CONSTITUTIONAL LAW

Our "immutable" Constitution and the paradoxes of Article 7B

Article 7B presents a complex challenge for Bangladesh's democracy. Bangladesh's aspiration for a democratic future necessitates a Constitution that can adapt to the needs of its evolving citizenry. While Article 7B's intent to safeguard our core constitutional principles is commendable, its rigid formulation undermines popular sovereignty and democratic evolution.

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Bangladesh's Constitution has seen its "basic structures" altered by several amendments. Several of those amendments altered the Constitution so drastically that we tend to call them "constitutional dismemberments"– a term borrowed from Professor Richard Albert of the University of Texas at Austin. The Supreme Court of Bangladesh declared some, such as the Fifth and Seventh, constitutional amendments, unconstitutional. Some, such as the Fifteenth, were never formally challenged.

The Fifteenth Amendment of 2011 arguably tried to protect the Constitution's basic structures from amendment, destruction, or dismemberment. It introduced Article 7B, granting an "unamendable" status to some unspecified "basic structures" and a large number of specific constitutional provisions. These include the Preamble, Parts I, II, III, and Article 150 accommodating the Fourth to Seventh Schedules of the Constitution. While proponents see Article 7B as a shield against democratic erosion, critics view it as a paradoxical grip that freezes the Constitution in time, hindering future generations' capacity to bring changes.

Some argue that Article 7B contradicts the core value of popular sovereignty (Article 7) by rendering certain provisions unalterable. It effectively militates against the people's right to self-determination, creating a constitution whose parts are considered unchallengeable. With the past dictating the present and future, some may call it a "Dead Men's Constitution." The architects of the Fifteenth Amendment, though alive now, are not eternal. Their vision, enshrined as unalterable law, raises a crucial question: Should the unalterable will of a bygone era dictate the aspirations of a living and evolving population?

Further, Article 7B undermines the core principle of a "living constitution" that should adapt alongside a nation's circumstances. Drafted in a specific historical context, a Constitution may no longer perfectly reflect the needs of a nation that has evolved over decades. However, Article 7B shackles future generations to a rulebook they may disagree with and lack legitimate means to change. This rigidity creates a breeding ground for frustration and potential unrest.

The "basic structure doctrine", championed by the Supreme Court, also aims to protect core democratic principles from erosion. This is, however, limited and the Supreme Court has the option to revise its definition from time to time. Article 7B recognises the doctrine but ironically exaggerates it by making even peripheral provisions, such as the status of Dhaka as our capital, unamendable. We already know that the judicially enumerated basic structure doctrine itself lacks a clear definition, potentially allowing the judges to interpret it subjectively. Therefore, elevating this judicial doctrine to the status of an unalterable constitutional principle through Article 7B risks perpetuating the very flaws of the doctrine itself.

Article 7B has a self-preservation paradox too. It declares certain provisions, including itself, unalterable. It raises serious questions about its validity. Was Article 7B or the Fifteenth Amendment as a whole, made by a Constitutional Assembly in the exercise of its original constituent power? Clearly not. Was it an act of a parliament exercising its derivative power of amendment? Perhaps yes. Since Article 7B was not part or basic structure of the original 1972 Constitution, Parliament should be able to use its amendment power to amend it.

Article 7B's self-entrenchment has a logic paradox as well. The "immutable Constitution" it seeks to establish is achieved through the very amendment process it restricts. Imagine a locked box with a note inside saying, "This box can never be opened." However, the note was placed by opening the box, and the instruction is to be seen upon opening the box. Similarly, Article 7B relied on the amendment process to become unamendable.

The self-preservation may set a dangerous precedent. Future regimes could exploit this logic to shield their amendments from scrutiny and hinder the Constitution's ability to adapt to unforeseen challenges. In this regard, it is worth recalling Justice A. B. M. Khairul Hoque's opinion regarding the referendum clause of the Fifth Amendment. Justice Hoque called it "a sheer hierocracy" that Ziaur Rahman amended the four pillars of the Constitution as per his sweet will and eventually made it impossible for Parliament to amend the new principles without seeking a referendum. Justice Hoque declared the referendum clause unconstitutional on the grounds of this hierocracy. Could the same logic apply to Article 7B? Article 7B seems to have a similar legitimacy crisis as did Zia's referendum clause.

In conclusion, Article 7B presents a complex challenge for Bangladesh's democracy. Bangladesh's aspiration for a democratic future necessitates a Constitution that can adapt to the needs of its evolving citizenry. While Article 7B's intent to safeguard our core constitutional principles is commendable, its rigid formulation undermines popular sovereignty and democratic evolution. While courts typically avoid questioning internal parliamentary proceedings, Bangladesh's Supreme Court would perhaps need a more nuanced approach, if the Article 7B is ever questioned there. We must balance legal principles with democratic ideals, potentially exploring the role of judicial review in ensuring a fair and inclusive amendment process.

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INTERNATIONAL LAW

Legal Stance of Bangladesh on the Palestine question

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Since its independence, Bangladesh has been a staunch supporter of the Palestinian cause. In fact, Bangladesh is one of 28 United Nations (UN) member states that neither recognise Israel nor maintain diplomatic relations therewith.

Bangladesh's stance on the Palestine issue is grounded in its historical struggle for self-determination, a unique instance of remedial secession outside the colonial context. Indeed, Article 25 of the Bangladesh Constitution pledges support for oppressed peoples fighting against imperialism, colonialism, or racialism, which Bangladesh referenced in the Oral Statement on 20 February 2024, to justify its participation in the current Advisory Opinion proceedings at the International Court of Justice (ICJ) on the question of Israel's occupation of Palestine.

