Star CONSTITUTION *review*

30th Anniversary of the Constitution of Bangladesh

Situating individuals and the Society

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4TH November, 2002 is the 30th anniversary of our Constitution. The Preamble of the Constitution states: (We, the people of Bangladesh) "In our Constituent Assembly, this eighteenth day of Kartick, 1379 B.S. corresponding to the fourth day of November, 1972 A.D. do hereby adopt, enact and give to ourselves this Constitution."

For most other nations, such an auspicious occasion would surely be marked elaborately, collectively and probably pompously. We, however, had hardly noticed this day in the past; neither is it likely to be any different this year. When it comes to matters of the Constitution, we are not even sentimental, though we are slushy-gushy and over-romantic in most other things, events and causes. We do nationally mark numerous other days as important and noticeable ones ranging from children's day to elder's day via mothers' day, on the one hand; UN day, education (primary, higher and various other varieties) day, and even tiger's day, on the other hand. Plus national/independence days of different countries find prominent spaces in our national newspapers. Examples of such 'days' are almost endless. Alas, a day to celebrate our Constitution is yet to merit our collective attention.

By most counts, our Constitution is a fine document. There had, however, been numerous instances in the past when many did not think so and had scissored it to fit their own coats.

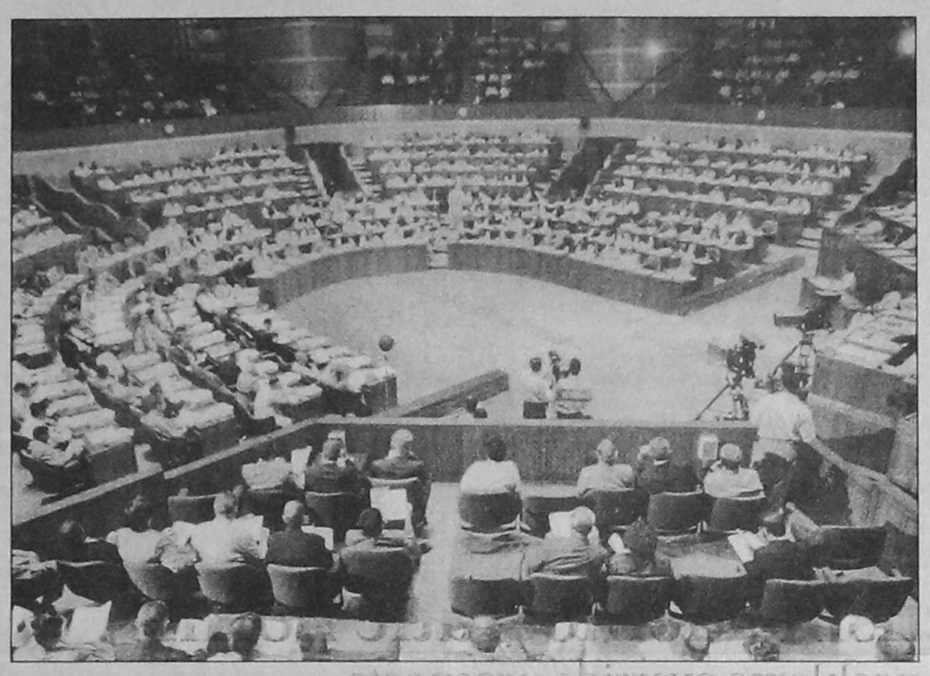
History of our Constitution-making is yet to be written, though arguably 30 years is not too long a period in historical terms. But a lot has surely happened in these 30 years. Gone are the founding principles; spirit of the Constitution seems often dissipated and, more importantly, the Constitution is hardly at the centre of discourse about power. This is not surprising, for the primary purpose of a Constitution is to rigidly define the parameters of power, to put a check to any unbridled exercise of state power. Talking about the Constitution inevitably entails talking about the limits of the executive power. Consequently, does one need too much imagination to figure out why those in power would not want to celebrate anything to do with the Constitution. Which powerful ones would want to remind themselves of the limits of their power? Why would the powerful ones want to celebrate the document which limits their power? Hence, the 4th November? the birthday of our Constitution? continues to be ignored. Any reminder of, or about, the Constitution is a reminder of the legal limits of power.

