

LAW alter views

Fallacy of upholding the constitution

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CONSTITUTION is essentially a body of fundamental principles or established precedents according to which a state is acknowledged to be governed. The constitutional law is superior to the will of the legislature. In that sense it is the fundamental or basic law to which all other laws must conform. It is an organic instrument intended to endure through ages and thus grows with the passage of time. Language of constitution is general and expressed in value-laden terms that leave ample scope for exercise of normative judgment. In *McCulloch v. Maryland* US Supreme Court observed, "We must never forget that it is a constitution we are expounding" and went on to say that a constitution is intended to endure for ages to come and consequently to be adapted to the various cries of human affairs.

The Indian Supreme Court held in *ABSK Sangha v. Union of India* that the 'Constitution is an organic instrument and it must receive generous interpretations as to give all citizens the full measure of justice so proclaimed instead of the austerity of tabulated legalism. The expositors of the constitution are to concern themselves not with mere words only, but as much with the philosophy or the spirit and the senses of the constitution. Our Supreme Court interpreted the constitution in the famous 8th amendment case on the basis of its spirit without caging the interpretation within the confines of written words.

It is, therefore, clear that constitution is the supreme law of a nation intended to endure through ages and adapted to various cries of human affairs. For the basic nature of the constitution its clauses are given generous interpretations keeping in view the underlying philosophy, or the sense and the spirit of it.

Our constitution is the embodiment of the will of the people which they have adopted, enacted and given to themselves through their constituent assembly with pledges, amongst others, that the fundamental principles of their state shall be to realise through democratic process an exploitation-free society in which the rule of law, fundamental human rights and freedom, equality and justice—political economic and social—will be secured for all citizens. And it shall be the sacred duty of all citizens to safeguard, protect and defend this constitution and to maintain its supremacy as the embodiment of the will of the people. Therefore, our constitution, being the codified will of the people is not only the supreme law of the land but a kind of sacredness is attached to this document wherein the dream of the people— political, economic and social — is enshrined and an inalienable duty is imposed upon every citizen to safeguard, protect and defend it.

Breach of Constitution: Usually the letters

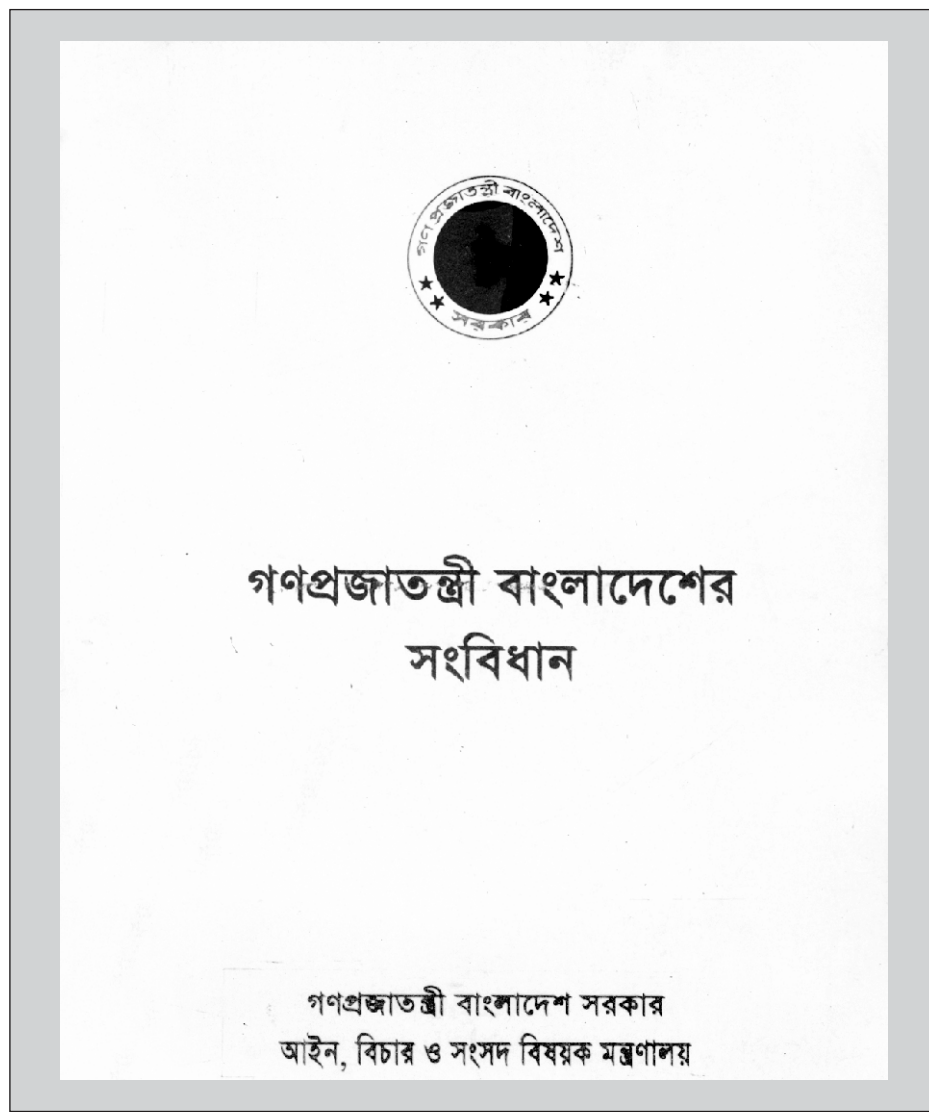
of the constitution are not violated what is derogated is its spirit. The soul of the constitution may be destroyed keeping the frame intact. It may sometimes be as carefree and irresponsible as is reflected in the sinister politicisation of bureaucracy, various state agencies and the constitutional institutions like the Supreme Court and the Election Commission (EC) carried out during the preceding BNP-Jamat regime -- the root cause of the current political crisis and enormous sufferings of the people.

