PARLIAMENT *scan*

14 Amendment of the Constitution

Why successive governments have neglected local government?

ANISUR RAHMAN

THE government has piloted a package amendment bill to the Constitution in the Parliament which is now waiting for approval of the house of the nation. The proposed bill advocates inter alia to insert Article 65 (3) in order to reserve 45 seats in the Parliament for the women and to add sub article 59 (1) (A) and 59 (1) (B) in the Constitution. The sub-article 59 (1) (A) proposes that no elected body in the local government institution at any level will continue after the expiry of its tenure prescribed by law. And from the expiry of this tenure a government official/ an administrator will be appointed to run the administrative works of the said local tire until the new elected body enters into the office. On the other hand the sub-article 59 (1) (B) proposes for the election of the local government within 90 days after the body is dissolved whether by law or otherwise. Among these two proposals the later deserves some special attention since it relates to the local tire of the government in the grass-roots level. The another reason is that the political position of the BNP relating to the local government seems unclear as it dissolved the Upazila Parishad and could not come to a decision whether the election of the Parishad will be held.

Meanwhile the Chairman of the Union Parishads under the banner of National Union Parishad Forum (NUPF) and Chairman of the Municipalities under the banner of Municipal Association of Bangladesh (MAB) have opposed the bill. They termed it undemocratic as well as unconstitutional and expressed their anxiety that it will increase the power of the bureaucrats over the local elected bodies. They were also dubious of the government's move and said that it desires to establish its ascendancy over local government institution. On the other hand the government argues that the amendment was proposed to hold the election in due time after the expiry of the tenure of the elected bodies. It also argues that since the election of the local bodies were protracted due to injunction of the court relating to legal difficulties in some cases, there will be no difficulties after the amendment. Both the arguments have some reasons in its favour and deserve to spell them out properly. Therefore, let us have a look at the proposals.

Proposed amendment

The proposed amendment includes two things in regard to local government, a) election of local bodies within 90 days and b) appointment of government official. It is praiseworthy to make the mandatory provision for holding election of local tires within 90 days. It is the local government institution where the election takes place regularly, though not timely mainly due to court cases. Mandatory provision in the Constitution will ensure the election of these local tire in due time. There is a same provision in the Constitution for the election of the Parliament. The election of the Parliament must be held within 90 days from its dissolution. The only exception is the 'act of God'. But in the case of local government there is no exception mentioned in the proposed amendment. That is by no means election will not be delayed more than 90 days. Then the basic question raises here is that what will be happened where there is a court case and the injunction of the court to not to hold election? Will the election take place defying the order of the court? If that will happen it may violate the right to get justice, one of the fundamental rights guaranteed by the Constitution. And it may go also against the concept of natural justice.

The second part of the amendment is to hand over the administration of the local body to the government official/administrator during the election period. There is no doubt that it will go against the basic concept of the local government as well as against the Article 59 of the Constitution. Article 59 Provides inter alia that local government shall be entrusted to bodies composed of person elected in accordance with law. "For an institution to be a local government under the Constitution two requirements are to be fulfilled. One is that a Local Government is constituted in an 'administrative unit' and the other is that the Local Government is entrusted to a body composed of elected person (Kudrat E-Elahi Panir Vs Bangladesh, 44 DLR, AD, 1991). Therefore by no means the powers of the local government will be entrusted to non-elected person, i.e. the government official whether for short time/interim period. Local government institution (except Divisional Council and Union Pancayet) was run by the Administrator till 1972 when the Constitution did not come into force. But the Constitution does not leave any room for the government to appoint its officials in the local tires at all. Any such attempt on the part of the government will undoubtedly go against the decision of the Appellate Division of the Supreme Court (Qudrat-E-Elahi Panir VS Bangladesh) and obviously the Constitution.