Constitutional governance or lack of it!

In these recent days of leading upto the 30th Anniversary of the adoption of our Constitution the constitutional premise of limited power is being put to one of it's most sever tests. We had, in the past, usurpers who had totally ignored the constitutional provisions regarding legitimate mode of accession to power, i.e., only through general elections. Such constitutional provisions regarding accession to power were bypassed with the aid of guns. At least the days of such naked interference with the constitutional process are matters of undignified past, though we often continue to hold those usurpers in high esteem as well as those who had drastically truncated the Constitution. This time the assault, however, is somewhat different and more clocked in ostensible legality and legitimacy. The deployment of army in the aid of the civil administration is an issue, which is fraught with too many dangers for constitutionalism, and one can not but be apprehensive about the long-term consequences of such drastic measures by the civil administration.

Any understanding of such danger inevitably entails an excursion into the nature of fundamental rights. Most constitutions have a distinct and separate part, often titled "Fundamental Rights", or some derivatives of this expression, as an integral part of the constitution. Why do constitutions inevitably contain a list of fundamental rights? The answer is rather straightforward - fundamental rights are the primary limits on the powers of governments and states. Statements of fundamental rights are statements of the limits of the executive power. Now, why would one, or a constitution, want to put boundaries on the state and executive power by way of elaboration of certain fundamental rights?

Any and all histories of power provide ample justifications for the need of such limits of power. Let us imagine what could, or rather inevitably would, happen if there were no fundamental rights in our Constitution. For example, the Constitution provides, in Article 33, that "Every person who is arrested .... shall be produced before the nearest Magistrate within 24 hours .. .and no such person shall be detained in custody beyond the said period without the authority of a magistrate". If the arresting authorities were not required to produce the arrested person to the nearest magistrate within 24 hours, the police (the arresting authority) could detain any person in their thana hazat indefinitely. There would be nothing to prevent the police, in the guise of 'investigation', to keep someone in the thana hajat even for weeks and months, refusing to allow anyone (friends, relatives of the arrested) any contact with the arrested person. This can not now be done because the Constitution says that an arrested person must be taken to the magistrate within 24 hours and her further detention is possible only if the magistrate so orders. Or, the Constitution, in Article 39, guarantees freedom of speech. Had the Constitution not guaranteed such freedom, we would all be in danger of being arrested for anything or everything that we express, for example this write-up. Or if we did not have the constitutional guarantee of 'right to property', would there be any way to restrain or prevent the state or the government from taking away my property without compensation? If we did not have these and other fundamental rights guaranteed by the Constitution, would anything we hold dear, important and precious be safe? No.



The Parliament, a constitutional organ, fails to establish functional democracy in Bangladesh

These fundamental rights are the only reason why we, at least theoretically, are 'saved' from the tyranny of the powerful ones.

The rights and the compromises

One may, however, argue that these rights often undermine our society. One of the more recently fashionable such argument takes the form of the allegation that certain people or political groups are belittling our international image by publicising untrue incidents of violence, rape, plunder, etc., of the minority communities. Since our country is in total bliss of communal harmony, such propaganda is tantamount to treachery and, hence, persons engaged in this propaganda must be arrested and punished.

