

REVIEWING THE VIEWS

Obstacles to Good Governance

MD. ASADUZZAMAN and EMDADUL HAQUE

GOOD governance is one of the desired aftermaths of the ruling principles in all forms of governing systems. Particularly in democracy there is no sweeter phrase than good governance coupled with accountability and no bitter ones than lack of tolerance and constructive criticism amid non-participation of opposition party or parties. In absence of strong opposition and pressure group, this form of government is considered to be worse than any other form of government resulting tyranny and elected dictatorship in the guise of embedded democracy.

Democracy is comparatively more tested governing system than other ones and as a result out of 206 sovereign states there are 137 democratic countries in the world. Like other forms of governments such as socialist, communist, monarchical or even in military dictatorship, democracy has its own discrepancy. The distinction of democracy from other forms of governing system is that in democracy the process is more valued than its outcome. But in other forms of governments outcome is measured in line with the adage end justifies the means. In a modern welfare state the role of a government is lot more than a laissez fair one which only aimed at protection of state and people from external force along with keeping domestic law and order.

The nature of obstacles in every form of government has its own distinctiveness and diversity. However, the hindrances of democracy in developed, developing and least developed countries cannot be measured in a same scale. Simultaneously the process to overcome the hurdles designing a healing parametre

concerning the wounds of bad governance may not be same. Science and technology have reached the zenith of success but yet there is no invented panacea to cure and prevent all wounds as to any bad governance. Even, "one-size-fits-all" approach is not well-suited to diversified problems of states.

Even Americans are tired with their gun violence but they are yet to repeal the second amendment of the constitution protecting the right to keep and bear arms. Even there are pro-guns and anti-guns advocates with arguments and counter arguments as to gun rights, despite the horrible statistics that three people are killed in gun violence in every hour while seven people are shot. The federal Supreme Court in *District of Columbia v Heller*, 554 U.S. 570 (2008) held that Americans have an individual right to possess firearms for traditional lawful purposes such as self-defense at home. In *McDonald v Chicago*, 561 U.S. 742 (2010) the same court extended the scope of gun rights from home to individual state level. The United Kingdom despite being the hub of Westminster model of democracy still criticised by a group of its own nationals that their Prime Minister is an elected dictator. Suicidal rate is a serious concern here because three young males take their own lives each day across the country. More than one million people aged 16 to 24 are unemployed. Frustration is widespread, and localised reports of competition for jobs being as high as 50 applications per position are common. But the UK Supreme Court on January 6, 2014 as per its decision on December 16, 2013 changed its own webpage as www.supremecourt.uk from the previous domain of supremecourt.gov.uk sensing that



the omission of "gov" would step up its sanctity and independence.

Bangladesh as a darling child of nature is facing scores of impediments as to good governance. In its 43 years of journey the malnourished child of democracy has stumbled by military rulers for many times while the land of the country is 8-9 times more fertile than Japan.

World Bank Country Director, Johannes Zutt recently opined the country's politics as the main obstacle in establishing good governance. Apart from confrontational politics, partisan appointments of retired civil and military bureaucrats in autonomous state institutions as heads and affiliated members

obliterate the potentials of good governance. Also, their alleged corruption to a massive scale in the name of law enforcement and providing of service is tarnishing the opportunity of good governance.

The United Nations Economic and Social Commission for Asia and the Pacific in a report in July, 2009 describes the term governance as the process of decision making and the way of implementing or not implementing of such decisions. The report also depicted eight major characteristics that contribute to good governance. These are accountability, adherence to the rule of law, effectiveness and efficiency, equity and inclusiveness, orientation towards consensus, participation, responsiveness, and transparency.

In democracy, the elected government is a pole of facilitators of the governance and trustee of people's power. When politics is devoid of principle it stands like a building without foundation. We are neither cynical nor pessimistic rather optimists believing that even after couple of decades or centuries the positive transformation will emerge as an evolution with sustainability in the democratic landscape of countries where most people are hungry for change but unmoved.

But expecting a revolutionary change in the presence of a branch of politicians' who may be the galaxy talents but behaving like a bag of weeds with corrupt mindset is too early! Being a part of "now generation" with the philosophy "Do It Yourself" will it be wiser to leave things for change to tomorrow's generation as it is said that tomorrow is a loser's excuse.

THE WRITERS ARE ASSISTANT PROFESSORS OF LAW, SOUTHEAST UNIVERSITY.

