#### 暴LAW&OUR RIGHTS

"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

# CONSTITUTIONAL ANALYSIS

### 15th amendment and constitutional sedition: Some issues

Barrister Md. Abdul Halim

NE of the most debatable issues introduced by the 15th Amendment to the Constitution of Bangladesh is the provision of sedition as provided in article 7A. In fact this new Article has created two substantive offences to be termed as Constitutional sedition:

(i)Abrogation, repeal or suspension of the Constitution by show or use of force or any other unconstitutional means (7A(1)(a)); and

(ii) Subverting the confidence, belief or reliance of the citizens to the constitution or any Article of it by show or use of force or by any other unconstitutional means (7A(1)(b));

Side by side two substantive offences this article also creates a pair of inchoate offences (attempt or conspire) and a pair of participatory offences (aiding, abetting, instigating, approving, condoning, supporting, ratifying).

In case of first category of sedition the offender has to either suspend, abrogate, or repeal the Constitution and any attempt or conspire to perform these actions will also be an offence and to constitute this offence the offender must either (i) show force; or (ii) use force; or (iii) use any other unconstitutional means. For practical purpose, ordinary citizens have nothing to worry about this first type of sedition since this show or use of force can in fact be done by the military authority. However, ordinary citizens will have concerns over the second category of sedition. Leaving aside the question of 'show' or 'use' of force, a person may, by 'any other unconstitutional means' subvert the confidence, belief, or reliance of the citizens to the Constitution or any of its articles. Here lies the most crucial and likely abusive part of the offence. Relying on this sub-article (b), the government of the day may file a case against a columnist or writer or news presenter or talk show presenter on the ground that the alleged writing, column, news or presentation or speech was written or presented in such a manner that it subverts the confidence, belief or reliance of the citizens to the Constitution. Leaving the question of proving the manner of 'unconstitutional

means' aside, this sub-article gives sweeping power to the executive to harass citizens at the cost of their guaranteed freedom of speech, expression and press.

The government argues that this provision is an armory or savers clause and it has been introduced in line with the observation made by the Appellate Division in 5th Amendment case. In this case the Appellate Division strongly denounced martial law and suspension of the Constitution and recommended for suitable punishment to the perpetrators. However, the way the provision has been inserted in the Constitution has every possibility of being abused at the cost of peoples' guaranteed right of freedom of speech and press which in effect will turn it into a sinister clause in the Constitution. This is because of the following reasons:

First, the provisions in article 7A are identical with ₹ those in article 6 of the Pakistan 1973 Constitution. However, the Pakistan Constitution does not have the provisions inserted in clause 7A(1)(b) and as such the provisions in Bangladesh Constitution have been made more draconian compared to those in the Pakistan Constitution. Further, Pakistan Constitution provides that parliament shall make law for punishment of persons found guilty of high treasons. However, the provisions in Bangladesh Constitution leave the entire matter of punishment with the existing law of the country whereas the existing law (Penal Code) seems incompatible with these provisions.

Second, the category and status of the crime created in article 7A also seems clashing with the existing provisions in the Penal Code. Article 7A creates a separate offence named sedition, better to be termed as "Constitutional Sedition" but again sub-article 7A(3) states that persons alleged to have committed the offence shall be sentenced with the highest punishment prescribed for offences by the existing law. Now plainly speaking, the offence and its actus reas have been created by the Constitution whereas the punishment is to be hired from the Penal Code. This inconsistent outlook of penal jurisprudence in a sacred document like the Constitution seems irrational and



conflicting with the spirit of constitutional jurisprudence. It will certainly generate unnecessary debate with constitutional interpretation. The Constitution creates an offence with constitutional significance but it neither mentions its punishment nor specifies the mode of investigation and proof and trial by courts etc. leaving many issues uncertain and vague. Which court will take cognizance of this offence? How will the investigation proceed? What will be the extent of 'show of force' or 'use of force'? How will the term 'unconstitutional means' be proved and at which standard? Likewise, 'confidence', 'belief' or 'reliance'these words are uncertain and vague- who will explain these? How will their explanation be accepted by the courts? It was incumbent upon the parliament either to outline these or to empower parliament to make law in this regard.

Third, the way the offence has been designed in clause (2)(b) it sounds clear that even judicial condonation has been made an offence of sedition and the Supreme Courts power of judicial review and condonation for the sake of restoration of democracy has been blocked.

