"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 • dslawdesk@yahoo.co.uk

LAW VISION

# Judging apex judges by parliamentarians

PROFESSOR M RAFIQUL ISLAM

*The recent criticisms of the apex Court decision and its amici curiae on the 16th Amendment by some parliamentarians before the full judgment and potential review are politically premature and legally untenable under the Constitution and parliamentary rules of procedure.*

THE 16th Amendment to the Constitution of Bangladesh in 2014 removed the power to impeach apex court judges from the Supreme Judicial Council to Parliament. This amendment has been declared unconstitutional by the High Court Division and recently by the Appellate Division of the Bangladesh Supreme Court. The Prime Minister rightly said that this decision is indicative of the independence of the judiciary. Also, the Law Minister publicly announced that the gazette notification of appointable qualifications of apex judges would be published soon by 15 July 2017. These are certainly welcoming developments for consolidating the constitutional basic structure of an independent judiciary.

However, the apex court's decision on the 16th Amendment has generated considerable resentments and blistering attacks by parliamentarians in manner and languages unprecedented in any form of parliamentary code of conduct. Some criticisms sound like arrogance of ignorance, while others attacking the messengers instead of their messages. The argument that Parliament, being an elected body, should prevail over the apex court. Parliament is a creation of, and derives its power from, the Constitution. Parliamentary powers, however passionately asserted and widely exercised, must stay within their constitutional limits set under Article 7(2). It is the apex Court's constitutional duty to determine whether Parliament has acted within the constitutional limits and enactments beyond this limit may suffer from legitimacy crisis. It is in this sense that Bangladesh Parliament is a non-sovereign law-making body. Another criticism suggests that the apex Court may keep on giving judgments, which will not be enforced through parliamentary endorsement as is the case with the 15th Amendment scaping the caretaker government system. This claim requiring parliamentary endorsement for enforcement contradicts Article 112 of the Constitution, which requires Parliament to 'act in aid of the Supreme Court'. These reckless and arbitrary claims do not exist in the Constitution, which has made the Supreme Court, not Parliament, the guardian of the Constitution.

The apex Court declared the 16th Amendment unconstitutional by exercising the same judicial review power under article 105 of the Constitution that enabled it to declare the 5th, 7th, and 13th Amendments unconstitutional. Instead of entering into an analysis of major amendments to the Constitution, it is enough to say that most, if not all, of them were enacted by civil and military governments alike to serve the sectarian interest of political parties to consolidate their position in power, not necessarily to advance constitutionalism. If Parliament enacts amendments (a) validating martial law parallel with and superseding the Constitution, the supreme law of the land (Article 7:1); (b) creating an unelected presidential form of caretaker government in presence of Article 11 requiring elected government and within a parliamentary form of government; (c) introducing government permission required before bringing any corruption proceedings against public servants, MPs, and ministers in flagrant defiance of the constitutional guarantee of equality before law under article 27 of the Constitution, what palatable constitutional duty the apex Court can perform other than to declare them unconstitutional. This is what precisely happened in the case of the 16th Amendment.

The arguments that the 16th Amendment was an attempt to restore the 1972 original Constitution and that Parliament has the power to remove apex judges in Commonwealth parliamentary form of governments represent half-truth. The restoration of the 1972 Constitution is intuitively appealing but the issue here at stake is the separation and independence of the judiciary, which is unlikely to be achieved in the absence of implementing Articles 115 and 116 of the Constitution authorising the President for the appointment, control, and disciplines of subordinate courts in consultation with the Supreme Court. Neither the 16th Amendment nor the Parliament initiated any steps to implement these constitutional provisions. The Commonwealth Secretariat Study of 2015 shows that the majority Parliaments, indeed two-thirds, (32 out of 48) do not have this power. Finding examples of Commonwealth Parliaments having opposition parliamentarians as ministers and parliamentarians' views eclipsing under the restrictive shadow of article 70 of the Constitution would be an uphill daunting task.

Rules of Procedure of Bangladesh Parliament made in April 1973 by the President pursuant to Article 75(1)(a) of the Constitution, adopted by Parliament on 22 July 1974, gazetted on 23 July 1974, as amended up to 11 January 2007 have made certain matters off-limit of Parliament. Rules 53(xviii) (xx:a), 63(xi) (xii), and 133 (iv) (v) impose explicit restrictions on issues to be raised and adjourned that "it shall not relate to any matter which is under adjudication by a court of law [and] it shall not contain a reflection on the President or a Judge of the Supreme Court". The apex Court appointed 12 leading lawyers as amici curiae to advise it on the constitutionality of the 16th Amendment and none of them supported the parliamentary power to remove apex judges. Yet two of them borne the full brunt of the attacks, presumably because they were the pioneers in drafting the 1972 original Constitution. Since their professional opinions went against the 16th Amendment, they became 'opportunists', who were hailed high in 1972 for their historic contributions to the development of constitutional rule of law in newly born Bangladesh.

