

CONSTITUTION DAY SPECIAL

LAW INTERVIEW

A precondition for rule of law is to ensure separation of powers

Dr. Kamal Hossain is a Senior Advocate of the Supreme Court and the senior-most lawyer in the country. He was elected as a Member of the Legislative Assembly in 1970. Dr. Hossain served as Chairman of the Constitution Drafting Committee (1972), Minister of Law (1972), Minister of Petroleum and Minerals (1974), and Minister of Foreign Affairs (1974 – 75) of the Government of Bangladesh. Law Desk spoke to Dr. Hossain, on Constitution Day (November 4) that marks the adoption of the Constitution by the Constituent Assembly in 1972.

**Law Desk (LD):** How would you reflect on the constitution making process that you had led from the front? Especially, with respect to people's participation and accommodating non-dominant voices from within the constituent assembly?

**Kamal Hossain (KH):** I've often quoted Albie Sachs, the South African jurist and anti-apartheid activist, who described the constitution making process as writing "the autobiography of a nation". In our case, when we were drafting the Constitution, we tried to reflect aspirations and ideas for which people had struggled throughout the liberation movement. The first affirmative and all-inclusive approach towards framing the Constitution of Bangladesh was taken on 11 January 1972, with the promulgation of the "Provisional Constitution of Bangladesh Order 1972". This provided for a Constituent Assembly comprising of members elected from the territories that had become our new country of Bangladesh to the then Pakistan National Assembly and East Pakistan Provincial Assembly. The Assembly set up a 34-member Constitution Drafting Committee which submitted the draft Constitution on 12 October 1972. Out of 34 members, 6 members gave notes of dissent separately. There were debates both in and outside the Assembly, in the newspaper columns and public meetings. We addressed the dissenting opinions on specific issues with the required sincerity. This is evident from the transcripts of the Constituent Assembly debate.

But we had also come out of an overwhelming experience of the Liberation War and the reality of that, of the recent genocide, alongside the struggle of freedom fighters, and of women and men across the country, gave us a sense of unity, and also of urgency, which meant there was broad consensus on many issues. The Constitution came into force on 16 December 1972. The makers of the Constitution made their intent clear in its Preamble, while affirming that people will be the source of all power. Integration of people from all communities and all sectors of society, without discrimination between women and men, or based on religion or community, by empowering them to participate in decision-making at all levels was the paramount objective of the constitution making process.

**LD:** What in your opinion have been the major challenges for the culture of constitutionalism in our polity to thrive?

**KH:** The four basic principles of the Constitution can be traced to elements which



converge to produce a consensus for the unifying role of nationalism; a democratic polity that harnesses people's power and enables social justice; a belief in bringing social and economic transformation, through a democratic process, and secularism and equality.

However, these principles are reduced to rhetoric unless institutional accountability and good governance through separation of powers are guaranteed. A precondition for rule of law is to ensure separation of powers among legislative, executive, and judicial bodies. Unless there is a clear demarcation of exercising powers in those three bodies in terms of their respective functions, the culture of constitutionalism will remain under threat. And the lack of checks and balances among the three institutions of State, and the erosion of guardian institutions is a major cause for concern. Consistent non-compliance with constitutional mandates or the spirit of the Constitution, has been reflected by those exercising untrammelled, unchecked power. People's empowerment and holding to account of those in power, their willingness to listen, and to take corrective actions, and to take responsibility is essential to build respect for the Constitution.

**LD:** As a constitutional lawyer, how do you evaluate the evolution of constitutional law jurisprudence in our country? Have some branches attained more attention than the others?

**KH:** The role of the judiciary – through interpretations of fundamental rights, and of other constitutional provisions – has been critical at many moments of our history over the past five decades. While there have been some very dark moments, there have been situations where the Supreme Court's intervention has enabled the resolution of major political conflicts or facilitated political transitions, and in the process strengthened democracy and enabled resistance against efforts to abuse power. The voting rights case of 2006 is an example. The Court has also been able to withstand efforts to reduce its powers and to limit access to justice and to remedies – the Anwar Hossain judgment, which struck down the 8th Amendment passed by Ershad (breaking up the High Court) was far from a foregone conclusion, and came after many of us, who had been closely involved in the lawyers' movement for years of campaigning on the issue, including our then leaders Shamsul Huq Chowdhury and Syed Ishtiaq Ahmed, had been jailed.

The Court has had high points and some very low points in terms of defending the right to life and liberty. On a more positive note, the Court has played a dynamic role in aiding and promoting social change. There have been quite a few examples of judicial activism where the Court has issued directions upon the executive and legislature to implement constitutional rights, also affirming certain foundational values, for example with regard to secularism and anti-communalism, or

women's rights and there is much that remains to be done on this front.

**LD:** As the constituent assembly debates suggest, the drafters had intended that the economic, social, and cultural rights would be eventually realised 'through conventions'. Do you think 'realisation' for the economic, social, and cultural rights was never meant to be equated with their 'judicial enforceability'?

