



CONSTITUTIONAL ANALYSIS

Constitution has won

ANISUR RAHMAN

PERHAPS one of the most important lacks of our fledgling democracy was to ensure continuation of the constitutional framework to transfer power of the government especially in the 'transitional time' (poll time). HLA Hart (1961) calls it the change of sovereignty in the transitional time which, according to Hart, is one of the most important defects of Austins' model of law. We adopted ad hoc and defective solutions time to time to overcome the problem which has ripened the crisis actually. These deviations from the Constitution led us nowhere but towards more uncertainty; even sometimes to the extent of extra-constitutional regime. The 10th Parliamentary election, whether legitimate or not perhaps shows us a path at least to remain within the constitutional framework.

In the newly adopted Constitution of 1972 an excellent provision was inserted (57:3) to make sure the transfer of power to the successor at the end of the term of an elected government. These provisions were replaced by the fourth amendment of the Constitution but the constitutional procedure of transferring power to the successive President was not ceased. The President was allowed to continue until his successor enters upon the office.

We must admit that the deviation from the Constitution is not new in our political culture. We are sometimes startled to the fact that it even occurred during the Bangabondhus' regime. Increasing the duration of the Parliament and the term of office of the President without election may be considered as the first deviation from the Constitution (the Parliament was however dissolved on 6th November 1975 by a Proclamation).

The rest of the history of our democracy is well-known to us. After the brutal killing of the Father of the Nation with his family members, we went far away from our Constitution. In the guise of Military Proclamation, Bangladesh was made an Islamic republic constitutionally within a short span of time. The Preamble of the Constitution was almost rewritten; secular character of the state was destroyed, struggle for freedom was denied by the successive rulers.

After the demise of Khandaker Mostaque Ahmed from the scene, a promise was made for general election before the end of February 1977 to nominate the successor by Abusadat Mohammad Sayem. But again the election could not be held since Major Ziaur Rahman assumed himself in the office of President and Chief Martial Law Administrator. Later he had legitimated his power



through a referendum and general election respectively and LG HM Ershad just followed his predecessor.

One important fact is that the succession of Mr. Sayem was recorded by a Proclamation issued on 8 November 1975. However, I have not found any such endorsement regarding Ziaur Rahman (I would appreciate if someone finds it out for me). I would also like to thank Prof. Borhan Uddin Khan who suggested me that since the Constitution was revived partially by this time and Mr. Rahman took oath under the [revived] constitution there was, perhaps, no need of official endorsement of his entering upon the office of President. Mr. Rahman perhaps became President sometime between 29 November 1976 and 23 April 1977 (many confirm that is was 21 April 1977); just after five months of his appointment as Chief Martial Law Administrator on 29 November 1976.

These endeavours to grab and remain in power unconstitutionally continued until 1990 when the then President Ershad had no option but to resign from the office of the President against the backdrop of a mass movement.

Our desired democracy could have found a new path had we kept our Constitution above all. Again we opted for an ad hoc solution. Instead of Speaker of the

Parliament (in absence of President and Vice-President Speaker of the Parliament will be the head of the state) we brought Justice Shahabuddin Ahmed from the Supreme Court to form a 'neutral and impartial government' in order to conduct the general election. We did not trust the Speaker and did not want him to continue though the Constitution desired to do so. Moreover, the Constitution was amended just to pave the way for Mr. Ahmed to return to his earlier position (perhaps it was unique in the constitutional history that a President went back and discharged his functions as Chief Justice of a country).

We were happy nevertheless. Weren't we? Our constitutional democracy came back. But the desire to grab the power of the successive government through election engineering led the opposition parties in Parliament to take the street for a non party caretaker government. Resultantly, another ad hoc solution came into being; of course unconstitutional and defective. Our political parties even the Bangladesh Awami League was happy with it, perhaps, due to their victory in the election. We got little leisure to think of this unconstitutional solution until 2007 when we came to realise what a defective solution it was. Again, we paid for it a lot; two years of extra-constitutional regime (a military - civil society consortium government).

Finally, fifteenth amendment of the Constitution brought back the provisions for transfer of power that were in the original Constitution. It was certainly a challenge for the present government to go with these provisions amidst rejection by the main opposition parties. However, the challenge is over and finally it is proved that there would be no harm with this system. We must endorse that there are some loopholes in our electoral process but these are soluble by keeping the Election Commission independent and by introducing a space for collective decision making of the cabinet during the time of poll (by limiting the authority of the Prime Minister).

