

"ALL CITIZENS ARE EQUAL BEFORE LAW AND ARE ENTITLED TO EQUAL PROTECTION OF LAW"—ARTICLE 27 OF THE CONSTITUTION OF THE PEOPLE'S REPUBLIC OF BANGLADESH

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RECENTLY a public debate has emerged on the sovereign status of Bangladesh Parliament. The debate is triggered by the decision of the Supreme Court not to allow its Registrar to appear before the Parliamentary Standing Committee on Law, Justice and Parliamentary Affairs despite a formal invitation for such appearance. The Chair of the Committee has argued that Parliament is sovereign and its standing committee is competent to issue such an invitation. Whether the Supreme Court should send its representative to parliamentary standing committees is not commented here. Instead, the central issue of the debate on the sovereign status of Parliament is briefly examined below.

Any parliament created by, and operative under, a written constitution cannot enjoy unfettered functional competence particularly in law-making. This is because the written constitution is the supreme law and parliament is made to operate within the set constitutional limits. Parliament under a written constitution does not possess any intrinsic law-making power, which actually comes from the constitution. This derived law-making power of parliament, however extensively and passionately one may construe, must be understood and exercised within, not beyond, the constitution. Such a parliament and its acts once defy and surpass the constitutional limit, they become unconstitutional and suffer from legitimacy crisis. This status of a parliament under a written constitution differs markedly from that of a parliament not created by, and functional under, a written constitution.

For example, Britain has no written constitution and its Parliament functions in the absence of any written constitutional limitations whatsoever. In other words, the British Parliament is a sovereign law-making body, whereas the US Congress, being operational under a written constitution, is not sovereign. The landmark decision of the US Supreme Court in Marbury v Madison (1803) declared an act passed by US Congress unconstitutional, thus establishing the judicial review power of the Supreme Court. The constitution vests Parliament with law-making power subject to its constitutionality. Whether a parliamentary act is constitutional is determined by the apex court by virtue of, and in exercising, its judicial review power. The apex court is the final arbitrator of the constitutional validity of any parliamentary act. Parliament under a written constitution therefore does not possess sovereign law-making power, which is contingent upon and subject to constitutionality.

Bangladesh has a written Constitution, which is the supreme law of the land. Bangladesh Parliament is a procreation of, and functions under, the Constitution. The Constitution imposes express limitations and specific conditions on the law-making functions of Parliament. Article 7 prevents parliament from making any law and/or amendment which is inconsistent with, or repugnant to, the Constitution. It is legally binding for Parliament to make law in compliance with the Constitution. A failure to comply would render such act/amendment of Parliament invalid to the extent of inconsistency or repugnancy. Parliament itself is not authorised to determine the constitutionality of its own act. The Judiciary, being the guardian and custodian of the Constitution, is entrusted to ascertain the constitutionality of any parliamentary act. The interpretation of all constitutional provisions is exclusively within the domain

of the Judiciary. Any competent court, particularly the Supreme Court, is empowered to judge whether a particular act of Parliament is consistent or not with the Constitution. This constitutional arrangement is designed to ensure the separation of powers with appropriate checks and balances between the government organs to avoid excesses and abuses of powers and functions.

Bangladesh Parliament is a non-sovereign law-making body by virtue of the restriction in Article 7 of the Constitution. Nor is it immune from any judicial review of the constitutionality of its act by the apex judiciary. It is the exercise of judicial power that held the parliamentary eighth amendment to Article 100 of the Constitution creating six permanent branches of the High Court Division unconstitutional in *Anwar Hossain Chowdhury v Bangladesh* in 1989. The recent decisions of the Supreme

Court proclaiming the unconstitutionality of the fifth and seventh amendments of Parliament are ample manifestation of the fact that Bangladesh Parliament is not mandated to enact any law that it deems appropriate but subject to an important condition of its constitutional validity, which is determined by the Judiciary by exercising its judicial review power. These parliamentary amendments surpassed the permissible law-making power under Article 7. By enacting these acts, Parliament had elevated itself to a status over and above the Constitution and ultimately suffered from legitimacy crisis. In view of the overt constitutional restriction on law-making and the judicial reviews of parliamentary acts referred to, any claim to sovereign parliament is misleading at its best and ignorant at its worst.