Concept of basic structure

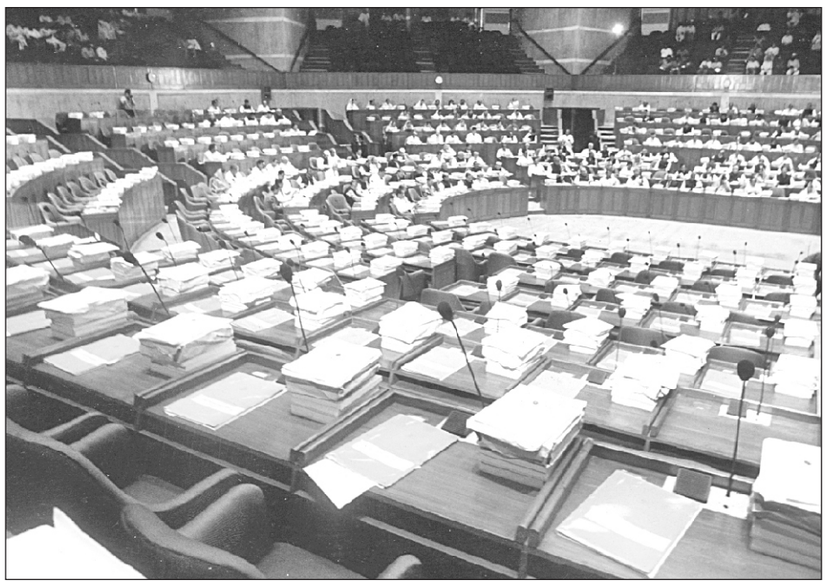
Democracy is one of the pillars which build the edifice of our Constitution (Anwar Hossain Case 1989). The Constitution speaks for the representative democracy that requires people's participation in the administration of all levels through their representative (Art. 11). From this article we unequivocally can say that local government is the basic structure of our Constitution. Therefore any attempt to amendment which may destroy the norms of democracy, i.e. local government will be unconstitutional. It is established in the 'Anwar Hossain Case' popularly known as the 8th amendment case that parliament has no authority to amend the basic structure of the Constitution. And thereby the 8th amendment of the Constitution was declared unconstitutional on the plea that it went against the basic structure of the Constitution. The Parliament is the creation of the Constitution and it can not amend the basic feature of the Constitution. " The amending power is but a power given by the Constitution to Parliament, it is a higher power than any other given by the Constitution to Parliament, but nevertheless it is a power within and not outside the Constitution (Anwar Hossain Case, Justice BH Chowdhury, para- 195)."

Legacy of Qudrat-E-Elahi case (44 DLR, AD, 1992)

In this case the question arose whether the Upazila Parishad is a 'local government'. The Upazila Parishad was established in 1982 by the Ordinance No 59 of 1982 and later it was abolished by Ordinance No 37 of 1991. The law which enacted to abolish the Upazila Parishad was challenged on the ground that it is unconstitutional. It was argued by the aggrieved party that since the Upazila Parishad is a Local Government abolition of it will go against Article 59 of the Constitution and the law should be declared void. But the Appellate Division of the Supreme Court in its judgement said that Upazila Parishad does not fall within the purview of local government as it is not mentioned as 'administrative unit' in the Constitution or any other laws. Consequently the Upazila Parishad was abolished and till today the government is under a dilemma to reconstitute it.

Now, what is the status of the Upazila Parishad? The Parishad is runs by the government official instead of elected representative. All the powers and all administrative set ups remain in the Parishad. So how can we say that the Parishad is abolished? The abolition must be total abolition (Justice Latifur Rahman in Qudrat-E-Elahi Case). The power, function which the central government handed over to the Upazila Parishad to perform its activities as 'local government' should go back to the central government. But in practice all these are remain in the Parishad and being enjoyed by the government officials. Therefore how can we say that it is not an administrative unit?

It is worth noting here that when the Union Parishad was created it was not mentioned as 'administrative unit' in the law. Later on the Act was amended to declare the Union Parishad as an 'administrative unit'. Our hon'able court could have took the chance to advice the government to amend the Act instead of declare Upazila Parishad as 'non-administrative unit'. Some one may say that it is the duty of the court to decide right and wrong or to interpret the Constitution instead of giving any advice to the government. Against this view it can be said that though the Act did not mention Upazila Parishad as an administrative unit it had its *de facto* existence (the highest court did not declare military rule unconstitutional as it had *de facto* existence). Supreme Court is also the sole institution to interoperate the Constitution to give it the real shape. No body can deny that the constitutional duty of the government is to encourage the local government institution. The highest court could have advice the government keeping in mind the *de facto* existence of the Upazila Parishad.



Concluding remarks

We can not rule the apprehension of the local leaders out. The local leaders in a press conference gave an alternative proposal for holding election before 90 days of the end of their tenure. Some body argue that if the election of the local government held with the chairman remains there, there will be some opportunity for him to manipulate the election process. They add that the provision of Administrator will be same as the caretaker government. But they forget that the government official appointed as administrator may be the returning officer during the election.

So is not there a chance for the government to manipulate the election to choose their loyal candidate? Above all, is not the election commission strong enough to conduct the election of the local body freely? However, the record of the election of local government does not demand the caretaker government there. The government should respect the voice of the local leaders before passing the amendment bill.

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LAW *campaign*

Ratification of the Rome Statute by Bangladesh

Question, concerns and dilemmas

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THE purpose of this article is to address various questions, concerns and issues raised by the officials and others, relating to ratification by Bangladesh of the Statute establishing the International Criminal Court (ICC), known also as the Rome Statute. Bangladesh was one of the leading Asian country active during its negotiation in Rome in 1998 and subsequently, was the third in Asia and first in South Asia to pen this landmark treaty in September 1999. Since its signature, the Statute had been under consideration of the government for ratification.

