LAW *opinion*

Biding goodbye to the ghost of 'delinquency'

M. JASHIM ALI CHOWDHURY

'IT is yet to be seen whether the Court has 'put our records correct' forever or not' - such was the conclusion of my write up in the *Law and Our Rights* on February 14, 2009. Then I was reviewing the historic judgment of the High Court Division in the celebrated *5th Amendment Case*. With a heart full of content, today I see the august citadel of justice not only put the record correct but also decides to bade the ghost of *Dosso* [*State* v. *Dosso* 11 DLR (SC) 1] a good bye from our jurisprudence forever. I'm speaking of the recent 184 page judgment of the Appellate Division in *5th Amendment Case*.

It is a mere piece of land and the building standing on it - The Moon Cinema Hall - that has shaken the earth to dislodge the basement of 'palace clique, deception and disappointment' 'the long shadows of the Marshals.' Starting the voyage with the Writ Petition No 67 of 1976, the ship sees the shore in Civil Petition for Leave to Appeal Nos. 1044 & 1045 of 2009. It is not only a piece of land that is restored, rather it is a nation's 'dignity, honour and glory achieved through great sacrifice' that is reestablished (p 181).

Not unexpectedly the Appellate Division has accepted almost all of the points advanced by the High Court Division with a little modification in the condonation part. By unequivocally rejecting 'any ground, principle, doctrine or theory whatsoever' justifying the Military Rule (p 181), the Court marked a 'total disapproval of Martial Law and suspension of the Constitution or any part thereof in any form' (p 184). The inevitable consequence of the verdict is that the Preamble and relevant provisions of the Constitution in respect of secularism, nationalism and socialism, as existed on August 15, 1975, will revive (p 125). However, two of the exceptions that Appellate Division made to the High Court Division verdict deserve special attention

Bangalee Nationalism revisited

In respect of nationalism, the Court is inclined to condone the substituted provision of Article 6. The consideration on which the Court does so is, in the words of the Court, 'if in place of "Bangladeshi" the word 'Bangalee' is substituted, then all passports, identity cards, nationality certificates issued by the Government and other prescribed authorities, certificates issued by educational institutions, visa forms and other related documents of the government will have to be changed, reprinted or reissued. Moreover the Bangladeshi nationals who will return to Bangladesh as well as those traveling abroad will also face serious complications with the immigration authorities abroad. Apart from the above and other hackles and harassments, this change of the nationality would also cost millions from the public exchequer. So for wider public interest the substituted Article 6 is to be retained.' (p 125)

Such an economic outlook, it is humbly submitted, may serve in lightening the weight of a serious constitutional issue like nationalism. Perhaps condonation of the change in Article 6 might have been based on some thing else. In my constitutional law lectures I respond to my students' query from a different perspective. To me, nationhood is something different from citizenship. A nationality grows out of common descent, common heredity and common environment. To be a nation a people need, apart from geographic unity, a community of language, religion, interest and political aspiration. Our nationhood arises out of the racial origin we belong to. We are the Bangalees having root in our ethnic homogeneity irrespective of our religious diversity. On the other hand, in terms of citizenship - a mere political status - we unfortunately had to bear so many identities. Before 1947 we were the British Indians, thereafter the Pakistanis and now the Bangladeshis. Our political status changed over times. But ethically, linguistically and culturally we remain today what we were thousands years ago Bangalees.

Undoubtedly it was the spirit of Bangalee nationalism, our proud sense of being Bangalees and the Pakistani junta's prejudice towards the 'Bangalee Babus' that spearheaded the historic struggle for national liberation in 1971. Bulgakpur (land of rebels) to Bangladesh it was the Bangalee nationalism that lit the light all through the way. To dispel the conspiracy to delete the word Bengal forever from the map of East Pakistan, East Pakistan became 'Bangladesh' on December 5, 1969. 'Except the Bay of Bengal there is no sign of the term 'Bengal' anywhere', Bangabandhu regretted that day. Even in August 25, 1955, in spite of severe opposition from Muslim League and Islamic political parties in the Constituent Assembly, Bangabandhu opposed renaming East Bengal as East Pakistan, 'Sir, you will see that they want to place the words 'East Pakistan' instead of 'East Bengal'. We have demanded so many times that you should make it Bengal (Pakistan). The word 'Bengal' has a history, has a tradition of its own' (*Dr. M A Salam* v. *Bangladesh* 18 BLT (Spl) (2010) 1, Para 15). Hence, the original Article 9 read with the original Preamble truly justified Bangalee Nationalism as a corner stone of the nation state Bangladesh.

