

LAW INTERVIEW

Constitutional governance ensures the growth of democracy

Barrister M. Amir-Ul Islam, Senior Advocate at the Supreme Court of Bangladesh, was one of the members in the Drafting Committee of the Constitution of Bangladesh in 1972. He was also the drafter of the Proclamation of Independence in 1971. Keeping in mind the significance of the 4th November Constitution Day of Bangladesh, Emraan Azad from Law Desk talks with him on the following issues.



Law Desk (LD): After forty-four years of drafting the Constitution of Bangladesh, how do you see the development of Constitution today?

M. Amir-Ul Islam (AI): Constitution is framed for ages to come and is designed to approach immortality as near as human institutions can approach. In tracing the immortality of Constitution, Chief Justice Marshall conceptualises the basic structure of the constitution as he reminds that, "The people have an original right to establish, for their future government, such principles as, in their opinion, shall most conduce to their own happiness. The exercise of this original right is a very great exertion: neither can it nor ought it to be frequently repeated. The principles therefore, so established, are deemed fundamental. And as the authority from which they proceed is supreme, and can seldom act, they are designed to be permanent."

Constitution thus not only acts as the supreme law of the land but also provides the basic structure for governance which is of permanent nature. Permanence is necessary not only for the continuity, growth and development of a society, but it should integrate into habit, culture and convention as they are important for protection of the basic norms and rights against the likely onslaught of other competing interest and powers. Conventions have close relationship with habit forming norm and values helping to build respect for the basics. In the process they become beyond questions and controversies. Those are the foundation for constitution based civilization.

Manipulation or interruption in the constitutional continuity would tend not only to disrupt the continuity and upset balance in a society, but it tends to disturb the rule of law giving rise to impunity culture. It would also impede the growth and progress and at the end likely to subvert its polity. The growth of habits and institutions necessary for the sustenance of democracy gets arrested in case of frequent shifts and manipulations. A Constitution therefore is meant as defined by Cooley as "The Fundamental Law of a State containing the principle upon which the government is founded, regulating the division of the sovereign powers and directing to what persons each of these powers are to be confined."

Source of our Constitution stems from a long standing aspiration for building a society free from exploitation and hunger to create an environment in which the human values could flourish to be shared in harmony irrespective of religion, race, caste, creed and gender. Dream and demand of autonomy has deep-rooted aspiration and as always remained a core issue since 1940. The right to self-determination coupled with political emancipation from foreign rule has become the dream of Bangladesh population ever since. After the attainment of independence from the British in 1947, India was partitioned into three parts: India, East Pakistan and West Pakistan, leading to birth of separate lands (East Pakistan and West Pakistan) distanced from each other having Indian Territory of 2000 kilometres. Neither being contiguous nor having social and cultural bonding other than sharing common religion by majority, where West Pakistan had military might and inherited part of Indian bureaucracies, East Pakistan despite the majority people, was reduced into a minority in the parliament allowing non-Bengalis migrated from India usurping seats from the East Pakistan quota. East Pakistan was under the dominance of West Pakistan, due to political exclusion, ethnic and linguistic discrimination, as well as economic exploitations.

Constitution was adopted on the 4th day of November in 1972 with retrospective effect from the 16th December 1972, based on our first Proclamation of Independence adopted on the 10th day of April in 1971, asserting the sovereignty of "the people of Bangladesh whose will is supreme". This is to be remembered that we fought the war of liberation for equality, dignity and social justice under the mandate of our people implemented through a government by way of reiterating and confirming the declaration made by the undisputed leader, the father of the nation, Bangabandhu Sheikh Mujibur Rahman as the first president of Bangladesh. Emphasis was placed upon acknowledging free elections with a view to establishing a

unitary state and a Westminster form of unicameral parliamentary democracy.

It is true that we started with one of the best constitutions based on the concept that all powers of the Republic belong to the people asserting people's sovereignty, nationalism, secularism, socialism and democratic polity based on free and fair election as the essential ethics that stands for the Republic and declare the quest of a society that gives its citizens - the rule of law, independent judiciary, fundamental human rights and freedom, equality and justice in political, economic and social sphere. Indeed, we as a nation, feel proud that we could efficaciously draw up the Constitution of Bangladesh engaging people from all walks of life, to be embodied as a solemn expression of the people's will. But the tragedy is that this Constitution has been defiled in the so-called proclamation of martial law, first in 1975, introducing thereby malfeasance in the

Constitution, specially on the protection of human rights and role of judiciary. Judiciary has however played a very significant role in saving the Constitution and restoring the constitutional continuation on number of occasions, particularly during the last caretaker government regime.

