



গণপ্রজাতন্ত্রী বাংলাদেশের সংবিধান

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Enforcing constitutional pledge

The Constitution of Bangladesh 'as the solemn expression of the will of the people' is the supreme law of the land. It embodies the principles to be followed at the governance of the republic; it guarantees the rights of the people to be protected by the supreme judicial authority. The Preamble of the Constitution pledges to establish a 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.

To manifest these towering ideals article 27 of the Constitution ensures 'equality before law' and 'equal protection of law'. Respect for human rights and dignity is the sine qua non of a democratic welfare State. The historic struggle for 'Rights of Man' is circumscribed by the denial of the absoluteness of the State and of its unconditional claim to obedience and, assertion of values and personal liberty against the State. One of the core rationales for adoption of written Constitution is to ensure 'recognition' and 'protection' of the individual's rights. In that esteem the Constitution of Bangladesh is unique as in addition to 'recognition' and 'protection' it affirms that 'laws' and/or 'actions' inconsistent with 'fundamental rights' shall to the extent of such inconsistency be void.

The High Court Division (HCD) of the Supreme Court (SC) is entrusted for enforcement of fundamental rights. As per article 100, the permanent seat of the SC (both divisions) is at Dhaka; though the sessions of the HCD could be held outside Dhaka it has never been accomplished after the Eighth Amendment case. The territorial remoteness coupled with cost, complexity and delay resulting in disinclination to approach the HCD at Dhaka for enforcement of fundamental rights. To ease

this barrier the framers of the Constitution from their far reaching vision permitted the Parliament to delegate the power/s of the HCD to any other court under article 44(2). The present articulation explores the potential advantages to materialise article 44(2) of the Constitution.

The HCD: Defender of rights

The enduring aspiration for 'equality, human dignity and social justice' as envisaged in the Proclamation of Independence of Bangladesh prompted the framers to make the Part iii of the Constitution an abode of rights. In articles 27-44 eighteen human rights have been recognised as 'fundamental rights'; these are fundamental in the sense that rights recognised in those articles are not only judicially enforceable by articles 44 & 102 but also are free from any legislative transgression by virtue of article 26.

Uniqueness of article 44(1) rests on its two dimensional effects firstly, under article 102(1) it ensures enforcement of fundamental rights by the HCD; secondly, right to approach the HCD for enforcement of fundamental rights under article 44 (1) - itself is a 'fundamental right'. Assertion of jurisdiction under article 102(1) has placed the HCD in a celebrated position. Being empowered by article 102(1) the HCD may on the application of any aggrieved issue directions or orders to any person or public authority for enforcement of any of the fundamental rights. Clause (2) of article 102 authorises the HCD to examine the vices of any act or omission made by any public authority which is popularly known as 'judicial review'. By virtue of article 102 the HCD in term has become the defender of rights and safeguard against mal-administration.

Access to justice

Seemingly the power to enforce fundamental rights along with the judicial review power



CONSTITUTIONAL ANALYSIS

Bringing justice home



has made the HCD a unique forum for justice. As the permanent seat of the HCD is at Dhaka and sessions of the HCD are never been decentralised, access to justice is likely to be jeopardised on account of territorial remoteness - associated with cost, complexity and delay.

Access to justice presupposes prompt and effective remedy through an available, affordable and efficient judicial process. Inaccessibility of the HCD, non-availability of cost effective remedy or delayed remedy under article 102 impairs the Constitutional commitment for 'rule of law, fundamental human rights and freedom, equality and justice'. Access to the HCD is prerequisite for enforcement of fundamental rights and judicial review of administrative action and to this end decentralisation of sessions or delegation of jurisdiction of the HCD is must.

Constitutional mandate for decentralisation & delegation

Predicting non-accessibility of the HC's jurisdiction of article 102 the framers of the Constitution prescribed alternative forum under articles 44(2) & 100. Article 100 permits the Chief Justice to decentralise sessions of the HCD subject to the approval of the President. Article 44(2) authorises the Parliament to enact law to delegate any or all powers of the HCD under article 102 to any other court to be exercised within the local limits of its jurisdiction.

