LAW *alter views*

Reminiscence of a lost battle: Arguing for the revival of second schedule

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THE original Constitution of 1972 with so many of its illuminating features is not excessively hailed as a document of hope. So many of its features had cures to so many of the hazards created by its post-martial-law version. Take for example the issue of a significant presence of Bangabhaban in national life. The majestic fashion in which the high stature and weight of a 'titular' Presidency was upheld in the original constitution, if kept alive could have served its institutionalisation immeasurably. In recent years, unfortunately the President, 'a symbol of national unity', is not less partisan then the Cabinet itself! But what did the original constitution contemplate?

Electing the President

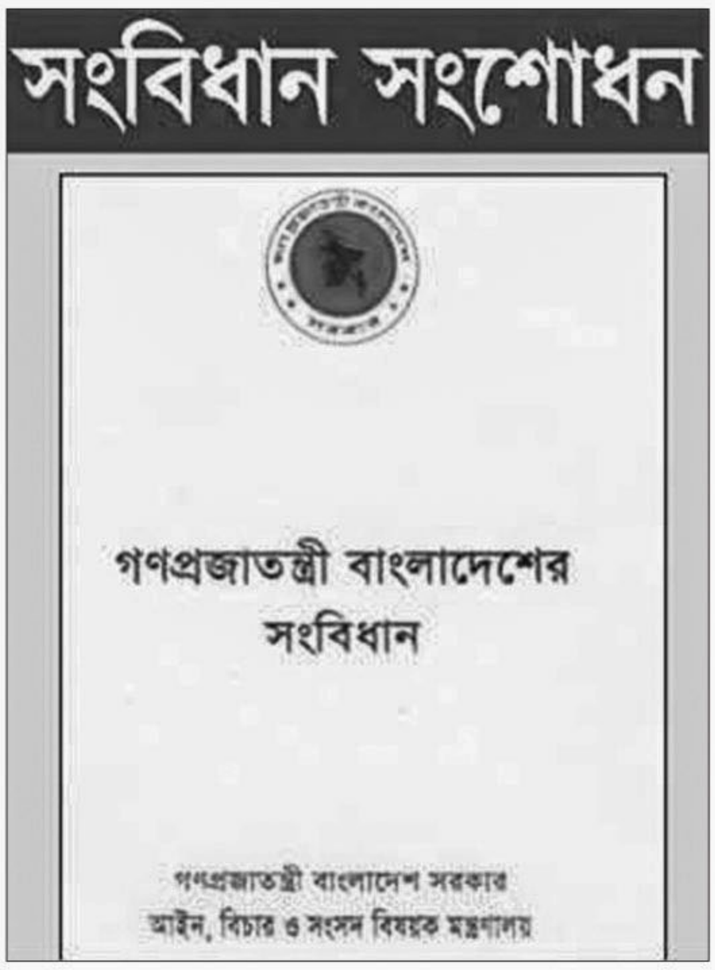
The framers of the Constitution 'had the foresight to apprehend that this country might not always be served by wise, conscientious and true patriotic persons' (The Appellate Division in 5th Amendment Judgment, p 58). Perhaps as a pre-caution on their part, they prescribed a commendable method of electing the President. It was taken care of that no MP, while voting to elect the President, act as a mere party puppet supporting the party nomination. Article 48(1) of the original Constitution prescribed the procedure which was exhaustively elaborated in the Second Schedule. The Second Schedule introduced a Secret Ballot system of voting. No ballot or its counter foil could bear any mark or sign giving any clue regarding the identity of a particular MP voting. Even there was a provision in Paragraph (12a) of the Second Schedule for cancelling a ballot if there was any sign of identification of the voter. The MPs were to act as liberated agents voting for any candidate they like.

For obvious necessity of the new system, the Second Schedule was omitted by the 4th Amendment. Till then it was not revived, not even by the 12th Amendment reviving the Parliamentary Democracy. Rather the 12th Amendment caused the Article 48(1) provide: 'There shall be a President of Bangladesh who shall be elected by members of Parliament in accordance with law.' Instead of 2nd Schedule, now Parliament is to enact law regulating the Presidential election. Accordingly the President Election Act, 1991 was passed in the Parliament. The President Election Rules 1991 were made by the Election Commission in pursuance of the Act.

