

## LAWvision

# Reform agenda should focus on 'separation of power' too

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THE doctrine of separation of power has found its expression throughout the whole scheme of the Constitution of Bangladesh of course with its inherent lacuna and defects. Executive power of the Republic lies with the Executive under the Prime Minister and his/her Cabinet. The executive power is exercised by or on the authority of the Prime Minister [Article 55(2)]. Legislative power is vested in the Parliament [Article 65(1)] Though there is no express vesting of legislative power in the Judiciary, the Appellate Division held in Mujibur Rahman v. Bangladesh 44 DLR (AD) 111 that it so lies.

Apart from this general formulation there are certain instances in which one particular organ of the State exercises power vested in another.

Executive can legislate in certain cases e.g., Article 62(2) empowers the President to provide for regulating the raising and maintaining of the defence services of Bangladesh and of their reserves; the grant of commissions therein; the appointment of Chief of Staff of the defence services, and their salaries and allowances as are not already subject to existing law and until Parliament by law provides for them.

Article 93(1) empowers the President to promulgate Ordinance if he is satisfied that circumstances exist which render immediate action necessary and Parliament stands dissolved or is not in session. Ordinance so made shall, as from its promulgation have the like force of law as an Act of Parliament:

Article 115 authorizes 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.

Article 133 says that it shall be competent for the President to make rules regulating the appointment and the conditions of service person in the Service of the Republic and until provision in that behalf is made by or under any law, and rules so made shall have effect subject to the provisions of any such law.

Judiciary also has got some delegated authority in legislation. Subject to any law made by Parliament and with the approval of the President, the Supreme Court may make rules for regulating the practice and procedure of each division of the Supreme Court and of any court subordinate to it. [Article 107(1)]

In this respect it is important to note that though the judiciary has got the role of interpreting laws and thereby creating new norms of jurisprudence, it cannot necessarily legislate nor can it give direction to the Parliament to enact laws. Article 112 requires all authorities executive and judicial (not legislature) to act in aid of the Supreme Court.

Parliament has a sort of judicial power to the extent that it may expel any MP or order a nonmember to



leave the precincts of Parliament who obstructs the functioning of the Parliament. [Rule 15, 16 and 313 of the Rules of Procedure of Parliament]. In such matter the jurisdiction of the Court is ousted by Art 78(2).

### Checks and balances as enshrined in the Constitution

Parliament can cause the fall of Government as the Prime Minister and his Cabinet is collectively liable to the Parliament and the Prime Minister holds the office during the pleasure of parliament [Article 55(3) and Article 55(2)]. Parliament can also impeach or remove the President on ground of gross misconduct, physical or mental incapacity. Parliamentary Standing Committee can review the enforcement of laws by ministers and investigate or inquire into the activities of the administration of the ministries.

Again when there is a constitutional deviation and constitutional arrangements have been interfered with or altered by the Parliament by enacting laws or by the executive by issuing orders, it is within the jurisdiction of the judiciary to bring back the Parliament and Executive in tract. Even then the Court can declare such legislative measures to be ultra vires, but cannot give a direction to repeal or modify it. [Secretary of Ministry of Finance v. Masder Hossain, 2000 BLD (AD) 104; Kudrat-e-Elahi v. Bangladesh 44 DLR (AD) 319, Mozibur Rahman v. Bangladesh 34 DLR (AD) 321]

President appoints the Chief Justice and Other Judges of the Supreme Court.[Article 95(1)]. President may appoint a Chief Justice on temporary basis if circumstance so require [Article 97]. Article 98 has empowered the President to appoint additional Judges for a number of reasons. President is also empowered to remove a judge of the Supreme Court upon recommendation of the Supreme Judicial Council [Article 96(6)].

### The harsh reality

However, reality tells an altogether different story from what has been told above. Cabinet comprising the most powerful members of the political party enjoys majority in the parliament. This collection of big shots again is led by an almost invincible Prime Minister. Members of the ruling party is nothing but helpless against such a panel of big bosses.

Article 70, which had only seven lines in the original constitution, is now almost a full page. The gist of the Article 70 is that an MP going against the decision of his political leadership runs the risk of losing his seat in Parliament. As a result, legislature and executive get virtually converged in one hand. Gone with this are the provisions of Articles 52(1), 53(1), 55(3) and 57(2). This executive dominance over parliament and other organs of the government has taken the shape of 'elective dictatorship' in Bangladesh where the winner in election takes it all and parliament acts merely as the rubber stamps of the executive. 'Constitution, Constitutional law and Politics: Bangladesh PerspectiveA Comparative Study of Problems of Constitutionalism in Bangladesh, Md. Abdul Halim at p. 179)

A minister, though now may not be the chairman of parliamentary standing committee but may be a member of the committees still an undemocratic provision. Again there is no provision in Bangladesh allowing taking evidence in public by committees. Surprisingly the ghost of Article 70 haunts the MPs even when they sit in Standing Committee which has been demonstrated in the role of the former Prime Minister Begum Khaleda Zia when she asked the chairman of parliamentary standing committee inquiring into the allegation of CNG scandal against her communication minister not to embarrass her government.

