LAW *in-depth*

14th amendment of the Constitution: A legal view

BARRISTER HARUN UR RASHID

THE 14th Amendment to the Bangladesh Constitution of 1972 was adopted on 16th May and the President assented to it on the next day. Since 1972, the Constitution was amended fourteen times until this day. In comparison, the Constitution of the USA of 1788 which was the world's first written Constitution, went through only 27 amendments during more than two hundred years of its adoption.

In case of Bangladesh, within a matter of 32 years, the Constitution went through 14 amendments and this reflects the ups and down of the fate of the Bangladesh Constitution. During the years, twice extra-constitutional governments were installed through martial law and the constitutional rule resumed only in 1991. It is probably a quirk in constitutional history of Bangladesh that the Chief Justice had to become the head of the extra-constitutional government in 1975. In simple terms, the Chief Justice who was to preserve, defend and protect the Constitution assumed the post of the Chief Martial Law Administrator.

Core elements of the 14th amendment

The 14th amendment of the Constitution has four elements:

- 45 reserved seats for women in the Parliament
- Display of President and Prime Minister's portrait in government offices and other institutions
- Raise the retirement age of the Supreme Court judges, Chairman and members of the Public Service Commission and the Comptroller and Auditor General
- Empowers the Chief Election Commissioner to conduct oath to MPs in the absence of the Speaker and Deputy Speaker.

The Law Minister reportedly stated that the amendments were brought after thorough scrutiny, keeping the fundamental spirit of the Constitution. He regretted that the opposition abstained from taking part in discussion of the bill before the Parliament. On the other hand, the Deputy leader of the opposition in Parliament called it a "black legislation" and stated the amendments were adopted to serve the purpose of the BNP-Jamaat alliance in the next election.

Why constitutional amendments are necessary?

The Constitution is not set in stone. It is a living document. It must serve its purpose. It has to march with the needs of the time. There are times when it is necessary to amend the Constitution and it is a serious matter. That is why special provision is incorporated in the constitution laying down the procedure of amending the constitution. Since the Constitution reflects the will of the people and not the will of the government alone, it is imperative that a national consensus is arrived at with the opposition members of Parliament on issues that need amendments in the light of the changed situation of the day.

Limitations of power of the Parliament on Constitutional amendments

On the withdrawal of the Martial Law, in the Eighth Amendment case (Anwar Hossain Chowdhury vs Bangladesh : 1989 BLD (Spl.1), it was challenged that four permanent benches of the High Court Division set up by the Martial Law Order number 11 of 1982 were unconstitutional. It was submitted that the basic structure of the Constitution could not be altered by an amendment on the ground that the Parliament had not the unlimited power of amending the Constitution if the amendment was inconsistent with concept of "the supremacy of the Constitution" embodied in the Preamble and Article 7 of the Constitution.

By a majority judgment (3:1), the Appellate Division of the Supreme Court agreed with the submission, thus firmly establishing the doctrine that the "basic structure of the Constitution" cannot be altered or amended. The Constitution is not an ordinary legislation. It is a basic structure how a country is governed. It reflects history, ethos, and aspirations of people of a country. There are certain basic principles on which a constitution is founded and these principles must be preserved.

Let us now briefly examine the core elements of the 14th constitutional amendment:

Reservation of seats for women in the Parliament

Article 28(4) of the Constitution provides that the state may make "special provision in favour of women or children or for the advancement of any backward section of citizens". This Article is often known as "affirmative action" provision. This implies that special attention may be given to these groups who may suffer from certain disadvantages inherently built on the society.

Women empowerment is a sine qua non in a democratic society. Empowerment of women is a process that aims at changing in the perception of women of themselves and the way in which the roles and functions of women are focused. The reservation of seats in the Parliament for women is considered as one of the actions that may accelerate the social consciousness about the status of women in society.

The reservation of seats for women in the Constitution is nothing new. It existed before varied in number of seats and lapsed in 2001, (30 reserved seats). Both major parties have committed to reservation of seats for women for sometime to come, although women can get elected from single territorial constituencies by direct election under Article 65 (3) of the Constitution.

The question is: Who elects them? What are their constituencies? These are the basic issues that divide the government and the Opposition and Women Rights activists. According to them, the women should elect the MPs. They argue that if the women members of the parliament are elected on the basis of party representation in the parliament, it not only denies empowerment of women but also undermines the very concept of "affirmative action."

