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SIXTEENTH AMENDMENT DEBATE

The need for calm and reason

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The recent verdict of the High Court Division (HC) of the Supreme Court (SC) declaring the 16th Amendment to the Constitution, which had allowed the Parliament to impeach Supreme Court judges with two-thirds majority, as unconstitutional, has not only stirred a debate but also the emotions of many people, particularly some members of the Parliament. As is often the case, when passion and emotions take over, our reasoning ability seems to vanish, and we say or do things that do not serve our best interests. Since the government has unequivocally expressed its intention to lodge an appeal against the verdict, the matter is far from closed. The full judgment of the HC has not yet been published and hence, commenting on the judgement is not possible. Again, on appeal, how the Appellate Division (AD) of the SC would settle the matter, is an issue for the AD, and to anticipate or prejudice that determination in any way is not the purpose of this brief write-up. Instead, my article seeks to shed some light on the ongoing debate on this issue.

First and foremost, it needs to be re-stated that the Parliament of Bangladesh is by no means sovereign, and it has not been so since the foundation of the Republic of Bangladesh. On four other occasions (5th, 7th, 8th, and 13th Amendments), the Supreme Court of Bangladesh has held constitutional amendments as incompatible with the Constitution. Laws made by the Parliament, or one or more of the provisions of the law, are often challenged on the grounds that the law in question, or parts of it, are incompatible with the Constitution, and the SC passes its verdict on those claims. This would not have been possible if the Parliament of Bangladesh was sovereign and laws passed by it were immune from constitutional challenges. And in a democratic society, fair and reasoned criticism of the judgements can be a right of the public, but criticism of the judges delivering the judgement just because a judgment is not liked by some is unwarranted and, in fact, hazardous.

On the other hand, there is no doubt that the laws made by the Parliament (which include constitutional amendments), as the expression of the will of the people of Bangladesh, manifested through the decision of the elected representatives, carries a presumption of constitutionality and there has to be compelling grounds for setting aside a law validly passed by the Parliament. An argument made by some eminent jurists, like Dr. Shahdeen Malik, that an

impeachment procedure involving inquiry would be less favourable to the judges, may be a bit too stretched. The concern that the abolished Supreme Judicial Council (SJC), which was constituted solely of sitting SC judges, was more favourable to the judges than the proposed three-member inquiry committee, of which no one would have been a sitting judge, therefore violating Article 147(2) of the Constitution, is open to debate. And a fundamental problem with the SJC was that it was rarely functional, its activities were shrouded in strictest secrecy, and it could only act when the President (upon the Prime Minister's advice) referred a matter to it. Thus, there may be a plausible case for some sort of judicial or quasi-judicial body to rule on the impeachment issue. However, reverting to the scrapped SJC model may be a step backward.

By delaying the formulation of a detailed law, the Parliament may have missed an opportunity to allay some of the concerns relating to the 16th Amendment. For instance, the Chairperson of the Law Commission commented that the proposed law on the detailed procedure for impeachment of the judges would have contained a provision that Article 70 of the Constitution would not apply in voting on the issue of impeachment. Thus, the MPs could have a chance of voting based on their conscience rather than their party's decision.

Again, it is a tragedy that our political system is such that we assume that on a sensitive issue like the impeachment of an SC Judge, if no political party holds two-thirds majority in the Parliament, a judge may continue to hold office simply because all MPs would be voting along the party lines (even if Article 70 of the Constitution does not tie their hands down). And more importantly, we are assuming (not unreasonably) that a whole political party, on the matter of voting on the impeachment of SC judges, would choose its course on the basis of petty party politics, even though such voting would be preceded by a detailed inquiry into the allegations raised against the relevant judge.

In this debate about the 16th Amendment, another point is that while the politicians have been very hasty in either dismissing or hailing the judgement of the HC, both sides of the political discourse have been visibly silent on formulating laws on the qualifications for appointment of the judges of the SC. The Law Commission made its detailed recommendations through a report published in 2012 (Law Commission's Report No. 118) but it seems that there has not been any progress whatsoever. There has to be an impeachment procedure for judges of the SC, but a procedure for appointment of the judges is no less important. In terms of the order, it can be fairly said that emphasising too much on the impeachment of the judges, with no emphasis on the detailed rules for their appointment, is in some ways like putting the cart before the horse.

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