Another variant of such an argument would be that, yes it is fine to have fundamental rights and guarantees against torture [as we happen to have under Article 35(5)], against arbitrary arrest, against illegal search and seizure [again, as guaranteed by different provisions of Articles 33 and 35] etc., but what about the rights of the victims? If torture, illegal search, arrest and seizure do lead to arrest and punishment of the 'real culprits' (i.e., hired killers, mastasns, chandabaz, cadres, rapists, etc.) whats wrong if, in the process, freedom against torture, right to privacy of home, right to liberty, etc., of a few persons are brushed aside. The end result, i.e., arrest and conviction of the real culprits and criminals are ensured, and that is what ultimately matters. If these real criminals (including the political mastaans and tenderbaazs) are put behind bars, the ordinary citizen and, ultimately, the society would be safer, even for those who have suffered torture or whose houses have been ransacked in the process, if they are not 'really' guilty.

Asking the questions in such a way presupposes the primacy of the society over the individual. This primacy of the society entails that if certain measures ultimately protect the society, at the cost of the rights of a few individuals, such measures ought to be adopted. In the process of putting a dozen real criminals into jail, if half a dozen innocent persons are also wrongly put into jail or tortured or humiliated, there is nothing terribly wrong in that because the safety of the society gained by incarcerating the dozen criminals far outweighs the 'injustice' suffered by the half a dozen. Hence, even if few persons have died in the course of army actions over the last few days, the crime rate has certainly decreased, the mastaans are on the run, chandabazi have surely diminished and so forth. Thus, hundreds of thousands, if not millions, have benefited from a better 'law and order' situation, even though a few of the niceties about fundamental rights have been ignored.

These are all valid arguments and most people are easily swayed by such propositions and their inherent justifications. However, there is a slight problem, a historical one, i.e., our collective inability to learn from past mistakes.

By deploying the army for 'law and order' we are, unfortunately, trying to re-invent the wheel. So many societies in the past have tried to resolve their 'law and order' issue by the strong arm tactics of deploying army that it is no longer funny. It is not funny because every such attempt has, ultimately, failed. Even the so-called developed countries of the west and the north have such a long history of attempting to resolve their 'law and order' problem by deploying their armies that they no longer do so, even if their problems are more daunting than ours. After all, the yearly number of rate over the last twenty years in New York city has not been less than the yearly number of murders in all of Bangladesh. More people have been murdered only in New York city during the last twenty years than have been murdered in the whole of Bangladesh during the same period. Why does not the Mayor of New York call out the American Army or the equivalent of their BDR? The Mayor does not do so because they have learnt that these so-called drastic measures such as deploying armies at the cost of sacrificing rights of individuals, however few, have not produced the desired result. We should have also learnt similar lessons by now; but we haven't, though armies have been deployed to 'improve' the situation at the cost of individual rights from the times of the first marital law in our region in the late 1950s. In fact our armies have tried to resolve these issues for at least of half of the period of our national existence. The armies were fully in charge for more than a decade in the 1950s and 1960, then again in the late 1970s to 1990, and now again, and they were so employed as recently as in the early 1996. It is just that we keep trying, to employ a metaphor, to re-invent the wheel, though it has been invented more than four thousand years ago. We insist on not learning, on trying to repeat the past mistakes. History, for us, does not seem to matter; nor the Constitution.

A society can prosper only if it learns to respect individuals more than the society. Whenever individuals' rights are trampled for the 'sake of the society' one ought to know that one is on the wrong track. We have been on that wrong track so many times in the past that one can not but be puzzled to find that we are yet again trying to bark up the wrong tree. Then again, we have engaged ourselves in re-inventing the wheel time and time again; have thought that by protecting the society we would be able to protect the individual better. This has never succeeded in the past, and it will not succeed again. Nevertheless, we persist in our follies and do so because we have not tried to understand the Constitution.

If we did, and tried to fashion our collective lives according to the Constitution we would surely have noticed the anniversary of the Constitution; would have known and understood that there is no quick fix to complex social problems and, more importantly, when governments enhance it's power vis-à -vis the individual, the society ultimately suffers more than it seems to gain in the short run. Using forces of violence to resolve social problems is anathema to the rule of law, to constitutionalism.

