



Constitutional mandate for special legislation

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THE Constitution of the People's Republic of Bangladesh (the Constitution) is a well-drafted one in comparison to many other constitutions of the developed countries. The framers of the Constitution purposefully incorporated some express provisions for specific legislation in different parts of it. In maximum cases the object of these special legislations is to ensure transparency, accountability, justice and independence of the institutions concerned. Now-a-days we often come across debate or controversy about the appointments in some constitutional posts, like Election Commissioner, Judges of the Supreme Court etc. The on going movement to reconstitute the Election Commission and remove some Election Commissioners is an example of such debate or controversy. In the limited sphere of this article some of the most necessary constitutional provisions for special legislation would be discussed and purpose, object and the impact of such legislations would be considered.

Important provisions: Some express provisions for special legislation as provided in the Constitution are as follows:

Parliament may by law prescribe the procedure to be followed by an Advisory Board to enquire about the justification of a preventive detention [Art 33 (6)];

Parliament may by law empower any court other than the High Court Division to exercise all or any of the powers mentioned in article 102 of the Constitution, popularly known as the writ jurisdiction [Art 44 (2)];

The President shall by rules specify the manner in which orders and other instruments made in his name shall be attested or authenticated [Art. 55 (5)];

The President shall make rules for the allocation and transaction of the business of the Government [Art. 55 (6)];

Parliament shall prescribe by Act amongst other the functions relating to administration and the work of public officers, the maintenance of public order and the preparation and implementation of plans relating to public services and economic development of the local government bodies [Art. 59 (2)];

Parliament shall by law confer powers referred to in the article 59 on the local government bodies including power to impose taxes for local purposes, to prepare their budgets and to maintain funds [Art. 60];

Parliament shall by law provide for regulating recruitment, etc., of defence services;

Parliament may, by law, regulate the recruitment and conditions of persons appointed to the secretariat of Parliament [Art. 79 (2)];

Other qualifications of a person may be prescribed by law for appointment as a Judge of the Supreme Court apart from the qualifications mentioned in article 95(2)(a) & (b) [Art. 95 (2) (c)];

Appointments of persons to offices in the judicial service or as magistrates exercising judicial functions shall be made by the president in accordance with rules made by him in that behalf [Art. 115];

The appointment of the Chief Election Commissioner and other Election Commissioners shall subject to the provisions of any law made in that behalf, be made by the President [Art. 118 (1)];

Subject to the provisions of any law made by Parliament, the conditions of service of Election Commissioners shall be such as the President

may, by order, determine [Art. 118 (5)]; and

Subject to the provisions of this Constitution Parliament may by law regulate the appointment and conditions of service of persons in the service of the Republic [Art. 133].

Law for Advisory Board: The Constitution expressly provides discretion on Parliament to enact law to prescribe the procedure to be followed by an Advisory Board in an inquiry about the justification of a preventive detention. According to Art. 33 (4) the Advisory Board is to be constituted by three persons, of whom two shall be persons who are either Judges of the Supreme Court or have been qualified to be appointed as Judges of the Supreme Court and the other shall be a person who is a senior officer of the Republic. The main task of the Board is to enquire and report about the justification of the detention of a person exceeding six months. So the inquiry of the Board would be more transparent, accountable and justified if there is enacted procedure to be followed by the Board in conducting such an inquiry.

Law to confer writ jurisdiction on other court: Art 44(2) of the Constitution expressly provides discretionary power to Parliament to enact law conferring any or all powers under Art 102 of the Constitution on any court other than the High Court Division without prejudice to the power of the High Court Division. Presently the High Court Division is overburdened with writ petitions when on an average ten thousand writ petitions are being filed in the High Court Division every year since 2002. Therefore, the cases are being piled up in the Supreme Court and the scope of enforcement of the fundamental rights of citizens/people is substantially hampered. If senior District Judges posted in the Divisional headquarters have been provided with the writ jurisdiction then the people would be able to exercise their fundamental rights conveniently and the backlog of the cases in the Supreme Court would be substantially reduced. By exercising this constitutional mandate Parliament can ensure smooth and effective enforcement of the fundamental rights enshrined in the Constitution.