Latifur Rahman, J and Advocate Mahmudul Islam suggested that such other court may be given concurrent but not exclusive power of enforcement of fundamental rights and judicial review under article 102 and; such jurisdiction may be delegated only to any court, not to any tribunal. To date, no

law has been enacted under article 44(2) for delegation of HC's jurisdiction under article 102 to any other court.

An unsuccessful attempt for decentralisation

By the Eighth Amendment of the Constitution the Parliament amended article 100 to set up six permanent HC Benches outside Dhaka and empowered the President to fix the territorial jurisdiction of new HC Benches and thereby to curtail the territorial jurisdiction of the HCD in Dhaka. Then, in the case of Anwar Hossain Chowdhury v Bangladesh (1989), amended article 100 was challenged for altering the basic structure of the Constitution by curbing the plenary jurisdiction of the HCD over the republic. Though the HCD summarily rejected the petition the AD declared the setting up of six permanent benches of the HC ultra vires for violation of basic structure of the Constitution.

For an extended forum

Decentralisation of sessions of the HCD under article 100 or delegation of jurisdiction under article 44(2) will enhance access to justice. Immediate output will be maximisation of judicial remedy and minimisation of cost, complexity and delay. Ultimate advantage will be improvement in governance, rule of law and human rights. Respect for justice and law is diminished when large sections of society are denied of equal access to justice. Keeping the HC inaccessible to the people of remote areas collective national development is impossible. Being imbibed of this reality the Parliament and Honorable Chief Justice may be pleased to move forward to unshackle the HCD from the clutch of privileged society. Let the justice be free to hear the unheard!!! Let the rights come home!!!

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HUMAN RIGHTS MONITOR

Nuclear power plant and human rights in Bangladesh

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NUCLEAR power plant can positively, on the one hand, change the structural social system in terms of people's everyday life, and, on the other hand, can significantly violate the human rights. For example, the government of Bangladesh have had taken steps to construct Rooppur nuclear power plant to meet the growing demand of power in terms of countries' overall development. However, the steps for constructing nuclear power plant do not necessarily consider the people's right of free access to information in general. This paper will delineate how Article 19 of the Universal Declaration of Human Rights has had technically been ignored in questions of nuclear power plant in Bangladesh. Discussions on nuclear power plant and human rights provide us a treasure trove of knowledge about sustainable human development.

According to Nobel peace prize winner Dr. Muhammad Yunus, government can help to create the kind of country we all want to live in. Truly, his statement provides us three components: our dream, governmental development activities, and appreciation. These components are closely intertwined with the descriptions concerning state approaches about people's wellbeing in Bangladesh. For instant, it was our dream to enjoy universal electrification through the use of advance energy technology. This dream is coming true into our everyday individual life through the governmental steps toward set up nuclear power plants in Bangladesh! There is not doubted to say that this step has had highly been appreciated by all of us. This new energy technology certainly and surely provides us number of opportunities to find the right doors to achieve our countries' development goals. Hence, we would argue that the investment in nuclear power plant is significant not only in terms of legal norms, but from an economic point of view. Question remains: how are countries' development and peoples' wellbeing related? How will we use our land to produce energy? How about food security? Before we answer these questions directly, let us take up related question: what about the nuclear power plant?

According natural scientists, nuclear power plant is domestic sources of energy; it produces electricity through a heat-generating process known as fission. This advance energy technology requires routine activities to produce capacity level electrification. Existing literature tells us, for example, every 30 day's (so far) to run this advance power system we must have to reduce greenhouse gases into atmosphere! The natural science experts proved that the greenhouse gases are caused several kinds of skin diseases, i.e. several negative effects on the human health and acid rain and thus reduce

the fertility of soil. At the same time prominent scholars in the field of forest sciences argued that the consequences of nuclear power plant that adversely affects the acquit life of the ecosystem. In addition to these, nuclear waste products cause cancer or genetic diseases! For example, world class think tanker Lingfelder (2009) provided empirical reports about childhood cancer (e.g. Leukemia) in the vicinity of German nuclear power plants. This report clearly indicates the distance of neighborhood is concern to set up a nuclear power plant in general. Further questions remain: how to deal with the nuclear waste management issue? Government stated that Russia would take back and deal with the nuclear waste! Additionally, the site safety-tornado, cyclone and tsunami, is



