

"ALL CITIZENS ARE EQUAL BEFORE LAW AND ARE ENTITLED TO EQUAL PROTECTION OF LAW" -ARTICLE 27 OF THE CONSTITUTION OF THE PEOPLES REPUBLIC OF BANGLADESH

JUDGMENT ANALYSIS



Road to decentralisation of the High Court blocked

MUHAMMAD MAMUNUR RASHID

HERE is no provision for permanent decentralisation of High Court in the Constitution of Bangladesh. Even it is beyond the power of Parliament to amend the Constitution to decentralise the High Court permanently as the Appellate Division imposed limitation on its amending power. Therefore, the Parliament is itself unable to enact any provision to decentralise the High Court.

In June 1988, article 100 of the Constitution was amended by the Parliament incorporating the provision for six permanent Benches of High Court for Chittagong, Sylhet, Comilla, Jossore, Rangpur and Barishal. The constitutionality of this amendment has been challenged in the eighth amendment case (*Anwar Hussain Chowdhury vs. Bangladesh case*). The Appellate Division consisting of four Judges declared the impugned amendment as void and ultra vires by majority of 3: 1. In this case, for the first time in Bangladesh, the Appellate Division has declared an amendment passed by the Parliament as void and imposed limitation on its amending power.

In deciding the constitutionality of the amendment, the Appellate Division followed the doctrine of basic structure of the Constitution, a judicial principle that some certain features of the Constitution cannot be altered or destroyed even by the two-third majority of the Parliament as the Constitution stands on these features. The impugned amendment was declared as void and ultra vires as it destroyed some of those features. But the Appellate Division could not reach a unanimous decision as to which features of the Constitution are basic, which are not. Shahabuddin Ahmed, J. has specified 6 features as the structural pillars of the Constitution, which cannot be amended by the Parliament. While Badrul Haider Chowdhury, J. observed that the

number of the basic features of the Constitution, which are not amendable, is 21.

M.H. Rahman, J, in deciding the constitutionality of the amendment, stressed on the preamble. He regarded it as an entrenched provision that cannot be amended by the Parliament alone. He held: "if any provision can be called the 'pole star' of the Constitution then it is the Preamble and the impugned amendment is to be examined in the light of the preamble".

He further held: 'one of the fundamental aims of our society is to secure the rule of law for all citizens and in furtherance of that aim Part VI and other provisions were incorporated in the Constitution. Now by the impugned amendment that structure of rule of law has been badly impaired, and as a result the High Court Division has fallen into sixes and sevens - six at the seats of permanent Benches and the seven at the permanent seat of the Supreme Court'. It should be mentioned that the fundamental aim quoted by M.H. Rahman, J. has been stated in preamble of the Constitution.

A.T. M. Afzal, J., the only Judge among the four, has given a dissenting judgement rejecting the concept of so called basic structures and opined that the impugned amendment has not destroyed the High Court Division and therefore it was not to be ultra vires on any of the grounds urged.

In Indian subcontinent, the doctrine of basic structure was introduced by the Supreme Court of India in 1973. Before that, in 1967, a question has been arisen in the case *Golak Nath vs. The State of Punjab* in

the Supreme Court of India that whether any part of the fundamental rights provisions of the Constitution could be revoked or limited by amendment of the Constitution? The Court held that amendments which take away or abridge the fundamental rights provisions cannot be passed. Six years later, in 1973, the fundamental rights became an issue again in the case of *Kesavananda Bharati v. State of Kerala*. This time the Indian Supreme Court



BD LAWS/24.BKOS/SPOT.COM

consisting of thirteen judges overruled the decision passed in *Golak Nath* case and held by majority of 7: 6 that although no part of the Constitution, including fundamental rights, was beyond the amending power of Parliament, the 'basic structure of the Constitution could not be abrogated even by a constitutional amendment'. The fundamental rights provision was indeed one of those structures. Thus the doctrine has got a legal shape for the first time in the Indian constitutional jurisprudence. But there is still controversy among the jurists as to which features of the Constitution are

basic, which are not. Even the Indian judges also could not reach a unanimous decision on this point.

By the way, in India, the fundamental rights of the people were threatened by the 24th amendment of the Constitution that was challenged in the Court and 'the doctrine of basic structures' has been invoked by the Indian Supreme Court to examine the constitutionality of the amendment. It ultimately upheld the people's interests safeguarding their fundamental rights. In Bangladesh, the doctrine was followed in a different climate, where article 100 has been amended by the Parliament to decentralise the High Court that was challenged in the Court and the Appellate Division applied this doctrine to examine the constitutionality of decentralisation.