Even then specification of nationalism in the sense of citizenship might have been avoided in 1972. Article 6 may accommodate the Bangladeshi Citizenship without any substantial damage to the Bangalee Nationalism in Article 9. However, it must also be recorded that the dictator substituting Bangladeshi for Bangalee in Article 6 was not so pious as to correct a mere clerical mistake. Rather it was a part of the conscious plot to dislodge the Bangalee nationalism, a structural pillar of the liberation struggle, from the Constitution. Article 9 was substituted with a non significant provision to 'encourage' local government institutions. Robbing Peter to pay Paul!

Hence, while reviving the original Article 9 and leaving Article 6 as it is, the Honorable Court, it is submitted, might have put its reasoning a bit differently.

The Supreme Judicial Council retained

Apart from Article 6, the Appellate Division decided to condone the introduction of Supreme Judicial Council in Article 96. Earlier a Judge of the Supreme Court of Bangladesh may be removed from the office by the President on the ground of "misbehavior or incapacity" by a two-thirds majority in the Parliament. Under the amended procedure a Judge of the Supreme Court of Bangladesh may be removed by the Supreme Judicial Council. The Court found this substituted provision to be 'more transparent' than that of the earlier one and 'safeguarding independence of judiciary' (p 177). It is respectfully submitted that this observation of the Honorable Court may miss the core issue of separation and balance of power. Article 92A empowering the President to dissolve a 'derailed' Parliament was an import from Pakistan. With a rubber stamp parliament in hand, the 'President' needed complete control over the judiciary as well. Hence the concept of Supreme Judicial Council was also copied from Pakistan and pasted in Article 96. Side by side, the provision for consultation with the Chief Justice in appointing the Supreme Court Judges was consciously not revived. Now appointment and removal of Judges both remain in the hands of the executive. Parliament remains to be a mere deliberative forum for 'ratifying, confirming and validating' all the illegalities committed by the illegal President.

It is submitted that removal of judges by the Parliament with a two-thirds majority goes more with the doctrines of separation of power and checks and balances. It must not be forgotten that the Parliament requires a two-thirds majority to amend the constitution itself. With a requirement of two-thirds majority for their removal, Judges of the Supreme Court are more valued than they are under the present scheme of Article 96. Moreover, a parliamentary proceeding is at any rate more transparent than an executive one and the independence of judiciary is not less safeguarded under this scheme. It is my humble wish that the apex Court may not have condoned the changes in Article 96.

In lieu of conclusion

Now-a-days in Bangladesh, a history is in the making. With the Martial Law declared unconstitutional, illegal, mischievous and not founded on any known source of law, the whole nation goes out of a state of siege. No more 'We, the people of Bangladesh,' wish to be taken hostage (p 151). We want to 'see that the Constitution is upheld, it is not kept in suspension, abrogated, it is not subverted, it is not mutilated, and to say the least it is not held in abeyance and it is not amended by any authority not competent to do so' (p 182). 'Let us bid farewell to all kinds of extra constitutional adventure for ever,' the Court invites. Yet the question remains, 'Is the Court the only light at the end of the tunnel?' May the courts change the course of the history? True it remains, as it was, a military coup does not depend on the court's justification or judgment. Rather it conversely controls the courts and judges. Therefore ultimately it is the politics pure and welfare politics that can determine the course of the history. The Court has discharged its historic burden 'so that the history never repeats' (p 155). Are the politicians ready to discharge theirs?