President's obligation to frame rules: The Constitution makes it imperative on the President to frame rules specifying the manner in which orders and other instruments made in his name shall be attested or authenticated. Though literally it is the obligation of the president under Art 55(5) of the Constitution to frame such rules but practically, in pursuit of Art 48(3) of the Constitution, the President must act in accordance with the advice of the Prime Minister in this regard. So far no rules have been framed under Art 55(5) of the Constitution, which creates a serious problem to ensure transparency and accountability in the business of the Republic where frequently orders and instruments have been attested or authenticated to be made in the name of the President. Instead of making detailed rules in this regard the government incorporated Rule 5 in the Rules of Business, 1996. This rule enumerated the persons who can authenticate, by signature, all orders and other instruments made and executed in the name of the President. Therefore, it is desirable that the government take initiative to frame such rules to ensure accountability and transparency in the business of the Republic.

The present Rules of Business have been made in 1996. In framing these Rules of Business which include the Allocation of Business among the different Ministries and Divisions the public representatives got very little opportunity to play

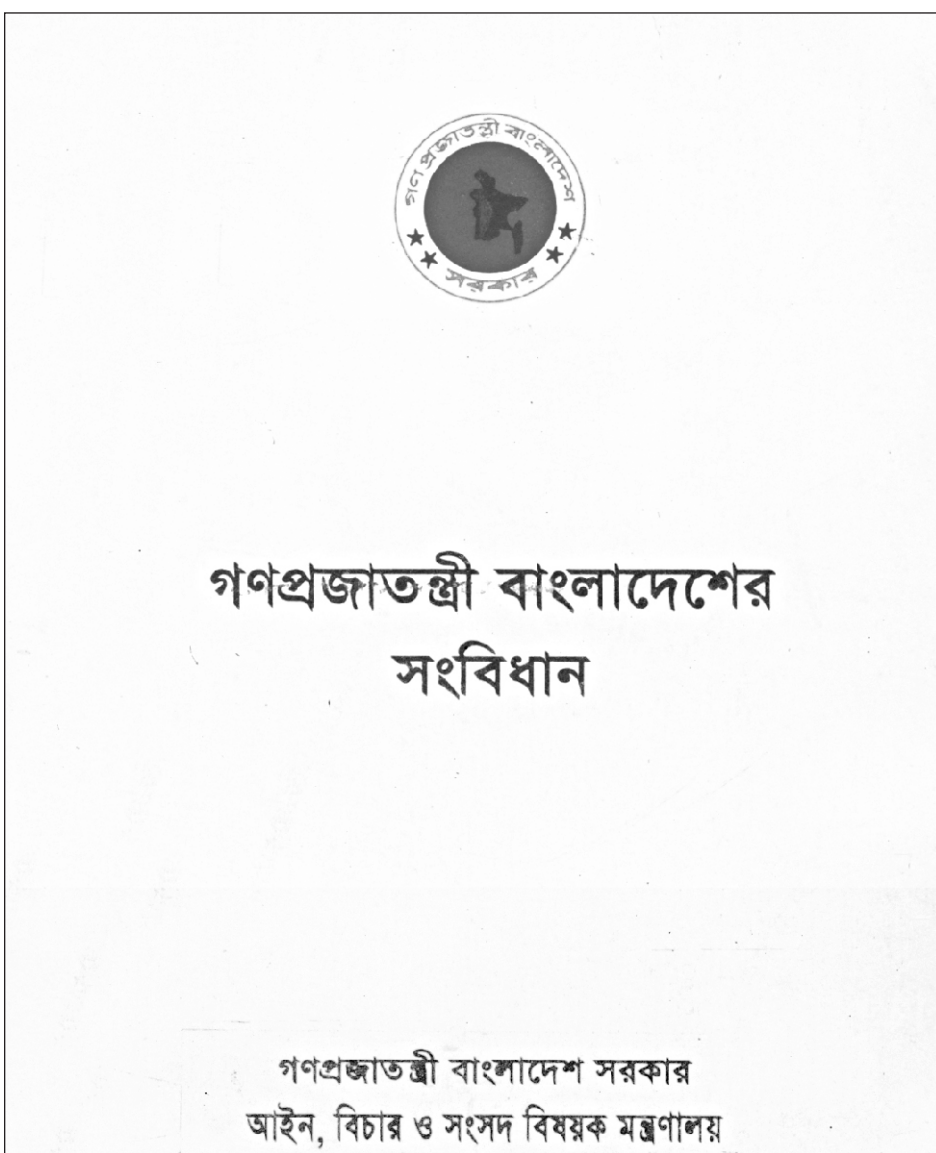
any vital role. Basically bureaucrats did everything and placed it before the Cabinet meeting. The Ministers had little time to go through the detailed provisions of the Rules of Business. They just put their seal of validity on these rules and the President virtually had nothing to do with these Rules but to put his rubber stamp. There should be a provision in the Constitution that all rules, regulations framed by the Executive should be placed before the Parliament to be scrutinised by the respective parliamentary standing committee. In this way people's participation and transparency could be ensured in making subordinate legislation including such constitutional instrument like the Rules of Business.