The President while appointing Judges of the Supreme Court is bound by the advice of the Prime Minister except in case of Chief Justice [Article 48(3)]. The provision of consulting the Chief Justice is gone with the Fourth Amendment and is yet to be revived. In fact President is bound even in appointing Chief Justice because of the proviso added to Article 48(3).

The practice of appointment of Additional Judges in the Supreme Court for such a short duration appears to be peculiar in our part of the world. It has adverse effect on the reasoned and impartial decision making by those judges. It proves to be a political weapon in the hands of the Prime Minister to tame an adverse Supreme Court.

### Concluding remarks

So it has been made apparent that in Bangladesh we have got a mere paper separation. It has been rightly said that 'What the constitution has done can very well be described as assignment of powers of the Republic to the three organs of the Government and it provides for separation of power in the sense that no one organ can transgress the limit set by the Constitution. Or encroach upon the powers assigned to the other organs.' (Constitutional law of Bangladesh, Mahmudul Islam at p. 65).

The ongoing reform talk must have given attention also to the structural and institutional reforms in the fabric of state mechanism. Any party or alliance that come to the power next must make a concrete manifesto in this regard. It has to clarify how it would deal with the flaws in the Constitution itself in this regard.

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## Star LAW report

# "Big progress in preventing violence" -WHO

Governments around the world are taking new and stronger measures to quell interpersonal violence and its life-long health consequences, a new WHO report shows. This week in Scotland, 200 of the world's leading experts in preventing violence gather for "Milestones 2007", to assess the advances that have been made, identify strategies for further expanding these, and advocate for increased investment by international development partners.

In the context of Milestones 2007, the WHO report documents progress in countries since 2002. Some key national achievements are:

- Brazil has published its first national report on violence and health and has completed a national inventory of over 300 violence prevention programmes;
- Malaysia has released its first national report on violence and health, developed one-stop crisis centres for victims of child maltreatment, and created services for survivors of intimate partner and sexual violence in all government hospitals throughout the country;
- Mexico has published its first national report on violence and health and established within the Ministry of Health a national centre for the prevention of violence and injuries; and
- The United Kingdom has published its first national report on violence and health, created the Violence Reduction Unit within the Scottish Executive, and has promoted the work of the Cardiff Violence Crime Task Group as a model for community safety partnerships nationwide. "With an improved understanding about what works to prevent violence in families and communities, the violence prevention field has reached a critical turning point," notes Dr Catherine Le Galès-Camus, WHO Assistant Director-General for Noncommunicable Diseases and Mental Health. "Milestones 2007 is an opportunity to draw lessons from the good work being done in many countries and define ways to scale up implementation in countries around the world."

Increased efforts to scale up violence prevention come when health policy makers and practitioners begin to fully understand the long-term consequences of violence. Other studies have also linked child physical abuse, intimate partner violence and sexual violence to excessive smoking, eating disorders, and high-risk sexual behaviour, which in turn are associated with some of the leading causes of death including HIV/AIDS, cancers and cardiovascular disorders. "Globally, the greatest challenge to scaling up violence prevention efforts remains a lack of investment in scientific, large-scale outcome evaluation studies, especially from low- and middle-income countries, where both the burden of violence and the cost of failure to invest in effective prevention are the highest," notes Dr Etienne Krug, Director of WHO's Department of Violence and Injury Prevention. "With those studies in hand, we would be well placed to scale up and globalise prevention." Milestones 2007 is being hosted for WHO by the Scottish Violence Reduction Unit in Kincardine, Scotland, United Kingdom, from 17 to 19 July 2007. It is the third in a series of meetings marking the anniversary of the launch of the landmark World report on violence and health released by WHO in 2002.

The report demonstrated the extent of the impact of violence. In 2002 (the latest year for which global estimates are available) an estimated 1.6 million people lost their lives to violence; more than 90% of those deaths are concentrated in low- and middle-income countries. Physical, sexual and psychological abuse undermines the health and well-being of many millions of people in all countries on a daily basis. Suicide and homicide are the 5th and 6th leading causes of death in people aged 15-44 years. Between three and seven million adolescents and young adults receive hospital treatment each year for a violence-related injury. "For the Violence Reduction Unit, the World report on violence and health was a revelation, in that it offered an innovative approach to the traditional methods of policing violent crime," notes Detective Superintendent John Carnochan, Head of the Scottish Violence Reduction Unit. "We are pleased to host Milestones 2007, and to share our experiences and learn from others."

