

CONSTITUTIONAL EVOLUTION

Forty years of Bangladesh constitution: "Wandering in the wilderness"



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To the Hebrews, passing of a forty-year period is taken as "the passing of a generation." The Bangladesh Constitution functioning for forty years can thus be said "to pass a generation." Biblically, the number '40' has another significance which represents "a time of testing or judgment" (the belief that Egypt was left deserted for 40 years because of God's judgment or the Israelites spent 40 years wandering in the wilderness seems to exemplify such significance). The forty-year old Bangladesh Constitution casts a critical eye not simply because of its passage of a generation but because of such passage being more a matter of "testing or judgment."

The experience of the first generation of our constitution is a bit blending of trick, trauma and triumph. Indeed, there will be hardly any disagreement that we are yet to be successful in formulating and reconstructing our "constitutional edifice" in the true line of our commitment to constitution and constitutionalism. Why have we been utterly unhappy with our constitutional experiments? Why is the constitution still left as a trauma, not being a tribute to the nation instead? Does the Biblical doctrine of testing or judgment founded on the presupposition of "mistake and misery" have

any ramification in this regard? If so, what are the mistakes we have started with or committed repeatedly and what are the miseries going on?

The larger tapestry of our social, political and economic trend shows the impact of our constitutional crisis which often resulted in the loss of our syncretic faith in constitutionalism and good governance. That the genesis of such constitutional crises popularly believed always lies in the "province of our political culture" is only partially true. The truth of the matter rather invites us to explore the roots of the problem in terms of thematic and pragmatic aspects of the constitution underlying some basic constitutional and political values. In this write-up, we will try to prove that our constitution has tremendously failed in both of its thematic and pragmatic configuration. In so doing, we will put forward the following crucial concerns:

The Constitution of Bangladesh originated with the typical paradox that most of the post-colonial constitutions of the African and Asian nations have entangled in. The paradox, as identified by Okoth-Ogendo, lies in the simultaneous existence of a "clear commitment to the idea of constitution and an emphatic rejection of the classical or at any rate liberal notion of constitutionalism." The essential feature of

such paradox is the centralization of power which actually arises out of an incurable disorder in the "power mapping."

Our Constitution itself, since its inception, fails to envision the problem of power realities by blindly emulating the Westminster type of parliamentary democracy which has already been proved to be ill-suited to the peculiarities of our society. By making the President a titular head and uniting the legislative and executive functions in the same body of persons, our constitution practically makes the centralization of power inevitable in the historical process of redesigning our state.

The second concern lies in the fact that our constitution seems, what Murphy calls, to be "a sham or cosmetic constitution." According to Murphy, a constitution is said to be "sham" when the constitutional text contains any element of deception. On the other hand, when the constitutional document's presentation of itself, its people, their values and decisional process is imperfect, it may be considered as "cosmetic constitution."

The Preamble of our constitution pledges socialism as one of the fundamental principles of state policy, but the overall scheme of the constitution does not necessarily, let alone neatly, fit with the operative mechanism of socialism. In practice, the absence of socialistic ideals in almost every sphere of state life therefore makes it doubtful whether the constitution has practically served as the source of deception. Moreover, the simultaneous existence of apparently irreconcilable ideals like democracy and socialism also creates a similar doubt.

For becoming an authoritative text, a true constitution should be cautious in incorporating and politicizing the ideals getting virtually congruent with the values of the people. The degree of distance laying between the ideals our constitution contains and the values that our societies foster seems to fade the sacrosanct of our constitution. Moreover, "double standardization of ideological choice" has been a

noxious feature of our constitution which allows accepting secularism by going beyond the religious belief of majority people in order to protect the religious minorities in one hand, but depriving the ethnic minorities by accepting the nationality of the majority on the other. By pledging socialism and nationalism as absolute constitutional ideals, our constitution hides the ongoing disagreement and thereby creates the possibility of fragmentation and degeneration.

To many constitutional observers, it became increasingly obvious that the defects of our constitution were originally related to the defects in our understanding of democracy and constitutionalism. The success of a constitution depends on the challenge of balancing the core principles of democracy and constitutionalism. In order to embody democratic theories, a constitutional text must protect the rights of political participation, and insofar as it embodies constitutionalism, "it must protect substantive rights by limiting the power of people's freely chosen representatives." (Murphy: 1993)

Though our constitution ensures democratic participation, it tremendously failed to accommodate the concept of limited government which is the basic requirement of constitutionalism. The obvious consequence of such failure creates an index of "imperium government" having almost an absolute power as state authority. It also creates a dissonance between constitutional order and rest of the legal order which facilitates the emergence of a strong bureaucratic and military professionalism comprised mostly of the caprice of educated middle class.

The more important factor contributing to distressing our constitutional development is the lack of our commitment to the "autochthonous basic law." Our constitution is said to derive its legitimacy and sanctity from the principles of autochthony (The Eight Amendment Case). The search of autochthony involves

not only the rejection of external institutions and foreign constitutional devices, but also its relevancy to our indigenous and traditional social values.

However, our leaders, as Rounaq Jahan claims, "regarded the political ideology and value system developed in the imperialist [west... as appropriate values for adoption." This creates a considerable dilemma in reconciling the requirement of autochthony with the 'the notion of borrowing [western political ideas and institutions.' Instead of being socially relevant, our constitution adhered to the style of Westminster constitution thereby frustrating the basic postulates of autochthony. The positivist pedigree in the core of constitutional authority and our reliance on the Diceyan concept of rule of law increase the degree of such frustration.