Parliament's obligation to enact law for local government bodies: It is the constitutionally mandatory responsibility of Parliament according to Art 59 to enact laws governing the functions of the local government bodies, which may include- (a) administration and the work of public officers; (b) the maintenance of public order; (c) the preparation and implementation of plans relating to public services and economic development.

In the case of Kudrat-E-Elahi Panir and others vs. Bangladesh, 44 DLR (AD) 319, Mustafa Kamal, J holds "It is to be remembered however that local government is a part of the constitutional system and therefore Chapter III of Part IV of the Constitution containing Articles 59 and 60 cannot ever be kept as a dead letter."

Constitutionally a district means an administrative unit. According to the provision of Art. 59 (1) the local government in a district must be entrusted to bodies composed of persons elected in accordance with law. Accordingly, Parliament enacted the District Council Act, 2000 (Zilaparasid Ain, 2000) giving a very limited administrative authority. In enacting the law Parliament even did not comply with the mandates of Articles 59 and 60 of the constitution. Moreover government has been empowered to dismiss the elected District Council under the circumstances mentioned in the Act. Such provision is also opposed to Articles 9 and 11 of the constitution where promotion of local government institutions and participation by the people through their elected representatives in administration at all levels have been declared as the fundamental principles of state policy. Parliament has also given in the hand of executive a weapon by incorporating a provision that the act shall come into force from the date as to be declared by the government in the official gazette. Now it is 2006 but the government did not get an opportunity to declare the date of enforcement of the Act by a gazette notification. This is how the bureaucrats frustrate any effort to strengthen the democratic institutions like separation of judiciary in Bangladesh. Therefore parliament performed its constitutional obligation in a haphazard way which could be amounted as failure of parliament to carry out its constitutional obligation.

Qualifications of the Judges of the Supreme Court: The broad outline of the qualifications of persons to be appointed as Judge of the Supreme Court has been mentioned in Art. 95(2) sub clause (a) and (b). The constitution has also given a scope to formulate detailed qualifications of persons to be appointed as Judges of the Supreme Court by prescribing law. Parliament itself may prescribe the detailed qualifications by enacting laws or even the president may promulgate an ordinance in this regard while the parliament is not in session or stands dissolved. By



prescribing such law, provisions can be made to

constitute a high powered committee headed by the Chief Justice of Bangladesh and four other senior most judges of the Appellate Division of the Supreme Court to nominate the persons as Judges of both the Divisions of the Supreme Court. Apart from the constitutional qualifications other detailed qualifications of the persons to be appointed as judges in the Supreme Court can be stated in such law. The provision also should be made that the executive must appoint Judges of the Supreme Court from the nominated persons by the high-powered committee headed by the Chief Justice. Enactment or promulgation of such law might play a vital role in dissolving the controversy prevailing now in appointing judges in the superior judiciary. The non-party caretaker government though not empowered to take any policy decision except in the case of necessity to perform its functions, but if for the greater interest of the nation it takes a move to promulgate necessary ordinance in this regard, that would be treated as violation of the constitution in any way.