Many are whining that the recently held 10th parliamentary election is not legitimate since many were deprived of their right to cast vote (more than 150 members elected unopposed). Perhaps, this is a unique problem that our democracy has been encountering since 1996 when BNP and JIB contested the election by forming a coalition (we have experienced coalition government of different political parties but coalition to contest election is perhaps new in our constitutional democracy). May we request them to think one thing? If there is a coalition between BAL and BNP in the next parliamentary election do we need any election at all? Shall we call the election

CRIME SCALE

Potential measures against cyber crime

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An overview of the international perspective of law on prevention and control of cyber crime makes it clear that the countries all around the world are highly concerned with the growing menace. However, much can be done to curb cyber crime but may not have desired results. So, a question may be raised; where lies the solution? The individual efforts that may come into the scene as a more effective tool than the elaborate policies and alike. The key is awareness and education. It is only through continuous education and awareness programmes; cyber crime can be kept under control. Thus, private individual should always rethink whether his activities render him vulnerable.

To be safe from the danger of cyber crime one should keep in mind the following things:

- To prevent ID theft, one should avoid disclosing personal information (date of birth, bank details) on any web site to strangers.
- Not to send any photograph online and providing email address to unknown persons or chat friends as there may be misuse of it.
- Unexpected financial gain offered by any person without any consideration should also be shunned unless the person is familiar to.
- All users should always use latest and update anti-virus software to guard against virus attacks and keep back up volumes.



Before opening an e-mail attachment one should ask

- Has the e-mail come from someone that he knows?
- Has he received e-mails from this sender before?
- Is he expecting an e-mail with an attachment from this sender?
- Does the e-mail from the sender with the contents as described in the subject line and the name of the attachment(s) make sense?
- Does this e-mail contain a virus?

Internet users should notice of the following as to password

- All users should have a strong password.
- It shouldn't be written down nor shared with anyone, even with best friends.
- Alphanumeric characters and special characters can be used to make a password strong.
- The length of password should be as long as possible (more than eight characters).
- Password should frequently be changed, at least once every 90 days.
- Change should also be made in the initial password that has been used for first time login.
- Change must be made immediately if one finds his password compromised.
- One should use Log off option when finishes his tasks in the internet or PCs especially in public areas, such as a library or cafe.

To save the children from pedophilia things are to done

- Parents should keep an eye on children accessing internet to protect them from any abusive or immoral illusion and imminent danger.
- Children should not give out identifying information such as name, home address, and school name or telephone number in a chat room.
- They should not send their photographs to any one on the net without initially checking with the parents or guardians.
- They are advised not to respond to messages or bulletin board items that are obscene, belligerent or threatening.
- Children should never arrange a face to face meeting without informing their parents or guardians.
- All concerned should remember that people online may not be who they seem to be.

For website protection

- One should keep alert to news regarding security threats and equip himself with the latest knowledge.
- He should watch traffic to his site and put host-based intrusion detection devices on his web servers for monitoring activity looking for any irregularities.
- Website should put in firewall and configure correctly.
- The owner should develop his web content off-line.
- He should make sure that the web servers running his public website are physically separate and individually protected from his internal corporate network.
- He should also protect his databases putting them behind a second interface on his firewall, with tighter access rules than the interface to his web server.
- Website should be backed up after every update.

According to McAfee's latest report, cyber crime causes globally over \$500 billion in economic losses per year. In Bangladesh, this trend is increasing and threatening to our lives and livelihoods over the years. So, let us prepare ourselves for the worse beforehand. Who does not know prevention is, undoubtedly, better than cure.

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Remembering Justice Habibur Rahman

His landmark judgments

lashed. As opining,

"an incumbent of an office for a fixed period of time can not hold on after the expiry of his term unless such action is either sanctioned or condoned by any law, or approved by the general constituents of an association."

The principle of natural justice is also stated in this judgment.

"Principle audi alterem partem,unless expressly excluded by law or by the nature of the objects of any particular law, is to be implied to have been provided in every statute."

In this judgment he also stated that a law should be interpreted in such a manner that it would rather be saved than destroyed.

In *Md. Asaduzzaman v Bangladesh*, 42 DLR, popularly known as *Famous Red Cross case* he stated,

"The right under Article 38 implies that several individuals having a community of interest can join together to form a voluntary association for furtherance of a common lawful object. Article 38 can't be invoked for support, sustenance of fulfillment of every object of an association."

Thus, by this judgment the right to freedom of association was established.

