

CONSTITUTIONAL ANALYSIS



Advisory opinion: Metaphor of PIL?

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IT is often argued that the Constitution of Bangladesh in its present form has made the President a titular one. It has shrunk the role of the President in such a manner that the President feels isolated in a larger constitutional canvas. But the President is gifted with a very unique power of seeking advisory opinion from the Supreme Court under Article 106, which runs as follows: "If at any time it appears to the President that a question of law has arisen, or is likely to arise, which is of such a nature and of such public importance that it is expedient to obtain the opinion of the Supreme Court upon it, he may refer the question to the Appellate Division for consideration and the division may, after such hearing as it thinks fit, report its opinion thereon to the President." Some elements of this provision are to be noted, firstly; it should appear to the President that a question of law has arisen or is likely to arise, secondly; this may appear to the President "at any time", thirdly; the question should be of such a nature and of public importance that it is expedient to obtain the opinion of the Supreme Court, and lastly; the Appellate Division would render its opinion "as it thinks fit." The linguistic vista of this Article is a temptation to unfold the interpretative horizon of the constitution for strengthening the trends of rule of law and constitutionalism in Bangladesh. Under the present political reality, it is assumed that many 'law questions of public importance' are likely to arise in the days to come. It is aspired that Article 106 may appear to be very significant to the new president in any probable juncture.

It is often claimed that in case of seeking advisory opinion under Article 106, the President can not swim beyond the wish of the government i.e. the Premier. In the face of any exigency of seeking any Reference to the Supreme Court of Bangladesh, the head of the state, it is said, is not constitutionally free to move on his own under Article 48 (3). Article 106 is said to be read with Article

48(3) which says that in the exercise of all his functions, save only that of appointing the Prime Minister and the Chief Justice, the President shall act in accordance with the advice of the Prime Minister.

Apart from this, it is further argued that under Parliamentary democracy, reintroduced in 1991 through 12th Amendment to the Constitution, the President constitutionally cannot apply Article 106 even if it is unanimous call of the people. The 12th Amendment to the Constitution was passed unanimously by all the Members of Parliament belonging to different political parties in the Fifth Parliament.

Keeping this traditional view aloof, President's power of seeking advisory opinion under the present constitutional set up may be viewed from a different angle. The reasoning put forwarded above, it appears, is based on one-eyed assumption. The language of Article 106 is couched in wide terms which provide that any question of law having public importance may be referred by the President for consideration of the Appellate Division. ATM Afzal J. rightly observed in en masse resignation of Mps Reference in 1995: "The discretion is entirely his [of the President] which can not be doubted or questioned. The expediency, or the motive, political or otherwise, or bonafides of making Reference can not be gone into by the Court. The President's satisfaction that a question of law has arisen, or is likely to arise, and that it is of public importance and that it is expedient to obtain the opinion of the Supreme Court justifies a Reference at all times under the Article."

Undeniably, government's interest is a factor in choosing the subject matter of Reference. But, till this date, we lack any precedent to the effect that any President of Bangladesh is rebuffed by the Supreme Court on the ground that he has not consulted with the Prime Minister and so on. Even proviso to Article 48(3) has given an indication that whether the President has consulted with the Prime Minister or not and if so, what advice has been tendered, is



a matter cannot be brought under judicial scrutiny. This should encourage the President to apply his conscience in case of dire necessity. However, it should not be overlooked that through personal charisma, wisdom the President can always take the Prime Minister into confidence to pay heed to his desire.

At this point, the question of institutionalisation of the post of the President comes into play. In exercising the power of invoking advisory opinion in favour of the prejudiced nation, the statesmanship and official oath (protect, defend and safeguard the constitution) becomes much more important than that of alleged constitutional limitation of the President. It is to be remembered that the marginal note to Article 106 of the Bangladesh Constitution has used the word 'Advisory Jurisdiction' not 'President's Function'. This jurisdictional dimension of the Appellate Division puts the President in an advantageous position to be aggrieved for the cause

of the countrymen, thereby extracting the best benefit possible from this mechanism under Public Interest Litigation (PIL) jurisprudence.