President to make rules for judicial service and magistrates: Article 115 of the constitution imposed a mandatory obligation upon the President to appoint persons in the judicial service or as magistrates exercising judicial functions in

accordance with rules made by him in that behalf. Long after the Appellate Division's judgment in civil appeal no. 79 of 1999 popularly known as Masdar Hossain appeal case the Rules regarding appointment of persons in the judicial service have been framed and notified in the Bangladesh Gazette on 12.6.2006 in the name of the President. However these rules are distorted and in framing the rules the appropriate authority did not follow the directives given by the Appellate Division in the Masdar Hossain Appeal case. The magistrates exercising judicial functions are not included in these rules, which is a major deviation from the constitutional mandate and the directives of the Masdar Hossain Appeal case. Since the directives of the Masdar Hossain case are yet to be fully implemented and the judiciary is not yet separated from the executive organ, therefore, if the non-party caretaker Government takes initiative to fully implement the directives of the Masdar Hossain Appeal Case and the constitutional mandate to separate judiciary from the executive organs by way of promulgating ordinance amending the Code of Criminal Procedure, 1898, such a move cannot be treated as a policy decision and in any way ultra vires to the constitution.

Provisions on Election Commission: The President is to appoint the Chief Election

Commissioner (CEC) and other Election Commissioners (ECs) subject to the provision of any law made on that behalf according to Article 118 of the constitution.

Parliament can enact such law or the President can promulgate ordinance or make rules in this regard. Here the Constitution does not make any specific obligation on the President or on the Parliament to make law on the appointment of such Commissioners. But it is clear from the plain reading of the Article 118 that such appointment should be made subject to the provisions of any law in this regard. But unfortunately no such law has been enacted or promulgated yet by any government. In the parliamentary form of government for such non-compliance the party in power can be made liable. Therefore, all previous democratic governments can be made responsible for their reluctance to make necessary law in appointing the Chief Election Commissioner and other Election Commissioners. The Constitution does not provide any qualification for appointing the Commissioners. The political governments used such constitutional silence to realise their motive and in appointing such Commissioners in maximum cases they tried to protect partisan interest to the detriment of national interest. In order to bring an end to this the present caretaker government may promulgate an ordinance specifying detailed qualifications and the terms and conditions of the service of the CEC and other ECs.

Concluding remarks: It is high time for major political parties of Bangladesh to realise that the dignity, neutrality and transparency of the constitutional institutions must be upheld in order to protect democracy and rule of law in our country. It is a matter of extreme misfortune that after long 35 years of our independence we could not achieve separation of judiciary, strong local government bodies and Election Commission. Still it is a common belief that only good intention of our major political parties will suffice to realise the aforementioned goals. We hope that bureaucratic obstacles, if any, wont be able to suppress the people's will if the public representatives are dedicated enough to ensure the people's participation in all spheres of the government. The caretaker government of Justice Latifur Rahman took an initiative to separate judiciary from executive by implementing the 12-point directives of the Appellate Division given in the Masdar Hossain Appeal Case. But due to political and bureaucratic interference it could not occur. We hope that the present caretaker government would succeed with such move. It is our expectation that either the present caretaker government or the next political government would take necessary steps to make laws regarding strengthening of local government bodies; appointment of right persons as judges of the Supreme Court and Election Commissioners; and constitute a judicial service which will include the magistrates exercising judicial functions in the light of the express constitutional provisions.