The political culture of Bangladesh is littered with inconsistent policies and their hypocritical orientation. Parliament had the power of removal of apex judges under the 1972 Constitution, which was dropped by the 4th Amendment enacted in 1974 by the Awami League government, which restored it in the 16th Amendment in 2014. It was Awami League in opposition who engineered the idea of caretaker government and politically besieged BNP Government had to adopt it under the 13th Amendment in 1996, which was scraped by the incumbent Awami League government in 2011. Now BNP once its opponent has now become its ardent supporter. BNP expressed its support for the apex Court decision on the 16th Amendment. One of its senior member has publicly declared that a BNP government in power would create a separate and independent secretariat for the judiciary. And it is coming from a former BNP law minister (a) who repeatedly refused to appoint an ad hoc judge from the High Court Division to the Appellate Division, which could not hear the *Bangabandhu Murder Appeal* for want of judges (caused by expressions of embarrassment) despite previous precedent of appointing an ad hoc judge; and (b) who sought and got 26 time extensions for the implementation of the *Masdar Hossain* Directives of the apex Court and left the office without implementing them.

The culture of exercising political power acquired by whatever means beyond the limits of law is yet to be dissipated in Bangladesh. Parliament is neither above the constitutional rule of law, nor a touchstone so that all of its acts are inviolable law. The recent criticisms of the apex Court decision and its amici curiae on the 16th Amendment by some parliamentarians before the full judgment and potential review are politically premature and legally untenable under the Constitution and parliamentary rules of procedure, which should not be repeated should a parallel situation emerge in the future. These critics would have been better off by toeing to the line of the Prime Minister that the decision demonstrates the independence of the judiciary. The apex Court must display its tenacity to withstand such attacks and not to abdicate its constitutional role as the defender of the Constitution, which has endured so much military and political vandalism. Shrugging off reasoned judicial activism to protect the Constitution in favour of a malleable and pliable role would be a betrayal to the national quest for an independent judiciary in Bangladesh.

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LAW EVENT

# Law students' symposium at NSU

HIMALOYA SAHA

ON 13 July 2017, the Department of Law, North South University organised Bangladesh Law Students' Symposium at its campus. The Hon'ble Minister of Water Resources, Barrister Anisul Islam Mahmud MP graced the occasion as Chief Guest.

Interested law students were requested to email abstracts of not more than 350 words on any discipline of law. The symposium committee asked for full papers of the 10 best selected, for presentation in front of a panel of experts comprising of distinguished legal academics and practitioners at the Symposium. North South University Law & Mooting Society (NSULMS) coordinated the organisation of this Symposium.

At the first session, the Hon'ble Minister in his words thanked the organiser of the event during inauguration. He mentioned the Symposium as one of a kind and unprecedented in Bangladesh, and encouraged the perseverance of organising this event every year.

Chairman of the Board of Trustees of North South University, Mr. Mohammed Shajahan welcomed observers from other universities at the state-of-the-art campus of North South University, and encouraged the Department, to keep organising research oriented events at a regular pace.

Papers were presented from student representatives from the UK's University of Portsmouth, BRAC University, the University of Asia Pacific, East West University, the Universities of Dhaka, Chittagong, Jahangirnagar and other renowned institutions.

Topics that were presented included mostly the contemporary issues, such as the establishment of the Ruppur Nuclear Power Plant, the consumer protection laws, laws in favour of disabled citizens and its implementation, the extent to which judges are at the verge of creating laws etc.

Professor Dr. Mizanur Rahman, former Chairman of the National Human Rights Commission, was one of the panelists, who remarked, "North South University through this event has created history! Papers presented by the students not only enrich the research culture, but bring about a certain quality in future lawyers, which our Bar at present is at a crisis of."

Around 150 observers from 40 universities were present at the symposium, along with heads and faculty members of various law schools, heads and partners of law firms, and also NGO representatives.

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RIGHTS CORNER

# Protecting consumer rights


UPAL ADITYA OIKYA

FOR protecting the interest of consumers at large, consumer rights have gained significance over the years. Previously the principle of "Caveat Emptor" (let the buyer beware) had the tendency to exempt the seller from the liability. But over the decades, another competing internationally recognised principle named "Caveat Venditor" has been evolved which means 'Let the Seller Beware'.

It is quite difficult for the buyer to examine the goods every time before buying. For example, if anyone needs to buy a Cell phone, he/she cannot examine the product by him/herself before buying it except the virtual representation of such product. The buyer cannot check the nano-technologies by himself of such product rather the buyer will look at the virtual representation of that product. So, if the seller changes the internal materials, the product will not be the same and in such case, the buyer would be deceived and exploited from getting the claimed good. So the idea of Caveat Venditor is very clear in sense that the seller must be conscious and must bring the responsibility upon his head always. After the enactment of Consumer Rights Protection Act 2009 (CRPA), several organisations have been working for promoting the consumer protection in local level. Consumer Association of Bangladesh (CAB) has instituted many civil movements for establishing Consumer Protection Right.