Source: WHO Press release.

## HUMAN RIGHTSanalysis

# Disability related laws and policies in Bangladesh

ADVOCATE SADIA SULTANA

IN Bangladesh approximately 14 million people are with disabilities that constitute a significant part of the extreme poor people. They have not received adequate attention of the policy makers. As a result poor and severely disabled persons with are facing deprivation that makes them marginalized and vulnerable to all forms of repression. They face environmental and attitudinal barriers while trying to enjoy or exercise human rights and fundamental rights in the political, economic, social, cultural, civil or any other field on an equal basis with other citizens of the country. This article tries to identify the disability related laws and policies in Bangladesh and also to find out their shortcoming.

### The Constitution

Principles of equality and non-discrimination are the twin pillars, upon which the whole structure of human rights is established. Thus Bangladesh Constitution has a number of relevant human rights provisions reflecting this significant principle of equality. With this aim one of the fundamental rights enunciated by our Constitution is- *the State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, or place of birth*[Article 28(1)]. The Constitution also utters the responsibility of the state to make any special provision in favour of women or children or for the advancement of any backward section of citizens. In our social context if we identify the 'persons with disabilities' or 'challenged people' or 'differently able people' of our country as 'backward section of citizens', consequently, it binds the state with several liability to make them forward. Thus there is no chance to discriminate against any disabled person on the ground of his impairments as the Constitution recognises the principle of equality and non-discrimination for all citi-

zens. Some relevant Articles of the Constitution are-

**Article 11** of the Constitution states-*The Republic shall be a democracy in which fundamental human rights and freedoms and the respect for the dignity and worth of the human person shall be guaranteed.*

**Article 27** states, *all citizens are equal before the law and are entitled to equal protection of the law.*

**Article-28(4)** states, *Nothing in this article shall prevent the State from making special provision in favour of women or children or for the advancement of any backward section of citizens.*

**Article-29 (1)** states-*There shall be equality of opportunity for all citizens in respect of employment or office in the service of the Republic.*

Fundamental rights provided in **Part III (from Articles 26 to 47)**

**Article 122 (2)** states: *A person shall be entitled to be enrolled on the electoral roll for a constituency if he... (c) does not stand declared by a competent court to be of unsound mind.*

**Article 66 (2)** states, *a person is disqualified for election as, or for being, a member of Parliament who... (a) is declared by a competent court to be of unsound mind... Protibandhi Kollyan Ain, 2001*

The purpose of the Act is to protect and safeguard the rights and dignity of the persons with disability, ensure their participation in the national and social programmes and their general welfare. This text consists 23 Articles and 10 Parts (Part A to J). Being the first Act in Bangladesh to address disability issues it bears major structural deficiencies e.g. accountability, enforcement, immunity from suit, scope of the authorities to exercise arbitrary and undue power, lack of adequate representation in the committees, weakness in the committees, lack of adequate detail and a meaningless schedule having no implementation mechanism. It is a thin Act having weak and inadequate provisions. Practically we need a comprehensive new Act

rather than its amendments or else it is not possible to ensure the rights of this oppressed section of our society.

### Legal Aid Act, 2000

The purpose of this Act is to give legal aid to those persons who are poor, insolvent, destitute and otherwise incapacitated, for socio-economic reasons, to be engaged in legal fights. **Section 6** of this Act empowers a district committee to engage a lawyer, at the expense of the government, for a poor and destitute person who has become a victim of offences or abuse of power. This Act contains no specific provisions for persons with disabilities, but the terms 'persons who are poor, insolvent, destitute and otherwise incapacitated, for socio-economic reasons' might include persons with disabilities.

### Penal Code, 1860

**Section-84** of the Code states-*Nothing is an offence which is done by a person who, at the time of doing it, by reason of unsoundness of mind, is incapable of knowing the nature of the act, or that he is doing what is either wrong or contrary to law.*

**Code of Criminal Procedure, 1898 Chapter-34** (From Section 464 to 475) of the Code provides the following procedures in case of accused being a lunatic.

**Section-464** (Procedure in case of accused being lunatic)

**Section-465** (Procedure in case of accused being lunatic before Court of Sessions)

**Section-466** (Release of lunatic pending investigation, trial)

**Section-467** (Resumption of inquiry or trial)

**Section-468** (Procedure on accused appearing before Magistrate or court)

**Section-469** (When accused appears to have been insane)

**Section-470** (Judgment of acquittal on ground of lunacy)

**Section-471** (Person acquitted on such ground to be detained in safe



custody)

**Section-473** (Procedure where lunatic prisoner is reported capable of making his defence)

**Section-474** (Procedure where lunatic detained under section 466 or 471 is declared fit to be released)

**Section-475** (Delivery of lunatic of care of relative or friend)

**Lunacy Act, 1912**

**The Lunacy Act, 1912 (Act No. IV)** deals with mentally challenged persons. But the Act itself use negative terminology such as lunacy, idiot etc. *Section 3(5)* of the Act defines a lunatic as an idiot or a person of unsound mind. We should change our terminology and use some facilitative terms like intellectually disabled or mentally challenged person.

