role of the Supreme Court while govt itself violates the constitution?

K Hossain: The Supreme Court under the constitution is the guardian of the Constitution. I want to say that there are checks and balances upon the executive and the legislature so that they do not violate the constitution. If they do so you can go to the court. That's why independence of judiciary is so critically important. As in the case of the 8th amendment, which had undermined the strong and united judiciary; but the court itself was able to declare it as unconstitutional later, the Public Safety Act was declared unconstitutional by the Supreme Court. So far the govt has respected the decisions of the court, but the delay with regard to implementing the separation of judiciary if it continues may be construed as disrespect. Constitution itself declares in Article 112 that all authority shall act in aid of the Supreme Court and the Supreme Court's decision is binding. So respect of the Constitution requires respect to judgements of the highest court.

A Rahman: What will be your comment on Non party Caretaker Government? Is it a permanent solution? Is it undermining the Election Commission?

K Hossain: No it should not. It is intended to, and does, supplement the election commission and make it possible to the election commission to perform its role more effectively without interference by a partisan govt. In 1990 the caretaker govt was devised to provide for transition to a parliamentary democracy. We had the president who was there before but no election could be held under him. When he resigned all the parties in the movement agreed that they would have a caretaker govt and it would be provided by the amendment to the Constitution. In 1990 Chief Justice Shahabuddin Ahmed headed the caretaker govt and an election was held under the presidential system. In 1996, an election was held under normal party govt, but the result of the election was so controversial, protests led to a demand for a fresh election under a caretaker government. The concept of the caretaker govt was then incorporated in the Constitution by an amendment. It was the generally held view that a caretaker govt. would ensure a fair election. The election commission would be more effective, since a caretaker government would not interfere in the electoral process through its administration and police and the official of the election commission would not be influenced, as was likely to be the case if there was a party government in power

Now a caretaker govt has on the whole been seen to be a useful arrangement for the election period. There has been growing apprehension that a party government would misuse power to favour its candidates, and the over-all election result. For a fair election, it is essential for administration to ensure the equality before law. The supporters of the govt party should not get preferential treatment.

A Rahman: Caretaker govt shall be collectively responsible to the president under Article 58B(2). Art 58E also gives president an unfettered power. Do you think that our Constitution provides dual system of govt?

K Hossain: This is way, which it is expected to be work. The caretaker govt is an innovative arrangement. In 1996 it was incorporated in the Constitution. The president is seen as a constitutional office, which is above party, and that he will not be a partisan person. Therefore it was thought that during the election period he is the person under whose umbrella the head of the administration, would be called "the Chief Adviser" would run the country. For this period, president is given a certain special status and special powers. He is not the head of the caretaker govt. He is constitutional head of the state, with certain defined responsibilities during the election period.

A Rahman: Do you think that the position of the Chief Justice as the Chief Adviser of the caretaker govt. encourages the superseding practice in the Supreme Court?

K Hossain: These are the matters about which questions certainly raised whether the fact that the immediate past Chief Justice is intended to be the head of the caretaker govt may begin to affect on appointment of Chief Justice. You know by and large we had followed in the past the convention that the senior most judge of the Appellate Division of the Supreme Court was appointed as the Chief Justice. If this practice is strictly followed there will be less chance of manipulation in the appointment of Chief Justice. I would like to hope that the appointment of Chief Justice will remain above political manipulation and the principle of seniority should be respected.

A Rahman: You were the leading lawyer of the 8th amendment case. Is not the 8th amendment gave people the opportunity of access to justice?