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LAW report

Child trafficking in border areas

RASHED, son of Saiful Islam of Gunobati village under Comilla district recently came back home with the support of UNICEF and BNWLA. He was trafficked to Dubai 10 years back and forced to serve there as a camel jockey. He was only 7 at the time of trafficking. Another little boy, aged 6-9 years, all he can now remember about his family is that he had a father, a mother, and two siblings. The father was a schoolteacher, and the mother raised chickens and ducks. One day he was playing outside all by himself, when two strange men came and took him away from his family.

In Dubai, he was employed as a camel jockey. One day while riding a camel he fell down and was seriously injured, and was taken to a hospital. When this boy was hospitalized, an international news media broadcasted this case. The BNWLA later got involved in repatriating this boy back to Bangladesh from Dubai.

In recent years, there has been a significant increase in trafficking of women and children in Bangladesh particularly in border area. Very little work has been done to understand the local dynamics of the problem meaningfully. There are young boys aged about 8 to 15 (some are even younger). They are those specifically sent to the Arab Gulf countries. There they are used as drivers for camel races; offering sexual favours is a secondary activity in most instances. As in the case of girls, there are no reliable statistics, but possibly about 50 to 100 boys are being smuggled out of Bangladesh for this purpose. The camel-rider boys of Bangladesh are part of rich Arab households.

The entire trafficking operation involves "scouting" for suitable victims, picking them up, then keeping them hidden in Dhaka City for a few days (sometimes the children are gagged and chained), then putting them on a bus or train towards the Indian border or elsewhere. There are people on both sides of the border who are part of the trafficking chain. Sometimes a prospective buyer is also waiting



at the border. Transactions can be up to 40,000 to 50, 000 taka though most go for less.

The main methods of trafficking are deception or false promises, and kidnapping. Among contributing factors identified were: poverty, open inter-country borders, political corruption at certain levels, and lack of inter-Government cooperation. One is tempted to add - the apparent ignorance of society regarding this problem, and the culpable apathy of those who could and should do something about it.

Recently, the countries of the South Asian Association for Regional Cooperation (SAARC) adopted a definition in their Convention for Preventing and Combating Trafficking in Women and Children. Trafficking in children usually consists of all acts involved in the procurement, transportation, forced movement, and/or selling and buying of children within and/or across border by fraudulent means, deception, coercion, direct and/or indirect threats, abuse of authority, for

the purpose of placing a child against her/his will without his/her consent in exploitative and abusive situations such as commercial sexual abuse, forced marriage.

Review of different literature showed that some 18 transit points along the India-Bangladesh border are used for smuggling children and women out of the country. The border areas of Khulna, Jessore, Satkhira, Rajshahi, Dinajpur, Rangpur, Mymensingh, Comilla, Brahmanbaria, and Sylhet are frequently used as land routes for trafficking.

Recently, the ATSEC has prepared a "Preliminary Directory of Non-government Organizations (NGOs) involved in combating trafficking in, and sexual exploitation of children and women". The directory includes information on 130 different local and national level NGOs. The directory shows that the NGOs are involved in awareness raising, information dissemination, advocacy, repatriation, rehabilitation, etc.

NGOs face many constraints in dealing with the issue of trafficking. Lack of a fully

equipped investigative cell has been the most outstanding one. NGOs get information about cases either through the media or when they initiate a special study/research. Sometimes they also receive information through local partner NGOs/organizations. Whenever a case is reported in the media, they try to follow it up and usually retrieve those children from jail or police custody.

Legal provisions to protect women and children from exploitation are not properly enforced due to organizational inefficiency and inadequate capacity of the law-enforcing agencies. Rashed, the boy with whom this report began, is one such victim who somehow escaped and came back to his parents. But when shall we have statistics of all those unlucky ones? In the final analysis, children need community - they should not be considered as an island in the society. There must be a strong social consciousness to prevent the trafficking of children. Such consciousness can probably be best achieved in the Bangladesh context by organizing information and planning sessions on this issue, on a regular basis, at least once a year, in different places. The sad and most sickening aspect is that these trafficked children are the victims of elders, the very ones in society who should be helping them and protecting them. To build a bright future for all children, kidnapping of children, sale, and cross-border trafficking must be ended without any further delay. Therefore steps should be taken for women and children trafficking-related cases to be disposed of speedily, giving punishment to the criminals and the perpetrators who are involved in whole trafficking cycle.

