



PARLIAMENT SCAN

Constitution amendment process: Proper approach

BARRISTER MOYEEEN FIROZEE

CONSTITUTION is 'Supreme' as the solemn expression of the will of the people and sole authoritative symbol of our sovereignty. Constitution is the supreme law of the Republic and if any other law is inconsistent with it that other law shall, to the extent of the inconsistency, become automatically void (Article 7). Every word used in the Constitution has a profound meaning and ramification of any undue, inconsistent or improper use of a word in any provision of the Constitution certainly is irreparable and immeasurable.

Constitution must be the most constant and consistent law for smooth functioning of the affairs of a country and maintaining rule of law. However, it is not the intention of the framers of the Constitution to make it rigid and permanent devoid the reality. With the change of the society and circumstances, except the basic structure of the Constitution, amendment may be essential and such necessity is recognised and contemplated in Article 142 of our Constitution.

Under Article 142, except the amendment of the Preamble or any provisions of Articles 8, 48, 56 or 142 of the Constitution, Parliament is empowered to amend any provision, by way of addition, alteration, substitution or repeal, by passing an Act of Parliament with the votes of not less than two-thirds of the total number of MP. However, for amending the Preamble or any provisions of Articles 8, 48, 56 or 142 of the Constitution, in addition to the above requirements, the amendment has to be endorsed through referendum.

Throughout the history of our Constitution, 15 amendments have been made out of which four of them were declared unconstitutional by the Supreme Court, some of the amendments were amended or became redundant and numbers of others are currently subject matter of judicial review. Why the fate of the amendments of the supreme law of the land is so appalling! Constitution has two major dimensions, political and legal. All the amendments of the Constitution were made considering the political side of it neglecting or remaining wilfully oblivious about its legal aspect. Even a popular amendment with political acceptance, e.g. 13th amendment, may become unconstitutional due to lack of legal basis. Our Supreme Court in various judgments expressly or impliedly identified number of legal reasons for declaring few amendments as unconstitutional. But the most simple and obvious

reason which led to controversy and judicial intervention on most constitutional amendments is lack of application of apt, rationale and intelligent thoughts on any of the proposed changes during the amendment process.

Almost all the amendments were made with political predisposition, for gaining unfair advantage by some influential quarter or for fulfilment of whim of few; and they hardly had relation with the solemn expression of the will of the people. None of the amendments were made after conducting appropriate research with the aid of constitutional and legal experts keeping in mind as to the future implication; harmonisation with the existing constitutional provisions and co-existence with the spirit and inner soul of the Constitution.

Although Parliament is empowered to pass legislation to amend the Constitution if 2/3 majority vote of its members can be secured, should Parliament make changes of the supreme law of the land in a casual and subjective manner? Irony is none of the draft amendments of the Constitution went through proper examination process. In all cases no expert committee has been formed for making appropriate recommendation and almost all the amendments, were drafted by few government draftsmen and only unceremoniously reviewed by few MPs before routinely passing through majority votes.

Surprisingly, amendment of ordinary laws gets more examination and review than the amendment of Constitution. Most of the recent enactments or amendments of old laws were thoroughly reviewed by the Law Commission who prepares a detailed report on the subject and such report is, usually, sent to legal experts for further comments before formal draft is submitted to the Parliament. In some cases, even opinion of the general people was sought on draft legislation.

Before passing 15th amendment to the Constitution Government formed a 15 mem-

ber Special Committee for Amendment of the Constitution ('Special Committee'). Although most of the members are seasoned politicians, apart from 2 or 3 members, most of them lack the experience in dealing with the Constitution from its legal dimension. Special Committee spent most of its time meeting with various political parties and focus groups of the civil society. Such encounter, no doubt, is important to take care of policy consideration of the amendment proposal, but it lacked its focus on the legislative and legal consideration. Besides, most of the members of the Special Committee hardly have any time to conduct the extensive research that is meticulously required to contribute in formulating the most important piece of legislation.

