

CONSTITUTIONAL ANALYSIS

The culture of impunity to be ended



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LIKE any other law teacher, I start my constitutional law lectures with a usual question, 'What is a Constitution?' The instantaneous reply on the part of my novice law students almost always characterizes it as a collection of 'rules' organizing and regulating the state. A quite predictable answer indeed! Yet I ask it every time, as this known-in-advance reply gives me a breeding ground for further curious deliberations. Then for a while I get the chance to stare at them with a cozy smile. It sets them a back 'Did we say anything wrong?' In the meantime I start turning out pages from Bangladesh Constitution: Trends and Issues written by honorable Justice Mustafa Kamal. Coming to the page (iv), I start reading: "The Constitution is the Supreme Law of the Republic. The entire legislative, executive and legislative activities of the Republic are guided and regulated by the Constitution. In all countries where constitutionalism prevails, ordinary men and women are more or less knowledgeable about their country's constitution and are vigilant and vocal to assert and preserve the Constitution and their constitutional rights. They do not leave their constitution in the hands of the constitutional lawyers, judges and academicians. Each citizen is a defender of the Constitution, so that it becomes almost impossible to make an open breach of it."

The gist of the quotation is that being the way of life the State has chosen for itself, the Constitution becomes constitution only by the understanding and voluntary acceptance of it by the people as a prescription for settling conflict within society. And it is this feeling of the people that we call constitutionalism - a doctrine of legitimacy of government and governance justifying all state action or inaction. Coming to the unfortunate ground

reality of third world's developing democracies, even the clear mandates - let alone the spirit, of the Constitution are not safe and guaranteed to be religiously observed. Take the case of Bangladesh, for example. Attempt to subvert the Constitutional spirit started immediately after the establishment of Bangladesh. On the early hours of August 15, 1975 Bangabandhu was brutally killed along with almost all of his family members. Khandoker Moshtaque Ahmed's sworn in as the President was clear violation of Article 55 of the Constitution which provided that the Vice-President would succeed the President if there is a vacancy until a new President was elected. Khandoker Moshtaque Ahmed was not the Vice-President. Moreover, he was sworn in as the President of Bangladesh by the acting Chief Justice Syed A.B. Mahmud Hossain, though Form I of the Third Schedule of the Constitution required the President to be sworn in by the Speaker of the House. To 'tackle' the situation Mushtaq 'suspended' the Presidential succession and oath related articles of the Constitution! On August 20, Khandker Moshtaq Ahmed declared Martial Law with effect from August 15. The Constitution was 'allowed' to remain in force subject to the decree and orders of Mushtaq!

During the turmoiling 1st week of November, Mushtaq 'nominated' Justice Sayem as the President. Again, on November 29, 1976 Justice Sayem, due to his 'deteriorating health', declared Zia as the Chief Martial Law Administrator, a post unknown to any constitutional dispensation. On April 20, 1977 Zia was formally 'nominated' the President of Bangladesh. While even 'a Chairman of a Union Council had to be elected and couldn't be nominated, nomination could be made to the highest office of the Republic' (Moon Cinema Verdict High Court Division, p 6). Zia arranged a referendum 'unknown to the constitution or any other law of the land' to obtain 'confidence' of the people. He hammered a 99 percent of the total vote cast. Finally the Constitution 'revived' on April 10, 1979.

On 24th March, 1982 martial law was imposed for the second time by the then Chief of Army Lt Gen HM Ershad ousting the civil government

of Justice Abdus Sattar. This time the Constitution was suspended. This Martial Law was kept in force for 4 years and 7 months. Lastly, there has been a disguised Military takeover under the garb of an emergency driven Caretaker Government in 2007. It passed after a credible election in December 2008.

It is observed that the justification all the supra-constitutional adventurers offered almost always followed the same prototype - the greater interest of the country, which was 'in the verge of catastrophe', made it incumbent upon them to assume full power, failing which the country

election to the National Assembly and declaring Martial Law, President Iskander Mirza claimed: "For the last two years I have been watching with deepest anxiety, for the ruthless struggle for power, corruption and shameful exploitation of our simple people, honest, patriotic and industrious masses, the lack of decorum and the prostitution of Islam for political ends. The mentalities of the politicians are so low that I am unable any longer to believe that elections will improve the present chaotic internal situation."