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Local government in our constitutional system

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THE celebration of the 30th anniversary of our Constitution - the supreme law of the land - offers us an excellent opportunity to closely examine its salient aspects and renew our commitment to the ideals for which it stands. The purpose of this short piece is to review the provisions for local governance set out in the Constitution and briefly discuss its present state. The provisions for local governance are important aspects of the Constitution in that they define the fundamental structure of our government.

The constitutional provisions

One of the distinctive and unique features of Bangladesh's Constitution is that it provided for local governance in its original version. It has four Articles - Articles 9, 11, 59 and 60 - for this purpose. They state:

"9. The State shall encourage local Government institutions composed of representatives of the areas concerned and in such institutions special representation shall be given, as far as possible, to peasants, workers and women.

"11. The Republic shall be a democracy in which fundamental human rights and freedoms and respect for the dignity and worth of the human person shall be guaranteed, and in which effective participation by the people through their elected representatives in administration at all levels shall be ensured.

"59. (1) Local government in every administrative unit of the Republic shall be entrusted to bodies, composed of persons elected in accordance with law.

(2) Every body such as is referred to in clause (1) shall, subject to this Constitution and any other law, perform within the appropriate administrative unit such functions as shall be prescribed by Act of Parliament, which may include functions relating to-

(a) administration and the work of public officers;

(b) the maintenance of public order;

(c) the preparation and implementation of plans relating to public services and economic development.

"60. For the purpose of giving full effect to the provisions of article 59 Parliament shall, by law, confer powers on the local government bodies referred to in that article, including power to impose taxes of local purposes, to prepare their budget and to maintain funds."

Articles 9 and 11 are part of what is called the "fundamental principles of the state policy." These principles are not mandatory or binding. They provide guidance to the interpretation of the Constitution, formulation of State policy, legislative initiatives and citizen action. As such a court of law cannot enforce the adherence to them (Article 8(2)). In other words, if the State cannot or does not implement these, the Court cannot compel the State to do so.

On the contrary, Articles 59 and 60 provide mandates and are therefore enforceable. In fact, they are the limitations on the plenary legislative power of the Parliament in the field of local government and the legislature cannot ignore them. Any law passed by the Parliament must be consistent with these two Articles. In other words, the Parliament is not free to legislate on local government ignoring Articles 59 and 60. Otherwise, there will be two classes of local government - one under the Constitution and the other under the ordinary law. This will be a clear mischief on the Constitution. (Kudra-e-Elahi Panir Vs. Bangladesh 44DLR(AD)(1992)

Intentions and interpretations

Articles 59 and 60 appear to clearly lay down three specific requirements: (a) there must be elected local bodies at each administrative unit; (b) they must be autonomous and parallel to the bureaucratic structure; (c) they must have certain functions and responsibilities; and (d) these bodies must be given powers, including financial powers. Meeting these requirements would allow effective participation by the people of all walks of life in decisions that directly affect them (Articles 9 and 11), and ensure democratic governance at the grassroots.

The overt intentions of Articles 59 and 60 are to give sweeping powers to the local government bodies and to provide a blueprint for democratic decentralization and local self-government in our country. Articles 59(2) specifically recommends for local government institutions' functions to include the work of public officers, the maintenance public order and the planning and implementation of services provided by public officers and economic development at the local level. These activities essentially encompass the management of all local affairs. Thus the Constitution appears to make the local bodies the conduits for giving the people of an area, through a democratic process, adequate authority, responsibility, power and resources in order to manage their own affairs. This is what self-rule is all about.

The Appellate Division of the Bangladesh Supreme Court has interpreted Articles 59 and 60 to provide a definition of local government: "...it is meant for management of local affairs by locally elected persons. If government's officers or their henchmen are brought to run these local bodies, there is no sense in retaining them as local government bodies." (Kudra-e-Elahi Panir Vs. Bangladesh 44DLR(AD) (1992) Thus it is clear that if local government bodies are controlled by the bureaucracy or the Members of Parliament (MPs), it is in violation of Article 59 of the Constitution.