Section 10(3) of the 1991 Act provides that Election Commission should prepare ballot paper of the required number and each ballot paper should have two parts. In the counterfoil in each ballot paper the name of the elector (i.e, the MP voting for a candidate) should be written. An MP is required to sign his name both in the outer foil and counter foil making his choice vulnerable to exposure. Section 11 provides that the Chief Election Commissioner, as the Returning Officer, shall count the votes openly.

Why open ballot?

The ulterior motive behind the introduction of Open Ballot system was exposed when the BNP government nominated for the Presidency Mr. Md. Abdur Rahman Biswas, controversial for his Anti-Liberation War role during 1971. The ruling party ignored the repeated call from the main opposition Awami League (AL) to nominate a candidate acceptable to all. AL, though was sure of the defeat of its candidate, nominated Justice Badrul Haider Chowdhury, an ex Chief Justice of Bangladesh. In the meantime criticism and conscientious objection against the BNP nomination was raised across the country. Situation was such that



even some pro-liberation war MPs of the ruling BNP were considering to vote against Mr. Abdur Rahman Biswas. On October 8, 1991 the election was held and the ruling party candidate escaped an almost defeat. Out of 330 votes, Mr. Biswas secured 172 (least votes needed were 166) and Justice BH Chowdhury got 92 votes. A total of 66 MPs refrained from voting.

Abdus Samad Azad v. Bangladesh: The forgotten battle

As a last resort after the election, six MPs of AL namely, Abdus Samad Azad, Suranjit Sen Gupta, Tofael Ahmed, Matia Chowdhury, Rahmat Ali, Md Nasim and Prof. Abdul Hafiz challenged the President's Election Act 1991. Br Moudud Ahmed, then a Jatya Party MP, also challenged the Act and the Rules [44 DLR 354]. As the writ petitions involved similar questions of laws, they were considered together before the Bench of F.H.M Habibur Rahman and Abdul Hasib JJ. While the Senior Judge of the Division Bench M Habibur Rahman J rejected the writs summarily, Abdul Hasib JJ issued a Rule Nishi (And later on, Justice Hasib was not confirmed as a permanent Judge of the High Court Division!). Ultimately the issue was thrown to the Single Bench of Anwarul Hoque Chowdhury J.

The Petitioners' Claim - The intention of the petitioners was not the revival of Second Schedule through judicial order. In fact the Court lacked such power. They were simply trying to argue that any law in this regard must provide a procedure more or less similar to the omitted Second Schedule. Even in the absence of Second Schedule, the over all scheme and spirit of the Constitution warranted a 'Secret Ballot' voting in Presidential Election. Barrister Amirul Islam appearing on behalf of the petitioners attacked the 'Open Ballot' from three sides:

First, Open Ballot system was repugnant to Article 39 of the Constitution guaranteeing unconditional and unrestricted freedom of thought and conscience. Since the 1991 Act put a bar on the independent and conscientious decision making by the MPs voting for the Presidential Candidates, now their fundamental right to choose the President freely was put at a stake.

Second, considering the Preamble and Articles 7 and 11 as a whole, the 1991 Act stroke at the 'Basic Structure' of the Constitution by converting the concept of 'Presidential Election' into a mere 'Selection' (Para 6).

Third, by the 1991 Act, the vice of Article 70 would be unnecessarily extended to the Presidential Election. MPs voting in Open Ballot would run the risk of losing his seat, had he voted against the candidate nominated by his party. The philosophy behind the inclusion of Article 70 was to prevent malicious defection and unnecessary defeat of the Cabinet in the floor. Therefore its effect should be limited only to the essential legislative affairs. The intention of the framers of the Constitution not to allow Article 70 operate in Presidential Election was evident in the Second Schedule (Para 26).

The Attorney General's defence - The then Attorney General Barrister Aminul Huq was very much literal and subjective in his arguments:

First, to the Attorney General, the right to vote was not a fundamental right. Being a creation of statute it could be regulated or even taken away by another statute. To him, choosing the method of voting was a matter of political convenience and necessity of particular occasion and no one could claim a fundamental right to vote in a particular method.

Secondly, voting by Open Ballot was not totally unknown to the Constitution, specially when election of the Leaders of the House and Opposition, Speaker, Deputy Speaker etc were held through Open Ballot (Para 7). Here the Attorney General cautiously evaded a vital difference between these offices and the Presidency. That the level of 'neutrality' expected from the President was much higher than the expectation from these offices was totally bypassed.