Though the decentralisation of the High Court by amended article 100 could not satisfy the Appellate Division as to its constitutionality, but its beneficence and necessity probably could by no means be ignored. The amended article 100 facilitated the judicial system getting the High Court reached the doorstep of people. It made the High Court accessible and affordable for those people, who are poor, powerless, weak and indeed the large majority of the society residing away from the capital. These people were the beneficiary of this decentralisation as it has helped them to ensure accessible, speedy, easy and affordable justice widening the access to the High Court.

While one of the the fundamental aims of the State is to secure the rule of law for all citizens, the access to the structure of

rule of law should be adequate, smooth and affordable to ensure that rule of law. Without adequate access to justice the rule of law is meaningless. It has been pledged in preamble of the Constitution that: 'it shall be a fundamental aim of the State to realise through the democratic process a socialist society, free from exploitation a society in which the rule of law, fundamental human rights and freedom, equality and justice, political, economic and social, will be secured for all citizens' and for the furtherance of this aim, the Constitution has guaranteed eighteen fundamental rights for all citizens. The right to move the High Court to enforce any of these rights is also guaranteed by the Constitution as a fundamental right. In a country of 16 crore people, the High Court Division centralised in the capital city Dhaka is by no means adequate to avail this right. It seems to irreconcilable with the fundamental aim.

It doesn't matter to the rich that where is the High Court. They can find the way to High Court anyhow. But it does matter to the poor living away from the capital. In Bangladesh, the litigation costs in the High Court is very high particularly for those common people coming away from the capital. Most of them cannot afford to reach the High Court and as a result they are deprived of justice.

The decision of the Appellate Division is binding upon the Parliament and therefore, it will not enact any more provision to decentralise the High Court as it will affect those basic structures of the Constitution. Then, will the High Court remain centralised in the capital city Dhaka forever? Is the road to decentralisation of the High Court blocked by the majority judgement in the eighth amendment case?

The writer is Advocate, Judge's Court, Sylhet.

RIGHTS INVESTIGATION



A cross examination of gross corruption in public health service

MD. ASHRAFUL ALAM

ABSENTIA, mismanagement and corruption are three common news through printing media as well as electric media in Bangladesh for concurrent period. The issue is not a new phenomenon in the context Bangladesh. It has a hereditary existence from year to year, period to period. But there is no headache for government. The issue is only confined within the news and writings as blind discussant. This writing is to find out the root causes behind the negligence of government to ensure right to health, a constitutional obligation, through an active public health service. Why government is not to take immediate measure to ensure active public health service may be named as privatization of politicians or politicization of private hospitals. I think both are correct. Firstly, I would like draw your attention as to the medical service of politicians or persons who are in the apex forum of government since independence of Bangladesh. They are habituated to over fly to Thailand, Singapore, Saudi Arabia or any European country for medical treatment even suffered by little back pain. But we can not go to Thailand or so other countries. Because, we have neither feather nor money. So, what should we do? The only answer is "go to die". This is our obvious result for being general people, we are not rich businessman or politician. The people who have a lot of money through business of politics or politics of business do not need any affection to improve the condition of public health service. This is privatization of politics. Secondly, the owner of private hospitals are never willing to see the public health service active or effective sufficiently providing health service to general people. They think if the public health service becomes active to provide health service, then none will be crashed away in their private diagnostic centers. Now, I would like to draw your

attention to see the people who are the owner of those private hospitals. They are not general people, they are something more, to say the rich. So, random absence of doctor, mismanagement and corruption in public medical colleges are not problem of the rich or politicians. It is only for those who are unable to fly over or to be crashed in public hospitals. These two issues have vitiated the public health service in the following ways.

First one is corruption. The Transparency International found that the health sector is the second most corrupt sector after the police sector. The survey found that 48 per cent admitted to government hospital by alternative methods including 56 per cent paid money, 22 per cent used influence, and 18 per cent sought help from hospital staff. The study shows that doctors are most corrupted followed by hospital staff. An Editorial of an English daily commented that Bangladesh experiences show "more than their number, corruption and lack of integrity of the doctors are perhaps, more important factors that explain the poor quality of services at the government run hospitals". So corruption makes the public sector in a bad shape. In addition to the above, he also maintains that the public sector has incurred problems of equipment, essential supplies, inadequate facilities; lack of cleanliness and lack of control make the public sector a defunct system. The public health care system has lost its credibility and people have limited confidence in it. Corruption begins from the budget formulation process to the implementation of policy. Budgets are frequently built on unrealistic estimates, either over- or underestimating tax income, which makes it difficult to understand and act on a budget proposal. A comprehensive budget analysis therefore needs to look at both the revenue and the expenditure side of the budget. These distortions and manipulations of the

budget can constitute acts of corruption in that they favor the political and economic elite of a country. Analyses of the health sector indicate that public expenditure tends to disproportionately benefit the rich in a majority of nations. It is common that priority is given to tertiary hospitals using costly equipment while smaller primary care clinics may be left without both staffing and equipment.