LD: Are we being able to maintain the trend of constitutionalism in Bangladesh that we promised in our original Constitution, specially while talking about the protection of human rights vis-a-vis the role of judiciary?

AI: The role of the judiciary is closely linked with the implementation mechanism of all rights and particularly human rights. These are the rights, which have not only been made enforceable, but were also recognised and developed by judges as inalienable natural rights even before the notion of human rights received universal recognition

Constitution upholding the rule of law and dispensing justice without any fear or favour.

Equality, human dignity and social justice, are the main aims of Bangladesh as being part of her Proclamation of Independence and these are echoed in the Preamble of our Constitution. We are committed to a society in which the rule of law, fundamental rights and freedom, equality and justice-political, economic and social need to be secured for all citizens.

When we interpret the enforcement mechanism provided under Article 102 or talk about the role of the judges, it is difficult to conceptualise any other role for them other than the one postulated and prescribed under the oath of the judge that they "will preserve protect and defend the Constitution". A judge should preserve and protect 'fundamental human rights' for all citizens as promised in the Preamble and the Constitution.

If one has to read, implement and expound the Constitution as the judges do;

"If they are incorporated into a Constitution, independent tribunals of justice will consider themselves in a peculiar manner as guardian of those rights; they will be an impenetrable bulwark against every assumption of power in the legislative or executive; they will be naturally led to resist every encroachment upon rights expressly stipulated for in the Constitution by the Bill of Rights."

People of Bangladesh have not been so fortunate in developing the role of the judiciary vis-a-vis protection and development of human rights as the continuity of constitutional regime has often been interrupted. Mr. Justice Mustafa Kamal observed, "Our Constitution too suffered interference at the cost of judicial review... The exercise of judicial review was interrupted over and over again by either a proclamation of emergency or a proclamation of martial law. The power of judicial review of the High Court Division has been interfered with at every break point of constitutional continuity". In the process, the independence of the judiciary has often been interfered with, and judges have been made to retire in midst of their tenure by usurper dictator through decree. Provision for effective consultation with the Supreme Court for appointment and confirmation of judges was removed by the 4th Amendment and the provision for consultation which is still there for promotion and disciplinary matters relating to judge of the subordinate judiciary has been made ineffective by ignoring the opinion and recommendation of the Supreme Court.

Mr. Justice Habibur Rahman in his judgment in the case of *Anwar Hossain Chowdhury v Bangladesh* 41 DLR (AD) 165 (popularly known as the "Constitution 8th Amendment Case"), points out that "the Supreme Court described by Alexander Hamilton as the 'least dangerous' organ of the state in our country however, has drawn much attention from the legislature as well as from the martial law authorities. So far changes have been brought in the structure, powers and functions of the Supreme Court for the eighteenth time". His Lordship then quotes US Chief Justice William H. Rehnquist "that the Supreme Court is the least understood of the three branches".

His Lordship Mr. Justice Mustafa Kamal points out that: "Nearly all Constitutions require judges to take an oath to 'preserve, protect and defend the Constitution and the Laws'. But when abrogated or suspended and made subservient to the will of an extra constitutional force, the Judges have to make a choice". Mr. Justice Mustafa Kamal quotes an Argentinean judge, according to whom, "The judge of the court under such circumstances can do three things: (1) resign, thus transferring the responsibility of the decision to others; (2) simply accept the fact; (3) try to save those institutional values which can still be saved."

When such an abnormal situation occurs, a judge according to Mr. Justice Habibur Rahman, has two alternatives: "either he would resign or he would hold on to his post". Mr. Justice Rahman strikes an optimistic note reaffirming his faith in the future and the ultimate rallying power of the law as he says that "one who has not lost faith in the rallying power of law may prefer a temporary deprivation of freedom to desertion".

Whatever may be the possible choice or a dilemma of any judge in a situation under an extra constitutional move, it creates an immense dilemma for the readers of law and the Constitution to understand choice of the highest Court when it chooses to declare that "whenever there would be any conflict between the Constitution and the Proclamation or a Regulation or an Order, the intention, as appears from the language employed, does not seem to concede such superiority of the Constitution. Under the Proclamation which contains the aforesaid clauses, the Constitution has lost its character as the supreme law of the country".

Their Lordships in expressing the opinion of the highest Court as custodian of the



Constitution Drafting Committee members.

body of politics in Bangladesh since the 15th day of August, 1975. This was the beginning of anti-thesis to the concept of Constitution at the very first instance. Our Constitution was suspended by the imposition of Martial Law, undermining the very sovereign character of the Republic, first by Khondoker Mustaque Ahmed, second by Ziaur Rahman, third by Hussain Muhammed Ershad and then by Iajuddin Ahmed during the last caretaker government. That the constitutional

under the Charter of United Nations or under any written Constitution.