Special Committee consulted with various groups without having any consultation paper in hand leaving them to make general comments. Had there been a consultation paper, the invited guests could give their reasoned opinion and structured suggestions. It was expected that Special Committee would publish a report describing the outcome of those discussions; and recommend the amendment with detailed justification and clarification of the proposed changes of each provision which would be made available to everyone for further analysis and review. But, before passing 15th amendment to the Constitution, a

report was placed before the Parliament with draft recommendation of the proposed changes of the Constitution without giving any reason or explanation whatsoever. Such draft proposal was in toto approved by the cabinet committee and was placed before the Parliament as a bill straightway without making further scrutiny or consultation and eventually passed with little debate in the Parliamentary Committee as well as in the House and virtually without applying any consideration other than political one. 15th Amendment certainly creates the need for further amendment in order to achieve political consensus which will be a major source of legal as well as political uncertainty.

Abrupt change leads to further change in the future or may cause judicial intervention which is not desirable and makes the Constitution a vulnerable as well as arbitrary piece of legislation.

It is of paramount importance that before passing any legislation amending the Constitution, every citizen must know the rationale behind changing a single word of the Constitution and every citizen must be assured that efficacy of the Constitution will be preserved and maintained after the amendment is made. Some of the changes will be policy driven which is understandable, but no effort was made to take care of the legal aspects of any of the proposed amendments which made all the amendment vulnerable to judicial scrutiny. What is questionable is the recurrence of the same mistake not to apply apt, rationale and intelligent thoughts during the amendment process.

In order to accomplish appropriate, suitable and justifiable amendments to the Constitution, Parliament should pursue the following course of action before passing the legislation amending the Constitution:

1. The entire amendment process shall be coordinated under the guidance and supervision of a Special Committee comprising both government and opposition MPs.

2. A committee consisting of constitutional, legal and political experts ('Expert Committee') should be formed who shall prepare and submit a detailed report after making thorough examination, within a specific timeline, to the Special Committee identifying the inconsistency and problems of the prevailing Constitution keeping in mind about the judgments of the Supreme Court. Expert Committee shall also prepare a draft amendment proposal with detailed and unequivocal explanation and necessary justification for each and every proposed change of the Constitution maintaining consistency and preserving the basic structure of the Constitution.

3. Special Committee shall publish the report of the Expert Committee in the newspapers and internet for receiving general people's views.

4. After considering the above report and reviewing the comments of the general people, Special Committee shall prepare their preliminary report explaining the reasons for accepting or rejecting any particular recommendation of the Expert Committee and/or give additional recommendation with appropriate explanation. Special Committee shall arrange consultations and meetings with various focus groups and political parties inviting their specific comments, written or verbal, on the preliminary report.

5. After considering all the comments received during the consultation, Special Committee shall prepare its final report and shall place it before the Parliament with draft legislation.

6. After debate in the Parliament relevant parliamentary committee shall make the final scrutiny on the proposed legislation and place it before the Parliament for its final debate and votes.

Constitution has never been amended from the legal point of view and hence its status as the 'supreme law' has always been compromised and judicial intervention was inevitable. In order to make future amendments to the Constitution without any controversy, flawless and less susceptible to judicial intervention, along with political will it is important that lawmakers treat the Constitution as the 'supreme law' of the land and amendment is made after maintaining rigorous scrutiny and thoughtful consideration. Such effort will ensure that the Constitutional amendment is legally appropriate and coherent to the basic structure of the Constitution.

The writer is an Advocate, Supreme Court of Bangladesh.

