LAW VISION

Bangladesh's Constitutional Crossroads: The Imperative of a New Charter

The courageous, necessary, and ultimately most stabilising path forward is to embark on the journey of crafting a new constitution. This is not merely a legalistic exercise; it is a fundamental step towards national reconciliation, democratic renewal, and the establishment of a just and durable rule of law that can truly serve the aspirations of all Bangladeshis.

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The seismic events of July-August 2024 plunged Bangladesh into a profound crisis far exceeding a mere political leadership change. The nation stands at a critical juncture with a fractured legal order, compelling the question: has the existing constitutional framework irrevocably broken down, making a new constitution essential for national healing and stable governance? Sheikh Hasina's departure, the President's constitutionally questionable unilateral dissolution of Parliament, and the subsequent extra-constitutional interim government signal a deeper constitutional rupture, placing the judiciary in an unprecedented, precarious position. While the Constitution's text remains, its selective dismemberment and an alternative authority's *de facto* operation create legal duality, obliterate legal certainty, and corrode the rule of law. Thus, an outsider might ask: Is there a dual legal system within a single state? This reality demands a courageous solution: creating a new constitution.

To understand this constitutional moment's gravity, legal philosopher Hans Kelsen offers insight. Kelsen argued a legal system's coherence and legitimacy derive from norms validated by a fundamental norm—the *Grundnorm*. This *Grundnorm* is not a formal law but the foundational presupposition of legality, the ultimate validity source for the legal edifice. If this *Grundnorm* is displaced or challenged, the system it underpins risks disintegration. Importantly, invoking Kelsen here is not to legitimise any specific 2024 political outcome. Rather, Kelsenian theory is a diagnostic tool, revealing the legal fragmentation and acute rule of law crisis from the effective collapse of the *Grundnorm* that once validated Bangladesh's constitutional order.

For decades, Bangladesh's legal and political life was nominally structured by its Constitution. This Constitution drew authority from the *Grundnorm*—the presupposed commitment to its supremacy and obedience. This provided the architecture for legal coherence. However, 2024's tumultuous events shattered its practical authority. The President's dissolution of Parliament and the installation of an interim government explicitly outside existing constitutional mechanisms signify a definitive break from the established legal order. These are not mere deviations but acts creating a new, nascent source of governing authority. The critical question is how to escape the ensuing chaos and forge a new, unified, legitimate legal foundation. The existing Constitution has proven incapable of managing such a profound crisis, highlighting its inadequacy.

The implications of this constitutional vacuum are dire, especially for the Supreme Court, the Constitution's designated guardian. It is now caught in an untenable position, navigating a landscape where the traditional legal authority, the existing Constitution, is largely moribund in practice, while a new, extra-constitutional authority issues directives. This is not a sustainable duality but a symptom of a broken system. The judiciary cannot function as the rule of law's bulwark when law itself lacks a single, undisputed legitimacy fountainhead.

The immediate casualty of this collapsed *Grundnorm* is legal certainty. A functioning rule of law, Kelsen underscores, needs a stable *Grundnorm*. When this shatters, predictability vanishes. Citizens, businesses, and institutions face uncertainty about governing legal standards, as legal validity's basis is contested. This breeds instability and undermines progress.

Furthermore, the institutional integrity of the judiciary is gravely threatened. Judges, sworn to uphold the Constitution whose foundational *Grundnorm* is no longer operative in critical spheres, face an impossible dilemma. Attempting to reconcile the directives of an extra-constitutional interim government with the letter of a largely ignored constitution creates a judicial schizophrenia. This can lead to inconsistent rulings, erode public trust in the judiciary, and open the door to arbitrary governance.

More fundamentally, the principle of constitutionalism—the bedrock of modern democratic governance—is in peril. Constitutionalism posits the supremacy of a constitution as the embodiment of the people's will and the ultimate source of state power, a hierarchy validated by the *Grundnorm*. When an extra-constitutional body effectively governs, this hierarchy collapses, paving the way for a system where power may not be adequately constrained by law. The current situation is not merely one of 'selective non-adherence' to the existing Constitution; it represents a comprehensive failure of that constitution to serve as the nation's guiding legal and political compact.

Therefore, the challenge confronting Bangladesh is not merely to 'restore' a fractured legal system or to find ingenious ways for the Supreme Court to navigate an impossible situation. The challenge is to acknowledge that the old *Grundnorm* has lost its efficacy and that the existing Constitution, as a living document, has ceased to function as the ultimate source of legal and political authority. The urgent, overriding imperative is the establishment of a new constitution.

