

## CONSTITUTIONAL ANALYSIS



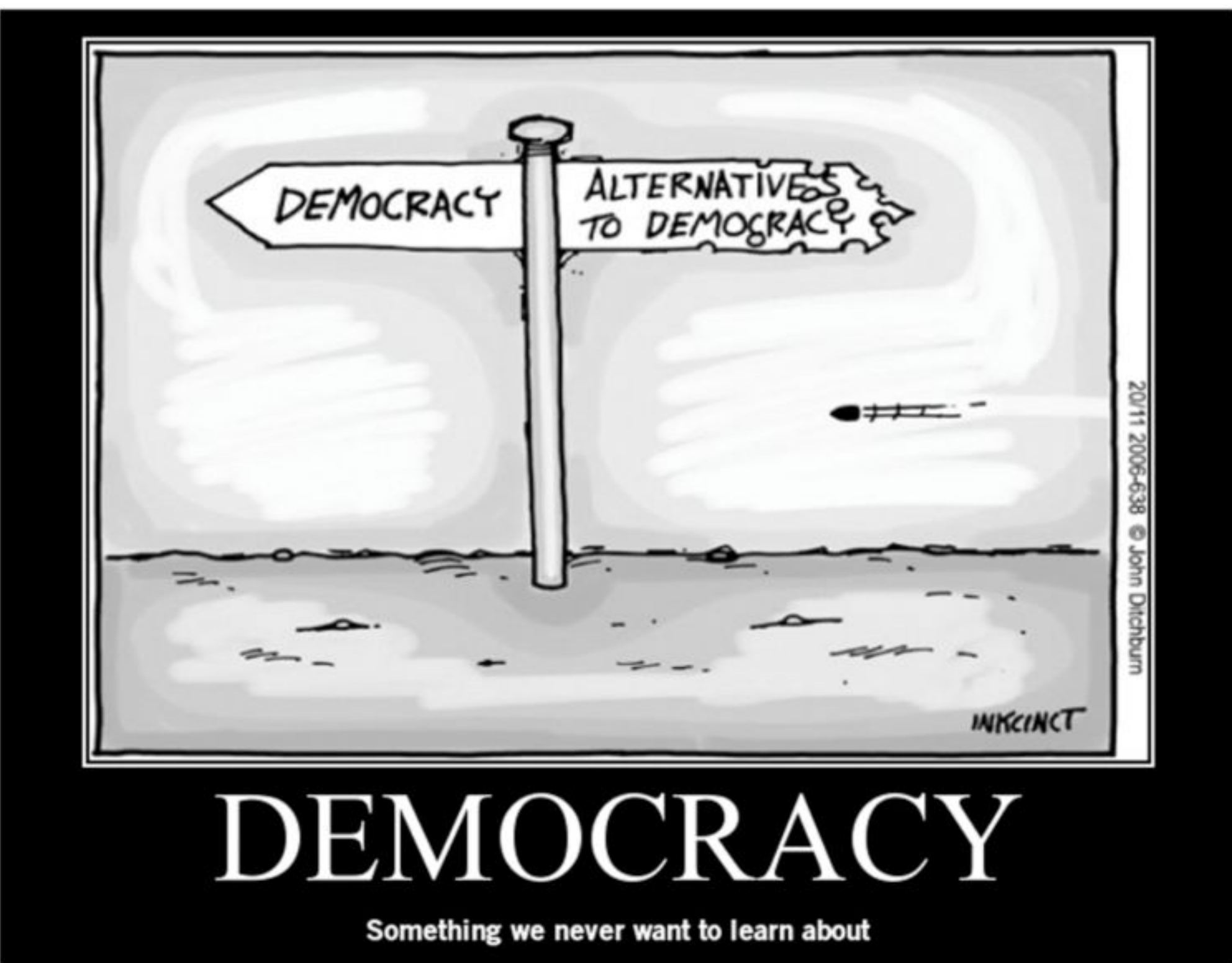
# Democracy needs constitutional clarity

MD. ASHRAFUL ALAM

DEMOCRACY is a term may be the most discussable topic all over the world by political leaders as well as national and international intellectual personnel at all levels. This writing is neither to discuss what is democracy nor the reasons for non-effectiveness of democracy in Bangladesh rather to show the constitutional basis of democracy and the legal phenomena arising from constitutional guarantee. Democracy is taken as a pledge in the preamble of Bangladesh constitution along with other three. This preamble is declared as a basic structure of our constitution which is neither amendable nor derogation. The issue is decided by the apex court in *Anwar Hussain Chowdhury v. Bangladesh*, 41 DLR (AD) 165, case popularly known as 8th Amendment case through the new concept of basic structure of constitution. As a pledge in the preamble, derogation from democracy is not allowed. More aptly, democracy is accepted as one of the four fundamental principles under Article-8 of Bangladesh constitution.