As we sometimes see an arrested person killed in custody without any mark of external violence similarly a Constitution, i.e., the collective will of the people, can be inwardly ransacked without any mark of external violence on its letters. This depends upon the way the government or, in other words, party in power looks at it. If the constitution is not taken in its true perspective and sought to be used for purposes not intended therein, it is the people, the repository of all powers of the Republic, to rise and defend their pledges.

Inward violation: Let us put things into perspective for an easy grasp of the mechanism of violation. Article 95 of the Constitution, for example, says, amongst other things, that a person shall not be qualified for appointment as a judge (of the Supreme Court) unless he has, for not less than ten years, been an Advocate of the Supreme Court. A plain reading of the clause does not suggest that the President shall appoint any person as judge of the Supreme Court who is not capable of doing justice to the chair.

Reality is, there are more Advocates than not who having merely completed ten years of practice in the Supreme Court couldn't acquire adequate knowledge and experience required to sit in the chair of a Supreme Court judge. Reasons are many. Secondly, there are Advocates who are merely enrolled with the Supreme Court Bar but basically practice in the District Courts. More so practices of many of them are confined to Magistrates' courts only. Thirdly, there are still others who by virtue of their technical qualifications obtained membership of the Supreme Court Bar and maintain the membership by paying off the dues of the Bar from year to year but are engaged in business other than the profession of law.

Many of the Advocates of these categories are linked with some or other political parties and have attained the technical qualification of being elevated to the Bench. If the political party to which any of them belongs comes to power and makes him a judge of the Supreme Court can it be said that constitution is violated? Such persons having been elevated will have to sit upon complicated cases and hear interpretations of law given by seasoned lawyers of both the sides. Question is how he will receive the points raised and how a proper judgment would be passed on proper analysis of facts and law? It is simply impossible. He would have no



choice but to bring down the Supreme Court from the sublime to the ridiculous. At so much cost of the Supreme Court can it be said that it is a violation of the constitution? Rather any personal reflections on the standard of the judge may lead to contempt of court.