Thirdly, regarding the operation of Article 70, the Attorney General straightly argued that political parties should get priority in all public affairs. MPs were bound by the party mandate and directions. People elected them on the basis of party and so they had a right to know for whom their representatives were voting!

The Court's response - The Court upheld the arguments of the Attorney General in its totality (Para 18, 20 and 22):

First, it offered a new dimension to the concept of 'Freedom of Thought and Conscience.' The gist of the concept may be summed up as follows: Unrestricted freedom of thought and conscience relates to the 'Private Liberty' of citizens. Private Liberty is an opportunity to express freedom of choice in those areas of rights where the result of its effort mainly affects that individual and none else. An MP while voting in Presidential election doesn't exercise Private Liberty rather he performs a public duty. In exercising public duty no unrestricted thought and conscience is available (Para 25).

Secondly, the Court was sharp in rejecting the basic structure approach. Neither the right to vote nor the right to secret vote were fundamental rights or policy to be treated as a salient feature of the Constitution to attract the doctrine of Basic Structure (Para 20).

Thirdly, interestingly, while emphasizing the necessity of following the party line the Court seemed to be 'more executive minded than the executive' - to quote Lord Atkin from Liversidge v. Anderson 142 A.C. 206. The inherent restrictiveness in Article 70's applicability was not taken care of. Rather it was interpreted to be a super encompassing one: "There is a self imposed restriction in Constitution itself which speaks of the role of a political party and its manner of influence upon a member of a political party, voted to Parliament under its ticket. An MP is thus not a free agent to act while voting in Parliament" (Para 20).

Putting arguments into action

Apparently this last effort of prominent AL legislators was lost to some technical, non-liberal and bookish stances taken by the State and the Apex Court. But what about the political commitment showed by AL thereby? Does it still remember the legal battle it fought for the dignity of Presidency? At least Sri Suranjit Sen Gupta and Mr. Tofael Ahmed should not forget. History has put on them the burden to put their arguments into reality. Therefore, we want complete revival of the 2nd Schedule.

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HUMAN RIGHTS *advocacy*

Securing food security: A looming human rights challenge

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RIGHT to food is an undeniable human right and is also unavoidable right for other forms of life in this mother planet. It is universal irrespective of race and sex, region and religion. It is the first and foremost right of a man. On recognition of its priority, almost all the human rights instruments of the world have set forth this right as one of the basic need for the people and made it obligatory for the states to comply with this fundamental human right. The Universal Declaration of Human Rights-the key human rights instrument of the world's people, has set forth a specific provision on the right to food as a standard of living adequate for the health and well-being of the people (Article 25). But the realization of the right is the challenge that loomed large threatening the health and well being of the present and future generations simultaneously. The right is universal and the challenge is global.

Even with this universal disposition of human need, it is yet to get a universal delineation in any international human rights instruments. The reasons are its obvious correlations with various factors which are different in perspectives. However, the Committee on Economic, Social and Cultural Rights conceptualised the access to food in a broader way which is applicable to every man, woman and child all the over world. To the Committee, access to food means physical and economic access to it.

Further development of the concept of the right to food is found in the observation of the Special Rapporteur on right to food. He has put some conditions which are very closely linked to the realization of access to food for all. Regular, permanent and unrestricted access are the prerequisites to deem that the right to food is ensured. But unfortunately, millions of people in the world do not have regular, permanent and unrestricted physical and economic access to food. They are deprived of having quantitatively and qualitatively adequate and sufficient food which thwarts their right to lead a dignified life and availing all other basic human needs.

Right to food is declared as the universal human right as per most international and regional human rights instruments. Those instruments also laid down some policies, guidelines and guiding principles to enable a country to be free from hunger and malnutrition and to cope with the challenges of food security. Implementation of the provision of Article 25 of the UDHR is a far cry so far the scarcity of food in the world is concerned. Standard of living adequate for health and well being is not possible leaving around half of the population in hunger and 50% of the child malnourished. How these malnourished children will overcome the future challenges and lead a productive life is another imminent challenge.