The reservation of seats is not a "favour" for women but is a cornerstone of making women productive in society. It is reasonable that gender-based balance of power is gradually introduced in the parliament to enable women's views to be taken into account at every levels of legislative process. Arguably, there is a strong merit of their case in electing women MPs by women. Indirect election at the beginning of the 21st century is to be regarded as something which is archaic and ancient in a vibrant democratic society prevailing in Bangladesh where the male-dominate mould of leaderships has been broken since 1990.

Display of portraits in government offices

Ordinarily display of portraits of political leaders is regulated by law and regulations and not by the constitutional provision. Constitutional provision for such action is like "killing a fly with a gun". Since a state is headed by a monarch or by a President, it is their portrait that is usually displayed. A government may come and go but the state exists and the head of the state continues in office.

However in Bangladesh display of portraits of political leaders has unfortunately been embroiled in bitter controversy. The major political parties have their own entrenched views on this issue and have not been able to come to an agreed view. It appears that the present amendment is designed to ensure that portraits of current political leaders (the President and the Prime Minister) are displayed and not those of past leaders.

There is a view that only the portrait of the President, being the head of the state, should have been displayed. There is a distinction between the head of the state and the head of the government, even though the powers of the head of the state are purely ceremonial.

The national emblem of a state is different from the logo or emblem of the government.

Article 4(3) provides that the national flower "Shapla" resting on water, having each side an ear of paddy and being surmounted by three connected leaves of jute with two stars on each side, represents the emblem of Bangladesh state and not of the government. This implies that government may not use the "Shapla emblem", earmarked only for the head of the state or his /her representatives overseas.

Raise the retirement age of Judges in Supreme Court

The innocuous amendment has become controversial, in particular the retirement age of the Supreme Court Judges including that of the Chief Justice. This has a particular reason. The Non Party Caretaker government, under Articles of 58B and 58C of the Constitution, involves the last retired Chief Justice to become the Chief Adviser (chief executive) of the interim government. What was a purely the highest judicial office in the country has been given a political role after retirement under these provisions and the office of the Chief Justice seems to be perceived now through the prism of these provisions.

Many think that retired Chief Justices will have a political role to play given the timing of their retirement. This is regrettable, to say the least. There is a view that the political leaders should not have involved the retired Chief Justices in the Caretaker government. There should have been other mechanisms including consideration of panel of impartial persons from which the Chief Advisor would have been selected.

Empowerment of the Chief Election Commissioner to conduct the oath of the MPs

Ordinarily such provision is not necessary because the outgoing Speaker or Deputy Speaker continues in office until a new Parliament is elected. They hold a unique position in parliamentary style of government. With the dissolution of the government, they do not lose their positions because they are tied up with the continuity of the tenure of the Parliament and not of the government.

Given the continuing mistrust between the two major political parties, it seems that the amendment is designed to ensure smooth transition from out-going parliament to the new one.

Concluding remarks

It would have been appropriate that the election to the reserved seats for women should have been through direct election to reflect the democratic principles of the Constitution. Indirect election is alien to parliamentary democracy. Other amendments are to be seen in the light of the charged climate of political parties in the country. Until and unless there is mutual respect, tolerance and accommodation of views of political parties, such anomalies may creep in the Constitution. The dictum seems to be that the winners get all.

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HUMAN RIGHTS *monitor*

Violation of Human Rights by Transnational Corporations

Is there any effective enforcement mechanism?

BARRISTER HASSAN FARUK AL IMRAN

UNDER various domestic law and international instruments the states are assuring individual's human rights. Now the question is: How could individual's human rights be protected, if it is breached by Transnational Corporations (TNC) or Multinational Corporations (MNC). Is there any remedy available for such violation?

At the beginning the question is- what is the role of TNC in the present world? TNC have production operations throughout the world. They are investing all over the world and contributing to economy especially in developing countries. The cheap and unorganised labour is one attraction for investing in a developing country as they can pay them barely survival wages. Many private economic institutions, such as large TNC / MNC, often wield significant power and affect numerous human begins both directly and indirectly in various sectors of public and private life. In fact, many TNC wield more effective power and wealth than many nation-states. For example, in 1992 General Motors' world wide sales ($132.4 billion, approximately one third of which was in foreign sales) exceeded the GDP of Indonesia ($126.4 billion), Norway ($ 115.7 billion), Poland ($83. 8 billion), and Malaysia ($57.8 billion). Moreover, coupled with new technology that allows rapid movements of finance and capital, TNCs use their economic power to gain the most favourable conditions for their activities. If a state introduces environmental laws, TNCs have the capacity to seek new sites for production where regulation is less strength.

