

LAW INTERVIEW

The risk of abusive constitutionalism

Law Desk (LD): On 4 November 2017, Bangladesh has celebrated forty-five years of founding of its constitution. As a constitutional law scholar, how do you see the culture of amending the constitution in Bangladesh?

Ridwanul Hoque (RH): We have to look at constitutional amendments, either formal or informal, as a political exercise to change the constitution. In amending the constitution, you can adopt either of the two approaches. Firstly, you may have a need for change or you already have experienced a constitutional change in society or the polity and then you go for a formal amendment. Secondly, you are not quite sure whether you need a change in some domain of the polity. Maybe you are deciding narrowly politically to have some political gains for which you want to amend the constitution. This latter approach is absolutely not good for constitutionalism.

Of the first approach, one example might be the 1991 democratic transition when there was a consensus among the major political parties that they would go for a parliamentary model of democracy with which Bangladesh began its constitutional journey. This was the founding value with which the constitution commenced in 1972. This is so far the best example of the first approach.

An example of second approach might be the 16th amendment by which the parliament basically restored an original constitutional provision. We cannot technically say that this is not for constitutionalism, but rather to intervene into the affairs of the judiciary or to create an atmosphere of fear vis-à-vis the non-independence of the judiciary. But there was no political consensus that this particular system should be restored which was once in the 1972 constitution, but then remained absent from the constitution for a long, long time. Moreover, another system (namely the Supreme Judicial Council) was in place before the 16th amendment's restoration of original article 96. Seen in light of these perspectives, the 16th amendment is an example that shows all the traits of a good constitutional amendment, but if we dig deep into the objective, context, and political background of this amendment we see that this is a problematic constitutional amendment deficient in legitimacy derived from political consensus.

As such, amending constitution is a culture, it is either democratic or pseudo-democratic, or authoritarian or devoid of effective public participation. To qualify as democratic, amendments must be predicated upon a minimum level of consensus in society vis-à-vis a political or constitutional

change. When that is not the case, some times use a special phraseology called 'abusive constitutionalism' in which the body politic often shows that a particular amendment is needed and it has been done complying with all the procedures, but that is actually not the case.

LD: Would you consider the 4th amendment to the constitution as one of the examples of 'abusive constitutionalism'?

RH: By definition, it's more than that or



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something else. If you look at the content of this amendment - the pack of changes that was brought about through this amendment, you will see many things were against the basic structure of the constitution. A big issue was the independence of the judiciary and also political pluralism, both of which were integral parts of founding constitutionalism. With regard to these two aspects, the 4th amendment is a major shift from the original constitutional terrain to sort of an 'extra-constitutionalism' or 'unconstitutionalism'. Of course, I agree there were perhaps some given contexts. Nevertheless, if you judge the amendment in terms of modern principles of the rule of law, democracy and constitutionalism, it is very difficult to support any of the provisions that were changed by the 4th amendment.

LD: Was the 4th amendment to the constitution challenged ever? If it was, what was the view of the judiciary?

RH: Some people blame that the 4th amendment was never challenged. That is a several factors involved. First of all, there are constitutional amendment can be challenged before the court is a very debatable idea by itself. This idea has attracted the allegations of democratic deficiency or counter-majoritarianism.

terms of constitutional law or constitutionalism. On the other hand, the things that were undone by the 4th amendment were sort of mitigated and remedied during this period. For example, the problem of independence of judiciary was, to some extent, remedied and political pluralism was also restored. Thus, the bad effect of the amendment was taken care of. Therefore, the need for challenging the 4th amendment did not actually arise in that way. However, in *Hamidul Haq Chowdhury v Bangladesh* (1983) 33 DLR (HCD) 381, a case decided interestingly during an autocratic regime, this issue was discussed. It was not a challenge per se against the 4th amendment. But whether the amendment should be treated constitutional or not.

LD: How do you assess the role of Supreme Court as the guardian of the constitution in interlocking the constitution?

RH: I do personally subscribe to the view that Supreme Court is the guardian of the constitution. But it is not an undisputed concept. As to the meaning of the constitutional mandates, norms and principles, ultimately the responsibility is upon the Supreme Court. The Constitution of Bangladesh gives the

power to enforce fundamental rights specifically to the Supreme Court. And, Article 7 says that the constitution is supreme, people are supreme. If you look at Articles 7, 26, 44 and 102 as well as the whole scheme of the constitution and the preamble thereof, you will find that it speaks of a rule of law and democracy shall have prominence. If that be the case and the allegation is against the parliament or the executive, who else than

the Supreme Court will come forward as the guardian of the constitution?