But the key player behind 'the ruthless struggle for power' was

Pakistan in 1954. He enjoyed a 'voluntary retirement' due to ill health. We couldn't punish Iskander Mirza for illegal proclamation of Martial Law on October 7, 1958. He was sent to a consensual exile. Ayub Khan could not be touched for his 'October Revolution'. He got a peaceful retired life. Yahya Khan also remained out of accountability for his 1969-71 misdeeds. Neither Zia nor Ershad got any scratch for uprooting the constitution and constitutional government. Rather the first one is hailed as saviour of democracy while the later still dreams to be the President again.

temporarily, but let it be laid down firmly that the order which the usurper imposes will remain illegal and Courts will not recognize its rule and act upon them as de jure. As soon as the first opportunity arises, when the coercive apparatus falls from the hands of the usurper, he should be tried for high treason and suitably punished. This alone will serve as a deterrent to would be adventurers (Constitutional Glimpses of Martial Law, Dr. Aleem Al Razei, UPL, Dhaka, 1982, p. 42)."

That is why perhaps the Constitutions of Mexico of 1917 (in Article 136), of Ecuador of 1985 (in Article 114) and of Venezuela of 1916 (in Article 250) made clear provisions regarding the unconstitutional takeover of power. Whenever the original constitution is restored, the perpetrators of its violation shall be punished in charge of sedition. Of late, Bangladesh also has taken the same route. The Constitution (Fifteenth Amendment) Act 2011 has introduced a new Article 7A. Clause (a) to the Article 7A(1) provides that whoever abrogates, repeals or suspends or attempts or conspires to abrogate, repeal or suspend this Constitution or any of its article, shall be guilty of sedition. He shall be subject to highest punishment acknowledged in laws of Bangladesh. Not only that, any other person who abets, instigates, approves, condones, supports or ratifies such act shall also be subject to same liability.

Yet the question remains, 'May the letters of the constitution change the course of history?' True it remains, as it was, staging or not staging a military coup, itself being an extra-constitutional incident, does not depend on any constitutional provision. Ultimately it is the politics pure and welfare politics that can determine the course of the history. This, however, does not mean that the constitution should remain silent and leave its fate at the mercy of vicious politics. If Article 7A(1)(a) may not prevent a coup, it would at least make the end result a non-profitable one. Therefore the insertion of the Article is conceptually a welcome development.

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would have been plunged into oblivion. However, the most unfortunate aftermath of each and every aggression on the Constitution is that it leaves behind a legacy of 'unconstitutionalism' which pose the democratic forces of the country to a critical challenge of upholding constitutionalism in its letter and spirit. They not only spoil the democracy but also corrupt the democratic mind setup of the body politic beyond recovery. Consequently politicians as well as the democracy fail again and on another dark night someone else comes out of the garrison 'to save' the nation.

To substantiate the claim, let us call back the memory of Pakistan's first Martial Law. On October 7, 1958, while suspending the upcoming

identified by his chief ally Ayub Khan on the morning of October 27, 1958 when Iskander Mirza was exiled to London: "The President had thoroughly exploited the weakness of the Constitution and had got everyone connected to the political life of the country utterly exposed and discredited. I do not think that he even seriously wanted to hold general election; he was looking for a suitable opportunity to abrogate the Constitution."

Surprisingly, never in the history of Pakistan or Bangladesh, we have seen any single incident of punishing the violation of the Supreme Law of the Land. We didn't or couldn't try Ghulam Muhammad for dismissing the Nazim Uddin cabinet in 1953 and arbitrarily dissolving the legitimate Constituent Assembly of

Parvez Musharraf is also enjoying an uninterrupted retirement. Prof. Iazuddin was allowed a normal exit while we could at least impeach him for snatching away the whole institution of caretaker government.

Whereas we usually and understandably punish the criminals for violation of criminal laws, we never think of punishing the perpetrators of violation of the Supreme Law of the Land itself! Should this culture of impunity continue? Yakub Ali J of the Pakistan Supreme Court strongly believed that it should not: "My own view is that a person who destroys the national legal order in an illegitimate manner cannot be regarded as a valid source of law making. May be that on account of his holding the coercive apparatus of the State, the people and the courts are silenced

LAW OPINION



Can Domestic Violence Act protect Rumanas?

