"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 OPINION

Legality and legitimacy of Bangladesh Constitution

Md. Johir Uddin Shohag

What is the source of legality or legal validity ('*Boidhota*' in Bengali) of a constitution? A superior law? India and Pakistan got their independence and established two constituent assemblies via the enactment of the Indian Independence Act, 1947. This Act was passed in the British parliament in Westminster. So, the Indian Constitution of 1949 and the Pakistani Constitution of 1956 got their validity from an Act of the British parliament.

All the members of the Constituent Assembly of Bangladesh were elected under the Legal Framework Order, 1970. Was that Order the source of legality of the Constituent Assembly of Bangladesh? The answer is no. The reason is that the Legal Framework Order, 1970 arranged elections for making a constitution for Pakistan, not for Bangladesh. This fact was not denied in the Proclamation of Independence, 1971. The Constituent Assembly of Pakistan was 'arbitrarily and illegally postponed for indefinite period' and 'Pakistan authorities declared an unjust and treacherous war'. Until the very war, the representatives of Bangladesh tried to make a constitution of Pakistan. The just and successful war established the Constituent Assembly as a sovereign and independent authority for Bangladesh. Hence, Justice Badrul Haider Chowdhury called Bangladesh Constitution an 'autochthonous constitution' in his opinion in the case of *Anwar Hossain Chowdhury* v *Bangladesh* (1989) BLD (Spl) 1, because it got its power not from the *above* i.e. the colonial superior authority, but from the very people.

One might argue that Bangladesh got its validity from the *above* i.e. from international law because Bangladesh declared independence 'in due fulfillment of the legitimate right of self-determination of the people of Bangladesh'. The right to self-determination is a right recognised in public international law. Hans Kelsen argues that a domestic constitution and international law are part of the same legal system where international law is *above* i.e. hierarchically superior to the domestic constitution. The Constitution of the United States of America also got its validity from the *above*. But this *above* is not international law, but natural law (God). This might be called a transcendental argument. The other argument might be called social contract argument. The idea '[w]e the people', although fictitiously constructed, expresses the general will. The validity of the Bangladesh Constitution came from it. The representatives of the people of Bangladesh constituted themselves into a Constituent Assembly because '[w]e the elected representatives of the people of Bangladesh' had the people's mandate. Later their authority was not successfully challenged.

Carl Schmitt would argue that if a constitution is not successfully resisted, it will be considered as accepted by the people. The opposition parties failed to resist it. The question of successful resistance and revolution is not a question of law, but a question of politics. A certain kind of politics would give birth to a certain kind of constitution. One might ask what the role morality plays in this regard. The answer is that politics might be influenced by morality.

THE BANGLADESH OBSERVER

A document to shape nation's destiny

Constitution enacted

By A Staff Correspondent

A charter of rights of oppressed millions

By A Staff Correspondent

Glimpses from the gallery

by Abdur Rahim

A pledge to realise dream of martyrs

Polls on March 7

By A Staff Correspondent

Yuval Noah Harari thinks that '[w]e the people' is a useful fiction. It resides in our imagination and gives meaning to our lives. I quote from Harari's *Homo Deus: A Brief History of Tomorrow* (2015): "The value of money is not the only thing that might evaporate once people stop believing in it." He asserts that nation and religion are also fictions. Antonio Gramsci's idea of hegemony is a concept closer to it. The civil society members tell a *network of stories* to the poor people and get their consent. If you want to grab the power, you need to tell better and credible stories.

Everything evolves. So does the constitution making process. Earlier people's participation in constitution-making process was very limited. But the scenario is changing. This change might be characterised as the constitutional evolutionism. We might insist that the draft Constitution of Bangladesh should have been sent to the people for getting their approval via plebiscite. But it did not happen. Even the proposal of Suranjit Sengupta to send the draft Constitution for assessing the public opinion was rejected by the Constituent Assembly of Bangladesh. It did not destroy the legality of Bangladesh Constitution but weaken its legitimacy.

Bangabandhu Sheikh Mujibur Rahman had a huge popularity in 1972. Neamat Imam comments in his novel *The Black Coat* (2013): "Sheikh Mujib was more popular with Bangladeshis than Mohammad the prophet; he was supported by people of all religions and creeds." Whatever constitution his party made would have been accepted by the people in a plebiscite. Still this process would have created a new precedent to help the future generations avoid abusive constitutionalism by way of constitutional amendments for the party interests and, in most of the cases, without having proper public deliberation.