LD: The Supreme Court itself was indirectly a party to the 16th Amendment Case. On one hand, the Supreme Court is the guardian of the constitution and on the other hand it adjudicates its own matter. How do you think that the court can deal with such a situation?

RH: It is a daunting challenge for the court to overcome, when institutional self-interest becomes entangled with other issues in a particular dispute. The 16th amendment is one example of such difficult cases. In this case, with other constitutional issues, court's leadership, power, institutional interest and position were intricately linked. When a particular amicus curia politely drew the attention of the court to the fact that the issue at hand was virtually an issue closely connected with the Supreme Court and therefore the court needed to be extremely cautious, the court reacted quite intensively. From one perspective, you can say that this is a debate or struggle or war between constitutional prominence of the judiciary on the one hand and that of the parliament or the executive on the other. But there is no other organ which could be entrusted upon to

deal with such cases. Therefore, the court had to be extremely cautious, judicious, and a believer in the doctrines of fidelity to the constitution, popular sovereignty, and constitutional supremacy. Time has not yet come to conclusively determine whether the court has done the right thing in the 16th Amendment Case, because we all know that a review is imminent and maybe a petition will be filed in this month. Let's better see what time has in its treasure for the 16th amendment decision.

LD: Is it possible to change the original decision given by the Appellate Division by means of review?

RH: Yes, it is possible if there are enough new circumstances to convince the court that they should altogether overrule or change their previous stand in the appeal. It is possible both theoretically and practically. But whether that would happen or not depends on a number of factors. It is another major challenge for the Attorney General's office to come up with cogent evidences and compelling new circumstances to show that the 16th amendment decision was constitutionally wrong and that it needs to be rectified. If that can be shown to the satisfaction of the court, there is no harm in overruling its own decision.

LD: What is your advice for young researchers in the field of constitutional law in Bangladesh?

RH: I will personally ask the young and enterprising constitutional law scholars to come up with a platform, either virtual or with physical existence. For example, one initiative could be taken to establish a Constitutional Law Association which I once had in mind to establish and am already thinking about it. Another option could be to develop some blogs specifically dedicated to constitutional law issues. We do not have any issue specific blog or any constitutional law journal in our country. I won't say we should have such journals exclusively for constitutional law right now. However, the existing journals should extend their focus on constitutional issues, specially in a comparative context. On top of that, for the healthy development and prosper of Bangladesh's constitutional law, there is no alternative to establishing a link among the academics of constitutional law, Supreme Court judges, and practising lawyers.

LD: Many thanks for your time.

RH: You are very welcome.

Full version of this interview is available at the webpage of 'Law & Our Rights' (thedailystar.net/law-our-rights).

FOR YOUR INFORMATION

Unconstitutional amendments

THE Constituent Assembly adopted the Constitution of Bangladesh in 1972. As of now, a total of sixteen amendments have been made to the Constitution. At the same time, the Supreme Court of Bangladesh has declared five amendments out of the sixteen (5th, 7th, 8th, 13th and 16th) unconstitutional.

The Constitution (Fifth Amendment) Act, 1979 validated all amendments, additions, modifications, substitutions and omissions made in the constitution during the period between 15 August 1975 and 9 April 1979 by the Martial Law Authorities.



This amendment was declared unconstitutional in 2005 by the High Court Division in *Bangladesh Italian Marble Works Ltd v Bangladesh* (2006) BLR (Special) (HCD) 1. Subsequently, the Appellate Division upheld the decision of the HCD in *Khandhaker Dewnar Hossain v Bangladesh Italian Marble Works Ltd and Others* (2010) 62 DLR (AD) 298.

The Constitution (Seventeenth Amendment) Act, 2016 was also provided, among others, that all provisions promulgated orders, Chief Martial Law Administrator's Orders, Martial Law Regulations, Martial Law Orders, Martial Law Instructions, ordinances and other laws made during the period between 24 March 1982 and 11 November 1986 had been validly made.

This amendment was declared unconstitutional in *Siddique Ahmed v Bangladesh* (2011) 33 BLD (HCD) 84 by the High Court Division. The Constitution (Eight Amendment) Act, 1988 declared,

among others, that Islam shall be state religion (Article 2A) and also decentralised the judiciary by setting up six permanent benches of the High Court Division outside Dhaka (Article 100).

Change in original Article 100 regarding the seat of the HCD was challenged and the Appellate Division in *Anwar Hossain Chowdhury v Bangladesh* (1989) BLD (AD) (Special) 1 declared the amendment of Article 100 unconstitutional.

The Constitution (Thirteenth Amendment) Act, 1996 introduced a non-party Caring Government (CtG) system which, acting as an interim government, would give all possible aid and assistance to the Election Commission for holding the general election.