According to Article 18 of the Constitution of Bangladesh, "The state shall regard the raising of the level of the nutrition and the improvement of public health as among its primary duties, and in particular shall adopt effective measures to prevent the consumption, except for medical purposes or for such other purposes as may be prescribed by law, of alcoholic, and other intoxicating drinks and of drugs which are injurious to health". Moreover, Article 16 of the Constitution states about the adoption of effective measures for improving the public health.

Thus, the adoption of CRPA 2009 was very time-befitting, but it has also some drawbacks. Firstly, the swindled consumer cannot lodge any criminal suit against the vendor directly under this Act. The provision made a restrictive provision like a written complain has to be placed before the Director General of Directorate of National Consumer Rights Protection (DNCRP). Secondly, regarding Healthcare Affairs, if any person (patient) gets wrong treatment, being a consumer, he cannot file any complain even against that Medical Clinic under this Act. Medical negligence is an offence under Penal Code but the Act could extend its vicinity to greater perspectives to bind those negligent healthcare business institutions. Promulgation of the Act is very time-demanding, but the Act needs several amendments to extend its vicinity for the greater protection of the citizen (consumer). DNCRP is nowadays working very hard but they should not limit their actions against the Business institutions only, rather their actions needs to be on every possible areas where consumers' interests are involved.

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LAW NEWS

MANDELA DAY

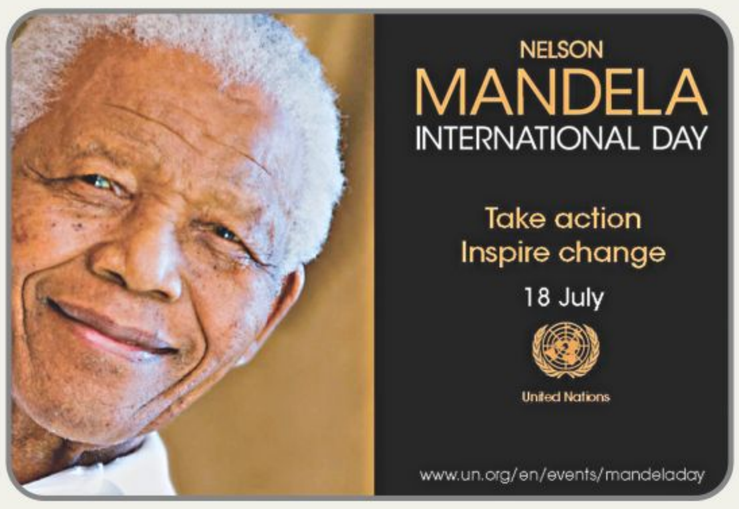
# *Take action! Inspire change*

EVERY year on 18 July – the day Nelson Mandela was born – the UN asks individuals around the world to mark Nelson Mandela International Day (18 July) by making a difference in their communities. Everyone has the ability and the responsibility to change the world for the better, and Mandela Day is an occasion for everyone to take action and inspire change. In November 2009, the UN General Assembly declared 18 July "Nelson Mandela International Day" in recognition of the former South African President's contribution to the culture of peace and freedom.

For 67 years Nelson Mandela devoted his life to the service of humanity – as a human rights lawyer, a prisoner of conscience, an international peacemaker and the first democratically elected president of a free South Africa.

The Nelson Mandela Foundation is dedicating this year's Mandela Day to Action Against Poverty, honouring Nelson Mandela's leadership and devotion to fighting poverty and promoting social justice for all.

Nelson Mandela dedicated his whole life to the service of humanity, in the fields of conflict resolution, race relations, the promotion and protection of human rights, reconciliation, gender equality and the rights of children and other vulnerable groups, as well as the fight against poverty and the promotion of social justice. The Mandela Day acknowledges his contribution to the struggle for democracy internationally and the promotion of a culture of peace throughout the world.




In December 2015, the General Assembly decided to extend the scope of Nelson Mandela International Day to also be utilised in order to promote humane conditions of imprisonment, to raise awareness about prisoners being a continuous part of society and to value the work of prison staff as a social service of particular importance.

General Assembly resolution A/RES/70/175 not only adopted the revised United Nations Standard Minimum Rules for the Treatment of Prisoners, but also approved that they should be known as the "Nelson Mandela Rules" in order to honour the legacy of the late President of South Africa, who spent 27 years in prison in the course of his struggle referred to above.

**COMPILED BY LAW DESK (SOURCE: UN.ORG).**