Moreover, a judge so appointed though considered to be derogatory to the dignity and standards of the Supreme Court cannot be removed as the services of a judge is protected by the Constitution itself. Article 96 says that a judge of the Supreme Court can be removed only when he is incapable of performing his functions by reasons of physical or mental incapacity (not for inefficiency) or he may have been guilty of 'gross misconduct.' If any outcry against such appointment is there for upholding the standard and public image of the Supreme Court the party in power would be there to

defend the judge by reference to the Constitution. Because it has by giving such appointment not violated what is written in the Constitution. This reminds me of a story. A gentleman while going off from home for a couple of days asked his gatekeeper to keep watch so that even a fly couldn't enter upon his premises. The gentleman came back home and found all his valuables stolen. "How could it happen?" the gentleman cried. The gatekeeper replied, "Sir, you asked me not to allow flies to enter upon your premises. I have not allowed any."

Question is if constitution is understood and its protection is sought in this way it is unfortunate but if the constitutional clauses are intentionally abused for narrow political interest crisis is bound to emerge because the people who fought for their independence and have

given unto themselves a constitution for materialising their national dreams are not as naive as not to understand the Constitution at least to the extent that if constitution is truly obeyed there is no reason for any political problem to loom large.

Constitutionality of an action: To judge the question of Constitutionality of an action or demand the most relevant question that comes in is whether the action or demand is violative of the express letters of and/or derogatory to the spirit and scheme of the constitution. Let us look at it in the perspective of our long agitated election-issue. The plain and simple constitutional mandate is to ensure a 'peaceful, fair and impartial' election, meaning, giving the people free choice to elect their own government. The constitutional pledge of the people is to establish an exploitation-free society through democratic process. The sacred constitutional duty cast upon all citizens of the country is to safeguard, protect and defend the constitution. With the above end in view if it is really found that there are impediments on the way to a 'peaceful, fair and impartial' election it is the constitutional duty of all who matter to remove and all the citizens to demand removal of the impediments. Not only that if the impediments are found to be designedly set in for extra-constitutional purposes the quarters responsible for obstructing constitutional process must be called to account.

Question may arise whether the system or individual considered to be an impediment is in fact an impediment or projected as such for collateral purposes. The question cannot be addressed straightforwardly. It is hardly possible to bear out direct proof of impediments if designedly set in. For the purpose of peaceful, fair and impartial election it is not necessary either. It would be enough for the purpose of election to take actions for removal of the impediment if it is found that the apprehension in the mind of the people is reasonable from their point of view. Question may again arise what would be meant by "people". Is it all the people of a country? As I understand people, as far as the credibility of election is concerned, means any significant number of people whose opinion is likely to affect the credibility of the election.

EC controversy: The BNP-Jamat alliance which formed the erstwhile government has been projecting themselves as ardent adherents of the Constitution and their stand has assumed an apparent look as if the 14-party alliance and all the other people demanding 'amongst others, removal of controversial Chief Election Commissioner (CEC) and other Commissioners appointed on partisan consideration, correction of voters' list, neutralisation of bureaucracy, cancellation of all the arm-licenses given to party loyalists etc. were doing something in violation of the Constitution.

The original stand of the 4-party alliance was

"if there had to be an election in accordance with the Constitution it had to be held under the existing Election Commission (EC) appointed by them." Their argument was that the EC is a constitutional body and services of its members are protected by the Constitution itself and in that view if the Care-Taker Government (CTG) took any step towards reconstituting the EC it would be exceeding its constitutional bounds. It was the duty of the CTG to assist the EC in holding an 'election' nothing more then they insisted. The move of the CTG to initiate dialogue with different political parties, so as to find ways for a peaceful, fair and impartial election was also extraneous to its business. Their party being one believing in the Constitution they cannot accept anything beyond Constitution. Later, of course, they made a shift from their position and propagated that if any reconstitution of EC was made within the Constitution they would accept otherwise not.

The demand of 14-party alliance later merged into a popular demand was no more than creation of a level playing field for a fair and impartial election so that people constitutional right to vote and to choose their own government is ensured. It was their specific apprehension that the path of holding a free and fair election is blocked by the BNP-Jamat alliance government by way of deliberate politicisation of the entire state machinery including the election mechanism. Therefore, levelling the playing field is the first priority for a 'peaceful, fair and impartial' election as contemplated in the Constitution. The siege programme launched by the 14-party alliance in demand of ensuring peoples right to vote gradually joined by all the political parties of the country barring the BNP-Jamat alliance gained moral support of the CTG as well as the international community and assumed a look of popular upsurge, amazingly, non-violent and festive—something phenomenal in the history of all out political movement of the kind.