TNC/MNCs are violating human rights by their activities. They have been accused of violating human rights to life, including the right to enjoy life, freedom from forced or slave labour, freedom from deprivation of or injury to health, enjoyment of a clean and healthy environment, air pollution, water pollution, environmental damping.. Although in some cases developed countries are protecting TNC's violation of human rights, however, in practice, still the situation is not sufficient, and moreover, in the case of developing countries the situation is different. It is alleged that, "the most notorious MNC abuses occur in the developing world, for example use of forced and child labour, suppression of rights to freedom of association and speech, violations of rights to cultural and religious practice, infringement of rights to property, and gross infringements of environmental rights." Therefore, question may arise- what regulatory challenge posed by TNC?

The distinctive regulatory problem posed by TNCs is their ability to operate as an integrated command and control system through two disaggregated institutional structures. The first of these structures is the collection of discrete corporate units- parent, subsidiary, sister and cousin companies- that make up the TNC group. The second disaggregated structure housing the TNC is the global system of separate nation-states in which those corporations are registered and do business. Thus, although decision-making within a TNC often occurs within a vertically integrated command structure, that same degree of integration is not available to regulations. Since the parent and subsidiary companies are legally distinct, they must be subject to separate and independent systems of inspection and regulation. But in practice the companies are not subject to the discipline of shared liability, since in most instances the parent company is not liable for the activities of the subsidiary following the principle of House of Lords (UK) decision in Salomon v Salomon, which is followed in most of the countries of the world. In theory, there is no court anywhere in the world that exercises jurisdiction over all the components of TNC doing business in three or four continents. In these circumstances, the TNC enjoys a degree of autonomy from national jurisdiction that is unique in the global legal order.

The regulatory response to environmental damage by TNC has been largely ineffective. International environmental treaties bind state parties, but do not place obligations directly upon companies. There have been some scholarly explorations of holding the "home" state liable for the activities of TNC headquartered within its jurisdiction, but this approach has largely failed due to both political opposition as well as the problems in jurisdiction and company law [Salomon v Salomon]. Anderson, an international environmental law scholar, criticised, "the greatest challenge for both human rights standard and environmental regulation is surely the problem of effective enforcement." The great example of ineffective regulation of TNC is 'Bhopal' case of India. In 1984 a leak of methyl isocyanate gas from a pesticide plant owned by Union Carbide in Bhopal, India, resulted in the loss of over 3,500 lives and the exposure of an estimated 521,000 individuals to the gas that can result in cheonic effects, including depression of immune response. Plaintiffs failed in their attempt to sue in the US, and following much-delayed litigation in India the case was settled for $470 million

Whether tort law is the best way to hold transnational companies accountable? Critics of tort approaches to human rights protection have contended that tort litigation can be slow, costly to mount, and organised in a fragmented, case-by-case basis that undermines that rationality of a consistent regulatory framework. Another problem of the private international law of torts is to decide the proper forum for a suit when the plaintiff and the defendant are in different jurisdiction. Forum non conveniens was originally invoked to protect the defendant from being harassed by a plaintiff choosing a genuinely inconvenient or inappropriate forum. Despite this intent, it has become in many instances a device for parent companies to escape liability for tortious acts committed abroad. There is further problem in the case of tort litigation, which is that the quantum of damages is likely to be lower in developing countries since wages and medicinal treatment are lower, so compensation will be lower as well.

One may argue that the TNC might be liable under customary international law as they are violating human rights. However, there is also a problem; as international law almost exclusively considers that nations will be primarily responsible for the management of human rights. National governments then hold all individuals within their borders responsible for managing human rights according to treaties and customary international law.