K Hossain: In a country like ours the highest court, the Supreme Court, should really be a national institution. Distances are not so great from the capital to any part of the country. Jamuna Bridge is here and it is five or six hours journey to reach Dhaka from most of the parts of the north. The benefit you get from an integrated national court in terms of higher standards, both of bar and bench, would not be possible to ensure in divisional courts. To give an example from other sector: a postgraduate hospital in Dhaka results in great distances having to be travelled by patients in need of specialised treatment. Putting up a sign-board of "post graduate hospital" in hospitals, which can neither be staffed nor equipped as the one in Dhaka, would mean that patients would still not get the same specialised treatment as from a single national institution, having the highest standard. A national institution, we strive for the highest attainable levels of excellence to set a standard. One must strive for access to justice to be made available. But the highest court of the country must play important role to interpret the constitution, protect the constitution and fundamental rights and be an appellate court for decisions of the lower courts. There is a provision in the Constitution that circuit benches of the High Court Division can sit outside Dhaka. So if there are a number of cases to dispose of in different divisions the Chief Justice can direct circuit benches to sit in the divisional headquarters for the disposal of the cases, if circumstances so require.

A Rahman: Constitution gives Member of Parliament an absolute immunity from the court to say anything during the session of the parliament. Do you think that this right should be restricted?

K Hossain: Yes MPs are given some immunity. But parliament itself should oversee that this immunity does not lead to abuse of rights of the parliament member. The concept behind the immunity is that the members of the parliament discuss all the matters on behalf of the people without fear or favour. If they are not immune from the legal proceeding or the court case, their freedom of expression would be restricted. The idea is that they are representatives of the people dealing with national issues they must enjoy "unrestricted" freedom but the parliament has the responsibility to oversee that whether they misuse their freedom.

LAW *opinion*

Revival of original Constitution is the way to move forward

SHEIKH HAFIZUR RAHMAN KARZON

AFTER the independence of Bangladesh, the spectacular achievement scored by the then incumbent authority was the successful enunciation of a good Constitution. Within a span of around thirty-two years after liberation, the Constitution has experienced thirteen amendments. It has undergone changes not for developing constitutionalism, not for paving the way for strong democracy, good governance and rule of law, rather the amendments mutilated the positive features of the original Constitution. Comparison of the present Constitution with that of 1972 would reveal how the successive governments manipulated the Constitution for legalising their usurpation and political purpose. Here I try to present very briefly the major changes made to the original Constitution.

The first major change to the Constitution was made by the Second Amendment, 1973. By this Amendment original article 33 was substituted and under the authority of this amended provision the Special Powers Act was enacted in 1974. This law curtailed citizens' right to liberty giving unscrupulous power to the executive without providing sufficient safeguards to the citizens. All the governments have abused this law and thousands of people became victim due to capricious application of this law.

The Fourth Amendment, 1975 introduced one party system and presidential form of government in the place of parliamentary form of government. Responsible role of parliament and independence of judiciary was undermined by this amendment. Later on the situation was improved, but the ideal status ensured by the original Constitution was never revived. Parliamentary form of government was reinstated in 1991, but independence of judiciary has yet to be ensured.

During the first martial law regime (1975-79) many changes were brought to the Constitution by the Martial Law Proclamations which lacked constitutional validity. When the question as to the supremacy of the Constitution and Martial Law Proclamation came, unfortunately the judges held that the Constitution was subservient to Martial Law Proclamation. (Halima Khatun V Bangladesh, 30 (1978) DLR (SC) 207) Instead of holding supremacy of the Constitution or at least that the Constitution and Martial Law Proclamation were co-extensive, the judges maintained the supremacy of the Martial Law Proclamation who were oath-bound to preserve, protect and defend the Constitution. All the changes made to the Constitution by the Martial Law Proclamations were validated by the Fifth Amendment, 1979.

The Fifth Amendment first slaughtered the Preamble of the Constitution, where basic philosophy of twenty-four years social and cultural struggle and finally the liberation war of Bangalee nation was clearly imprinted. This Amend-

ment inserted "a historic war for national independence" in the place of "a historic struggle for national liberation." This is clear negation of all the social, cultural and political movements of thousands of people including language movement of 1952, education movement of 1962, mass uprising of 1969 and non-cooperation movement of 1971.