Why a new constitution? It is imperative for several critical reasons. First, it would establish a fresh and legitimate *Grundnorm* based on popular will, ensuring a stable and unified legal order. Second, it would definitively end the current legal duality by creating a single, coherent framework, superseding outdated and ad-hoc arrangements. Third, reflecting the people's demand for change, it would embed core principles like accountability and justice, addressing the root causes of the recent national crisis. Fourth, its creation process can foster national dialogue and rebuild trust, contributing to social cohesion. Fifth, it would grant state institutions, including the Supreme Court, a clear and accepted mandate, restoring their effective authority.

Attempting to merely amend or selectively apply the Constitution in the current context is akin to performing surgery on a patient who requires resuscitation and a complete systemic overhaul. The 'selective non-adherence' observed is not a temporary illness but a fatal symptom indicating the demise of the old order's legitimacy.

Bangladesh is at a precipice. The current untenable situation—a partially inoperative Constitution alongside an extra-constitutional governing body—creates a damaging dual legal reality, breeding uncertainty, chaos, and potential arbitrary rule. The courageous, necessary, and ultimately most stabilising path forward is to embark on the journey of crafting a new constitution. This is not merely a legalistic exercise; it is a fundamental step towards national reconciliation, democratic renewal, and the establishment of a just and durable rule of law that can truly serve the aspirations of all Bangladeshis. The time for incrementalism is over. Bangladesh must now embrace foundational renewal through a new constitutional compact.

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COURT CORRIDOR

Revival of stopped criminal proceedings

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Revival of a criminal proceeding previously stopped under section 249 of the Code of Criminal Procedure, 1898 (CrPC) involves important questions about procedural legality and judicial interpretation. Section 249 allows a judicial Magistrate to stop the proceeding of a case instituted otherwise than upon complaint at any stage of the trial and release the accused, particularly when further prosecution witnesses are not forthcoming. However, the question remains, whether the revival of such proceedings is lawful or not.

It is significant to note that the CrPC does not provide an explicit statutory mechanism for reviving such proceedings once they have been lawfully stopped. In practice, however, some Magistrates rely on two decisions of the Supreme Court to justify such revival, namely, —*Niamat Ali Sheikh* v *Begum Enayetur Noor* (1990) and *Mosharraf Hossain Sheikh* v *Abdul Kader* (2004). A closer look at these decisions reveals the correct legal position.

Firstly, in the *Niamat Ali Sheikh* case, the Appellate Division (AD) of the Supreme Court of Bangladesh (SCOB) considered whether a fresh proceeding, based on the same facts and against the same accused, could be initiated after the earlier one had been stopped. The Court unambiguously held that revival of a proceeding is impermissible in absence of a clear legislative mandate. Nonetheless, it clarified that there is no legal bar to instituting a fresh proceeding based on the same allegations, so long as it conforms to legal standards. It will not attract the prohibition of double jeopardy. This decision was later echoed in Rule 638(2) of the Criminal Rules and Orders, which governs judicial conduct under the CrPC.

In the *Mosharraf Hossain Sheikh* case, on the other hand, the High Court Division (HCD) of the SCOB addressed a different context—one involving a case and a counter-case arising from the same incident. The Court emphasised that such matters should be tried simultaneously to prevent contradictory outcomes. Here, failure to revive one of the proceedings was deemed a procedural lapse. However, this precedent is inapplicable to situations where there is no counter-case, and the revival issue stands alone.

Furthermore, historical legislative support for revival, previously found in section 339C (4) of the CrPC, was substituted and section 339D omitted. This repeal indicates a deliberate legislative intent to bar automatic revival, thereby reinforcing the AD's position in the *Niamat Ali Sheikh* case.

In conclusion, absent a specific statutory provision, the revival of proceedings stopped under section 249 remains outside the ambit of lawful procedure. The initiation of a fresh proceeding remains the appropriate legal recourse, subject to compliance with procedural safeguards and limitations.

