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REVIEWING THE VIEWS

Giving the parliament its due

A pluralist-institutional view

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THE vibe that the Westminster type parliaments are declining was first aired by Lord Bryce in 1921. The general conclusion of Bryce's comparative study among British, American, French and Italian parliaments was plain - legislative bodies had declined in brilliance, acumen, importance and interest. This later took a name – The Decline of Parliament Thesis (DPT). Westminster type parliaments are particularly vulnerable to the powers of Cabinet so far as it relates to the law making, financial management and policy making. Cabinet dictatorship was further strengthened by the rise of polarised and cohesive party system in the nineteenth century. Situation is even worse in jurisdictions where the Prime Minister is placed far above his cohorts in the Cabinet. Today, parliament barely controls the legislative proposals that come to and passes through it. It has virtually no say over foreign affairs and security issues. Financial accountability mechanisms are increasingly falling upon non-parliamentary bodies like Comptroller and Auditors General, Anti-Corruption Commission, Multinational Donors and Lending Agencies. Parliament's oversight tools like ministerial responsibility has fallen prey to cohesive and clientelist political parties and their predetermined agendas. Even parliament's "mere deliberative" ordeal in state policy making is under challenge. Mass media has overtaken the bulk of agenda-setting and discourse setting function in political debate. Parliament merely follows the policy vibe created somewhere else. Rise of local government autonomy and community-based interest groups directly linked to the government have relieved the MPs from most of their representative functions. So now, the question is - what remains for parliament and what it stands for?

Fortunately, Anti-DPT scholars like Lord Norton and others believe that parliament still has potentials. DPT scholars over-emphasise the elitist and coercive aspect of legislatures, they argue. To them, a pluralist-institutional perspective would better justify parliament as an institution both of coercion and persuasion. Legislature may coerce by its voting power. If not possible, it may persuade by its debating power. Elitist and coercive perspectives highlight the larger hold of the cabinet over parliament. Instead, a pluralist-institutional view would explain why and how the structures (committees, speaker, etc) and procedures (rules of procedure, etc) of parliament may affect what is brought forward by the government. Institutional view has two dimensions – rational choice institutionalism and historical institutionalism.

Historical ideas and norms developed through institutional practice are impossible to amend unless a decisive wave of public support brings an inevitable "constitutional moment" for the ruling class.

True it is, government of a given time would seek to manipulate the parliamentary bodies and procedure towards its own advantage. But the rational-choice explanation of institutional change as expounded Douglas North suggest that such changes would be attempted only when the price for it is worth risking. For example, governments in Bangladesh would think thrice to reintroduce the fourth or fifth amendment like system again. This will be legally unsustainable and politically suicidal. The political price that might need be paid here constitutes a strong deterrent for such attempted change. Parliamentary system is therefore safe at least for the foreseeable future.

Again, could the rulers of the time attempt to reduce the authority of the Speaker, for example, substantially? From a historical institutional analysis, this is almost impossible to do. Parliamentary norms, ideas and etiquette developed over thousands of years of Westminster system militant against such retrogression. Same would be the situation had the rulers wanted to abolish the committee system, ministerial responsibility, parliamentary pre-approval of taxes and revenues, etc. Historical ideas and norms developed through institutional practice are impossible to amend unless a decisive wave of public support brings an inevitable "constitutional moment" for the ruling class. Constitutional moments are admittedly hard to come by.

The institutional view of parliament calls for a pluralist appreciation of the role and place of legislature in Westminster-style governments. To assert that the modern parliaments are far from decline, Robert Packenham identified a total of eleven functions of legislatures and tabled those functions into three major-categories – first, legitimation (democratic legitimacy to the governance), second, recruitment, socialisation and training (creation of future cabinet rank and file from the parliamentary backbenchers) and third, decisional and influence functions (law making and oversight). Prior to Peckenham, Walter Bagehot also outlined five functions: elective (choosing the government); expressive (public perception of current issues); teaching (letting the people know things that might otherwise left unknown); informing (raising the grievances of the people); and lastly, the law making – the most conspicuous one to us.

A combined reading of Peckenham and Bagehot suggests that empirical study, appreciation and measurement of the Inform, Training and Influence Roles of parliament side by side with its Legislative and Elective Role might prove a practicable way to locate modern parliaments' position within the DPT v. anti-DPT discourse. If the parliament's apparent weaknesses in the legislative and oversight functions are recoverable at least in some extent through its Inform, Training and Influence Role, we might be able to make a case for giving parliament a chance in the overall body politic.

The pluralist-institutional perspective is further substantiated by a recently articulated "Expectation Gap" analysis in the UK. Flinders and Kelso from United Kingdom argues that the declinist scholars unrealistically increase public expectations by posturing parliament as an arch rival of the executive. It fails to accept that parliamentary government was explicitly intended to deliver 'strong government'. Again, while inflating public expectations, the declinist scholars fail to close the gap from below - parliament's actual capability to deliver the expectation. Declinist scholars bypass the existence and capacity of 'informal, but no less important,' intra-party and inter-party avenues of legislative oversight through pre-legislative opinion building, cross party committee deliberation and post legislative scrutiny, etc. If the top bar of expectation is pulled down by accepting acomparatively limited role of parliament, and if the bottom bar of actual capacity is pulled up by acknowledging some less visible intra-party and inter-party control mechanisms, then the peoples' 'Expectations Gap' would have been narrower and parliaments could get the attention and appreciation it deserves. Institutions thrive only when those are cared for and appreciated.

