The Daily Star DHAKA TUESDAY MAY 17, 2016

"ALL CITIZENS ARE EQUAL BEFORE LAW AND ARE ENTITLED TO EQUAL PROTECTION OF LAW"-ARTICLE 27 OF THE CONSTITUTION OF THE PEOPLE'S REPUBLIC OF BANGLADESH dislawdesk@yahoo.co.uk



Restraints on the judge-made law

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HE role of the judges in the course of interpretation of law has at times been controversial, not just in Bangladesh but also in many other countries. At one extreme, some jurists subscribe to the view that the 'law is what the judges say it is', on the other end, some others would say that judges are nothing but interpreters of law and they can only apply it (may reluctantly concede that they can interpret), but cannot make it. While the theory of separation of powers as enshrined in the Constitution of Bangladesh would lend support to the latter view, on some occasions the Judges of the Supreme Court may have leaned somewhat in the direction of making law, the Appellate Division (AD) of the Supreme Court's decision in Abdul Mannan Bhuiyan and another v State (2008) 60 DLR (AD) 49, has very lucidly charted some territories where Judges should refrain from treading, in the course of interpretation of the Constitution and other laws.

The power of judicial review is an indispensable element of the constitutional supremacy and more often than not resorting to interpretative tools is an inseparable part of it. However, the power to legislate is not necessarily a part of the exercise of judicial review.

In this case, the High Court Division of the Supreme Court (HCD), on the basis of a newspaper report, appearing in the Daily Ittefaq, issued a rule under Section 561A of the Code of Criminal Procedure, 1898 (CrPC) upon, inter alia, the political leaders and Secretary, Ministry of



Home Affairs to explain why pro-hartal and antihartal activities would not be declared as cognizable offences. The HCD held that every assembly of five or more persons either to support or desist a hartal would be an unlawful assembly under the fifth clause of Section 141 of the Penal Code, 1860 (if the common object is "by means of criminal force, or show of criminal force, to compel any person to do what he is not legally bound to do, or to omit to do what he is legally entitled to do."). It also held that the activities of the members of such an unlawful assembly would be cognizable offences under various Sections of part VIII of the Penal Code, depending on their actual action/s.

In the course of the hearing of the appeal against the judgment rendered by the HCD, the Attorney General made a fundamental point that since there was no pending judicial proceedings which would trigger the exercise of the inherent powers of the HCD, there was no scope for the HCD to apply it; and the AD accepted this argument. The AD arrived at this conclusion on the basis of the finding that the word 'or' in Section 561A of the CrPC is conjunctive. The AD referred to the judgement in Khondaker Modarresh Elahi v Government of the People's Republic of Bangladesh, (2002) 54 DLR (HCD) 47 and observed that the legality of hartal per se is firmly established and was not at all an issue in the case before it.

Referring to the decision of the US Supreme Court in Myers v United States (1926) 272 U.S. 52, the AD observed that the raison d'être of the separation of powers among the organs of the government is not efficiency, but the curtailment of arbitrary power by ensuring

checks and balances. The AD concluded that "[i]t is true that there is no such thing as absolute or unqualified separation of power in the sense conceived by Montesquieu, but there is however, a well marked and clear cut functional division in the business of the Government, and our judiciary is to oversee and protect the overstepping not only of other organs of the Government but also of itself." (Para 40)

If the ratio of this case is followed in its letter and spirit, some needless friction between the judiciary and the two other organs of the state would be avoided, avoidable politicisation of the judiciary would be averted, and democratic culture in this country would be strengthened. The power of judicial review is an indispensable element of the constitutional supremacy and more often than not resorting to interpretative tools is an inseparable part of it. However, the power to legislate is not necessarily a part of the exercise of judicial review. Judicial activism is lauded by many commentators and surely such activism has played a laudable role in the progressive development of the society but there is a fine line between activism and traversing in areas reserved for the Parliament. It is quite clear that the AD in this case was acutely aware of that delicate line and the pitfalls of crossing that line. Such self-restraint has not only helped the AD to avoid being dragged into politically sensitive areas but also has helped it to preserve its image as an impartial arbiter for settling legal disputes as opposed to political ones.