**KH:** The Constitution recognised socio-economic rights as fundamental principles of state policy. The Judiciary has intervened in this area repeatedly to catalyse state action. The role of the judiciary in implementing social and economic rights within constitutional parameters can be assessed by our experience over the last few decades of seeing thousands of writ petitions being filed before the Supreme Court for protection of economic and social rights, through expansive interpretation of the right to life, including the right to health, education, and a safe environment. Famously, in the Kansat case, the Court gave orders for distribution of power to ensure rural irrigation, giving strength to all those who had been engaged in raising this demand. I have personally seen how the timely directions of the Supreme Court, catalysed by public spirited petitioners and lawyers, have been harnessed to enable a response from the state authorities and also to create an understanding among people of how they can claim and realise their rights. This has been very clear for example in the many writs on behalf of people living in slums

disadvantaged group. This was a major stride forward at that time.

As different communities have organised and asserted their identities in recent years, based on their ethnicity or language, they have also been demanding their rights and there has been a response in terms of recognition whether through legislation, or judgments or political decisions or development programmes. For example, the Chittagong Hill Tracts Accord is itself a recognition through a political settlement of the demands of the Hill People for inclusion. In recent years, our highest court, and various laws have also recognised the distinct identity of the diverse communities including in the Chittagong Hill Tracts. The constitutional principles of equality and affirmative action can be deployed to enable such expansive interpretations.

**LD:** As a lead drafter of the Constitution and a constitutional lawyer, what do you think should guide the interpretation of the Constitution? The intention of the drafters or the needs of the hour? Would your answer be different based on which hat you wear?

**KH:** I think it should be both. I have had the good fortune to wear both hats. During the making of the Constitution, in the Constitution Drafting Committee and in the Assembly itself, we were focused on translating the lessons learned from the liberation struggle. We tried ensuring to draw up a vision that would guide our new nation

Those charged with interpreting the Constitution and in particular with enforcing rights have to be aware of how to ensure these fundamental principles – in particular protecting people against abuse of power and majoritarianism – in trying to attain the objectives which the framers of the Constitution had set out but in a contemporary, very changed, context, and responding to contemporary challenges, and ensuring a response to people's needs in rapidly evolving realities.

and settlements who were able to secure the protection of the Court, through emergency orders, to survive and safeguard themselves against forced eviction, having come to the cities after facing climate displacement, or due to other disasters.

**LD:** One of the major academic critiques against many postcolonial constitutions is that they appear myopic with respect to minority rights. Would you say our Constitution is unscathed by this academic critique?

**KH:** We were very clear that the Constitution had to include secularism and also freedom of religion, in a clear acknowledgment of moving away from the history of communalism and using religion for politics that we had seen in the Pakistan period. We also included Article 28 (4) – stating that the State shall not be prevented from making special provisions for the advancement of any historically

through the future and lay down a framework for realising this vision. This included the four pillars, including of course democracy and secularism, to lead us to the path of a society free from exploitation upholding the rule of law and protecting fundamental human rights.

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**LD:** Thank you for your valuable time!

**KH:** Thank you!

FOR YOUR INFORMATION

Who can get fundamental rights enforced against whom?

Over the years, article 102(1) of the Constitution of the People's Republic of Bangladesh has been liberally interpreted so as to make its application more just, non-technical, and accessible.

LAW DESK

Under article 102(1) of the Bangladesh Constitution, the High Court Division on the application of any person aggrieved, may give such directions or orders to any person or authority, including any person performing any function in connection with the affairs of the Republic, for the enforcement of any of the fundamental rights conferred in this Constitution. Over the years, this article has been liberally interpreted so as to make its application more just, non-technical, and accessible.

In an early case, Mohiuddin Farooque v Bangladesh and others (1996), the Appellate Division went for a liberal interpretation of the term "aggrieved" as appearing in article 102(1). For instance, the Court described the expression "person aggrieved" as not only "any person" who is personally aggrieved but also as one whose heart bleeds for his less fortunate fellows for a wrong done by the Government or a local authority in not fulfilling its constitutional or statutory obligations. Thus, the Court opened its doors to public-spirited or public-interest litigations— litigations filed on behalf of an aggrieved collectivity. Similar observations were made in Ekushey Television Ltd. (2002), Mrs. Parvin Akhtar (1997), Bangladesh Ship Builders



Association (2010).

The Appellate Division in Tayeeb v Bangladesh and others (2011), went on to interpret "on an application" liberally. The Court held that where fundamental rights of citizens is infringed, the High Court Division can issue suo motu Rule

even in absence of an "application" filed. The Court further observed that curtailment of rights must be amenable to writ jurisdiction and in absence of an application, even newspaper reports, post-cards, or any other written materials coming to the judicial notice of the

Court, may be treated as application made by a person aggrieved.

In Moulana Md. Abdul Hakim (2018), the High Court Division extended the ambit of article 102 by allowing an individual to claim reliefs against a private person/entity. The court observed that "when issues of fundamental rights are raised, the sanction of redress under Article 102(1) is clearly of availability against "anyone", or "any authority", inclusive of "any person performing any function in connection with the affairs of the Republic". The reference to Government functionaries must, accordingly, be seen as an appendage made to the broader category of "anyone" or "any authority" by way of abundant caution.

In Liberty Fashion (2018), the High Court Division, referring to the Abdul Hakim case, held that the language of article 102(1) of the Constitution clearly entails that a person must be aggrieved by the action or order of "any person" including a person acting in connection with the affairs of the Republic. As per the Court, when any fundamental right of a person is violated, the remedy provided by article 102(1) is available to the aggrieved person irrespective of whether the violator is in the service of the Republic or in any local authority or statutory body or even in a private capacity.