The focal point of statesmanship and the Constitution is the people. So, when the fate of the people is at stake, when the Constitution is at peril, resort to the guardian (the Supreme Court) of the Constitution becomes the most desired option. It is submitted that the Supreme Court has the responsibility of ensuring that a Constitution, however flawed it may be, is given an interpretation that promotes the working of the Constitution in a manner that is consistent with constitutionalism. N.S. Bindra, a leading authority on interpretation emphasises the sui generis character of constitutional interpretation. To quote N. S. Bindra: "A democratic Constitution cannot be interpreted in a narrow and pedantic sense. It is the basic and cardinal principle of interpretation of a democratic Constitution that it is interpreted to foster,

develop and enrich democratic institutions. To interpret a democratic Constitution so as to squeeze the democratic institutions of their life giving essence is to deny, to the people or a section thereof the full benefit of the institutions which they have established for their benefit."

We can easily precede the post of the President amongst all other 'democratic institutions'. So, there is at least an academic scope to argue that President's power under Article 106 should not fall within the purview of Article 48(3) of the Bangladesh Constitution, which has restricted the exercise of the President's function subject to the Prime Minister's consent. It is high time to think whether President's power of invoking advisory opinion can be forged and developed as a technical extension and isomer of Public Interest Litigation. It can be said that seeking advisory opinion of the Appellate Division is somewhat like the President's PIL. Metaphorically, this can be termed as the only original jurisdiction of the Appellate Division of the Supreme Court. In any case, let the content of Article 106 itself be the subject matter of reference where, the constitutional scope of president-prime minister relationship may be explored.

However, it is to be admitted that public opinion is not well formed and convinced about judiciary's capability to play an effective role in dismantling the Constitution from the garb of politics. In such a Bangladeshi polity, president's move for advisory opinion may be seen from a meticulous eye. But given the circumstances, especially evaluating the advisory-opinion-worthy instances that frequently occur in our national life, it would be unwise to deny the court's role in times of juncture. Collective wisdom of the Supreme Court definitely can foster a more dependable constitutional pattern from the shadow of politics.

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LAW OPINION



Rearview mirror of justice, laws and courts



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THE notion of justice is as old as human existence in the earth unlike to the concept of laws and courts. The 'absolute monarchy' started with the idea of 'King can do no wrong' and ended with the perception 'king is also under the law' paying the way for 'limited monarchy'. With the empowerment of upper middle class in the name of common people, the perception of democracy entered with a view to minimizing the gap of injustice of some tyrannical aristocrats.

From the idea of 'rule of man', the thought 'rule of law' heralded but the popular name of democracy still serves the interest of some 'elected elites'. The difference between the haves and have-nots still predominantly persists reflecting two giant evils- inequality and injustice worldwide.

The status of rule of law is seemingly a metaphor. At present, 135 of the world's 206 sovereign states use the word 'Republic' as part of their official names but democracy is struggling almost in all coun-

tries as it is redesigned as 'oppression of the majority'.

The quote of Abraham Lincoln on democracy as 'a form of government of the people, by the people and for the people' was a synthesis of the noted political treatise 'Republic' of Greek philosopher Plato. However, democracy is not a panacea because the Chinese along with a good number of states are happy with socialist as well as communist ideologies while still some countries in the Middle East are patronising modern monarchy in the backdrop of Arab Spring.

Laws and courts do not play equal role as to developed, developing and least developed countries. In developed states laws and courts have dominating role while in developing countries laws and courts have progressive role. But in least developed countries laws and courts have less significant role while people are leery of laws and courts.

However, showing apathy and distrust on laws and courts, people again trying to popularize ADR going back to the basics of

religious and social norms of peace and harmony. Long ago, Chinese Philosopher Confucius taught their people that law can play only secondary role not primary one to regulate human life and society. The Chinese still believes that going to court means 'to get a goat selling a cow' and also imbibed with a taboo 'in death avoid hell and in life avoid law courts'.

The concept of law to a capitalist, a socialist, and a communist differs creating division in western and oriental philosophy. Perhaps, to a working class of people 'law is a tool of oppression used by the ruling class to advance its own interest'. Honoré de Balzac, a nineteenth-century French novelist and playwright says, "Laws are spider webs through which the big flies pass and the little ones get caught."