A more comprehensive approach regarding access to food is articulated in the ICESR where states are made responsible to ensure adequate standard of living including right to food, clothing etc. The terms and principles of the ICESCR followed those of the UDHR. Both the instruments considered adequate food, clothing and housing as the prerequisites for adequate standard of living, but the latter besides acknowledging the state's responsibility, has put some guiding principles in it to ensure access to food for the people. The scope of taking appropriate measures in national, regional and international level has been pointed out in the ICESCR.

Appropriate measures in national level call for government interventions in ensuring a society free from hunger and malnutrition. The government is under an obligation to accomplish and cherish three types of obligations-respect, protect and fulfill. The government which respects that right will refrain from taking any negative actions which are arbitrary in nature. Furthermore, it will take affirmative actions to foster it. Affirmative actions also include formulation of appropriate laws (article 2(1) of ICESCR) and policies and strengthening state mechanism as well. Initiating massive governmental programmes and schemes involving all government institutions is of paramount importance in this regard.

Right to food is particularly dealt with in several international and regional documents. The Rome Declarations and other documents are very specific about the right to food. The Universal Declaration on the Eradication of Hunger and Malnutrition which was adopted by the World Food Conference held in Rome is another one which described the ways for all states to take any measure appropriate to ensure food security. The state can implement internal legislation and can have sovereign judgement to deal with the challenge. The Additional Protocol to the American Convention on Human Rights recognized some economic, social and cultural rights for it citizenry which includes right to work, the right to health and the right to food etc. So, the right to food is guaranteed in almost every country or region by any international or regional human rights instruments. The problem lies with the implementation of those instruments by states concerned.

The states have to formulate laws and policies in the light of those international and regional human rights instruments. The basis of necessity of incorporating the right to food in the constitution cannot be ignored. Getting the constitutional status of any right or provision indicates the priority of issue. It makes the government institutions accountable and sincere in respect of taking further actions to achieve the goal. Regarding right to food, we are yet to have such legal framework to the extent that could be enforced by law. Some rights groups are advocating for incorporating the right to food in the constitution on the plea that there is no reference to it in our constitution. But, article 15 of the constitution laid down the provision on some basic necessities including the right to food, though those are not enforceable by law as the same are directive in nature for the state. However, the right to life and personal liberty is cited in our constitution in the fundamental rights chapter. But, the relation between right to life and right to food is yet to be established in legal interpretations.

Unlike ours, the constitutions of some other countries have included the right to food as a fundamental right. Of late in this year, the constitution of the republic of Kenya has recognized the right to food in their constitution. The provision has been articulated in article 43. The article referred the right to adequate food in the context of economic, social and cultural rights. The provision of this article has followed the principles contained in the ICESCR. The constitution also acknowledged the duty of the state and state organs to observe, respect, protect, promote and fulfil the rights. South Africa has incorporated the

provisions in the constitution that was adopted in 1996 (Article 27). The constitution also obligated the state to comply with the provision. It clearly says, "The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights (Article 27 (2)). The constitutions of Ecuador, Nepal and some other countries have put the right to food in their constitutions. Some countries like India, Brazil, Guatemala, Mali, Nicaragua and Malawi have enacted special legislations regarding right to food. Some judicial developments have also been attainted in those countries. The courts of those countries are treating the issue very progressively and deliver progressive decision on the right to food. About 30 countries have included right to food in their constitutions.

It is to be added here that food security is yet to be met in those countries where right to food is included in their constitutions. Even formulation of special laws is not enough to ensure food security for the people. The ground reality is that incorporation of the right in law book cannot ensure the realization of the rights. Scarcity of food is necessarily not the only reason of hunger and malnutrition as has been observed by Amartya Sen. The prevalence of Complex interrelations amongst the multiple factors play the pivotal role behind issue.

The scarcity of food and inaccessibility of this right are acute in our country and thus the challenge is ominous. Many people of our country live below the poverty line and are not financially capable to purchase their daily food resulting severe malnutrition and unhealthy life. Most of the negative factors are present in our national perspective. To meet the challenges in our country is more difficult than most other countries of the world.

A coordinated approach amongst the government machineries is utmost important to overcome the situation. The initiatives as indicated by those human rights instruments are to be implemented in national jurisdiction. Intergovernmental coordination in technology transfer, knowledge sharing and all other appropriate measures to combat the challenge is necessary. And last but not the least, participation of people will give impetus to the struggle for a society free from hunger.

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