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Feasibility of Brick Kiln Control Act

IMTIAZ AHMED SAJAL N 2013 the Brick Manufacturing and Brick Kilns Establishment (Control) Act has been passed to establish control over brick manufacturing and brick kiln establishment for the interest of conservation and development of environment and biodiversity. This Act came into force from 1st July 2014, and permits two years' time limit to convert the brick kilns into modern technology and relocate thereof. After three years of enactment of this Act, now the question arises as regards feasibility and enforceability of the provisions of this Act. Following are the chalan ECA and within one kilometer distance from the boundaries of ECA. In 2009 Department of Environment (DoE) declared the four rivers around Dhaka city as ECA. On the other hand almost all the brick kilns of Dhaka city are situated in the banks of these rivers, where they can be relocated? Again the law prohibits to keep or to establish brick kiln in the agricultural land and within one kilometer distance from the boundaries thereof.

By the pressure of increased population and use of agricultural land in non-agricultural purposes country's cultivable land is decreasing. To meet the demands of food for this increasture, railways, educational institutions, hospitals, clinics and research institutions. With all these appropriate authorities. But the prohibitions in mind, it suggests to establish brick kiln in such a place where there is no human mobility. But in the reality of this small sized and densely populated country it is quite impossible to find out such place.

The law provides mandatory provision to manufacture minimum 50 percent hollow brick in the brick kilns of modern technology which is less pollutant, energy efficient and with advanced technology. If all the brick kilns are converted into modern technology such hardship in site selection is not considered as rea-



lenges to face for implementation.

The Act imposes prohibition on establishment of brick kilns within the boundaries of several areas, like residential, preserved or commercial area; City Corporation, Municipality or Upazila headquarters; public or privately owned forests, sanctuary, gardens or wetlands; agricultural land; Ecologically Critical Area (ECA); and areas adjacent to these areas. By analyzing this provision it is assumed that, after two years of enforcement (30 June, 2016) no suitable place can be found to establish brick kiln in Bangladesh. For instance: as per law no brick kiln can be kept or established in

ing population, agricultural lands are used to produce agricultural products more than once in a year. The Act further provides that, no brick kiln can be kept or established within minimum half kilometer distance from upazila, union or rural roads made by the LGED. Ordinarily in the both sides of LGED made roads there is strip plantation (one type of social forestry). Social forestry is a part of privately owned forest where brick kiln cannot be kept or established in and within one kilometer distance. The law prohibits to keep or to establish brick kiln within one kilometer distance, from any special strucsonable to the experts.

The law speaks about different areas or zones. In reality there is no complete land zoning in Bangladesh as a result some areas are expanding indiscriminately (residential area, commercial area) and some are shrinking alarmingly (agricultural land). Without a comprehensive land zoning implementation of this provision is almost impossible.

The law provides that, no person can use the soil as raw material in brick manufacturing, after cutting or collecting it from agricultural land, hill or hillock. Brick manufacturers can only cut or collect soil from dead pond, canal, swampland, creek, deep tank, rivers, haor-baor, char land and fallow land with the approval of law has not defined appropriate authorities and not prescribed the procedure. As a result most of around 7,000 brick kilns across the country use topsoil of agricultural land to make bricks, it takes around 127 crore cubic feet of fertile soil to manufacture 1,500 crore bricks per year.

The law strictly prohibits the use of wood as fuel in brick kilns. Brick manufacturers can only use coal as fuel containing prescribed standard of sulfur, ash, mercury or similar material. Till now the government has not determined any standard or quality for coal. As a result Brick kilns across the country are illegally using firewood instead of coal. About 2 million tons of firewood are burned in the brick kilns per year, which facilitates deforestation and extinction of biodiversity and pollutes the atmosphere.

Environment Courts are empowered to take cognizance of any offence punishable under this Act. Only three Environment Courts in Dhaka, Chittagong and Sylhet have been so far established and functioning. Providing environmental clearance for brick kilns and monitoring the compliance of this Act with the primary responsibility of filing case and investigation thereof is vested to the DoE. Establishment and smooth functioning of Environment Courts depend on DoE. Though it is aimed to establish one or more Environment Court/s in 64 districts but in reality DoE has office only in 22 districts. It is practically impossible to establish Environment Court and effective implementation of this Act without office and manpower of DoE.

This Act should be amended in light with the field level study considering the issues mentioned with the participation of people. At the same time for the effective implementation of this Act concerned institutional frameworks should be strengthened and necessary by-laws should be framed.

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Symposium on budgetary allocation

Ministry of Law, Justice & Parliamentary Affairs

AW and Justice' plays an imperative role in economy. Likewise, development is often equated with economic factors only. However, ✓ law and justice contribute greatly to influence the performance of these economic factors and thereby to ensure social and economic justice in any society.