LAW TRIBUTE

JUSTICE MUSTAFA KAMAL A man of judicial excellence

EMRAAN AZAD

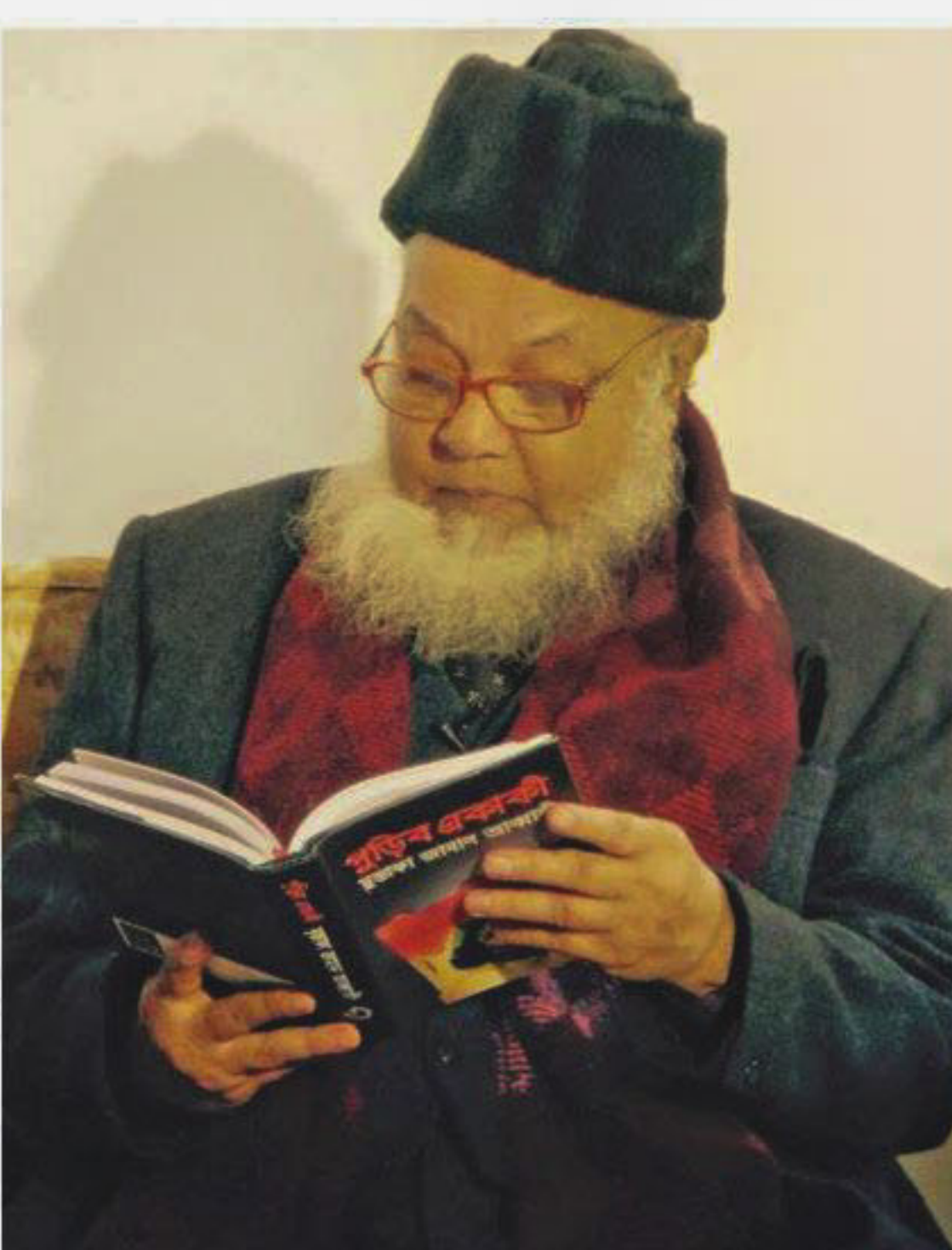
EMINENT Supreme Court judge, former Chief Justice Mustafa Kamal is known for a jurisprudence that stood out for its emphasis on interpreting and extending the meaning of locus standi for the cause of public spirited litigation in Bangladesh, for landmark constitutional judgments, and for the family lawsuit struggles.

In the beginning of nineties, Justice M. Kamal's activism in *Kudrat-E-Elahi Panir v Bangladesh* (1992) 44 DLR (AD) 319 to enforce the constitutional mandate for local-level democracy is uniquely encouraging. In this seminal case, the constitutional question of non-enforceability of fundamental principles of state policy (FPSPs) was raised where he opined that Constitution being the supreme law of the land prescribes that FPSPs, which in fact embody social and economic rights, are not 'laws' themselves. To equate 'principles' with 'laws' is, he added, to go against the Constitution itself.