The Article more emphasises to provide that these principles shall be fundamental to the governance of Bangladesh, shall be applied by the state in the making of laws, shall be a guide to the interpretation of the constitution and of the other laws of Bangladesh, and shall form the basis of the work of the state and of its citizens. Furthermore, Article-11 of the constitution provides for democracy stating that the Republic shall be a democracy in which fundamental human rights and freedoms and respect for the dignity and worth of the human person shall be guaranteed, and in which effective participation by the people through their elected representatives in administration at all levels shall be ensured. These three provisions have shaped democracy as a constitutional basis. That's why democracy is a matter of constitution and constitutional law rather political science.

This is the constitutionalisation of democracy to create legal perception for the citizens of Bangladesh. Although democracy has a strong constitutional basis but there is no where any explanation and definition of democracy in Bangladesh constitution. This lacuna has facilitated the state to give a traditional and one-eyed explanation of democracy.



The matter is more sorrowful that despite of the clear statement in Article-8 as democracy shall be a guide to the interpretation of the constitution the constitutional court don't dare to give a full definition of democracy rather thinking it is a matter of politics and not of constitution.

Since, there has no uniform definition or explanation of democracy, it is considered as of political narrow concept where there is a significant distinction between political concept of democracy and constitutional democracy. Generally, political concept of democracy implies majority rule or taking decision by majority support. So, it is a collective rights exercised by majority people. But constitutional democracy is something more than that of majority rule. Constitutional democracy infers both to individual right and collective right.

There is cohesion of individual and collective right. Constitutional democracy has two steps, firstly, protection of individual right and secondly, protection of collective right. Protection of Individual right is the hardcore of constitutional democracy. Constitutional democracy looks at first to the right of individual than to collective right. Collective right shall not be exercised in any way to affect individual right.

Secondly, collective right needs effective and active participation in exercising the right. Although we have constitutional democracy in Bangladesh but there is no protection of individual right while exercising collective right.

Moreover, there is no active participation of majority people in collective decision. Dear readers, look to an example, it is truth that the maximum people of Bangladesh are poor or in middle class level. Since, majority are poor majority rule requires the poor representatives in taking decision collectively. Can you give any example to show a poor citizen is parliament member? All are business class rich man. Now, the question arises why constitutional democracy is not active in Bangladesh. The only reason is some myth and misconception about democracy.

Some common myth and misconception about democracy are discussed for more clarification. Firstly, it is considered that democracy is a matter of politics and it is not applicable in social and economical aspects. But this concept is absolutely wrong. Because, a person who has no social and economic guarantee can never participate in collective decision. If you say there is participation by vote, this is a token participation, not effective.

Second misconception is to consider democracy as a matter of political science. But I have shown that democracy has constitutional basis and it is a constitutional matter. Now another question arises democracy being a constitutional matter, why it is not applied constitutionally? Because, the concept is not known to all or none dare to raise the issue. Moreover, democracy has no uniformity in our constitution.

Therefore, its up to the stakeholder to bring uniformity in our constitution. The countries in which democracy is working effectively, transformed democracy from political aspect to constitutional shape. United States of America made a sustainable shape to constitutional basis as to democracy. USA constitution provides the essential principles and essentials of democracy. We need a constitutional reform to alive dead democracy.

First initiative requires the principles of democracy should be recognised constitutionally. They are popular sovereignty, majority rule and minority rights, limited power of government and due process of law. Popular sovereignty requires constitutional recognition that the people are the ultimate source of the authority of the government which derives its right to govern from their consents both individually and collectively. Strong protection of the fundamental rights of individuals in the minority should be ensured. The powers of government should be limited by law and constitution which those in power obey. And the most important one is due process of law. Individual rights to life, liberty, and property should be protected by the guarantee of due process of law.

Secondly, equality should be ensured politically, socially and economically under constitutional provision. Political equality means all citizens are equally entitled to participate in the political system actively (not participation in name). Guarantee should be provided for ensuring representative without any discrimination on the basis of social status. Constitutional democracy has a different concept of the meaning and importance of economic equality. At the very least, all citizens should have the right to an equal opportunity to improve their material wellbeing.

There should have an attempt to eliminate gross disparities in wealth through such means as progressive taxation and social welfare programs.

Thirdly, there should have justice system as required by constitutional democracy. They are distributive justice, corrective justice and procedural justice. Distributive justice requires the fair distribution of the benefits and burdens of society among all. Corrective justice refers to fair and proper responses to wrongs and injuries without any bias and partiality. Procedural justice needs the use of fair procedures in the making of decisions by all agencies of government and, most particularly, by law enforcement agencies and the courts.

If democracy gets a constitutional uniformity and clarity, we the people of Bangladesh shall have some legal perceptions. All persons shall have equal entitlement in application and protection of law in real sense. They shall be free from discrimination based on gender, age, race, ethnicity, religious beliefs, class or socio-economic status. All agencies of government shall use fair procedures in the gathering of information and the making of decisions. The government shall facilitate easy access to all information necessary for making a wise and just decision as well as the procedure allows interested members of the public to observe how information is gathered and used in making decisions. Enough notice should be given of when, where, and why information is to be gathered or decisions are to be made, so those concerned can prepare adequately. Therefore, constitutional democracy obliges us to make the relationship between citizens and constitutions and to the means of realising democracy at the level of the fundamental laws. This is far preferable than obsessing about who should have the final word about the meaning of a constitutional provision. As crisply stated by the judges of the Supreme Court of Canada, "viewed correctly, constitutionalism and the rule of law are not in conflict with democracy; rather, they are essential to it". This would be the wisest and most practical thing to do.