SADRUL HASAN MAZUMDER

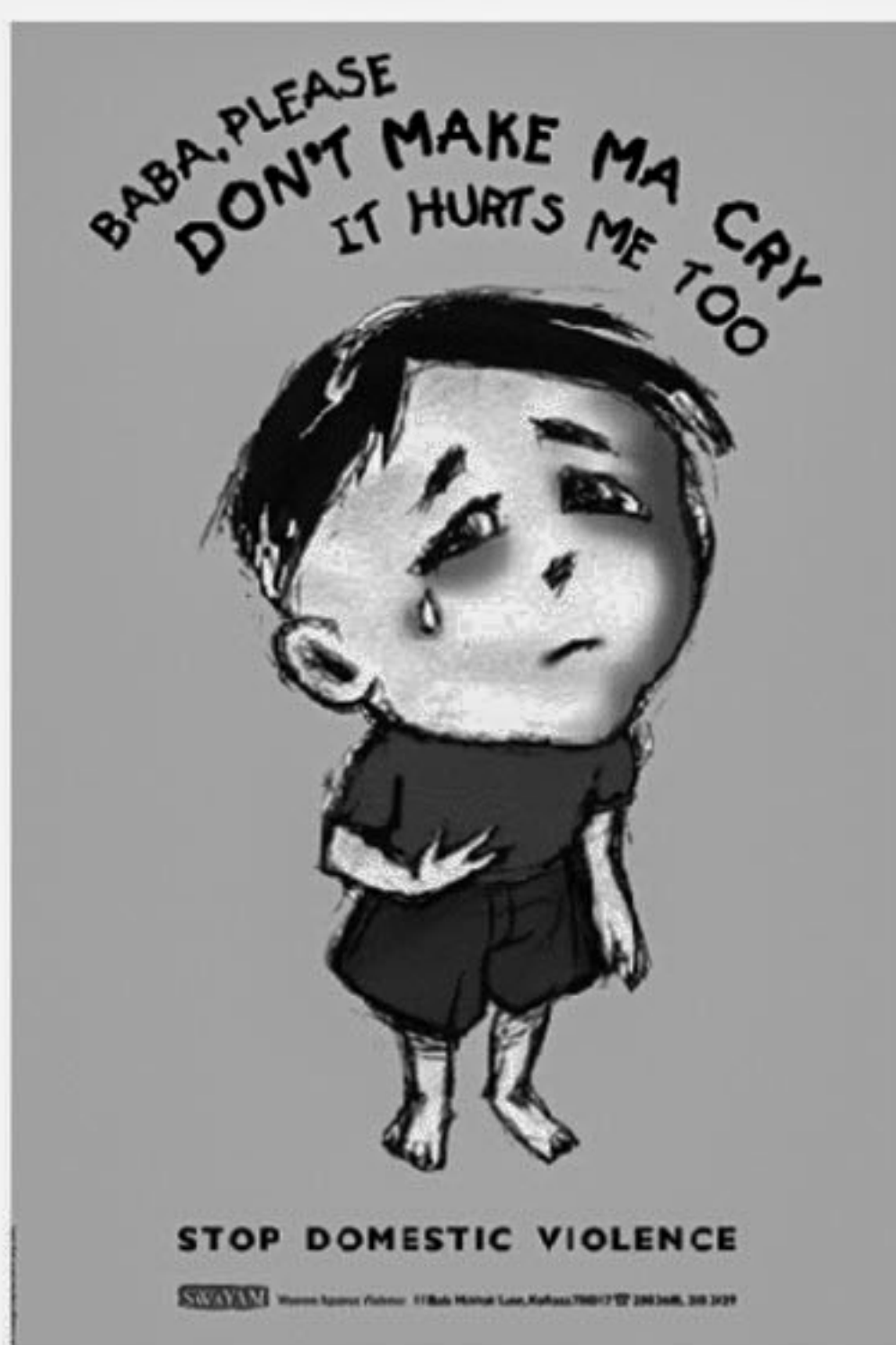
(.....from previous issue)

WE have good number of laws for the wellbeing of women but the challenges are enormous in drawing a sharp line among the existing laws and the DV Act and finding out operational linkages among various laws of the land to address violence against women. As domestic violence exists in every cluster of the society whether rich or poor, literate or illiterate, developed or underdeveloped; designing the "Support Services Packages" for possible survivors still remain as a greater challenge. Domestic violence especially wife beating has been found as the most widespread form of violence against women and as the services rendered by NGOs or Government Agencies have been focused on the disadvantaged or marginalized section of the society, women from the affluent class of the society remain out of the orbit of such services. To reverse the scenario there needs important adjustment of service mechanisms at operational level having diversity in the mode or pattern of services otherwise violence against RUMANAs will always remain in dark unless they will not be tortured to blind or murdered or commit suicide. The process of finalising the Rules of Procedure is advancing very fast and all concerned are requested to have further thought while devising "Support Services Packages" under the Domestic Violence Act.