A problem in the budget formulation process is that significant portions of resources may not appear in the budget: they are off budget. This is often a consequence of donors who do not trust a country's financial management system, and that often compete for projects. As a consequence, substantial expenditures may simply not appear in the government's budget. Ministries may also prefer not to disclose donors' project grants and internally generated funds because they fear that this may decrease their share of government funds. The lack of information is common in the health sector judging from studies in Bangladesh. The fact that the private sector is a major player in health care in many low-income countries may contribute to the poor data collection. Off-budget activities create non-transparent, parallel systems that make comprehensive budget analysis and monitoring of expenditures difficult. Delays in donor disbursements also cause difficulties in estimating the full resource envelope.

Corruption extends to the execution of Programs. Once the budget has been approved by the legislature, the executive has to ensure that it is implemented in line with what was enacted into law. However, in many countries, budget management systems are so poor that it is difficult for the executive to monitor how resources are spent. Financial information on expenditures is frequently late, often incomprehensive and inaccurate. Crucial

data are often non-existent, and the data that are available are plagued by problems of timeliness, accessibility and frequency.

In practice, therefore, budgets are not always implemented in the exact form in which they were approved. Funding levels in the budget are not adhered to and authorized funds are not spent for the intended purposes. These practices are not necessarily corrupt. However, if for example trips abroad for high level public officials are well over budget, whereas the budget allocated for recurrent charges, such as medical supplies, is not spent, then corrupt behavior of public officials may have played a role. Once the fiscal year is over, the public (and the legislature who represents them) should be able to measure whether public resources have been spent effectively. Again, this is often hampered by delays in providing information and a lack of access. Even when data and statistics are accessible in time, they may be inappropriate, faulty and organized in a way that readers cannot draw any conclusions from them.

After budget, Second phase of corruption begins among Bureaucrats. Breaking down the budget process into consecutive stages is a helpful way to understand the various steps of the budget cycle. The cycle starts with governmental policy inception, which involves an analysis of the previous fiscal year, the setting of priorities, and estimates of income. It is followed by the government's budget formulation, including setting the resource framework, objectives and priorities. Upon enactment through the legislature, the budget is actually executed (or implemented) during the fiscal year: Revenues are collected, funds released, personnel are deployed, and planned activities are carried out. The budget cycle ends with the monitoring and evaluation of achievements: Expenditures are accounted for, the achievement of targets is measured, and the audit institutions provide their

feedback to the legislature. Their information is used to analyze and formulate the next year's budget. Figure 1 illustrates the various stages of the budget cycle.

There is a lot opportunities of corruption in the health sector. The corruption starts from appointment of a peon up to the highest post. Since they get appointment with high money, so, their first target is to fulfill their demands of money. At the result health service seeker become victim of unexpected harassment. They have to pay extra money which may not be possible to get service in public hospitals. There is a circle of broker for collecting corrupted money. Victims do not take legal action for possibility not to get proper remedy.

Third phase begins by Corruption in Hospital Management. It is a common matter rooted in health service provided by the government is equipped with full of corruption. Government hospitals may be called as the centre of corruption. Corruption in delivery of medicine, service by doctors and nurses, bribery to get bad in hospital are common form of corruption. I made a field survey during a research as to the implementation of right to health in Bangladesh. The survey shows that 95% of patents have to pay extra money to get service in public hospitals. It is either by doctor itself or through broker. Patents have to extra pay for government medicine, seat in hospital and other equipments. Doctors have collaboration with private Diagnostic centre and private clinic. It is clear from the above discussion that corruption is the prime obstacle in ensuring a public oriented health service in Bangladesh. Therefore, it should be the first attempt of the concerning stake holder to take initiative to eradicate corruption in health service to ensure a minimum standard of public health service.

The writer is Senior Lecturer, Department of Law, Uttara University.