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



# GI Law: To protect intellectual properties

TANZIM ALAM

THE enduring competitive advantages in a global economy lie increasingly in local things-knowledge, relationship, motivation- that distant rivals cannot match.' Michael Porter (1998)

Concerns about intellectual property rights have been amplified because of advancement of technology. Geographical Indication (GI) is one type of intellectual property which can be termed as cultural heritage property of a particular territory. The importance of local things in the global market has increased due to the legal protection of local things or products with their local essence and flavor. This is happening as a result of safeguarding geographical indications worldwide. Different countries of the world have adopted the GI law to protect their exceptional and traditional export oriented products in the global market.

Bangladesh has not enacted any Geographical Indication law yet perhaps due to the bureaucratic complexities. But in case of ascertaining intellectual property rights, it is crucial to note that- 'first in time, first in right'. By now, a report has drawn our attention published in different newspapers a few days ago concerning India's one step way ahead in the arena of protection of geographical indications. The news disclosed regretful news for Bangladesh.

India has registered Jamdani Sari (Uppada) as originating from Andhra Pradesh, the nakshi kantha from West Bengal and fazli mango from Malda district in West Bengal. Owing to the negligence of the authorities, we have lost the royalty on this fazli mango which is famous for its taste and size largely produced in the Rajshahi region. This mouth-watering mango variety is now included within the protected geographical indications of India.

A draft Geographical Indication law has been prepared but we don't know about its fate. This GI Act has listed 66 products as geographical indications of Bangladesh including fazli mango. There are other products like Hilsha from Chandpur, Khadi from Comilla, and Curd from Bogra which indicate the special geographical characteristics and reputation of these particular territories. These traditional know-how

needs to be protected to fix a commercial value of these products for the betterment of position in the global market. Safeguarding geographical indications is closely related with the improvement of economic livelihood of rural people. If our products are duly protected under the geographical indication law, and its quality and other characteristics are accordingly monitored and certified by an authority, consumers will be satisfied about the product's content without any fear to be cheated.

Now the question arises what is the legal basis of protecting geographical indication. This term has been defined in a variety way. In its simplest form, Geographical Indication is a sign which recognize a link between a product's geographical origin and its reputation or quality because of that particular geography. According to the Art.22 of the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPs), Geographical indication means 'any indication that identifies a product as originating from a particular place, where a given quality, reputation or other characteristics of the product are essentially attributable to its geographical origin.' When any product originates from any particular territory, it also attributes a definite quality or other reputation owing to its geographical environment. We all are familiar with Basmati rice of India and Pakistan commonly recognized for its aromatic flavor which signifies its origin. A controversy arose when USA claims patent to this variety of rice. At last, India and Pakistan has registered it as their geographical indication. Besides, Darjeeling tea is well-known worldwide for its flavor, color and essence. But countries like Kenya, Sri Lanka and Nepal produced tea often passed off worldwide as Darjeeling tea. As a result, India has lost a huge amount of revenue from this sector. After adopting adequate legal protection by registering Darjeeling tea as India's geographical indication, this misuse has been averted. The tea regained its reputation which attracts the global consumers to pay money for a quality product even with a premium price.

Legal advancement taken by India in the field of intellectual property can be regarded as an example for

Bangladesh for its development in this context. In case of Bangladesh, if we can guard our traditional products and processes from free riding and intact the quality, it will be boosted as a boon to our economic development. It will also help to enhance rural livelihood through the protection of local products and attributing commercial value to these. The handloom sector of the country is neglected though it has a glorious past. If



the government can regain that position by safeguarding products made by handlooms then it will be considered as a gate to earn revenue.

Why Geographical Indication protection law is necessary? Geographical Indication law is necessary to protect intellectual properties, heritage products and also to encourage innovation. Without adequate legal protection in domestic and international arena, products identified as geographical indication of a particular territory cannot bear the true result. At present, there is no law to protect the traditional know-how or exceptional export oriented products in Bangladesh by which it can claim its geographical originality on that particular product. Bangladesh Rice Exporters Association (BREA) has urged to include Bangladesh

with India and Pakistan in the joint registration of basmati rice under the geographical indication law. It claims that this variety of rice is a joint heritage of this sub-continent and it is also cultivated in the Dinajpur region commonly known as 'Banglamoti'. If there is no geographical indication protection law, we have to lose all our cultural and traditional products as the products of other origins. Our products will be alien to

us for our negligence. Bangladesh is a member of World Trade Organization (WTO) and obliged to TRIPs agreement. Without proper care to protect its traditional product and process, Bangladesh will lose a huge sum of revenue. Through the GI process, Bangladesh can accrue various benefits like market access and establish brand and goodwill of the product which will facilitate in reducing tax. It is a burning necessity to implement geographical indication protection law to preserve traditional knowledge and enhance reputation of Bangladeshi products in the global market.

The writer is Student of Law, University of Rajshahi.