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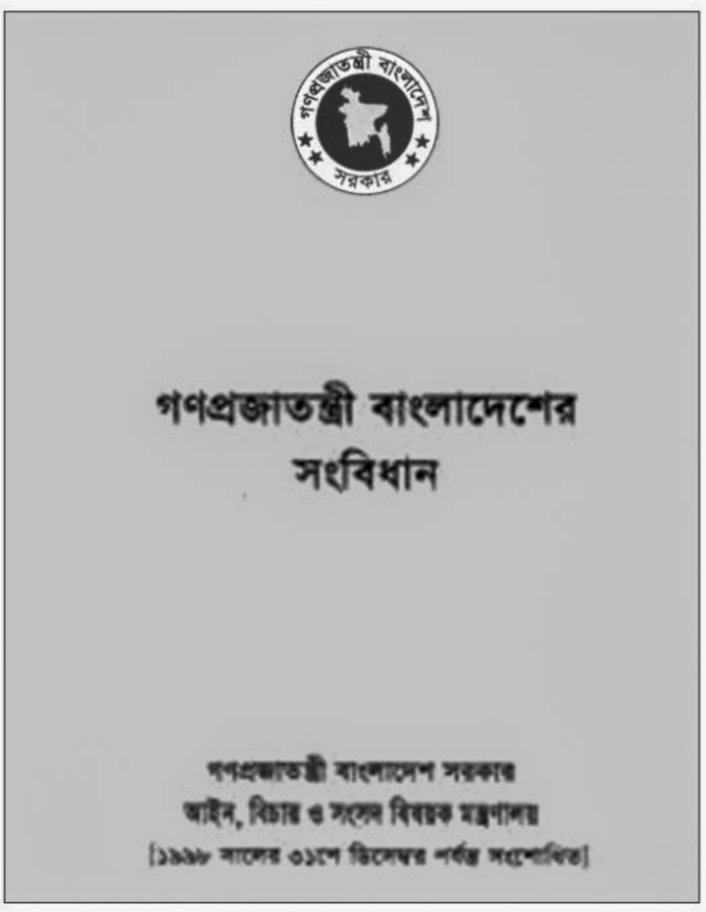
COURT *corridor*

Pursuit of a democratic and secular constitution



SAMIUL HASHIM

THE Fifth Amendment passed in 1979 gave constitutional legitimacy to the governments came after the 1975 assassination of the country's founding President Bangabandhu Sheikh Mujibur Rahman. The Fifth Amendment had allowed the religion-based political parties and added the Arabic 'Bismillah-ar-Rahman-ar-Rahim' or in the name of God, the most merciful, benevolent in the preamble of the Constitution.

Fifth Amendment of the constitution was done to accommodate the constitution to give validity to the unlawful taking over of State power after killing of father of the nation Bangabandhu. Fifth Amendment issue arose when the petition regarding ownership of Moon Cinema Hall in Wise Ghat in the capital Dhaka, was filed in the High Court challenging the legality of the Martial Law Regulation of 1977. On 29 August 2005, High Court Division declared Fifth Amendment illegal following that petition

Further, on 2 February 2010, the Appellate Division (hereinafter AD) rejected two separate petitions namely C.P. Nos. 1044 & 1045 of 2009 (5th Amendment), which was filed against a judgment of High Court that declared the Fifth Amendment illegal. The detail judgment with modifications was published 27 July 2010, seventy four days after passing the verdict.

The six-member full bench of the AD, headed by former Chief Justice Mohammed Tafazzul Islam, along with Mr. Justice Mohammad Fazlul Karim, Mr. Justice Md. Abdul Matin, Mr. Justice Bijan Kumar Das, Mr. Justice Md. Muzammel Hossain, Mr. Justice Surendra Kumar Sinha, passed the judgment with modifications.

AD had upheld the High Court verdict. The AD also emphasizes on punishing and taking pre causations to prevent further any further infringement of the Constitution in future. There are some imperative facts of the Judgment which may satisfy many curious minds, as they follow:

(i)Supreme Court declared the fifth Constitutional amendment illegal which had allowed religion-based political parities to flourish in the country. Therefore it will lay concrete on the way for the government to ban Islamic groups. Though, main portion of the verdict makes no reference to use of religion for political purposes,

(ii)Martial law was declared illegal.

(iii)The expressions in the original 1972 constitution, "a historic struggle for national liberation" would substitute the expression "a historic war for national independence", inserted by the 5th Amendment.

(iv)Nationalism would remain 'Bangladeshi'.

(v)It upheld the decision that taking over of State power by Khandaker Mushtaque Ahmed, Abu Sa'dat Mohammad Sayem and Maj Gen Ziaur Rahman from August 15, 1975 to April 9, 1979, was illegal and unconstitutional. However, it exempted certain measures and administrative works of those regimes initiated for public welfare. Other than this, all the changes in government from August 15, 1975 right up to the national elections of 1991 were unconstitutional.

(vi)It upheld the decision of High Court in going back to four principal policy of state by 1972 constitution e.g. Democracy, Nationalism, Secularism and Socialism. AD made no further modification as to this, so the constitution can go back to it former position.