*Section 14* provides that the Magistrate, upon determination that a person is a lunatic, may make an order for admission of such lunatic into an asylum. *Section 15* states provision of punishments for the relatives and caretaker of a lunatic if

they maltreat or show any cruel attitude to him or her. Under *Section 16* Magistrate may order detention of a person for the purpose of determining whether or not he is a lunatic, but the maximum period of such detention shall not exceed thirty days. When an order has been made by the Magistrate to send a lunatic to an asylum, under *Section 23* pending his removal to an asylum, he may be detained in a suitable custody in such place as the Magistrate thinks fit.

Mentally challenged persons may be cured through proper care and treatment. But under the authority of the existing Acts of the country police arrest mentally challenged persons from street and detain them in custody as they disrupt public tranquillity. Often such a helpless mentally challenged person is arrested on very inept ground or under *Section 54* of the Code of Criminal Procedure, 1898. Some case studies give a horrible

scenario of the victims who are languishing in the prison or *Pabna Mental Hospital* or other receiving centres. Government should take initiative to properly rehabilitate them. If it is not possible, the authority concerned should send them back to their family without depriving them of the normal environment of the society; thus helping them to embrace the sound life they desire.

### Building Construction Rules, 1996

To accomplish the purpose of the Building Construction Act 1952 Bangladesh government constituted the Building Construction Rules, 1996 and the Dhaka Mohanagar Building Construction Rules, 2006. The Building Construction Rules, 1996 lay down provision for ramp in its **Rule-5(5)** and **Rule-13**.

### Dhaka Mohanagar Building Construction Rules, 2006

The Dhaka Mohanagar Building Construction Rules, 2006 provides rules for easy accessibility of disabled people in all appropriate buildings (e.g. for the areas in Dhaka Mohanagar under The Town Improvement Act, 1953). One will not get the occupancy certificate if he – the occupier – violates the rules while designing the building under this Building Construction Rules.

**Rule-75** provides special provision for universal accessibility including disabled people. It states that- (a) In each governmental and non-governmental building there shall be provision for universal accessibility including disabled people. Provided that, in residential building such provision for accessibility shall be at least 5 percent in its entire part.

(b) Universal accessibility including disabled people must be ensured in building for 'public use' (e.g. commercial building, shopping complex, health care centre, educational institution etc.) over an area of 100 square meters.

(c) In each floor of all appropriate buildings there shall be at least one toilet or 5 percent of total toilet in the building whichever is higher in number, for universal accessibility including disabled people, which is easily accessible and well-indicated.

(d) In each parking space of all appropriate building there shall be at least one parking space or 5 percent of total parking space in the building whichever is higher in number, for universal accessibility including disabled people.

**Schedule-3** set up a minimum standard for easy accessibility of disabled people in building. This standard is set up for easy access through specific provision for entry or exit, ramp or handrail, lift, parking spaces, wash room and toilet. This schedule specifically declares that-

- there will be no revolving turnstile in the entry;
- there shall be enough space for the movement of wheelchair in the footpath, corridor or other walkway;
- there shall be provision for ramp

and handrail for accessibility of disabled people;

- if it is not possible to provide lift or ramp, there shall be provision for wheelchair lift or platform lift in special cases;
- the parking space for universal accessibility shall be closer to the exit;
- there shall be western commode in the toilet;
- the washbasin system must be accessible to the wheelchair user;
- There will be no enclosure in the floor of the bathroom.

In its **Schedule-1** it states of provision for **ramp in parking spaces**. There is provision for **exit ramp** with guard or handrail in its **Annexure-3**.

### The National Policy on Persons with disabilities, 1995

It is a compilation of policies to ensure all rights and facilities for persons with disabilities which includes 14 chapters on prevention, detection and intervention, early intervention, assistive devices, education, rehabilitation, human resources development, employment, research, accessibility and facilities for movement, information, recreation, self-help movement and implementation and coordination. It also speaks of Article 15, 17, 20, 29 of the Constitution of Peoples Republic of Bangladesh.

All citizens and the government of our country should recognise persons with disabilities as 'citizens' of the country on equal basis without any discrimination. Without effective participation of this large number of population no development can reach its envisaged goal. Hence we need adequate disability-friendly laws and policies in our country and their effective implementation mechanism.

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