He was in favor of conventional notion of applying FPSPs by the State in the making of laws, or following them as the guide in interpreting Constitution and others laws, and treating them as the basis of work of State and its citizens. Though he finally held that FPSPs cannot be judicially enforceable, to some extent his opinion signifies that non-justiciability of FPSPs does not in any way undermine the transformative character of Bangladesh Constitution and the normative abidingness of these principles other way around.

Following a long-fought jurisprudential battle and a series of initial attempts, public interest litigation in Bangladesh was formally accepted in 1996 in *Dr. Mohiuddin Farooque v Bangladesh* (1997) 49 DLR (AD) 1, where Justice M. Kamal held that "[W]hen a public injury or public wrong or an infraction of a fundamental rights affecting an indeterminate number of people is involved, any member of the public, being a citizen, or an indigenous association, espousing the public cause, has the right to invoke the Court's jurisdiction".

In *Hefzur Rahman v Shamsun Nahar Begum* (1999) 51 DLR (AD) 172, Justice M. Kamal along



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with other judges of the AD overruled the HCD's ruling which was that the Muslim husband is bound to maintain his divorced wife beyond the iddat period and until she remarries. Though he wanted to avoid making a secular interpretation of Quranic verses fearing that it might lead to discrepancies and contradiction with Sharia law, subsequently he was criticised for his paternalistic outlook particularly when he viewed that it is inhumane, unjust, inequitable and unfair to impose on a husband the burden of maintaining his divorced woman.

Writing a lengthy but overall well-reasoned leading judgment in the case of *Secretary, Ministry of Finance v Masdar Hossain* (2000) 52 DLR (AD) 82, Justice M. Kamal began by characterising the independence of judiciary as a basic pillar of the Constitution, not to be "demolished, whittled

down, curtailed or diminished in any manner" (p. 103). By employing the 'oil and water' metaphor to the distinctness of the functions performed by the civil administrative service and the constitutionally-schemed independent judicial service, the learned judge found the existing amalgamation of the 'judicial service' with the 'civil service' unconstitutional.

In this case, by invoking the principle of separation of powers, the Attorney-General argued that the Court lacked an authority to direct Parliament to enact laws or to direct the President to frame rules. Justice M. Kamal's articulate and thoughtful response was that if in any case a course of 'constitutional deviation' is found to be engineered and pursued by either Parliament or the executive, the higher judiciary can exercise its jurisdiction to bring them back to the constitutional path by giving necessary directions (p. 108).

In Constitutional Special Reference No. 1 of 1995 regarding en masse resignation of Members of Parliament (MPs), the AD was asked by the President to advise whether continuous boycotting of Parliament by opposition MPs for consecutive 90 days would render their seats vacant for being "absent" from Parliament for such a period, as constitutionally mandated in article 67(1)(b). Reported in 47 DLR (AD) 111, Justice M. Kamal intrepidly wrote that the possibility of non-acceptance of opinion by the President is not a premise with which the Court will start the exercise of an advisory rule. Rather the Court will presume that the honour due to this Court by soliciting an opinion on some questions of law will be supplemented by its acceptance and adherence. The consideration that the opinion may not be honoured has never deterred any Court from answering a Reference (p. 133).

The constitutional aptitude of Justice M. Kamal still today provokes both the academic and legal communities to undertake further inquiries and researches. Let wisdom of Justice Mustafa Kamal enlighten us forever!

THE WRITER IS LL.M STUDENT, UNIVERSITY OF DHAKA.

LAW LETTER

Prevention of Money Laundering

Money laundering is a term for process used by criminals in order to hide the source of funds that come from illegal activities or criminal offence. With the technological development, various types of offences are increases rapidly and money laundering is one of those which are increasing at an alarming rate in Bangladesh.

Money laundering has potentially devastating economic, security and social consequences. It provides the fuel for drug dealers, corrupt public officials and others to operate and expand their criminal enterprises. Generally money is laundered through currency exchange, stock brokerage houses, gold dealers, casinos, automobile dealerships etc.

The offences of money laundering are seriously takes effects as follows: Economic instability and distortion, loss of revenue, loss of control of economic policy, undermining the legitimate private sectors, undermining the integrity of financial markets, increase of crime and corruption, transfers economic power from the market, government and citizens to criminals.

Due to the high integration of capital markets, money laundering can also adversely affect currencies and interest rates. Ultimately, laundered money flows into global financial systems. Furthermore, the sheer magnitude of the economic power that accrues to criminals from money laundering has corrupted effects on all elements of society. In extreme cases, it can lead to the virtual take-over of legitimate government. Money laundering is thus not only a law enforcement problem, it poses a serious national and international security threat as well.