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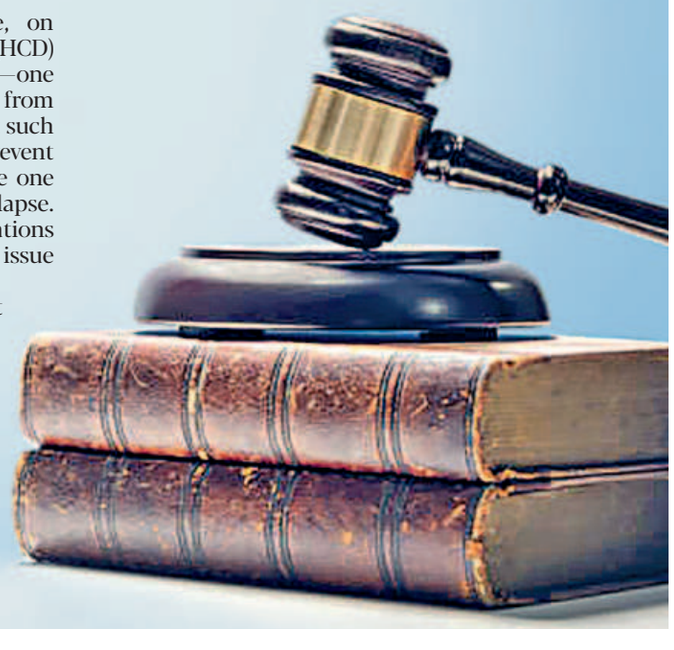

LAW REVIEW

Legal Aid Services (Amendment) Ordinance 2025

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On 1 July 2025, the *Legal Aid Services (Amended) Ordinance, 2025* came into effect. The newly enacted ordinance introduced both pre-case and post-case mediation, either physically or virtually by mutual compromise. The most crucial part of this ordinance is its schedule which incorporates mandatory pre-case mediation in matters of family disputes, negotiable instruments, rent control, and controversially dowry violence, among others.

Notably, "mediation" means flexible, informal, non-binding, confidential, non-adversarial and consensual dispute resolution process in which the mediator shall facilitate compromise of disputes in the suit between the parties without directing or dictating the terms of such compromise. The Code of Civil Procedure, 1908 (CPC) already makes the mediation process mandatory by an amendment of 2003, incorporating section 89A. The amendment of 2012 also includes section 89(D) and 89(E) to allow cases filed before 2012 to get the same benefit of mediation with a retrospective effect and later, the CPC amendment of 2017 integrated Legal Aid Officers into this mandatory mediation process under CPC (Chowdhury). However, the procedure still remains the same, adding another layer to civil litigation, and successful resolution of civil disputes through Alternative Dispute Resolution (ADR) mechanism remains rare.

The first impression of the fresh ordinance may seem visionary, but in practice, the outcome

appears less promising. Although mediation has long been part of the legal framework, its effectiveness in delivering measurable outcomes remains inadequate. However, The National Legal Aid Service Organisation estimates that about 90 per cent of disputes can be resolved through mediation; which aligns with Sustainable Development Goal (SDG) 16: 'Access to Justice for All,' by making legal aid more accessible, affordable and people-friendly. Despite official claims that mediation can resolve up to 90% of disputes, there remains a lack of transparent, verifiable data from the courts or the Legal Aid offices to validate these outcomes.

By and large, the state has been quite unsuccessful to promote public awareness and understanding of the mediation process. Additionally, there lies significant shortage of judicial manpower, as the judges of civil and criminal courts remains the same and has not been separated yet and there's only one Legal Aid Office per district. Therefore, mandatory mediation puts overwhelming pressure on already stretched judicial officers and adds further procedural complexity to litigation. Hence, the practical impact remains limited as mediation does not prohibit parties from withdrawal, adjustment and compromise of the suit under Order XXIII of the CPC.

To ensure meaningful and effective mediation, it is essential to address key social and ethical concerns. Mediators must remain sensitive to issues such as gender-based power imbalances, family violence, and the dynamics of fear, silence, and control that disproportionately affect women. In the context of Bangladesh, mediators often go beyond a purely facilitative role and engage in evaluative mediation. While they may offer suggestions or assessments, it is important to note that they do not determine the outcome of disputes or impose decisions on the parties involved (Chowdhury).

Many mediators are appointed without any ADR-specific qualifications, as there is currently no national framework or accreditation standard for mediators in Bangladesh. This regulatory gap can result in inconsistent outcomes and may erode the trust of parties in the mediation process. Moreover, despite the growing reliance on digital tools, a significant portion of rural and economically disadvantaged litigants lack access to the internet or required digital literacy to participate effectively in virtual mediation. This not only hampers inclusivity but also raises concerns around privacy breaches and potential discrimination. Compounding the issue, most courts in the country are still not adequately equipped to facilitate widespread virtual proceedings.

Whether the ordinance becomes a visionary tool for justice or merely an added procedural burden will depend not on legal mandates alone, but on meaningful investment in mediator training, technological infrastructure, and the cultivation of public trust.

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