Fourth, the words, 'show of force', 'use of force' and 'unconstitutional means' are not only wide but are

always subject to interpretation and debate. After the passage of the amendment the Prime Minister Sheikh Hasina stated on several occasions in public that the amendment has been made with a view to preventing extra-constitutional military take over only. However, the Prime Minister's contention has relevance only with regard to the first category of sedition in clause 7A(1)(a) but not with regard to clause 7a(1)(b). It is not indicated anywhere why the clause (b) (indirect sedition) was introduced. We should not forget that these stringent provisions were also inserted in the Constitution of Pakistan but these could not prevent military take over in that country. Genral Ziaul Haque and Parvez Mosarraf ruled the country with martial law suspending the Constitution in spite of these tigerprovisions but ironically they did not face charges

of 'high treason'. Martial law or military take over never comes in force through constitutional means, and that they know no court verdicts; they don't care about court rulings; court verdicts are suspended or overruled by force; even judges become bewildered and succumbed to circumstances and so an amendment to the constitution is never a solution to prevent military rule. The only guarantee to hinder the unconstitutional take over of the state power by the Armed Forces is to install a truly democratic Constitution which articulates the will of the people and ensures the participation of all the citizens in the democratic polity. It is now apprehended that anyone who criticizes the Constitution may be prosecuted for sedition. This is glaringly manifested in the International Crisis Group Asia Report No 226 13 June, 2012 in which extensive interviews have been taken recently from experts and leaders but all are anonymous for fear of being charged with sedition.

It remains to be seen how these offences are dealt with by the judiciary. However, the constitution- the supreme law of the country is now full of contradictions and uncertainties.

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in Bangladesh. In 1972, the Constitution of the Peoples

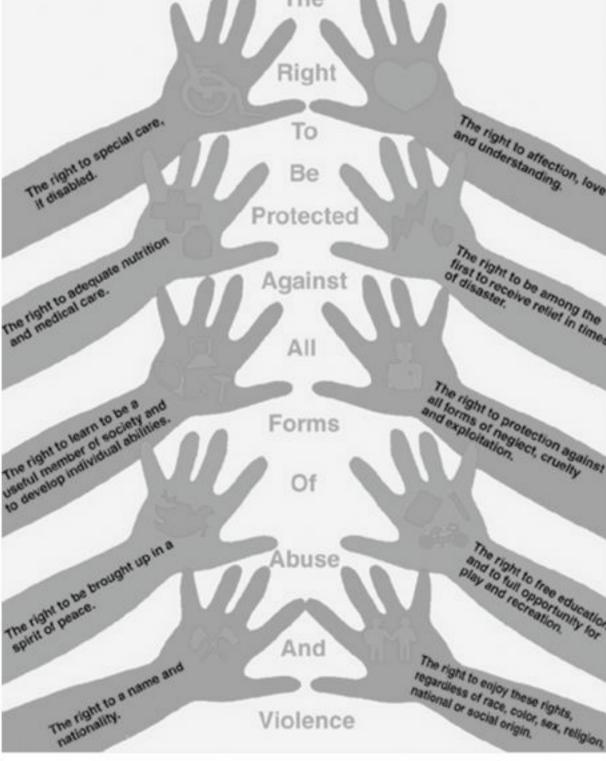
#### HUMAN RIGHTS ADVOCACY

## Realizing child rights!

ANUP KUMAR BISWAS

T ET us ignore the age-old dialogue that we should take care of children because they are the future hope and aspiration of a nation. Let us raise the idea that children should be protected better because its our responsibility to promote their welfare. A prosperous nation works much but deserves little. The far developed communities of the world have preserved an enlightened universe for their future generations leaving the thoughts of their own comfort and betterment. Since they have protected their children better, their national progress is automatically ensured. A country can reach the highest culmination of success if it can guarantee the rights of

#### THE RIGHTS OF A CHILD



the children. Almost all the better developed countries of the world have become successful in establishing and promoting child rights than the least developing countries. The problem in establishing child rights is not always with the resources and infrastructures but with honest will, attitude and determination. Regarding promotion and protection of child rights, Bangladesh lies in the category of less developing countries. But it is quite surprising to know that Bangladesh ratified 'The Convention on the Rights of the Child (UNCRC)', the mother instrument regarding child rights, in 1991. In addition, long before the ratification of the UNCRC,

there was a continuation of development of child rights

Republic of Bangladesh was framed which contained provisions relating to children's welfare. A full-fledged Act for the children exclusively named 'The Children Act, 1974' was passed following a supplement to it, 'The Children's Rules, 1976'. The Bangladesh Shishu Academy was established in 1976. A separate ministry named 'Ministry of Women and Children Affairs' was established in 1978. The Government of Bangladesh has undertaken many development programmes for its children in its 'National Plans of Action for Children'. Besides, many other facilities affecting children have already been reflected in the 'Poverty Reduction Strategy Paper (PRSP)' and 'Millennium Development Goal (MDG).' Now the question arises as to where lies the problem. Actually from time to time, the demand for establishing children's rights becomes active in Bangladesh and seminars, symposiums, round-table conferences are organized in this respect but with no fruitful consequences after that. It is, as if, the sole responsibility lay only in organizing the programmes but not advocating for its effective implementation. Of course, it is true that both the Government and the civil society of our country do feel the dire necessity of promising the children a more favourable environment. But the problem is, whenever the issue of establishing child rights is raised, it is interpreted from only a single view perspective whereas, the issue involves more comprehensive considerations simultaneously rather than one strategic solution. Many think that it rests solely upon the Government to implement child rights. In fact, there are some other factors which can effectively accelerate the establishment of child rights and promote child development.