— A group of child journalists from Children's Express, Shishu Prokash, Comilla.

LAW week

EC starts close review of election laws

The Election Commission (EC) started reviewing the existing election laws to bring in massive electoral reforms, but it did not say how much time will be required to complete the task. "It's a massive task. We have just started examining the election laws. After a few days, we will be able to say how much time will be needed to complete the task," Chief Election Commissioner ATM Shamsul Huda told reporters after an EC meeting that started the review of the existing election laws. "Our only objective is to proceed with the process for holding a free and fair election. We are not sure how much time the process will take," the CEC said replying to a query about a tentative timetable for holding the next parliamentary election. The EC at its first review meeting took up the review of Representation of the People Order 1972 that contains 95 provisions and a large number of sub-provisions. The EC reviewed 12 provisions of the order yesterday and will continue discussions to prepare a set of draft proposals for reforms. The CEC said a draft will be prepared after reviewing the election laws and the recommendations from the civil society and different organisations. Then the EC will consult with the caretaker government, political parties and the civil society seeking their opinion. *The Daily Star, February 19.*

50 given 72 hours to submit wealth report

The Anti-Corruption Commission (ACC) published a list of 50 persons, including three dozen former ministers and lawmakers, and top politicians and businessmen, in the first phase of publishing names of 420 top corrupt suspects. The 50 were asked to appear before four assigned ACC directors and submit their wealth statements at the ACC office in Segunbagicha within 72 hours of receiving the notification. If they fail, their movable and immovable properties will be attached for a temporary period. The list has the highest number of 26 leaders from the BNP, 18 from the Awami League (AL), one each from Jamaat-e-Islami and Islami Oikya Jote (IOJ), and two former secretaries and two businessmen. Of the 50 people, eight former ministers and 13 lawmakers are from BNP and four former ministers and 10 lawmakers are from the Awami League. Already 22 of the 50 people have been arrested. *The Daily Star, February 19.*

Review appeal of

JMB man on death rejected

The Supreme Court summarily dismissed the review petition filed by Khaled Saifullah, one of the six condemned JMB outlaws in prison, for non-prosecution. The order came since the court found no specific grounds for review of its earlier order. On November 28 last year, the Supreme Court rejected all the six applications filed by the condemned JMB militants, including Khaled Saifullah, seeking leave to appeal against their death sentences in the Jhalakathi judges killing case. *Unb, Dhaka, February 20.*

CANDIDATE'S INFO DISCLOSURE

SC dumps its own surprise order after courtroom chaos

The Supreme Court (SC) in an unprecedented move recalled within three hours its verdict against collecting eight-point personal details of a parliamentary candidate amidst stubborn opposition from lawyers. A four-member SC Bench headed by Chief Justice Syed JR Mudassar Husain gave the verdict, overturning a High Court judgement to allow candidates not to submit personal and wealth statements to the Election Commission (EC). The SC had earlier fixed the day for its judgement on the appeal of one Abu Safa who had filed it to overturn the HC verdict given on May 24 in 2005. Disposing of a writ petition filed by three lawyers, the HC had asked the EC to gather personal details like academic qualification, profession, source of income, criminal records and some other information about aspirants for contesting parliamentary polls and publish those to help voters choose their representatives properly. Surprisingly, a single-member SC Vacation Bench comprising Justice Joyrul Abedin on December 19 last year stayed the HC decision without hearing any submission from the three petitioners. On July 3 in 2005, Abu Safa who hails from Swandip filed his appeal with the SC Chamber Judge's Court. February 21, *The Daily Star.*

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