The reality

Although the constitutional commitment is to create an autonomous, self-governing system of local government, the reality has been very different. The local bodies have been made totally subservient to the bureaucracy both by legislation and administrative circulars. For example, both The Local Government (Union Parishad) Ordinance, 1983 and The Upazila Parishad Act, 1998 allow government officials to remove and suspend elected local officials, and supervise, control and direct the activities of the local bodies. In addition, both of these legislation have also designated elected local representatives as "public servants," like other paid staff, in order to bring them under the total control of the government officials This control has become even more blatant over the years. The UP representatives are now even denied, through administrative circulars, their fundamental right of movement, violating Article 36 of the Constitution. Furthermore, the taxing authority of the local bodies are being taken away in violation of Article 60 of the Constitution. Such action affects the financial viability of local bodies, instead of empowering local bodies with financial powers, as required by Article 60.

A relatively new element in the local government scene is the interference - rather naked control - of MPs over local bodies. In 1993, MPs were made advisor to the Thana (now Upazila) Development through an administrative circular. Subsequently, The Upazila Parishad Act, 1998 designated MPs as advisors whose advice would have to be accepted, turning the elected local body merely the authority to put rubber stamps on the decisions of MPs. This is a "colourable legislation" in that it allows MPs to exercise executive functions, violating the principles of separation of powers. The question of colourable legislation arises when something that cannot be done directly is done indirectly. Although MPs are locally elected, they are not elected for the management of local affairs but rather their functions are national in scope. Member of Parliament are to exercise legislative powers rather than the management local affairs.

Thus, it is clear that legislation for Union Parishads and Upazila Parishads and administrative actions that place government officials in control of local bodies and facilitate MPs' interference are totally inconsistent with Articles 59 and 60. Rather than upholding and implementing the supreme law of the land, the authorities are making a mockery of it.

Conclusion

On the occasion of the celebration of the 30th anniversary of the Constitution, our resolve should be to strengthen its fundamental provisions, rather than undermining them, to ensure a vibrant, flourishing democracy in Bangladesh. This would mean not only safeguarding the provisions for local government already enshrined, but also including amendments which would direct a significant proportion of national budget - at least a third - to local bodies and settling contentious issues - such as the number of tiers once and for all.

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Introducing ADR in Bangladesh-I

The vagaries of civil litigation

JUSTICE MUSTAFA KAMAL

ADR means Alternative Dispute Resolution, mostly applied to civil cases. When a civil case is instituted in a court of competent jurisdiction, the scenario usually is, that a long time is taken to serve the process, the defendants beat the law and submit their written statement/s after a long delay beyond the permissible statutory period of two months, lawyers and judges do not take any interest in screening out a false and frivolous case at the first hearing of the case under Order X CPC (in fact no such first hearing takes place), they seldom try to shorten the disputed questions of fact and law by application of Orders XI and XII of the CPC and mostly ignore the elaborate procedure of discovery, interrogatories, notice to produce etc. contained in those Orders, the issues of a case are seldom framed following the Code of Civil Procedure, the case takes several years to reach a settlement date and on the date of positive hearing half a dozen or more ready cases are fixed for hearing, resulting in the hearing of none. In the meantime years roll by, presiding judge of a single case is transferred a number of times, witnesses of a single case may be heard by more than one presiding judge, arguments are listened to may be by another presiding judge and judgment may be delivered by a presiding judge who had had no connection with the case ever before. Our legal system has thus been rendered uncaring, non-accountable and formalistic. It delivers formal justice and it is oblivious of the sufferings and woos of litigants, of their waste of money, time and energy and of their engagement in unproductive activities, sometimes for decades. When they win a case the result is much worse than winning it. When they lose a case they lose not only the subject matter of the dispute, but also a good part of their fortune. If interlocutory matters are dragged up to the appellate or revisional courts, their woos know no bounds and their agonies are prolonged for an indefinite period. Appeals from trial court decrees may reach unto the Appellate Division by which time the parties are thoroughly drenched in misery. When a decree is thus obtained after protracted litigation, it does not end there. Execution proceedings then re-starts a fresh litigation between the parties or even their successors which may take years or decades to come to a conclusion and which may end up with no real or positive benefit to the decree-holder plaintiff. This is the experience of a common litigant in Bangladesh. Added to this inherent and in-built delay and expenses, corruption and often terrorism at almost each stage of litigation is eating into the vitals of the justice delivery system.