LAW REPORT



Bangladesh still in Tier-2 Watch List *Trafficking in persons report-2011*

BANGLADESH is a source and transit country for men, women, and children subjected to forced labor and sex trafficking. A significant share of Bangladesh's trafficking victims consists of men recruited for work overseas with fraudulent employment offers who are subsequently exploited under conditions of forced labor or debt bondage. Bangladeshi children and adults also are trafficked internally for commercial sexual exploitation, domestic servitude, and forced and bonded labor. Some children are sold into bondage by their parents, while others are induced into labor or commercial sexual exploitation through fraud and physical coercion. Internal trafficking often occurs from poorer, more rural regions, to locations with more commercial activity including Dhaka and Chittagong, the country's two largest cities. Women and children from Bangladesh are trafficked to India and Pakistan for commercial sexual exploitation or forced labor. Many Rohingya refugees from Burma transit through Bangladesh using unofficial methods, leaving them vulnerable to traffickers inside Bangladesh and in destination countries. In 2010, some Rohingya girls were forced into prostitution.

Bangladeshi men and women migrate willingly to Saudi Arabia, Bahrain, Kuwait, the United Arab Emirates (UAE), Qatar, the Maldives, Iraq, Iran, Lebanon, Malaysia, Singapore, Libya, Europe, and other countries for work, often under legal and contractual terms. Most Bangladeshis who seek

overseas employment through legal channels rely on the over 1,000 recruiting agencies belonging to the Bangladesh Association of International Recruiting Agencies (BAIRA). These agencies are legally permitted to charge workers up to \$1,235 and place workers in low-skilled jobs typically paying between \$100 and \$150 per month, but workers are sometimes charged \$6,000 or more for these services. Many Bangladeshi migrant laborers are victims of recruitment fraud, including exorbitant

sexual abuse. Some Bangladeshi women working abroad are subsequently forced into prostitution. Some Bangladeshis have been convicted by foreign governments for their human trafficking crimes abroad. There are reports of an increased number of Bangladeshis transiting through Nepal to obtain Nepalese visas and work permits for employment in the Gulf, and many of them are likely trafficking victims. Many Bangladeshi migrant workers including trafficking victims were stranded in Libya in

the minimum standards for the elimination of trafficking, and is placed on Tier 2 Watch List for a third consecutive year. Bangladesh was not placed on Tier 3 per Section 107 of the 2008 Trafficking Victims Protection Reauthorization Act, however, as the government has shown evidence of a credible, written plan that, if implemented, would constitute making significant efforts to bring itself into compliance with the minimum standards for the elimination of trafficking and is devoting sufficient resources

prosecute or convict those who trafficked men, as well as those responsible for subjecting Bangladeshi workers to forced labor overseas through fraudulent recruitment mechanisms. The government did not report on law enforcement efforts against Bangladeshi officials who were complicit in human trafficking.

Recommendations for Bangladesh: Enact the draft comprehensive anti-trafficking legislation that criminalises the forced labor of men, in order to integrate anti-labor trafficking objectives into national anti-trafficking policies and programs; increase criminal prosecutions and convictions for all forms of labor trafficking, including those involving fraudulent labor recruitment and forced child labor; take steps to address the allegations concerning the complicity of public officials in trafficking, particularly through the criminal prosecution and punishment of those found involved in or abetting human trafficking; increase the capacity of the Vigilance Task Force and improve oversight of Bangladesh's international recruiting agencies to ensure they are not promoting practices that contribute to labor trafficking; place Anti-Trafficking Monitoring Cell officers in Bangladeshi embassies in destination countries; and provide protection services for adult male trafficking victims and victims of forced labor.

This is the abridged version of the report. For full report, log on to: <http://www.state.gov/g/tip/rls/tiprpt/2001/3929.htm>

recruitment fees often accompanied by fraudulent representation of terms of employment; high recruitment fees increase vulnerability to debt bondage and forced labor among transnational migrant workers. Women typically work as domestic servants; some find themselves in situations of forced labor or debt bondage where they face restrictions on their movements, non-payment of wages, threats, and physical or

early 2011 due to the civil conflict in that country. Trafficking victims among these migrant workers may be particularly vulnerable to being trapped in Libya as a result of the confiscation of their travel documents and unpaid wages. Some of these migrants who have been able to return to Bangladesh are under pressure to repay the high debts they incurred for recruitment fees.

Bangladesh does not fully comply with