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LAW LETTER

Against the archaic definition of "rape"

The existing Penal Code of 1860 that was promulgated during the British colonial era is mostly unchanged and archaic ever after 159 years of its adoption. Definition of rape enshrined in the section 375 is inter alia the most primitive rhetoric that defines the most heinous crime rape very narrowly. Though the punishment for the rape was upgraded by enacting the Prevention of Oppression against Women and Children Act of 2000, the definition of rape is still constrained in penile-vaginal penetration. Section 375 of the Penal Code defines rape as sexual intercourse by a man with a woman without her consent albeit there are five other grounds when sexual intercourse amounts to rape including, for instance when consent is obtained through fraud, threat of hurt or death. Most of the reported rape cases suggest that sexual intercourse without consent is alleged by most of the victims while filing the rape charges. The worrying fact is that the term "sexual intercourse" is not defined under section 375, although the explanatory part of the section states "penetration is sufficient to constitute the sexual intercourse necessary to the offence of rape". The courts have been interpreting the terms "sexual intercourse" and "penetration" to mean penile-vaginal penetration between male perpetrator and female victim that does not require ejaculation for intercourse to be rape. These narrow definition and historical interpretative praxis of the courts thoroughly exclude any

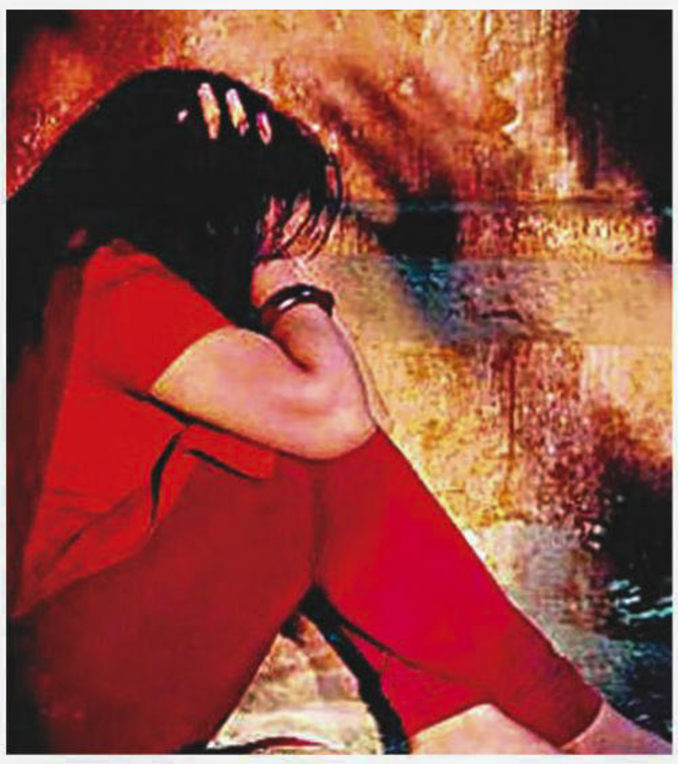

PHOTO: HINDUSTAN TIMES

other penetrative actions, such as oral sex, anal sex, digital penetration and penetrations by objects from the contour of the rape law. Two other serious lacunas of the section 375 are of the legalisation of marital rape and gender biased definition of rape that considers male as only perpetrator of rape. When most of the civilised countries are criminalising marital rape and defining rape based on gender neutrality because of proven reports of marital rapes and rapes of men, boys, transgender people and hijras, rape laws of Bangladesh are still ancient that does not suit with contemporary criminology and penology discourse. The neighbouring country of Bangladesh, India has overhauled the rape laws in 2013 based on Justice Verma Committee Report after the 2012 Nirbhaya gang rape case. After adopting Criminal Law Amendment Act of 2013, section 375 of Indian Penal Code defines rape as follows: A man is said to commit rape if there is:

- Penetration of penis into vagina, urethra, mouth or anus of any person, or making any other person to do so with him or any other person;
- Insertion of any object or any body part, not being penis, into vagina, urethra, mouth or anus of any person, or making any other person to do so with him or any other person;
- Manipulation of any body part so as to cause penetration of vagina, urethra, mouth or anus or any body part of such person or makes the person to do so with him or any other person;
- Application of mouth to the penis, vagina, anus, urethra of another person or makes such person to do so with him or any other person;
- Lastly, touching the vagina, penis, anus or breast of the person or makes the person touch the vagina, penis, anus or breast of that person or any other person

Although India did not accept the recommendations of Justice Verma Committee Report completely, it did brought a new era of criminal justice system by redefining rape laws. Bangladesh also needs to ameliorate the ancient colonial rape laws to keep pace with civilised criminal justice system and to provide justice to all equally and neutrally.