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LAW LETTER

Wife's right to dower in case of divorce initiated by wife

Md. Mahmudul Islam Shakil

There exists a wide misbelief among the general people of the society that the payment of any unpaid dower is avoidable or non-payable where the process of dissolution of marriage is initiated by the wife. The right of dower is so prominent that the provision of payment is ensured both by the religion and by the operation of law and is referred to as a debt on the husband until payment in full in his lifetime and even after his death unless the wife relinquishes or gives up her right to dower. The wife's right of dower is mentioned in many verses of the Al-Qur'an, where it says that upon marriage a gift or dowry shall be paid graciously to the wife, unless waived by her willingly (4:4), and the wife shall become lawful upon payment of her full dowries (33:50).

Right of dower is guaranteed under the applicable laws of Bangladesh. Section 3 of the Muslim Marriages and Divorces (Registration) Act, 1974, states that every marriage solemnised under Muslim law shall be registered to be considered as valid marriage. Accordingly, the law requires the fulfillment of the standardised form of *Nikahnama* or the marriage contract under the Muslim Marriages and Divorces Registration Rules, 2009, which contains the mandatory field of the details of dower, such as, the amount and mode of payment. Furthermore, section 10 of the Muslim Family Laws Ordinance, 1961 states that dower is payable upon demand of the wife, and if the mode of payment is not mentioned specifically in the *Nikahnama* or the marriage contract, as the case may be, the entire amount is payable. In case of disregard or refusal to make the payment, the wife has the right to bring legal actions for recovery of dower under the Family Courts Ordinance, 1985.

There are two popular and largely accepted mode of payment of dower: prompt and deferred. The prompt dower is payable right away on the wedding taking place, hence, there prevails no conflict. However, the dispute arises in the case of deferred dower, since the whole or part of the amount is due and is payable on the agreed future date, even if the marriage is dissolved for divorce or death. The same is also mentioned in the Quran (2:236), that it is an obligation to pay a suitable compensation upon divorce even where the marriage is not consummated or the dower is not fixed. Therefore, there remains no space for debate anymore that where the dower has been fixed or not, and the mode of payment is deferred, it does not terminate the obligation of the husband to pay the wife's dower even in the case when the dissolution of marriage is initiated by the wife and not by the husband.

Most of the women in our society lack the knowledge of the existence of their basic rights in marriage not only as citizen but also as women, as important as the right of dower for instance. Therefore, it is the duty of the concerned authority of the government and the non-governmental organisations to introduce more awareness programmes and activities regarding the matter concerned. Also, the government may take necessary steps to add or insert a clause under the dower section of the standardised form of the *Nikahnama*, stating that the right to recover dower is absolute even where the dissolution of marriage is initiated by either party in the contract of marriage.

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LAW WATCH

MLM on digital platforms: Legality and efficient enforcement of law

Zubair Ahosan

Generally, Multi-level Marketing (MLM) refers to a business scheme where a company's revenue derives from selling the products or services of a company where the participants or workforce of that company achieve their earnings through a pyramid scheme. Section 2(8) of the Multi-Level Marketing Activities Control (MLMAC) Act, 2013 defines MLM activity as a marketing activity by establishing two or more levels of a product or service marketing procedure with a commitment or plan to provide specific commissions or dividends or any other benefit. Though the definition does not directly refer to the pyramid scheme, this Act subsequently discusses it elaborately.

Recently, CID has arrested several officials, including CEO and MD of an MLM group conducting their MLM business, disguising them as an e-commerce platform. According to the investigation made by the Cyber and Special Crime unit of DMP, it has stated that only this SPC group has allegedly embezzled 268 crore taka within this year. Therefore, a question arises whether the existing MLMAC Act is adequate in restricting these activities.

According to section 4 of the MLMAC Act, no MLM company can run their business without a license. Also, section 4(2) of the said Act delineates the industries in which MLM business may be conducted to ten criteria for consumable products. However, the e-commerce sector sells a range of products and there is little law enforcement or regulatory oversight on their compliance with the existing laws. Besides, section 21 of the MLMAC Act requires every product or service to have a visual presence within a credible environment. But the catchy offers of many e-commerce platform and their advertisement modules show that most products and services have no visual presence. Instead, those advertisements of products are made in relation to products that may be produced in the future.

The fundamental problem with those online-based digital MLM activities is that their business is based on a pyramid scheme that is inherently an integral part of MLM business and declared illegal under section 15 of the MLMAC Act. Firstly, this section explicitly bans pyramid or any similar kind of pyramid module-based business system. Secondly, it hinders any illusory or non-materialistic products manufactured or produced on a time-to-time base cycle in the future. Under this section, all the digital-based MLM companies can be taken into question whether their business can run beyond all those legal restrictions or should be taken under immediate legal sanction. However, it is a matter of concern that those MLM companies frequently disguise themselves as e-commerce platforms for which they remain out of sight for most of the consumers. They have also managed to convince many public figures and celebrities as their well-wishers and ambassadors by the passage of time. As a result, the rapid involvement of mass people cannot be controlled within due course.