Providing Shelter support to the survivors [Section 8: Enforcement Officer will arrange shelter for the aggrieved women and their children] has philosophical limitations and do not conform with the principles of Rights Based Approach because under traditional shelter services provided by both NGOs and the Government Agencies, Survivors remain confined, their right to mobility and living a free life are destroyed keeping the perpetrators

free, which also contradicts with the Section-3(b)(c) of the DV Act. Should I mention here that in most cases Minimum Standard of Care are not maintained in those Shelter Homes? Even if the Standard is maintained, experiences show that such confinement for a certain period in the name of "Safe Shelter" creates threat to Social Integration Program, while initiatives are being taken to integrate the Survivors to the mainstream of the society. Thus we should think of such circumstances in advance and it is the right time to incorporate the "Women Refuge Model" replacing the traditional "Shelter Model" because "Women Refuge Model" enables the survivors to remain relatively free and allow the survivor to do her work with Protection Order under the DV Act.

The Domestic Violence Act has put a milestone in the history of women's movement in the country and recognises their right to Residence [Article 15], which can only be enforced through efficient and effective intervention in creating a "Social Safety Net" for the Community by the Community. To ensure proper enforcement of the Act immediate initiatives needed to board creating such "Social Safety Net" based on community participation that includes supports like Counseling and Legal Aid for protection and awareness programs for prevention. As long as the question of Victim Witness Protection is involved, to deal with incidences of domestic violence - the efficiency of the community based legal institutions should be enhanced and public confidence into the local justice system should be restored so that women can comfortably reach someone [preferably a Counselor having knowledge of first hand management of survivors] to share such discomfort in their personal life within shortest possible time. Geographical disparity is of utmost importance to consider firstly, to have information about incidences of domestic violence and secondly, for quick responding to the possible survi-



vors because spirit of the DV Act is to bring any woman out of violence immediately without any delay. There are on going programs supported by UNDP where "Women Development Forum" has been formed under the leadership of Upazilla Female Vice Chairperson bringing the current and former female Members of the Union Parishad in the same platform. Reiterating the importance of establishing Union based "Community Counseling Center" I would like to emphasize on building working coordination among all initiatives from the international development partners and donor agencies creating spaces friendly and easy-to-reach for possible survivors.

Recommendations:

- To adopt the Rules of Procedure immediately to accelerate the process of enforcement of the Domestic Violence [Prevention & Protection] Act 2010.
- To create efficient manpower who are sensitised and devoted to the cause having sound knowledge about the judiciary and criminal justice system.
- To appointment the Enforcement Officers immediately and training them about operational aspect of DV Act.
- To ensure operational coordination among the concerned Ministries under the leadership of the Social Welfare Ministry to enforce the order to be passed by the Honorable Court.
- To sensitise the Community Policing, Union Level Standing Committees on Violence against Women about domestic violence and their role to address such violence in their own community.
- To sensitise the Legal Practitioners and Court Officials, Social Workers, NGO workers etc about domestic violence and specifically on the Rules of Procedure of Domestic Violence Act.
- To design the "Support Services Packages" for possible survivors irrespective of class, religion, ethnicity and cast including those who are differently able persons.
- Available services under the "Victims Support Centers" and the "One Stop Crisis Center" should be extended up to Upazilla level and the quality of services rendered by these institutions should be ensured conforming the Minimum Standard of Care and universal Human Rights principles.
- To introduce moral education courses at primary or secondary level so that the next generation will be more sensitised about women rights and will be respectful towards principles of Human Rights.
- To introduce integral services for identifying

the possible survivors and enhancing local government initiatives designed to developing their capacity so that they can handle possible survivors within their own capacity and jurisdiction.

- To create "Social Safety Net" through establishing "Community Counseling Center" at Union level having linkage with the "Women Development Forum" and the Enforcement Officer.
 - To train the Members of the Law Enforcing Agencies on mechanism of protecting gender-base violence including techniques of first-hand management of the possible survivors-their attitude towards women should be changed at large.
 - To conduct an in depth serious research to analyse the economic impact of violence against women through developing "Composite Violence Index" spending adequate time.
 - To strengthening working coordination among all initiatives of the international development partners and donor agencies to address domestic violence.
- We should help the society to give up the superstitious believes around women's rights and domestic violence and extending support to possible survivors. For immediate start the government required funding, we have limited resources and we should put our best efforts to maximize the usages of available funding from the development partners so that we can enforce the Act faster. Let us challenge Domestic Violence to the next door and help the survivors in getting support. Let us join the crusade against domestic violence. Let the violent father to listen to his child, "BABA, PLEASE DON'T MAKE MA CRY! IT'S HURT ME TOO..... STOP DOMESTIC VIOLENCE".

Concluded.

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