There is an Act namely The Money Laundering Prevention Act, 2012 and accordingly the duty to prevent money laundering is rest upon the Anti Corruption Commission (ACC). But the law is not sufficient alone to prevent money laundering without strict application of the law.

So, it is high time to take steps to prevent money laundering from Bangladesh. Thus following initiatives may be taken to prevent money laundering- Enforcement of the laws strictly, increasing the power of Anti Corruption Commission as per its necessity, Campaigning regarding the negative aspects of money laundering and creating separate cell to prevent money laundering.

T M Abeer hasan
LLM student, BUIBT.

LAW WATCH

Law alone can't be the only deterrent of violence against women. It must be backed up by prompt action and sincere efforts to change society's attitude towards women.

MD. ARIFUL ISLAM

VIOLENCE against women has been increasing rampantly. According to Police Headquarter, up to November in 2014, a number of 19773 cases regarding violence against women have been filed. In One-stop Crisis Centers 2951 complaints has been received. In accordance with the findings of Bangladesh National Woman Lawyers Association (BNWLA), violence against women has been increased 11% in 2014 than previous year. Moreover, domestic violence 44%, rape 10%, persecution against domestic worker 9% has been increased. 1910 women were killed and 449 women committed suicide due to different forms of violence upon them.

According to a survey published by UN Women in 2014, 76% women become victim of sexual

harassment. In public and private universities 87% female students face sexual harassment. The High Court Division delivered a milestone judgment by issuing certain directives in the form of guideline following a writ petition filed by BNWLA for prevention, protection and redress against sexual harassment at educational institutions and workplaces. This guideline is monumental in the context of promotion of gender equality to create a safe and secured working environment for women and thus to uphold women's esteem. But unfortunately the High Court directives are not followed properly.

Rape became a common incident. Even children are not getting rid of such violence. In 2014, number of rape is 789. Although Women and Children Repression Prevention Act, 2000 contains very vigorous punishment, experience indicates that provisions can't effectively deter offenders or ensure their prosecution. In fact, the law has been misused in many ways and implementation of the law has not been improved.

Information of Police Headquarter up to November, 2014 shows that 456 cases have been filed under Human Trafficking Prevention and Deterrence Act, 2012. In case of filing cases victim of trafficking becomes more vulnerable, as there is no security available for victims.

Domestic violence is one of the worst ways to infringe the human rights of a woman. Previously, it was seen as a personal issue, beyond the reach of the law. After the enactment of the Domestic Violence (Prevention and

Protection) Act, 2010 it is no longer a mere personal issue. But implementation of the law is not satisfactory at all. The main reason behind it is ignorance of victims and relevant stakeholders about the law. One of the major challenges of this Act is the trend of divorce by husband after filing case under this law. As a result a woman falls into uncertainty, as there are not enough infrastructures to rehabilitate a divorcee woman.

It is impossible to find out one single approach through which violence against women can be stopped. Some recommendations to prevent violence against women are as follows:

- Proper implementation of laws is essential. Infrastructure facilities as well as gender sensitivity have to be enhanced in administration and judiciary. Moreover, case management and court management has to be introduced in all courts to reduce huge case backlog.
- Law enforcement agencies must be more vigilant and prompt to treat the cases of violence against women with utmost care. More training on women rights issues should be provided to them.
- An independent investigation agency should be formed to investigate crimes against women.
- Protection of victim and witness has to be ensured.
- Law regarding Prevention of Sexual Harassment has to be enacted.
- There should be more interaction between law enforcement agencies and NGOs to com-

bat violence against women.

- Though it is strictly prohibited in Women and Children Repression Prevention Act, 2000 to publish name of victims, many print and electronic media don't comply with this provision strictly. In this regard news editors of the media should be made aware.
- Integrated initiative has to be taken through inter ministerial coordination.
- National plan of action to curb violence against women has to be implemented effectively.
- Rules under Women and Children Repression Prevention Act, 2000; Torture and Custodial Death (Prevention) Act, 2013 and other women friendly laws have to be made as soon as possible.

Existing number of Women and Children Repression Prevention Tribunal is insufficient. There is no separate tribunal under Human Trafficking Prevention and Deterrence Act, 2012. As a result case backlog has been increasing. So, Human Trafficking Prevention and Deterrence Tribunal has to be formed immediately.

Law alone can't be the only deterrent of violence against women. It must be backed up by conscious public opinion, prompt action, sincere and constant efforts to change society's attitude towards women.



THE WRITER IS RESEARCH AND ADVOCACY OFFICER AT BANGLADESH NATIONAL WOMAN LAWYERS ASSOCIATION (BNWLA).