Recently, the United Nations Sub-Commission for the Promotion and Protection of Human Rights unanimously approved the "Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with regard to Human Rights" (the Norms) on 13 August 2003. Together with the interpretative Commentary, the Norms constitute an authoritative guide to corporate social responsibility. They are the first set of comprehensive international human rights norms specifically aimed at and applying to transnational corporations and other business entities (companies). They set out the responsibilities of companies with regard to human rights and labour rights, and provide guidelines for companies in conflict zones. Although the norm is a milestone since this is the first time that the companies are being put a notice that they will be expected to meet the basic human rights standards. But it is not clear how the Norms will be binding or what legal principle would be involved.

At present TNC and other private entities are playing an important role in world economy. TNC are growing their business from one country to another, investing capital, creating new jobs, transferring technology and skill from developed country to developing countries. As a result TNC are bringing many benefit to the countries within which they are operating. But there is also dark side of it. TNCs are violating individual's human rights in many ways. Although in some cases developed countries are trying to control TNC's activities by making domestic law, but in practice, still it is not sufficient. Because of veil of incorporation (Salomon v Salomon) the home country of TNC can avoid its liability, and, it is very difficult to bring any breach of human rights allegation against subsidiary company under tort law. Moreover, in the case of developing countries, the situation is worst; because developing countries social, economic and judicial conditions are poor. In some cases the TNC are economically more powerful than many states, as a result the developing countries don't want to lose their investors by making strict law.

Furthermore, there is no international backstop to hold companies accountable when national regulatory systems are insufficient. International law says about state responsibility if it does any internationally wrongful act, but there is no clear indication about TNC's or any private entities. Finally, recently UN Norms on the Responsibilities of Transnational Corporation had been adopted, however, still the problem is how this Norms will be binding? What is the legal consequence of it, if the TNC and any other private entities don't follow this Norms? What would be the remedy for violation of individual's human rights? Therefore, we need to re-think about these issues. And we are waiting for the future when all the victims of human right violation by TNC/MNC will get justice and sufficient remedy.

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Victim of Bhopal gas disaster

LAW *news*

Women Abuse Council of Toronto

FARZANA CHOWDHURY

MANY thousands of Canadian women experience poverty and violence every day. As each year passes, many more join those women. Violence against women knows no geographical, cultural or linguistic boundaries and it affects all women without regard to their level of income. However, for many women, poverty adds another dimension to the pain and suffering they experience as a result of violence. Poverty limits choices and access to the means to protect and free oneself from violence. It also means more barriers to using services and programs that can help. Low-income women comprise a group with unique needs. This has implications for the community groups and agencies that work with them.

Women Abuse Council of Toronto is a policy development and planning organisation whose mandate is to improve the effectiveness of the community response to woman abuse.

The Council evolved out of a community need to develop a more coordinated approach to woman abuse in Toronto. It was recognised that while there was a range of existing services for assaulted women and their families, as a whole, the services were fragmented, inconsistent and uncoordinated. The fragmentation of such services has an impact on the quality, consistency and accountability of services received by women. Among various programs they have a project named Women's Court Watch Project.

The Women's Court Watch Project is an initiative of the Women's Abuse Council where women survivors, volunteers and students observe domestic violence trials in all of the five courts across Toronto to monitor judge's decisions and to compare the effectiveness of the specialised domestic violence courts.

The main reason of implementing the program was to:

- Raise public awareness of issues within the judiciary and the courts about the response to woman abuse cases.
- Explore and uncover biases of judges and hold judges accountable to their responses and conduct to victims of abuse.
- To provide women survivors of abuse an opportunity to participate in changes to the criminal justice system.
- Collect information about the availability of court support services to victims of abuse. To share resources and information with agencies supporting women survivors while also presenting feedback about the courts and services available to women to the greater community.
- Compare the situation in the courts over a three-year period. Each year an evaluation and recommendations for change will be presented and published.

Volunteers, survivors and students are involved in the program. The council provides training sessions explaining the court system, the survey, and woman abuse issues, etc.

I think the program is very effective, involving survivors of women abuse is very encouraging for those who still are going through abuse, and cannot find the courage to come out. Many women organisations in Bangladesh have taken programs to deal with women abuse, and offering them assistance to go to court. But I think if some organisations introduce this type of a Women's Court Watch Project it would really benefit the women who are going through abuse and also others, such as students. Students by participating in a wide specialised family and criminal court monitoring programs, learn about the court system first hand.

Exploring and uncovering biases of judges and hold judges accountable to their responses and conduct to victims of abuse is indeed is a step towards an accountable judicial system and ultimately a better society for women.

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