Over the years, Bangladesh officials, both at home and abroad, in formal and informal meetings, have pointed out a number of issues that have come up during analysis and consideration phase of the ratification process. Often, to ratify an international treaty, an inter-ministerial committee examines and assesses all aspects before the initiating ministry submits it for Cabinet's discussion and approval. No such inter-ministerial committee was formed to review the Rome Statute, but it was examined by the experts of the Ministry of Foreign Affairs, and to a certain extent, by the Ministry of Law officials.

The Statute that set up the first ever-permanent international criminal came into force on 1 July 2002 following its 60th ratification. Then, senior officials including its Judges, Prosecutor and Registrar were elected, and with 280 officials and staffs, are now busy with first two situations referred to by Uganda and Democratic Republic of Congo (DRC).

Until today, 139 States have signed the Statute while 93 States have ratified, thus making a history as one of the fastest ratified international treaty. Many believed it would take decades for the international community to ratify and establish the ICC. In reality, it was in force little before fourth anniversary of its adoption. Countries all over the globe and from all regions, 23 African, 18 Latin American and Caribbean, 12 Asian and Pacific, 14 Eastern European, and 26 Western European and other States have already ratified it.

Bangladesh and the Rome Statute:

Bangladesh was one of the 120 countries that voted in favor of adoption of the Statute of the ICC in Rome in 1998, where 160 other nations joined the diplomatic conference convened by the United Nations. Bangladesh delegation comprised of its Ambassador in Rome and a team from Dhaka actively participated in the negotiation, in particular debates relating to gender and gender related crimes. A handful of Bangladeshi non-governmental organizations also made their presence felt in Rome.

It took little over a year for Bangladesh to sign the Statute, and at the time of signature, it came under detail scrutiny. The government experts raised several questions on judicial sovereignty, consequences on penal provision, relations with existing international treaties, and the Constitution. Bangladesh's move of its early signature received international acclimation for her support to the development of international law and justice.

Immunity: Question on President's immunity and others were raised as an important issue of consideration. Under Article 27, the Rome Statute shall apply "equally to all persons without distinction based on official capacity." This provision often found to contravene many national constitutions that provide various degrees of immunities to the kings, Queens, heads of the states, and others.

Immunities are not homogenous; they vary between states and as between the different types of privilege, they afford. In some cases, the scope of conduct are covered by immunity is limited, while in others, it is absolute on its face, apparently guaranteeing the inviolability of the person. The countries that have ratified so far have applied as many as seven different approaches to address this question. Most of the States have adopted interpretative approach, teleological approach, or purposive approach. No country has thus far amended the constitution to revoke Kings or Presidents immunity.

The Constitution of Bangladesh in Article 52 offers immunity to the President for acts "in the exercise or purported exercise of the functions of his office", and Article 53 provides provision of impeachment of President on charge of violating the Constitution. Bangladesh adopted functional approach to immunity to prevent frivolous or politically motivated interference in the governance of the country in consistent to the Constitution. It is not possible to commit ICC crimes without violating the Constitution.

Moreover, under Article 48, the President has very limited constitutional power. He acts in accordance with the advice of the Prime Minister. Therefore, his possibility to come under the Court's jurisdiction is highly improbable.

Penalties (Life imprisonment and death penalty): In number of countries there are constitutional provisions prohibiting life imprisonment while under Article 77 the ICC may impose life term for extreme gravity of crimes. It will not impose death penalty. However, the Statute's penal provision, like life imprisonment or death sentence as practiced in Bangladesh, would not entail doing away with death penalty upon ratification. In fact, Article 80 of the Statute provides that penalty provisions of the Statute will not affect inclusion or prohibition of particular penalties in national laws. Therefore, there are no consequences in imposing death penalty if Bangladesh ratifies. Nevertheless, as it sets the minimum standard of international norms, non-inclusion of death penalty reflect current trends of abolition of such punishment.

Definition of Crime of Aggression: The Crime of Aggression found a place in the Statute but the governments in Rome could not agree to a common definition and how the Court would exercise jurisdiction. A Working Group on Crime of Aggression at the Preparatory Commission (PrepCom) meetings then continued the discussions but remained inconclusive. Now, the Assembly of State Parties will take over the work on defining the crime of aggression.

Non-inclusion of the Crime of Aggression as one crime for the Court to exercise jurisdiction cannot be a justification not to ratify the Statute. Such approach undermines other three serious crimes of international concern that the Court will deal with. Moreover, those States who are concerned about crime of aggression, its definition and exercise of jurisdiction should rather ratify the treaty to join as full participant of the Assembly of State Parties. By ratifying the Statute, the States could then effectively contribute as full voting member to include the crime of aggression. Staying out of the Court will offer States no opportunity to influence the course of event.