Previously, Bangladesh also participated in the oral proceedings of the ICJ's Advisory Opinion proceedings on the question of construction of a Wall in the Occupied Palestinian Territory and expressed its intent to intervene in the proceedings of *South Africa* v *Israel*. Alongside South Africa, Bolivia, Comoros, and Djibouti, Bangladesh referred the Palestinian situation to the International Criminal Court under Article 14 of the Rome Statute. Consequently, its participation in the current Advisory Opinion proceedings was anticipated, with expectations regarding how it would contribute to the legal questions posed by the UN General Assembly to the ICJ on the Legal Consequences arising from Israel's Policies and Practices in the Occupied Palestinian Territory, including East Jerusalem.

In the 1st written submission, Bangladesh addressed issues on the ICJ's competence, the nature of the questions posed, the adequacy of evidence, and the potential impact of the Advisory Opinion on political peace negotiations. Bangladesh asserted that there are no compelling reasons for the Court to decline rendering the opinion, as historically, the Court has never refused to render advisory opinions.

Regarding the nature of the question and the Court's propriety, Bangladesh indicated that the Court could refer to the Wall Opinion to address jurisdictional and judicial propriety concerns. In the 2nd Written Submission, Bangladesh argued that legal and political questions are often intertwined, and that the presence of political questions does not negate or dwindle the legal nature of the issues. It affirmed that the Court had sufficient evidence from various UN sources to render the Advisory Opinion in question. Bangladesh contended that future solutions for the Palestinian people should be grounded in international law, without them having to negotiate their freedom under unlawful conditions.

Bangladesh's participation in the current Advisory Opinion proceedings is symbolically and legally significant, reaffirming its historical stance on the Palestine question and contributing to the deliberation of the Court.

Bangladesh highlighted that the legality of occupation is still debated and countered the argument that occupation can never be illegal. It proposed two frameworks, based on reports by Special Rapporteurs Michael Lynk and Francesca. Bangladesh contended that Israel's occupation policies violate both frameworks and outlined the legal consequences, stating that Israel must end its occupation, provide assurances against repetition, and make reparations.

Bangladesh's submission also underscored the Palestinian right to self-determination, supported by various international recognitions and previous ICJ opinions. Although it did not fully analyse this right, it highlighted Israel's violation of this right and the obligations of Israel, other states, and the UN to ensure its realisation.

Bangladesh's participation in the current Advisory Opinion proceedings is symbolically and legally significant, reaffirming its historical stance on the Palestine question and contributing to the deliberation of the Court.

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FOR YOUR INFORMATION

Navigating Non-Performing Loans (NPLs) and loan defaults in Bangladesh

IFAT TASNIM

The issue of defaulting on loans continues to be the biggest trouble for the banking industry. At the end of March 2024, total disbursed loans stood at BDT 16,40,000 crore, of which BDT 1,82,000 crore were in default, the highest in the history of Bangladesh. Currently, 11.11 percent of disbursed loans have turned into NPLs.

In the banking and finance sector, NPLs and loan defaults are related terms that belong to slightly distinct circumstances. While both NPLs and loan defaults involve borrowers not meeting their repayment commitments, the remedies that banks have at their disposal for handling these situations can differ based on the particulars and the overarching regulatory environment. Loans that are seriously past due—typically 90 days or more—are referred to as NPLs. Whereas, when debtors fail to make the agreed-upon payments under the contractual obligation of principal and interest on time, it is considered that they have defaulted on their loans.

Several things can lead to defaults, such as unexpected events that affect borrowers' capacity to repay debt, company failures, financial difficulty, or even sheer negligence and unwillingness to repay on part of the borrowers. Certain industries—such as manufacturing, agriculture, and textiles— are more vulnerable to loan defaults. Another reason behind the increase of NPLs in Bangladesh's banking industry is inadequate or poor governance.

Banks may also use techniques such as pledge enforcement, hypothecation enforcement, or mortgage foreclosure to uphold security interests. Alternatively, to expedite repayment, they might choose to use negotiation techniques, such as settlement agreements or loan restructuring.

To overcome these obstacles and restore the health of the banking industry, rule of law, accountability, and transparency must be reinforced. When dealing with loan defaulters in Bangladesh, banks have a variety of options at their hands, *e.g.*, civil litigation and looking to specialist tribunals like the Artha Rin Adalat. Banks may also use techniques such as pledge enforcement, hypothecation enforcement, or mortgage foreclosure to uphold security interests. Alternatively, to expedite repayment, they might choose to use negotiation techniques, such as settlement agreements or loan restructuring. Cross-default clauses may increase the pressure on defaulters and cause defaults on other loans. Banks may also report defaulters to credit bureaus, which might have an impact on the defaulters' credit scores and future credit availability.

To properly negotiate the complexity of loan defaults, both banks and borrowers must have extensive knowledge on these remedies. Artha Rin Adalat Ain section 22 permits the Artha Rin Adalat to appoint mediators to help parties settle their differences through mediation. These neutral third parties promote the value of a compromise in the settlement of disputes by facilitating negotiation and working to encourage consensual resolution outside of formal judicial proceedings. Finally, to effectively tackle the problems caused by NFLs and loan defaults in Bangladesh, a comprehensive strategy encompassing governance improvements and efficient application of legal and alternative dispute resolution procedures is needed.

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