Was it not the enough people to count upon in view of our constitutional scheme to ensure 'peaceful, fair and impartial election'? Was not the dichotomy between destroying the soul of the Constitution and upholding the Constitution adequately reflected in the spontaneity of people's demand? Curiously, the President, a celebrated educationist was found faltering with his people's legitimate demand until the ember of fire was felt under his own feet and the CEC, a former judge of the Supreme Court, was found to be insensitive to the millions demanding his resignation until jolted up to do something for his own good. But why? What could be more impelling for them than the cause of their people? -- question that will linger long through history at the cost of our national pride.

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HUMAN RIGHTS advocacy

Why Saddam must not be hanged?



BARRISTER HARUN UR RASHID

ON 5th November, an Iraqi special tribunal convicted former Iraqi dictator Saddam Hussein of crimes against humanity and sentenced him to death by hanging.

As the verdict was read, Saddam shouted, "Long live the people! Down with spies! He then chanted "God is great"

The five judge panel, which heard more than nine months of testimony, against Saddam passed the sentence. Public celebrations broke out among Shi'as while among Sunnis, there was anger and resentment. Immediately following the verdict fighting broke out between gunmen and the predominantly Iraqi army.

Critics further accused the Bush administration of playing with the calendar, starting with the Iraqi war authorisation vote being held so close to Bush's midterm election in 2002. Again the verdict on 5th November was just two days before the midterm Congressional elections in 2006.

The US President Bush has hailed the death sentence of Saddam and called it as "milestone" and called a remarkable achievement for Iraq. As a Texas Governor Bush was known to have approved numerous death sentences and therefore it is understandable for Bush's views.

Why the death sentence should not be carried out?
There are many reasons for which

Saddam Hussein must not be hanged and a few of them deserve mention as follows:

First, it is extraordinary that a domestic tribunal has tried on criminal charges under international law, in this case genocide, crimes against humanity and war crimes. The trial should have been conducted out of Iraq and by an international tribunal consisting of a mix of Iraqi and foreign judges, if not by the International Criminal Court at The Hague. (The US has always been against any trial before the ICC).

Furthermore on 20 November, New York based Human Rights Watch said in a 97-page report calling the verdict "questionable" and saying that the Iraqi Court was not equipped such a complex case

Second, the trial is seen unfair because the court sat for 40 days and heard 70 witnesses. It failed to give defence lawyers important documents in advance, lost track of paperwork and kept no written transcript, according to Human Rights Watch.

There have been clear instances of political interference. For example the last judge was sacked by the government for claiming Saddam was not a dictator. A few Saddam's defence lawyers were murdered. To try a political enemy by the Iraqi judges who are victims themselves brings charges of bias. Justice must not only be done but also seen to be done. From this perspective, it has been a flawed trial.

Third, international legal experts have questioned the impartiality of trial by the tribunal and its procedures which was created during the 15th month period of formal American occupation. It is an American trial in Iraq, executed by Iraqi judges.

Fourth, the Baghdad tribunal has shown flaws because when it exer-

cises justice, it should do so in such a way that it emphasises its moral superiority to the criminal. By killing Saddam Hussein, the new Iraq behaves just the same thing to him that he has done to others. The Iraqi leaders are squandering a chance to prove it is better than the Saddam Hussein regime.

Fifth, hanging will make Saddam a martyr before his supporters in Iraq and outside because it will be perceived as an act of vengeance, not justice on behalf of all Iraqi people.

Sixth, many commentators suggest that if Saddam is killed, his cooperation and testimony needed by the prosecution in future trials of certain other persons would not be available.

Finally, the hanging will make the security situation in Iraq worse. Execution of Saddam is likely to stir up more civil unrest and innocent civilians will die. Saddam's chief lawyer Khalil al-Dulaimi, reportedly said that the verdict will open "the doors of hell" in Iraq, and "the sectarian divide in the country will deepen and many more coffins will be sent back to America." In recent days President Mubarak of Egypt expressed similar fears of more of sectarian conflict in Iraq.