(vii)It did not modify the changes brought by the Fifth Amendment of appointing High Court Judges. So it remains the same i.e. the President will only have the power to appoint the Chief Justice and he can appoint the other justices of the High Court by consulting the Chief Justices.

(viii)AD also upheld the provision by Fifth Amendment of forming Supreme Judicial Council in case of any expulsion of Justices of the Supreme Court.

AD approved the judgment of the High Court Division subject to certain modifications. All the findings and observations in respect of Article 150 (Emergency period) and the Fourth Schedule in the judgment of the High Court Division are hereby expunged, and the validation of Article 95 is not approved. In respect of condonation made by the High Court Division, the following modification is made and condonations are made as under:

(a) all executive acts, things and deeds done and actions taken during the period from 15th August 1975 to 9th April, 1979 which are past and closed;

(b) the actions not derogatory to the rights of the citizens;

(c) all acts during that period which tend to advance or promote the welfare of the people;

(d) all routine works done during the above period which even the lawful government could have done.

(e) (i) the Proclamation dated 8th November, 1975 so far it relates to omitting Part VIA of the Constitution;

(ii) the Proclamations (Amendment) Order 1977 (Proclamations Order No. 1 of 1977) relating to Article 6 of the Constitution.

(iii) the Second Proclamation (Seventh Amendment) Order, 1976 (Second Proclamation Order No. IV of 1976) and the Second Proclamation (Tenth Amendment) Order, 1977 (Second Proclamation Order No. 1 of 1977) so far it relates to amendment of English text of Article 44 of the Constitution;

(iv) the Second Proclamation (Fifteenth Amendment) Order, 1978 (Second Proclamation Order No.IV of 1978) so far it relates to substituting Bengali text of Article 44;

(v) The Second Proclamation (Tenth Amendment) Order, 1977 (Second Proclamation Order No. 1 of 1977) so far it relates to inserting Clauses (2), (3), (4), (5), (6) and (7) of Article 96 i.e provisions relating to Supreme Judicial Council and also clause (1) of Article 102 of the Constitution, and (f) all acts and legislative measures which are in accordance with, or could have been made under the original Constitution.

The constitution's amendment has become a necessity. It seems that pursuit of a democratic and secular constitution for the long ravaged country is becoming an imperative. It is hoped that the country is not to be intruded by any person further to vindicate personal gain.

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GOOD NEWS

Cluster bomb ban treaty takes effect worldwide

THE worldwide ban on cluster bombs that comes into force on 1 August, marks the most groundbreaking disarmament and humanitarian treaty in over a decade, Amnesty International said on Sunday.

The Convention on Cluster Munition, which bans cluster bombs and compels states to assist victims while clearing their land of munition, will become binding international law in countries that have signed and ratified the treaty, including Spain, Japan, Niger, Mexico and the United Kingdom.

"This treaty is a crucial step towards protecting civilians, during and after armed conflict, from this cruel and indiscriminate weapon," said Sauro Scarpellli, Amnesty International weapons campaigner.

"As with the treaty banning anti-personnel landmines in 1997, this convention is a landmark victory for civil society campaigners across the globe and shows that governments are willing to end civilian suffering caused by cluster bombs."

Amnesty International and hundreds of NGOs and survivors of indiscriminate cluster bomb explosions have been campaigning for a total ban on cluster munition. Adopted in Dublin on 30 May 2008 and opened for signature in Oslo in December 2008, the Convention bans the use, production, stockpiling and transfer of cluster munitions.

It also calls for stockpiles to be destroyed within eight years; for cluster munition-contaminated land to be cleared within 10 years; and for assistance to cluster munition survivors and affected communities. To date, 107 countries have signed the Convention and 37 have ratified. Among them are former users and producers of cluster munitions, as well as countries affected by the weapons.

The last confirmed use of cluster munitions in a major armed conflict met with international condemnation when both Russia and Georgia used them in the conflict over South Ossetia in August 2008. In recent weeks, Moldova and Norway destroyed the last of their cluster munition stockpiles, joining Spain, which eradicated its stockpile last year.

Nearly a dozen other states have begun destruction, including the United Kingdom, a major former user and producer of cluster munitions. Amnesty International has called on all governments that have not already signed the treaty, to do so immediately and commit to protecting civilians from the deadly effects of armed conflict.

Source: Amnesty International.