Besides, MLMAC Act is a law that involves many shortcomings and loopholes that should be amended within the due period of time. The mostly contraband fraudulent Ponzi Scheme is not explicitly banned or defined. In addition, the penalty for violation of the provisions is fixed in case of a monetary fine. For instance, section 26 penalises any person for the infringement of section 15, with a monetary penalty not exceeding fifty lakhs of taka. The question arises when an MLM company has the scope of seizing millions of taka, how much it is justifiable to penalise them within a fixed monetary fine. Rather inserting ad valorem fine would be a more sensible and pragmatic step to put a stumbling block for those scams. Moreover, this Act remains tongue-tied regarding how the victims will get remedy in case they face any infringement and swindling experience.

The authority should admit the gravity of this issue and take some urgent action over the expanding digital MLM market and revisit the provisions in question to enhance a compact and strict regulatory system for wiping out any further probability of MLM scam in Bangladesh.

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LAW REFORM

Proposal to improve the current state of recording confessional statement

Shishir Manir

In our criminal legal framework, confession is a valuable piece of evidence. Many death sentences have been awarded solely based on confession. This can be defined as a statement made voluntarily by a person charged with a crime, stating or suggesting an inference that he committed the crime. Section 164 of the Code of Criminal Procedure (CrPC) bestows the power upon Magistrates to record confession and section 364 specifies the procedure. A confession is evidence against its maker unless its admissibility is excluded by provisions embodied in the Evidence Act 1872. The 1872 Act makes confessions irrelevant in a criminal proceeding when it appears to be obtained by inducement, threat, or promise.

Article 35(4) of the Constitution protects each individual from being compelled to act on self-incrimination. Article 35(5) strictly prohibits torture or cruel, inhuman, or degrading punishment or treatment in any circumstance. Confession is an exception to the general rule embraced in the Constitution. The objective of the law is to make sure confession is given voluntarily out of guilt and as repentance.

Despite having good protection in the law, allegations of custodial torture are rampant. When we raised the issue of forceful extraction of confession from a minor before the Supreme Court, it had commented forcing a confessional statement out of the accused was unfortunate for the country.

Dhaka Metropolitan Sessions Court convicted five police personnel for killing 'Jony' in custody under the Torture and Custodial Death (Prevention) Act, 2013. The boy died in consequence of tragic custodial torture that created uproar throughout the country. According to a report of Ain o Salish Kendra (ASK), 1,474 incidents of custodial deaths took place from January 2016 to July 2021.

In *BLAST* v *Bangladesh* 69 DLR (AD) 63, the Supreme Court addressed the issue of unlawful arrest, remand and custodial torture in detail. The Apex Court gave directions to prevent the same. The Court tried to check abuse of the statutory power conferred on police.

The Court in the case directed the law enforcing officer, to take the arrested person to the nearest hospital for treatment and to obtain a certificate from the doctor if he finds any marks of injury on the person arrested. The officer shall record the reasons for such injuries. The Court also directed the Magistrate that if there is information to him that a person has been subjected to torture, he shall refer the victim to the nearest doctor. If the medical evidence reveals that the person detained has been tortured, the Magistrate shall take cognizance of the offence *suo-moto* under section 190(1)(c) of the CrPC without awaiting the filing of a case.

The United Nations Committee Against Torture (CAT) in its '*Concluding observations on the initial report of Bangladesh, 2019*' expressed concern over the information it had received alleging the widespread and routine commission of torture and ill-treatment in the country by law enforcement officials to obtain confessions.

The nature of the process of recording confession is very sensitive. There is a thin line between protection of fundamental rights and their encroachment. Considering the sensitivity of the issue, countries including the USA, Australia, Netherlands, South Korea, European Union countries recognise the presence of counsel in the course of the interrogation to ensure the accused is not subjected to any maltreatment. In 2009, India amended section 164 of its CrPC and inserted provisions to empower Magistrates to record confessions by audio-video electronic means and in the presence of the advocate of the person accused.

In our Constitution, we have a fundamental right to be defended by a lawyer. Interrogation in presence of a lawyer is a worldwide recognised practice. We can introduce the provision of lawyers' presence, at least, at the time of recording confession, so that the accused may be made aware of the gravity of the confession he is making. Recording confession in audio-video electronic means may be added to ensure the legal requirements for future reference. Sooner or later, we have to introduce similar provisions in our law to protect the fundamental rights of our citizens.

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