In a participatory democratic system, parliament ought to possess and exercise

transcendent power for democratic governance pursuant to the constitutional rule of law. Historically, the situation in Bangladesh is somewhat different. Political power exercised by incumbent governments has steadily created a strong executive, which is inclined to enhance its stature by controlling parliament that more often than not toes to the executive-centric party line. It is imperative that Parliament performs its functions in compliance with the specified constitutional requirement. Parliament must understand the ethos and spirit of the constitutional rule of law. Unfortunately, Bangladesh has witnessed the enactment of many parliamentary acts not in response to genuine needs but for political ends. These acts have hamstrung the integrity of good governance and dignity constitutionalism in Bangladesh. Many past major political impasses with far reaching stultifying effect on constitutional development and responsible government may be attributable to many unconstitutional acts of Parliament.

Constitutionally all three organs executive, legislature, and judiciary are independent to each other but acting together in collaboration for good governance. They all must respect each other's constitutional role. This mutual respect generates self-restraint, which is in-built in the Constitution. Whilst Parliament is entitled to perform its constitutional role, it must also allow other two organs, particularly the Judiciary to scrutinise whether parliamentary acts are within the constitutionally prescribed legal bounds. The motivation to a judicious mind and due process in performing parliamentary functions would go a long way in establishing good governance.

Parliament is constituted on the basis of political power expressed through popular votes of the majority. Once constituted, Parliament becomes the law-making body of the entire Bangladesh and its functional legitimacy no longer comes from any political source. Such legitimacy comes from a legal source the Constitution. The Constitution is a sacred and authenticated norm setter for parliamentary functions to achieve and preserve an orderly Bangladesh. It is not a convenient tool to be used for the perpetuation of political power. Parliament is not a touchstone so that anything it touches or does becomes inviolable. In view of the principle of constitutional supremacy, separation of powers, and checks and balances embodied in the Constitution, it is pretentious to argue that Bangladesh Parliament is a sovereign law-making body like the British Parliament.

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PARLIAMENT SCAN

# Sovereignty debate



REVIEWING THE VIEWS

# Scope of legitimate expectation doctrine



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THE field of natural justice is the most developed area of public law. It is the exclusive development made by the courts. The term 'Legitimate expectation' was first used by Lord Denning in 1969 and from that it has assumed the position of a significant doctrine of public law in almost all jurisdictions. Legitimate expectation of a person is such kind of right which the court now enforces. Expectation means the act or state of expecting; that which is or may fairly be expected; that which should happen, according to general norms or custom or behavior; that the degree of proportionality or the value of something expected.

A natural or constitutional residence of this doctrine is article 27 and article 14 of Bangladesh constitution and India respectively which abhors arbitrariness and insists on fairness in all administrative deal-

ings. Regarding the meaning of legitimate expectation, In *Asaf Khan and Others v. The Court of Settlement, Dhaka and Others* (23 BLD 24) Justice M.M. Ruhul Amin in favor of the Division Bench comments that "Legitimate expectation is a concept of administrative law, which means that an administrative authority cannot abuse its discretion by legitimate expectation by disregarding undertaking or statement of its intent"

**Development of the concept**

In Bangladesh it is true that there is no general statute like administrative Justice Act laying down the minimum procedure which administrative authorities must follow while exercising decision making power. Nonetheless the court has always insisted that administrative authorities must follow a minimum standard of fair procedure (ensuring legitimate interest of individual). This minimum procedure refers to

the concept of natural justice which ultimately protects and ensures legitimate expectation. Again in Bangladesh though natural justice enjoys no express constitutional status the Appellate Division of the Supreme Court of Bangladesh in *Abdul Latif Mirza v. Government of Bangladesh* (31 DLR 1) had observed: "It is now well- recognized that the principle of natural justice is a part of the law of the country"

In *Fazlul Karim Selim v. Bangladesh* (33 DLR 406), the District Magistrate did not use the term 'legitimate expectation'. But in deciding in favor of the applicant that he should have been given a hearing, what the court wanted to assert that in the case of first grant of license and renewal of license the principles of natural justice is attracted in a limited way in consideration of legitimate expectation.