The vires of this amendment was questioned in *Saleem Ullah v Bangladesh* (2005) 57 DLR (HCD) 171, in which the HCD validated the CtG system. Subsequently, the decision was challenged in the Appellate Division which, in *Maman Khan v Bangladesh* (2012) 64 DLR (AD) 1, decided against the HCD and by a four-to-three decision prospectively declared the Thirteenth Amendment unconstitutional.

The Constitution (Sixteenth Amendment) Act, 2014 gave power to the parliament to remove superior court judges if allegations of incapability or misconduct against them are proved.

The HCD in this amendment unconstitutional in *Asaduzzaman Siddiqui and Others v Bangladesh* (Writ Petition No. 9989 of 2014, decision of 5 May 2016). The Appellate Division upheld the HCD's decision in *Government of Bangladesh and Others v Advocate Asaduzzaman Siddiqui and others* (Civil Appeal No. 6 of 2017; decision of 3 July 2017).

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RIGHTS ADVOCACY

Child marriage: A maze of dialectics

PSYME WADUD

A High Court Division (HCD) bench comprising of Justice Quazi Reza-Ul Houssein and Justice Mohammad Ullah, has issued a suo motu order taking notice of a report (eight child marriages prevented in 24 hours) published in the *Daily Prothom Alo* on 28 October 2017. The rule has asked the concerned authorities (Secretaries to different ministries) to explain in four weeks as to why the union parishad chairpersons and members as well as ward councilors of city corporations and municipalities and the local people's representatives across the country, will not be held responsible for the child marriages taking place in their respective areas of governance. The bench went on to ask the authorities concerned to show cause as to why the aforementioned persons should not be terminated from their posts for not being able to prevent child marriages in their areas.

Even a few years back, an objection could have been raised against the issuance of suo motu rule in the present case for the absence of the condition as it appears as such under Article 102. However, this issue has already been settled by the HCD in 2015. In *Tayyeb v Bangladesh* 67 DLR (HCD) 57, the HCD reiterated the fact that the majority of the people in Bangladesh cannot afford to come to court to seek redress of any grievance. If the fundamental right of a citizen is violated, in view of the HCD, mere non-filing of an application cannot be a ground for not exercising its jurisdiction under Article 102. The Court substantiated its point by relying upon a unreported case, *Sayeda Rizwana Hasan v Bangladesh*, 18 DLR 514, in which it was held that whenever an invasion of fundamental right shocks the judiciary, the court should extend its jurisdiction. Therefore, in the court's opinion a proper case where fundamental right of a citizen is infringed, the HCD can issue suo motu rule provided the infringement is amenable to writ jurisdiction and is of great public importance. In this context, newspaper reports, post cards,

written materials may be treated as an application to overcome the obstacle of application. But, before issuance of suo motu rule the HCD should be satisfied in terms record its satisfaction to exercise



such power. Therefore, there should not remain any objection, on the present date, against the issuance of suo motu rule on the present issue in question upon taking notice of a 2015 judgment report.

Any critique of the 2015 judgment is a matter of a different discourse. The main concern here is the existence of the Child Marriage Restraint Act 2017 which allows marrying off girl children below 18 under 'special circumstances'. For a better understanding of the exceptional clause, the Child Marriage Restraint Rules to the corresponding Act have also been drafted. The Rules interpreted the 'special circumstances' to include the girls' pregnancy followed by their involvement in romantic relationships and absence of the girls' closed friends for maintaining them. The blanket clause validates child marriages and now, the 'immensely' pro-bono suo motu rule at hand, speaks as if the Act did not exist.

The idea of holding the local government representatives accountable for the child marriages taking place in their respective areas sounds extremely pro people. But the difference between the stance of the legislature and that of the

judiciary on the self-same issue is visibly astonishing. Where an Act of parliament, along with the *Inter-Bules*, provides for a clause validating child marriages and indirectly (unintentionally or not is sub-



ject to another decision) makes room for coercive sexual intercourse(s) and/or rapes within the purview of 'special circumstances', the suo motu rule of the local government representatives will be responsible only if the child marriages are not in compliance with the exception clause and do not take place under the special circumstances as were thought of by the legislature or not, entices a sense of discomfit.

If it had been 2015, given the fact that Bangladesh has been suffering from child bride epidemic for a while now and is ranked among the first 10 in the world in terms of marriages of girls under 18, the rule issued by the HCD could have got the applause it rightfully deserves. But the Greenfield Mean Time says something different. Both the facts that it's 2017 and the Child Marriage Restraint Act 2017 is a law in place, negate the idea of admiring the judiciary. The fate of the children in Bangladesh, swings in the direction, the wrongness of which is hard to even begin to contemplate.

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