Higher Threshold: There are some concerns about higher threshold of crimes and its possible impacts on national legal order. It is true that the government delegates at the Rome negotiation were very careful so that the Court should only deal with the cases of major concern to the international community. In this regard, the negotiators agreed that the crimes to be defined clearly including the elements of the crimes, and provided numerous safeguards against abuse of the process.

The thresholds of the crimes, therefore, are every high. Higher bars were put to protect frivolous or motivated cases ever to reach to the Court. However, largely, the Statute set the minimum standard of justice. Nevertheless, one can argue that not holding a trial to ICC standard may tantamount to inability on the part of the State, triggering ICC's jurisdiction.

This must be seen in the context of the principle of complimentarity, where ICC will not interfere if a State Party carried out a genuine investigation or prosecution. Therefore, higher threshold of the crimes cannot be any ground for the State not to ratify the Statute, rather, ratification will likely to generate aspiration to improve the national legal system to minimum international standard.

Mental Elements: Some have expressed concerns about the mental element (*mens rea*), necessary for criminal responsibility in the ICC crimes, and whether it is different from the age-old concept applied in Bangladesh, and its possible consequences of ratification. If so, whether it would require re-writing of entire penal and procedural laws of Bangladesh.

Such arguments are unfounded. Under Article 30 of the Statute, "a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court only if the material elements are committed with intent and knowledge". It defines intent and knowledge. The Statute never intended to compel nations to change all the criminal provisions; rather, the principle of complimentarity under Article 1, and in Preamble reinforces national systems. However, States have always been under obligations to bring domestic norms to internationally recognized standards.

This is illustrated by the fact that major Commonwealth countries including Canada, New Zealand, UK, South Africa, Ireland etc, with similar common law principles, did not find any contradictions with the mental element aspect of the ICC and their legal systems. Ours, based on same principles, do not have to change because of mental element requirement of the ICC crimes.

Regional Considerations: Bangladesh is the only South Asian country to have signed the treaty. It is, therefore, natural to inquire about the perceptions of the neighbors, and to weight any consequences. However, Bangladesh has always been ahead in fulfilling its international responsibility compared to other countries in the region. On the one hand, regional situation appears bleak, but on the other hand, signs of hope are there. Nepal's government, before recent dissolution of parliament, all but decided to ratify the Statute to arm itself with additional weapon of law against the rebels. As peace, dividends in Sri Lanka gets momentum, government's earlier opposition in all probability will dissipate. Moreover, Bangladesh ratification is not likely to put the nation at any particular disadvantage vis-à-vis its neighbor. Rather, Bangladesh would gain substantial benefit from good wishes of the world community to stand-alone among neighbors in favor of international law.

US Role: US opposition to the Court is indicative of the Court's potential power, and its independence. The US opposed the Court to the extent of un-signing its signature demonstrated that as far as US is concerned, the Court will to be effective, and will exercise power independently, and stay beyond US influence. US would not have opposed the Court had it been certain about influencing it. In addition, US are unsure of its future activities that might attract the Court's jurisdiction.

To shield American nationals from the ICC's reach, US has aggressively campaigned and succeeded in securing bilateral non-surrender agreements with as many as 72 States, 33 of which are State Parties to the ICC. Typically, under such an agreement, US secures promise not to surrender a wanted American before the ICC or other international tribunal without agreement of the United States.

US applied unfair, illegal and immoral tactics including withholding of military aids, to obtain such agreements. Bangladesh is also one of the 15 Asian countries that have signed such an agreement.

These bilateral non-surrender agreements have no legal effects on the ICC, and States are free to ratify the Statute. It merely expects not to handover American nationals found of the territory of State Party. It however does not prevent the State to exercise judicial sovereignty to prosecute such a person for commission of international crimes and to fulfill the principles complimentarity. As such, despite a signatory to a non-surrender agreement, Bangladesh still could ratify the Statute.

Conclusion: International system had long been chaotic, but quietly, international law has now developed to the extent that today a person could be individually held criminally responsibly for committing international crimes. It was not very long ago when international law was solely government affairs, but now; we all are subject to international law. International law now is the connecting cords of humanity. Serious international crimes will continue to be committed around the world, but as the ICC gradually leaves its imprints, future perpetrators will not be as immune as they are today

Considering national experiences and trauma, Bangladesh cannot let commission of genocide, crimes against humanity, or war crimes, not on any soil and certainly not Bangladesh. Thus, Bangladesh has no fear to say yes to the ICC.

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