Herbert Spencer, a British philosopher points out that civilizations and laws are the products of biological, organic evolution, with the struggle for existence, natural selection and survival of the fittest coinciding with Darwinism. He opines civilization as a gradual progress of social life from simple to more complex forms, from primitive homogeneity to heterogeneity.

Charles Dickens in his dramatic novel 'Great Expectations' says that there is nothing so finely perceived and felt as injustice. Thrasymachus, a sophist of Ancient Greece best known as a character in Plato's Republic terms justice 'as whatever the strongest decide in their best interest'. Socrates dismisses this argument by proving that the strong rarely figure out what is in their best interest, and this cannot be just since justice is a good thing.

The basis of justice, according to Socrates, is that you do what is socially most beneficial. Tragically, Socrates was the victim of injustice which haunted him even before the execution. Before swallowing the 'hemlock' he emotionally uttered before the court, "the hour of departure has arrived, and we go our ways. I to die and you to live, which is the better, only God knows".

After devoting his entire existence to

figuring out the meaning of life, even he didn't know the answer and ultimately left it to nature. His disciple Plato uttered that 'just men are happy and unjust men are unhappy after the demise of his peer as part of non violent protest.

Nobel laureate economist Amartya Sen in a public speech on "Justice and India" at Kolkata in 2009 humorously uttered, "Justice for many is like trying to find a black cat in a dark room, however if you can throw some light, it is not dark anymore" He added that justice is about stopping severe injustice not about a utopian notion of justice.

"Justice is fairness" based on 'social contact theory' of US leading political philosopher John Rawls relying on the theory of "just society" founded on "liberty and equality". Rawls openly acknowledges that the world's poor have no place in his 'A theory of justice' published in 1971. On the other hand, according to Nobel Laureate Indian economist, justice is a "social value" based on diverging ideals and he thinks that 'just society' is a vague concept because a society may be "more or less just" in a comparative approach in line with his noted book 'The Idea of Justice' published in 2009.

To a capitalist justice is the result of price while to a sociologist justice is a value. If justice is a value then it is the duty of all to ensure justice in the respective fields.

Consequently, all judgements are not justice rather they are decisions based on evidences and sometimes on hunches. Lord Hewart in *R v Sussex Justices* [1924] 1 KB 256 at 259 opines: "... it is not merely of some importance but is of fundamental importance, that justice should not only be done, but should manifestly and undoubtedly be seen to be done."

In a survey in 1999 conducted by the National Center for State Courts (NCSC) assisted by Hearst Corporation, an American mass media group, it was found that the US trial courts aims five points namely i) access to justice, ii) speedy and timely trial, iii) equality, fairness and integ-

riety iv) independence and accountability and v) public trust and confidence. In the survey it also reveals that two-thirds of the American think access to justice is very expensive, 87% feel trial is not speedy, 50% think Blacks, Hispanics and Asians are not getting justice, and 80% reckon that the US judiciary is for rich.

More than 81% of respondents strongly feel that judges' decisions are influenced by political consideration and 78% agree that elected judges are influenced by having to raise campaign funds. Moreover, 90% people feel that they do not have trust and confidence on courts. The summary of the survey report was that the US trial courts have failed to fulfill their own set aims.

Justice Rodger K. Warren, President of the NCSC said that the main purpose of such type of survey was to assess the thoughts of people on courts, trial and justice before entering into the 21st century. However, in another survey of the NCSC in 2000 the trust and confidence of the Americans were seemed to be raised to a large extent on 'Procedural Justice'. In the second survey on procedural part of justice there were emphasis on i) neutrality ii) respect iii) participation and iv) trustworthiness.

If this is the scenario of the USA then what about other countries in which elected governments put assignment to some politically appointed judges to serve their purposes of justifying the unjustified issues? In the name of 'managed justice' through judgements, some judges are dividing the nations politically while they are obliged to ameliorate the rifts or division among people for the interest of peace, harmony and tranquility within people and society. The seat of Judge is seat of god. Besides powers and discretion it holds responsibilities and duties. Judges are also bound by law and they should not impart their emotions and futile comments.

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