Since development of a country contributes towards an effective system of law and justice and as such, there exists in independent relationship between 'law and justice' and development, it is vital to see if this Ministry of Law, Justice and Parliamentary Affairs is losing its comparative importance within the Public Order and Safety category of the Government.

To give appropriate insight to this matter, two papers have been presented in a symposium organised by Bangladesh Institute of Law and International Affairs (BILIA) on Saturday, May 14th. The subject of this symposium was "Budgetary Allocation for Ministry of Law, Justice and Parliamentary Affairs", where the speakers were Dr. Tureen Afroz, Prosecutor at International Crimes Tribunal of Bangladesh and Professor of the Department of Law at East West University and Mr. Md Mustakimur Rahman, Lecturer at Department of Law at the Notre Dame University, Bangladesh. The event was hosted by Dr. Shahdeen Malik, Honorary Director of BILIA and chaired by Barrister M. Amirul Islam, Chairman of BILIA. Mr. Anisul Huq, MP, Hon'ble Minister, Ministry of Law, Justice and Parliamentary Affairs, was the Chief Guest at the symposium.



Dr. Afroz's paper explores the extent and trends of annual budgetary allocation by the government of Bangladesh to the Ministry of Law, Justice and Parliament Affairs and bases its arguments on the available financial data for the last fifteen years i.e. from 2001-02 FY to 2014-15 FY. She has shown that the total budget allocated for the Ministry in nominal terms has followed an increasing trend; however, a strong case can be made for better and more efficient use of resources, which in turn, can flow from a more comprehensive planning process.

Mr. Mustakimur Rahman stressed on the fact the mission of the Ministry is to create an enabling environment for ensuring equitable justice for the people through institutional and structural development of the judiciary, on the other hand, the mission of the Ministry of Fisheries is to meet the people's demand for animal protein by enhancing production and productivity of fisheries and livestock sector.

Barrister M. Amirul Islam, Chairman of BILIA, turned the spotlight on identifying the areas of expenditure for the Ministry for attracting more budgets from the government. He further stressed on developing the capability of lawyers, judges and whole judiciary for having a competent judiciary. Mr. Anisul Huq, MP, Hon'ble Minister opined that the government of Bangladesh is vigilant enough to ensure the independence of judiciary, which is one of the prerequisites for establishing rule of law.

The Minister thereafter presented the success story of the current government in implementing the 12-point directives the Supreme Court in famous Mazdar Hossain case, to ensure separation of judiciary from the executive.

In the end, it was unanimously agreed that the Ministry of Law, Justice & Parliamentary Affairs shall focus on ensuring increased and efficient development works in Bangladesh.

> THE EVENT COVERED BY TASMIAH NUHIYA AHMED; RESEARCH ASSISTANT (LAW), BILIA.



Safety during flyover construction



Many of the readers have watched footages of flyover collapse in the television channels that took dozens of lives in India. However, there were causalities at flyover sites in Bangladesh too. There was a recent accident in the capital that took life of a worker some weeks ago. Rabbi Ahmed Emon, a construction worker died in the incident after an iron rod fell on his head on March 16, 2016. It drew media attention when learned advocate Amit Das Gupta submitted a petition before High Court seeking compensating for the family of victim.

'To enjoy the protection of the law, and to be treated in accordance with law, and only in accordance with law, is the inalienable right of every citizen, wherever he may be, and of every other person for the time being within Bangladesh, and in particular no action detrimental to the life, liberty, body, reputation or property of any person shall be taken except in accordance with law'- said in Article 31 of the constitution. This article is the celebrated provision of the Constitution of Bangladesh and occupies a unique place as a fundamental right.

It has further been stated in Article 32 of the constitution, "No person shall be deprived of life or

personal liberty save in accordance with law". However, challenges to the right to life come from many directions, including from arbitrary action by the police or security forces, and from inadequate or lack of enforcement of safety laws and regulations. Similar to Article 31, this very article also guarantees right to life and personal liberty to citizens and aliens and is enforceable against the State.

The learned lawyer took the opportunity to make authorities involved with the construction of flyover accountable for their alleged negligence. Upon initial hearing, High Court directed the concerned authorities to take adequate safety measures in the Moghbazaar-Mouchak flyover area within 15 days to avoid similar accident.

To conclude, Prime Minister recently inaugurated a twokilometer section of the 8.5 km Mouchak-Moghbazar flyover in Dhaka. The deadline for the project is June next year and the safety concern remains as major portion of the construction work still lies ahead.

Would safety of construction workers and passerby be ensured in remaining construction work?

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