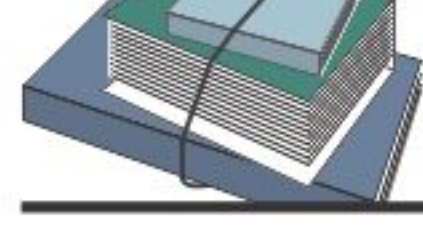
also concern to set up nuclear power plant in Bangladesh? That is why Dr. Zakia Begum (Bangladesh Atomic Energy Commission) gave heavy weight on meteorological study while she was presenting a paper entitled 'Present status of nuclear power plant in Bangladesh'. Although government made statement that Bangladesh Atomic Commission will take all responsibilities in this regard. Honestly, both we and human rights practitioners are not totally satisfied with the statements that were made by concern authorities for nuclear power plant project in Bangladesh? For example, social scientist Dr. Peter Custers, Netherlands, stated that 'being no natural scientist myself and aware of the certain risks of oversimplification, I would nevertheless argue that the country would do well to take notice of the huge international controversy surrounding nuclear energy today'.

In the book entitled 'Development of Freedom' (1999), Nobel Prize winner, economist Amartya Sen has said that there has never been a famine in a country with a free press

and open government. In the present day, unfortunately, we do not know what kind of responsibilities and safety measures have had taken by the government in particular. Do we? This leads to the violation of human rights in many areas, especially the right to enjoy about freedom of information that is incompatible with Article 19 of the Universal Declaration of Human Rights? Additionally, the violation of this right also indicates to revise democratic participation in terms of one's best interest and beliefs in the execution process of nuclear power plant in Bangladesh. Hence, we argue that by ignoring public's perception, how government would be able to ensure sustainable nuclear power plant in terms of both (1) business benefits: increased profits and the potential for long-term growth, and (2) people benefits: new sources of income and the empowerment of individuals and communities in Bangladesh.

Recapitulating, government steps to build nuclear power plant brings for us a golden time to get the test of economic development in terms of our everyday wellbeing. In the nuclear power plant implementation process, government should re-consider wellbeing in the local context. More importantly, the basic question remains unanswered: (1) what about planning security and social acceptance regarding nuclear power plant in Bangladesh, and (2) why the atomic energy commission does not fully consider the approach of ecosystem in the process of utilizing the advance energy technology to ensure universal electrification in Bangladesh? To address these two questions, more importantly, first, government need to know, for most of the Bangladeshi people, wellbeing is about peace of mind, good health, food, safety, freedom of choice and action...and so on (see Kandachar and Halme 2008). If they do not take these into the account with their universal electrification programme then we must have to accept death of numerous people of Bangladesh? In this paper our main concern wellbeing in terms of human fundamental right to access information about nuclear power plant activities in general. More specifically, this paper highlights most fundamental issues: safety and security in the regular process of nuclear power plant in Bangladesh. Conversation from many Bangladeshi people around the world, I am not only the person who feels like this ways. This paper summarizes by emphasizing on further consideration about ecology of nuclear power that is not only important but also necessary to ensure sustainable human development in Bangladesh.

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REVIEWING THE VIEWS

Evasion of justice: perpetual agony

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IT is a matter of exhilarating jubilation that after traumatic procrastination of approximately 42 years the heinous war criminals have been brought to book. The trial proves that justice protracted is not necessarily justice gain-said. But the rending torments of victims will not be assuaged unless Pakistani war criminals, the living phantoms, are brought to justice. The celestial dictates of justice will not be realized unless the 195 listed war criminal repatriated to Pakistan by dint of preposterous treaty of 1974 are shown the music of law. The Tribunal rightly observed that a cogent national effort is prerequisite to bring them within the ambit of law [Chief Prosecutor v. Quader Molla (2013)].