Most of us who are or were in the judiciary and were or are practicing in the Bar think that nothing can be done about it, or, at least, we have no role to play in the matter, either individually or collectively. We are drifting into a stage of aimlessness, inertia, inaction and helplessness. Many conscientious judges and lawyers have done what they could under the circumstances, but their sincerity has been drowned into the general morass of malfunctioning of the court system.

Experience of Developed Countries

All countries, following the common law system, have faced this problem of delay and excessive expenses in the disposal of civil cases at some point or the other in their respective legal history, as also the problem of apathy of judges and lawyers. Developed countries like the USA, Australia and Canada have witnessed a few decades back huge backlog of cases, excessive legal costs and expenses and litigants' misery, as we are witnessing now in our country. Lawyers and judges of developed countries did not look upon the Government to solve what was essentially a problem of administration of justice that concerned lawyers and judges themselves. In many areas of these countries, some thirty plus years back, public-spirited judges and lawyers put their heads together and devised a common strategy to solve the problem of huge backlog of cases, delay in the disposal of cases and excessive expenses in litigation.

Perception of Adversarial system

What they found was that the adversarial system prevalent in common law countries were no longer adequate to address the growingly complicated technical legal problems of modern-day litigation. The adversarial system creates two mutually contending, exclusive, hostile, competitive, confrontational and uncompromising parties to litigation. This system does not generate a climate of consensus, compromise and co-operation. As litigation progresses it generates conflict after conflict. At the end of litigation one party emerges as the victor and the other party is put to the position of the vanquished. Adversarial litigation does not end in a harmony. It creates more bitterness between the parties that manifests itself in more litigation between them or even their successors. However, judges and lawyers of developed countries found that the alternative is not to do away altogether with the adversarial system. The adversarial system plays a positive role too. It settles through adversarial hearing complicated and disputed questions of fact and law. The law that superior courts lay down to be followed by subordinate courts and tribunals can never be arrived at without following the adversarial procedure. Any court cannot lay down any law by way of compromise, consent or consensus of parties to litigation.

Adoption of consensual system as an alternative, not substitute

Beyond the territory of complicated questions of fact and law there lies a vast area of litigation where the adversarial system must yield to a consensual type of dispute resolution even though there are complicated technical legal problems in this vast area as well. The consensual type is essentially a type and a process of dispute resolution that requires judges, lawyers and the litigant public to change their centuries old mind-set and to adjust gradually to play a combined and co-operative role in the resolution of disputes. In an adversarial system a judge has a passive role to play. He/she will take the evidence as it comes, hear the parties and deliver his/her judgment without getting involved in the entire dispute resolution process. In a consensual system the judge, the lawyers, litigants and outside mediator or evaluator are all active parties to the resolution of dispute. It is informal, confidential, speedy and less expensive. It preserves the jurisdiction of the trial court to try the case on merit, if A.D.R. fails.

Justice Mustafa Kamal was the former Chief Justice of Bangladesh Supreme Court. The article was based on a keynote paper presented on 31 October 2002 in a National Workshop on 'Introducing ADR in Bangladesh' organised by Legal & Judicial Capacity Building Project of the Ministry of Law, Justice & Parliamentary Affairs' Government of Bangladesh.

To be continued