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GLOBAL LAW UPDATES

The admissibility of Saif Gaddafi case in ICC

ON 5 April 2019, Pre-Trial Chamber I of the International Criminal Court (ICC), by majority, rejected the admissibility challenge presented by the Defence of Mr. Saif Al-Islam Gaddafi. The majority, constituted by Judge Péter Kovács and Judge Reine Adélaïde Sophie Alapini-Gansou, decided that the case against Mr. Gaddafi was admissible before the Court.

Judge Marc Perrin de Brichambaut will file a minority opinion in due course.

On 6 June 2018, the Defence filed an admissibility challenge concerning the case against Mr. Gaddafi asserting that, on 28 July 2015, Mr. Gaddafi was convicted by the Tripoli Criminal Court for substantially the same conduct as alleged in the proceedings before the ICC. Mr. Gaddafi further alleged that, on or around 12 April 2016, he was released from prison pursuant to Law No. 6 of 2015 which provided for a general amnesty. Thus, Mr. Gaddafi submitted that the case against him on charges of crimes falling within the jurisdiction of the Court was inadmissible.

The majority's determination was made after careful review of the different submissions and observations of the Defence, the Prosecutor, the Legal Representatives of Victims, the amici curiae, and previous filings from the Government of Libya.

The majority found that in order for a second trial not to be permitted before this Court, for the same conduct, the decision of the Tripoli Criminal Court would have had to be final and acquire the effect of res judicata. The majority was not satisfied that this requirement was met in the case at hand as the judgment of the Tripoli Criminal Court was still subject to appeal and was rendered in the absence of Mr. Gaddafi (in absentia), which left open the possibility of reinstituting judicial proceedings.

The majority was also not satisfied that the passing of Law No. 6 of 2015 rendered the case inadmissible before the Court. The majority found that Mr. Gaddafi was excluded from the amnesty and/or pardon provided by Law No. 6 of 2015. Even assuming that Law No. 6 of 2015 would apply to Mr. Gaddafi, it still did not render proceedings final. According to the majority, granting amnesties and pardons for serious acts such as murder constituting crimes against humanity is incompatible with internationally recognised human rights. Amnesties and pardons intervene with States' positive obligations to investigate, prosecute and punish perpetrators of core crimes. In addition, they deny victims the right to truth, access to justice, and to request reparations where appropriate.

Decision on the admissibility challenge by Dr. Saif Al-Islam Gaddafi was made in pursuant to Articles 17(1)(c), 19 and 20(3) of the Rome Statute.

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LAW EVENT

SCLS organises Model Law Commission

COUNTRY'S maiden Model Law Commission titled "Principal M. Wazhiullah Model Law Commission and Legislative Process Simulation 2019" has been held on 5th of April at Collegiate School and College. Themed as "Enact Future Laws" the programme was organised by Society For Critical Legal Studies (SCLS). The day long competition was divided into three segments namely 'White Paper Presentation Round', where each team presented two problem Agendas before panel judges, 'Draft Preparation Round' where team had to present the specific draft law and finally in the 'Parliamentary Round' each team recognised as parliamentarian and the process of passing a draft law had been showed.

There were 12 teams each consisted of 3 participants participated in the competition. The teams were from different law schools around the country including Bangladesh University of Professionals, BRAC University, Britannia University, Daffodil International University, Premier University, Southern University Bangladesh, State University of Bangladesh, Varendra University and University of Chittagong.

The competition was held on the basis of 2 specific problem agenda, e.g.: Implementing Policies for Clean Air in Bangladesh and Planned Industrialisation in Bangladesh, Establishment of Law University in Bangladesh: Prospects and Barriers. In Draft Preparation Round, all teams came up with 6 very time demanding laws including Maritime Resources (Exploration, Utilisation and Management) Act, E-Judiciary (Establishment, Utilisation and Management) Act, Space Technology (Establishment, Control and Management) Act, Renewable Energy (Utilisation and Management) Act, Online Advertisement on Digital Platforms (Control and Management) Act, Forensic and Scientific

Evidence (DNA Collection, Maintenance and Regulation) Act, etc. Throughout the day the participants engaged themselves in intense research, debate and in answering questions of the judges.

Distinguished adjudicators panel comprising of judges, advocates, professors heard the participants and also delivered their insights upon the performance of the participants. Justice Mr. Khurshid Alam Sarkar, Honourable Justice of Supreme Court of Bangladesh, was present as chief guest in price giving ceremony of this competition. In his speech he said that SCLS is playing a great role in studying law as well as in legal field. BRAC University stood as champion and Bangladesh University of Professionals secured the runners up position.

The programme was organised by Society for Critical Legal Studies following the footstep of the organisation's previous events such as mooting competition, law olympiad, law lectures, research conference, debate competition, etc. The distinguished guests expressed that the good works of SCLS will be continued in future and contribute much in legal education field of the country. Associate Professor of Department of Law, University of Chittagong and Moderator of SCLS Mr. Nirmol Kumar Saha presided over the programme.

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