The agonizing context of granting clemency to 195 Pakistani war criminals was dexterously delineated by Kamal Hossain in his book 'Bangladesh: Quest for Freedom and Justice'. He put down that it was the appeals from countries assembled at the Islamic summit, US & USSR which led Bangladesh to grant clemency. The granting of clemency can in no way be interpreted to exculpate the despicable criminals of the charge. The tribunal observes that the scope of clemency being limited to Bangladesh decision not to try them has kept option open for the trial of these vandals [Chief Prosecutor v. Kamruzzaman (2013)].

Treaty-making is an executive prerogative under our constitutional mechanism [Kazi Mukhlesur Rahman v. Bangladesh 26 DLR AD 44]. The constitution of Bangladesh encapsulates the separation of powers [Abdul Mannan Bhuiyan v. State 60 DLR AD 49]. Being a party to the Tri-partite Agreement of 1974 the Executive has allowed the evasion of the due process of law and thereby has militated against the Constitution and frustrated the motto of the ICT Act 1973. Making of such treaty was not within the exclusive realm of the Executive. Therefore the treaty should have been produced before the Parliament in line with Art. 145A of the Constitution. Charles D. Fenwick in his book 'International Law' has observed "a treaty ratified without proper observance of requirement is ipso facto invalid". Palpably the treaty infringes jus cogens, the compelling norm in the International law, and thereby is invalid under Art. 53 of the Vienna Convention on the Laws of Treaty [Chief Prosecutor v. Kamruzzaman (2013)].

The crime of genocide defined by Raphael Lemkin means the denial of the right of existence of mankind. Underscoring the grisly idiosyncrasy of the crime the UN has adopted the convention on the prevention and punishment of crime of genocide in 1948. Art 1 of the Convention clearly defines genocide as a crime under international law and obligates the state parties to prevent and punish the crime and perpetrators thereof. The provision has by now acquired the status of International Customary law and is binding even on the state which has not acceded to it [Re Advisory opinion by ICJ].

There is universal jurisdiction to try the war criminals. The perpetrators of these crimes being hostis humanis generis (enemy to mankind) have ceased to be national of any state. The Israeli Supreme Court has observed, "The crimes offending the whole of mankind are grave offences against the law of nations. The jurisdiction to try these crimes is universal" [Re Eichmann case]. Wheaton states in his book 'The Elements of International Law', "the judicial power of every independent state extends to the punishment of piracy and other offences against the law of nations by whomsoever and whosoever committed". The Supreme Court of US has observed that those who have infringed the laws of war can be tried by any state [Re Ex parte Quirin 317 US].

Article 40 of the Constitution of Pakistan enjoins the state to promote international peace which necessarily presupposes immediate state endeavor to try their own war criminals who have mutilated humanity in 1971. Pakistan is party to four Geneva Conventions 1949 enjoining the state party to try the persons alleged to have committed grave breaches of the convention before its own court [Art.49 of Convention No-1, Art. 50 of Convention No-2, Art. 129 of Convention No-3 and Art.146 of Convention No-4]. Non-incorporation of these conventions into laws does not give a free license to a state to flout the obligation undertaken. The Apex Court of Australia has observed, "The fact that convention has not been incorporated into Australian law does not mean its ratification holds no significance for Australian law" [Minister of Immigration and Ethnic Affairs v. Teoh (1995)].

Pakistan may take resort Art. 6 of Genocide Convention providing that the perpetrators of genocide shall be tried by the Court of the state in whose territory the crime was committed. She can argue that Bangladesh having exhausted the opportunity cannot now force Pakistan to try them. In the 6th Committee, the delegates of several countries pointed to such a case and expounded that Art. 6 contemplated the obligation of the state in whose territory the genocide was committed but it did not affect the right of any other state to try them. The August Court of Israel has observed, "Had the Art. 6 meant to provide that those accused of genocide shall be tried only by the court of the state in whose territory the crime was committed, it would have foiled the very object of the convention" [Re Eichmann case].

No barbarity is such macabre as the odious butchery committed in Bangladesh in 1971. Canada has convicted two army personnel of Canadian armed forces for infringing the laws of war [The Queen v. Boland (1995)]. Therefore why does Pakistan endeavor to identify them with the war criminals? Should the people of Pakistan not disown them and espouse the dictates of justice?

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