Bangladesh, being the result of a culmination of struggle for a just and representative government, has a distinct imprint of the human rights in its first constitutional document in the form of Proclamation of Independence. It was proclaimed therein that "in order to ensure people of Bangladesh equality, human dignity and social justice" people made pledges to do "everything that may be necessary to give to the people of Bangladesh an orderly and just government". In the Proclamation of Independence there was further promise "to observe and give effect to all duties and obligations that devolve as a member of the family of nations under the Charter of the United Nations".

Bangladesh's allegiance to the Charter in its Proclamation of Independence and the pledge to observe the duties and obligations as member of the family of nations along with the promise of her people for establishing equality, human dignity, social justice and to form an orderly and just government is of fundamental character. This was part of her birth cry echoed all through the Constitution.

This faith in the human rights is further reinforced and elaborated in the Preamble of the Constitution by affirming that "it shall be a fundamental aim of the State to realise through the democratic process 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. ...so that we may prosper in freedom and may make our full contribution towards international peace and cooperation in keeping with the progressive aspirations of mankind".

Concept of equality, social justice and human dignity has to be read as the central component of the will of our people and this supremacy of the will of the people is enshrined in the Constitution by vesting all power to the people and by giving the Constitution a status of supreme law. Moreover, this supremacy of the people is further strengthened by the fact that certain powers are not to be exercised by any of the organs of the State, nor their original rights so guaranteed be encroached. The inalienable nature of those rights is further emphasised by recognising the concept of equality before law, non-discrimination, equal opportunity in public employment and access to law; right to life, personal liberty, safeguards against arrest and detention, prohibition of forced labour, due process in trial and punishment; freedom of movement, assembly, association, conscience, speech, profession, occupation and religion; rights to property; protection of privacy, home and correspondence. Enforcement of fundamental rights is itself a part of our guaranteed rights under the

they cannot escape reading, implementing and expounding the Constitution as a whole. In reading the rule of 'locus standi' or 'exhaustion rule' it is necessary to take such care so that the cause for social justice is not obliterated or undermined and that the exhaustion rule is not used to frustrate access to law and access to justice particularly for those who cannot afford litigation.

It is neither the justice through forms and technicalities nor between the adversaries, but the justice in substance that people seek as well as justice for all in both social and economic life. It is not the individual liberty alone, but rights which are shared with the entire community also and rights which can be meaningful by sharing the responsibilities as well ought to form part of the consideration while dealing with the fundamental principles of state policy and the fundamental rights.

Right to move to the High Court Division has also been made part of the fundamental rights. The Supreme Court was given unequivocal power for giving direction and orders to any person or authority for the enforcement of the fundamental rights conferred by Part III of the Constitution, specifically by Article 44.

Bangladesh Constitution has thus made the rule of law and its enforcement a part of fundamental rights, thereby ensuring the right of every person to be treated only in

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history is full of interruption and allegiance of people to the Constitution is somewhat exclusive of political culture. The true objectives of the original Constitution have been marred by indiscriminate amendments, additions, modifications, substitutions and omissions made at one time under certain compelling circumstances and subsequently removed by another amendment, hence causing one violation leading to another, be it for legitimate reasons in terms of protecting public interest or sometimes for denominational political purposes, but a few of the amendments were enacted with appropriate deliberations and thorough discussions concerning all the stake holders and intelligentsia and concerned citizens subscribing to different or opposing ideological or political views. This shows the practice of one-dimensional thought in our political culture, having lack of respect for democratic practices or expediency and good governance. Constitutional share of politics therefore has developed autocracies leading to controversial discourses on the notion of



accordance with law (Article 31) fundamental rights are enforceable under Article 102(1) of the Constitution.

Articles 7, 11, 26, 31 and 44 read along with the Proclamation of Independence and the Preamble of the Constitution, create the appropriate backdrop for understanding the role and the extent of judicial review as envisaged under the Constitution (Article 102). It has thus become inseparable concomitant for fundamental rights as is said in the words of the sponsor of first ten amendments in the US Constitution, James Madison, also known as the father of Bill of Rights:

Constitution perhaps went far beyond the judicial choice, while recognising that Article 7 in existence "must be taken to have lost some of its importance and efficacy". In the beginning of the nineteenth century almost 200 years ago, Chief Justice Marshall pointed out the judges oath in the famous case of *Marbury v Madison*, "How immoral to impose it on them, if they were to be used as the instruments, and knowing instruments for violating what they swear to support".

(This is a two-part interview. The second part will be published in the next issue).