Impediments standing in the way of establishing child rights in Bangladesh

Though Bangladesh ratified UNCRC in 1991, it is yet to be implemented completely. There are some problems because of which implementation of child rights still remains a far cry. Through review of the situational analysis, reasons responsible for non-

implementation of child rights are: Inadequate legal protection when children come in

conflict with the law. Minimum level of child participation.

- Failure to establish an Ombudsperson exclusively for children.
- · Absence of separate budgetary allocation for children in the annual national budget.
- Less effective or shadow role played by the NGOs. Indifferent attitude towards some specific provision rights.
- Having no categorized definition of the term 'child'. Lack of Inter-agency coordination, monitoring and reporting.

· Failure to comply strictly with the provisions of the UNCRC.

#### Recommendations with probable forward-thinking

Regarding Ombudsman for children: In order to safeguard the rights of the children effectively, the establishment of a Commissioner or Ombudsperson exclusively for children with statutory powers shall be a priority issue for Bangladesh. He must be entrusted with such independent authority so as to enable him to monitor the establishment of the rights of the child without any intervention of the Government.

Legal protection: The Government should take all necessary measures to eliminate all forms of violence against children. In this regard, the Government should first cause 'The Draft Children Act, 2010' to turn into law as soon as possible. Not only that, the Government should strictly implement the provisions of the laws so that a sound juvenile justice system can be ensured. There should be special laws for children during emergency situation in Bangladesh.

Separate budgetary allocation for children: The Government should provide special allocation in the annual national budget for children within its available resources and strictly monitor the proper implementation of such allocation. In this respect, the Government should have regard to the budgetary allocation provided in other countries of the world and allocate under special head like 'Child development budget', 'Child protection budget', 'Budget for street children', 'Budget for disabled children' etc.

Child participation

Supreme emphasis should be given on promoting children's right to participation. More child participation should be ensured especially in development policies and programmes affecting them both at local and national levels.

Role of the NGOs: NGO's should play a key role in the monitoring and the implementation of the UNCRC. The government in this respect should systematically co-operate with the NGOs and involve NGOs in research, policy formulation, monitoring and evaluation of the implementation of the Convention. State Parties should treat NGOs as partners, not as competitors.

Child labour: Child labour works against child education. But it should be kept in mind that in a least developing country like Bangladesh where many root level families are dependant on the sole income of the children, it is quite difficult to eliminate child labour overnight without opting for an alternative remedy. What we can do right now is that we can monitor and address exploitative forms of child labour. Laws prohibiting employment of children under 18 in hazardous situation or environment must be strictly enforced.

Right-based instead of need-based projects: Instead of undertaking separate need-based projects, an effective right-based national health policy should be adopted by the Government. Legislation needs to be extended to other areas which vitally affect children's health and nutrition.

Child marriage: Child marriage and the prevailing attitude towards the role of women in the family and society continue to be the two major reasons for the female child's backwardness in education. So, proper awareness raising campaign should be launched in this regard. The traditional attitude towards the female child's marriage should be changed.

Categorized definition of the term 'child': From the perspective of Bangladesh, having a fixed definition in accordance with article 01 of the UNCRC for all purposes arising out of the situations involving children will create a few problems. So, the term 'child' should be defined under the following categories: Considering the age of criminal responsibility, considering child labour, for juvenile justice administration and other purposes.

Coordination, monitoring and data collection: Interagency coordination and monitoring should be strengthened. Ongoing research is necessary to ascertain what works and what does not work. As a necessary component of both monitoring and research, ongoing collection of rationally consistent data at both the police and the court levels should be a goal.

Compliance with the UNCRC provisions: Adequate steps need to be taken by the Government to implement the provisions of the UNCRC by incorporating into its national legislation and continue a review process in order to comply with it.

It is true that considering all the above factors for actual child right establishment is a gigantic and daunting task for the Government of Bangladesh since there are so many impediments standing in the way of implementing child rights including the resource constraint as the main hindrance. But no other option lies open. Total commitment and total execution are needed. It should be borne in mind that Japan and Germany (after World War II), many countries of middle Europe (in the beginning of 19th century), did not have so much resource but now they are excellent examples of countries promising child rights. Honest political will of the Government and sacred commitment of the common people will definitely enshrine the rights of children. All that is required now is to act upon respective duties on everyone's part in order to build up an enlightened environment for children liberated from all complexities.

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