Concluding remark
Many social scientists believe death penalty is inherently cruel. Since human beings cannot create life, so it cannot kill human life. Even Tony Blair, the British Prime Minister is against the death sentence. In this case, death sentence in a flawed trial is indefensible.

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LAW in-depth

Article 58C (6): Aladdin's lamp?

Amendment needed for the sake of democracy

SINHA M A SAYEED

THE expression of Article 58C (6) has articulately been made too prosaic saying: Notwithstanding anything contained in this Chapter, if the provisions of clauses (3), (4) and (5) cannot be given effect to, the President shall assume the functions of the Chief Adviser of the Non-party Caretaker Government in addition to his own functions under this constitution.

The phrase 'notwithstanding anything contained in this chapter' apparently makes Article 58C (7) inoperative, Article 58B (2) meaningless and Article 48 (3) insignificant while the rest of the writings in the clause are, more or less, related to the functions of the Chief Adviser to the nonparty, neutral CTG.

Truly speaking, the debut constitutional and political experiment of Article 58C (6) has proved to be a dangerous exercise because of its immediate negative feedback on the democratic political culture in Bangladesh. It has, in practice, manifested itself as Aladdin's lamp in the hands of President-cum-CA Professor Iajuddin who has meanwhile by a number of measures and steps proved himself puzzled as to what to do, when to do and how to do.

President-cum-CA Professor Iajuddin perhaps is not in a position firmly to bear the unique, unprecedented impact of the weight of Article 58C (6); it is neither possible on the part of a person even being in the highest office of the country to move arithmetically and geometrically having two caps on head. Out of such peculiarity of the newly emerged position he might have made a mistake by branding his government a kind of presidential in nature; on the other hand it is also a fact that the government now under him is neither presidential nor parliamentary, rather it is a centralised administration in the hands of a single person known as President-cum-CA, which is not understandable even to a student of politics/political science or of

law. It may be a source of research to political scientists and thinkers in future.

And therefore, it is an outright rejection of the concept and spirit of the non-party, neutral CTG introduced by 13th Amendment to the constitution which, of course, has been devised in the wake of chronic mistrust and doubt of political parties of each other and one another.

During the period of June and July, 2000, I wrote a series of articles on the 13th Amendment to the constitution. In one of the articles titled 'the spirit of caretaker government' focusing mainly on Article 58C (6) I made an analysis to show what would be the consequences if this sub-clause be operative even under president Justice Shahabuddin during the functioning of second CTG in 2001.

The recent exercise of the options (3), (4), (5), (6) and jumping from sub-clause (3) to (6) without proper application of (4) and showing a total disregard to (5) further tells the nation that had there been no option of (6), the president could not have emerged as President-cum-CA. Political leaders, constitutional experts, lawyers, intelligentsia and professional groups of various shades and backgrounds have meanwhile registered strong voice against existence and continuance of the sub-clause for the sake of smooth running of democracy and non-party neutral CTG.

Therefore recommendations for a further amendment by Parliament are:

1. Sub-clauses (3) and (4) may be kept intact while sub-clause (5) should be dropped; sub-clause (6) be amended and replaced with the following paragraph—

If/when parliament is dissolved anytime before expiration of its term or stands dissolved by reason of expiration of its term, the sitting chief justice of Bangladesh, pursuant to article 58B (1) will take over as Chief Adviser to the non-party, neutral caretaker government; and then, on the date which a new Prime Minister enters upon his office after the constitution of parliament, shall, accord-



ingly, go back to his original office of the Chief Justice of Bangladesh. Here the spirit of the 11th Amendment to the Constitution of Bangladesh and of the reference to the Successive Act in the Constitution of India may duly and relevantly be utilised; or

2. Sub-clauses (4) and (5) shall be dropped; sub-clause (3) shall continue and (6) shall be amended and replaced as mentioned above; or

3. Sub-clauses (3), (4), (5) and (6) in the Article 58C shall be dropped in toto and a new amended provision of (6) as mentioned above in serial 1 shall be provided accordingly.

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