The Fifth Amendment together with the Eighth Amendment, 1988 (made during another military ruler) successfully mutilated the provision of secularism and made the Constitution communal at the cost of the people of different religious denominations other than Muslims. Their status, in their language, has been relegated to that of second-class citizen. The above two amendments made some changes along religious line which on the one hand undermined the spirit of all secular movements, on the other negated the different entities of Hindus, Buddhists, Christians and people of other religious identities. The Fifth Amendment changed the Preamble along religious line and the Eighth Amendment inserted Article 2A by which Islam was declared state religion of Bangladesh. Moreover, the Fifth Amendment deleted the proviso of Article 38, which banned the activities of some communal political parties who exploited religion to pursue their political goal. That was an onslaught on the magnificent sacrifice of the martyrs of liberation war.

Successive military rulers usurped state power and amended the Constitution through Martial Law Proclamations and then legalised those amendments and their unconstitutional regimes by manipulating the constitutional mechanism. The Constitution has become hapless victim of the operation of military rulers, which they did promiscuously to suit their needs. By manipulating the provisions of the Fourth Schedule they validated all the Martial Law Proclamations and all the activities of their regimes. Sections 3A, 18 and 19 of the Fourth Schedule declared that all the activities of two Martial Law Regimes "are hereby ratified and confirmed and are declared to have been validly made, done or taken and shall not be called in question in or before any court, tribunal or authority on any ground whatsoever." The Fourth Schedule is in fact a pre-constitutional mechanism to meet up the exigency of war situation. But this pre-constitutional mechanism was utilised to validate post constitutional situation. Both the Martial Law Regimes extending from 1975 to 1990 (with three years interruption) lacked constitutional validity and the processes through which those were validated those were also unconstitutional. Unfortunately the present Constitution has to bear all the vestiges of those unconstitutional activities.

Preamble and Article 8 of the original Constitution very correctly inserted four Fundamental Principles of the newly independent state and provided that secularism, (Bangalee) nationalism, democracy and socialism would constitute the



Fundamental Principles of People's Republic of Bangladesh. Democracy was demolished by the Fourth Amendment, later on partially revived during the martial law regimes. Secularism, (Bangalee) nationalism, and socialism were exiled by the Fifth and the Eighth Amendments. Due to the aberrated course taken by the successive rulers, the original Constitution lost its unique feature and complexion. The four fundamental principles on the basis of which the people of this land directed all social, cultural and political movements and finally liberated this country, all the principles except democracy were eliminated from the Constitution.

The only remaining fundamental principle, democracy, cannot step forward due to the antagonistic politics between two major political parties. Absence of independent judiciary, non-establishment of local government at all levels, absence of anti-corruption commission, Ombudsman, strong Election Commission and electronic media are the major causes operational behind the stumbling of democracy. Independence of judiciary was entrenched by the provisions of the original Constitution. Heavy onslaught on the independence of judiciary was

made by the Fourth Amendment. Later on Judiciary got partial independence as judicial officers of the lower level are still controlled by the executive. Articles 95, 115 and 116 of the present Constitution should be amended to ensure complete separation of judiciary from the executive. Without an independent judiciary we cannot expect democracy will take institutional shape.

Article 59 of the Constitution enjoined the parliament to establish local government in every administrative unit of the Republic. But successive governments failed to do so. Similarly the establishment of the office of Ombudsman, a mandate assigned to the parliament by Article 77, has not implemented yet. Without fulfilling the pre-conditions required for a strong democracy we should not expect democracy will function smoothly.

Concluding Remarks

An ideal constitution has some fundamental principles on which the basic structure of the constitution lies. Basic structure of the constitution cannot be changed by amendments. It is beyond the constituent power of parliament. If any amendment changes fundamental principles or basic structure of the constitution, that amendment will be declared ultra vires on the touchstone of basic structure principle, a principle which has long been established since Marbury V Madison (1803) 1 Cr. 137. In Bangladesh all the Fourth, Fifth, Seventh and Eighth Amendments have violated the basic structure principle of constitution. The mischief of the Fourth Amendment was undone by the later government, but vestiges of unconstitutional activities made by the military rulers by the Fifth, Seventh and Eighth Amendments still present on the body of the Constitution. The sooner we realise that the resurrection of the original Constitution is the first step to move forward, the better.