Freedom of expression

In the judgement of *Bangladesh v Amiruzzaman Khan*, BLR 1977 he stated,

"As the Court is for the welfare of the people, members of the public are entitled to make fair, reasonable or legislative or even out spoken comment on, or make fair dramatic representation of, court-affairs."

Another case named *Saleem Ullah v State*, 44 DLR was also regarding the right to freedom as well as freedom of press. This is also a landmark judgment for the establishment of the right to freedom of expression, where he stated,

"Freedom of press is recognised in our constitution. A Court is to suffer criticism made against it. Only in exceptional cases of bad faith or ill motive it will resort to law of contempt."

In the judgment he also given a suggestion to the Parliament for updating the law of Contempt of Courts. As he said,

"Our Parliament may consider updating the law of Contempt of Courts in the light of our Constitution, recent changes in media communication, and practice in comparable jurisdictions in other countries."

Freedom of trade and business

He has also delivered a judgment of the case named *B.S.A. Association v Bangladesh*, 1 BCR 1981. In which he mentioned about the right to trade and business also the constitutional obligations. he also talked about the power of the Government in permitting the business in Bangladesh.

Right to equality

In the judgement of *Md. M. Rahman v Water Board* 1 BCR 1981, Justice Habibur Rahman stated that,

"Once the direct recruits are promoted are absorbed in one cadre, they form one class and there will be no classification for the purpose of promotion to the higher grades."

In *Sheikh Abdus Sabur v Returning Officer* 41 DLR, He stated,

"A member of the parliament is not answerable to the Court for his legislative functions. He is only answerable to his electors."

Citizenship rights

In *Bangladesh v Prof. Golam Azam*, 46 DLR, Justice Habibur Rahman has given a milestone judgement in the history of the Judiciary of Bangladesh about the citizenship right. In the Judgment, it was stated,

"the citizenship, though not mentioned as a fundamental right in our constitution, is to be considered as the right of all rights as on it depends one's right to fundamental rights expressly provided for a citizenship in Part III of the Constitution and his right to seek Court's protection of those rights."

Right to fair hearing and principle of natural justice

In *M. A. Rashid v Govt. of Bangladesh*, 30 DLR, He opined,

"The principle of natural justice that no one should be condemned unheard have been firmly rooted in our judicial system."

Thus the principle of Natural Justice has been well founded in our judiciary.

He had also given a landmark judgment on the constitutional matter like in *Anwar Hossain Chowdhury v Bangladesh*, 41 DLR. The Judgment was about the legality of the famous 8th Amendment of the constitution of Bangladesh. In this case, the foundation of basic structure was well-established in the legal sphere of Bangladesh. The Supremacy of the constitution was upheld. It was also established that the parliament can't do anything at its whim. It can never change or destroy the basic structure of the constitution on which the constitution is standing.

Finally it can be said that Justice Habibur Rahman has given many landmark judgments on different important issues. Of them, the prevalent practice of habeas corpus petitions and the court's obligation to protect and uphold a citizen's rights to life and personal liberty, citizenship of Bangladesh, rights to equality, freedom of association, freedom of expression, freedom of trade and business, the doctrine of Basic structure of the constitution can be largely mentioned. For these famous and legally important judgments he has greatly contributed to our judiciary, citizens as well as the nation. We are really indebted to this 'Legend of Law'.

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Judgments on right to life and personal liberty
He had given some important decisions on the matter to protect right to life and personal liberty. In *Md. Shameem v Bangladesh*, 47 DLR; he delivered his judgment stating,

"It is a distinctive norm in our Court system that application for habeas corpus should get top priority over all other businesses and be expeditiously disposed of. It is no longer common to direct the body of the prisoner to be produced before the court, but the respondents having the custody of the prisoner must specify the causes of detention and discharge the burden of proof in lawful justification of the detention. The detaining authority making return to the rule is to place relevant facts before the court."

Thus the right of the person in detained was given preference over other rights. Regarding the same, another cases *Sajeda Parvin v State* 40 DLR(AD); and *Naser Kader Siddiqui v Bangladesh* 44 DLR are also mentioned.

In *Habiba Mahmud v Bangladesh*, 45 DLR; He stated,

"The court is to hold the balance between the states's need to prevent prejudicial activities and citizen's right to enjoy his personal liberty."

Judgments on freedom of association

On the above matter a landmark judgment was delivered in the case of *Dr. Neelima Ibrahim v Bangladesh*, 32 DLR; In this case besides establishing the right to association some other important principles were also estab-