It is a matter of hope that there are three facts heading to the possibility of the recognition of the concept of legitimate expectation by the courts in Bangladesh. First the legal system of Bangladesh is greatly influenced by English laws where we can see a development trend towards the concept of legitimate expectation. Secondly, Bangladesh has a written constitution which embodies clear principles of natural justice. Thirdly, Bangladesh courts are developing the principles of natural justice based on common law, the constitution (Art.135), and some statutory provisions. These facts clearly indicate that Bangladesh is in a suitable position to develop the concept of legitimate expectation. The most recent instances of application of this doctrine can be traced from

*Bangladesh v. Idrisur Rahman* 15 BLC (AD), 2010 at 49, where J Md Joyrul Abedin held that the appointment of an additional judge under Article 98 is a gate-way to the cadre of a permanent judge under Article 95 of the constitution and in that view of the matter an additional judge acquires a right or at least has a legitimate expectation to be appointed as a permanent judge to the High Court Division. So following the English and Indian decisions, the courts in Bangladesh have been developing the legitimate expectation doctrine with reference to the principles of natural justice since a long time.

**Rationality of legitimacy of an Expectation**

When and how an expectation becomes legitimate, should be construed carefully. The means of test must be standard one. Justice Amirul Kabir Chowdhury, formerly Chairman of National Human Rights Commission prescribed a test in *Md. Hafizul Islam v. Government of Bangladesh and Others* in this manner: "the concept of legitimate expectation is to some extent uncommon in our jurisprudence. The word 'legitimate' connotes lawfully begotten. An expectation to become legitimate therefore should not be sworn of lawful begetting. The concept of legitimate expectation cannot be given such wide interpretation so as to allow any wishful hope without lawful root." Again mere fanciful expectation cannot be taken to be a reasonable expectation. Even expectation based on contract or relationship would not be maintainable if it is not clear founded.

**Loopholes of the Doctrine**

Due to its certain limitations, it is not substantially able to render service to the public by giving protection to their legal rights and enjoyment. In case of substantive action this doctrine is hardly visible as it is purely a procedural matter. The contending plea not recognizing the substantive action within its ambit is that, if substantive protection is to be accorded to legitimate expectations it would create encumbrances in administrative decision which is taken on merits. It has no application against statute. It means all the law which are made by legislature shall be in traceable by the doctrine of legitimate expectation. Even the supreme court of India held that legislation cannot be invalidated on the basis that it offends the legitimate expectation of the persons affected thereby. The security of the state or public policy is enough qualified to override the expectation or right of the individual. In case of contractual relation there is no application of the doctrine legitimate expectation. The Constitution of Bangladesh only contains some rules of natural justice in a general way. The word legitimate expectation has no place in the constitution or any other statutes of Bangladesh. There is no specific Act containing the minimum procedure requiring administrative authorities to follow in times of exercising decision making power.

**Comments**

No doubt, a huge acclivity and declivity this new doctrine of administrative law now stands in Bangladesh through the case law given by the supreme court of

Bangladesh. In the instant attempt I would prefer to propose some suggestions to the authority concern for their cordial consideration in the way of development of doctrine of legitimate expectation.

1. The legislature of Bangladesh may enact an Act providing for the improvement of administrative justice in Bangladesh. In the prospective Act, there should be indicated that the rules of natural justice would apply to all judicial, quasi-judicial and administrative authorities who have decision making power affecting people's rights, privileges, liberty or livelihood.

2. A decision without fair procedure suffers from jurisdictional error, which consequently renders the decision void. So notice must be given to the applicant before deciding his cause or imposing punishment on him.

3. Opportunities of hearing must be given to the individual for explaining the humanitarian or other special grounds by reason of which he should not be deprived of his right.

4. The Supreme Court of Bangladesh need to give recognition to the concept of legitimate expectation in every judicial approach substantially.

Legitimate Expectation is gradually gaining importance. The substance of the doctrine is honoring implied commitments without hampering express policies. The doctrine invokes to enforce regularity, predictability and certainty in Government's dealings vis-à-vis the masses.

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