The foregoing discussion quite clearly suggests that a document bearing the label 'Constitution' and declaring its own supremacy may not even amount to a "true constitution." Of course, a true constitution must contain some constitutional insights nourished in the crum of political philosophy coupled with an arrangement of effective and pragmatic machinery.

Being with our tediously pessimistic observations, what our readers are thinking now? Will they nevertheless argue that we do really have a constitution, and always had? Or will they think alike that our forty-year constitutional journey was nothing but 'wandering in the wilderness?'

Interestingly, the spiritual significance of number 40 does not always push us to pessimism. We may get optimism from the fact that a fetus takes 40 weeks in the womb to be born as a full-fledged human being. So we must have a hope the great hope that our constitution has just been passing the period of its mother's womb. Now let's give birth to a new constitutiona constitution in the best sense.

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HUMAN RIGHTS WOMEN RIGHTS ADVOCACY

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SINCE the last three decades, it has been recognised that the violence against women is a wide spread violation of human rights. Therefore, a number of international covenants have been signed and countries have adopted domestic strategies to stop violence against women. The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) is the most important international document among them to acknowledge the recognition. International agencies such as the United Nations and the World Health Organization have recognized violence against women as a public health concern and a human rights violation. As per the international phenomena, Violence against women has emerged from around the world as one of the vital issue for the human rights activists, civil society along with non-governmental organization (NGO).

Bangladesh is not out of the phenomena rather under the same father drawing hundreds of examples showing women's vulnerability to violence and its effects. Bangladesh has an experience on high levels of physical or sexual violence. As the global agenda was set to eliminate violence against women, civil society, feminist activists and certain non-governmental Organizations have been mobilizing to initiate women's right policy, national legislation, and strategy to protect women from violence and support those who seek assistance in Bangladesh. This writing is not to do advocacy to adopt national women policy in Bangladesh rather to ask who is liable for the suicide of Farhana, a college student, at Sonargaon in Narayangong recently. News focused on that Farhana filed a general dairy in police station against Shamim Mia, the accused for eve-teasing. But no remedy she got except the way of suicide. The death of Shohana, Norjahan and so others, Brutal rape and murder of Yasmin by policemen in Dinajpur are a common scenery to understand the level of violence against in Bangladesh. Can the government escape its liability only saying sorry?

At first it should be more reasonable to establish legal obligation of government to take immediate action to stop violence against women. The government is under a legal obligation under constitutional provisions as well as international legal docu-

ments to adopt anti-violence women policy. Article- 10 of our constitution provides for the participation of women. The article states that steps shall be taken to ensure participation of women in all spheres of national life. Article-19 provides that (1) The State shall endeavor to ensure equality of opportunity to all citizens. (2) The State shall adopt effective measures to remove social and economic inequality between man and man and to ensure the equitable distribution of wealth among citizens, and of opportunities in order to attain a uniform level of economic development throughout the Republic. Article-28 provides that (1) The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex or place of birth. (2) Women shall have equal rights with men in all spheres of the State and of public life. (3). No citizen shall, on grounds only of religion, race, caste, sex or place of birth be subjected to any disability, liability, restriction or condition with regard to access to any place of public entertainment or resort, or admission to any educational institution. (4) Nothing in this article shall prevent the state from making special provision in favour or women or children or for the advancement of any backward section of citizens. Article-28(2) clearly imposes not only a strict legal obligation on state to ensure equal right for women but also mentions another obligation to frame any special law for women to bring in equality.

The obligation gets its strong legal basis from international grand norm. On 18 December 1979, the United Nations General Assembly adopted the Convention on the Elimination of All Forms of Discrimination against Women. Article -2 of the convention provides that the States Parties condemn discrimination against women in all its forms, agree to pursue by all appropriate means and without delay a policy of eliminating discrimination against women and, to this end, undertake necessary legislative principles and measures described under various clauses of this Article. Article- 3 of the same convention impose obligation on state as prescribing that states Parties shall take in all fields, in

particular in the political, social, economic and cultural fields, all appropriate measures, including legislation, to ensure the full development and advancement of women, for the purpose of guaranteeing them the exercise and enjoyment of human rights and fundamental freedoms on a basis of equality with men. Bangladesh is a party to this convention. So it has an international commitment of Bangladesh to adopt policy to stop violence against women in Bangladesh.

Secondly, forms and varieties of violence should be identified for better enactment of legislation. Physical and mental violence against women are common forms of violence against women in Bangladesh.



Physically Women are victim by hit, kicked, and dragged, beaten up, choked, burned, or threatened/aggressed with a weapon and some other severe physical violence. Emotional abuse included belittlement, public humiliation, intimidation, intentional causation of fear, and threats of physical harm directed to the woman or someone she cared about. Sexual violence sexual violence is considered as the most common form of violence through forced sex, coerced sex, or were forced to perform sexual activities that they found degrading or humiliating. Mental violence includes discriminatory behavior with women in family, educational institute and work place.

Thirdly, root causes for violence against women need to be identified. There are two types of reasons for rapid growth of violence against women in Bangladesh. They are- Outcome variable reasons and Exposure variable reasons. Overcome vari-

able reasons imply to lack of formal help. Women do not get enough help from the following services: police, hospitals/health centers, social services, legal advice centers, courts, shelters, and women's organizations. If they seek help or if sought it from other sources (including religious and local leaders), they are coded as negative. Exposure variable reason refers to socioeconomic and demographic characteristics of variables.

Fourthly, now it would be logical to discuss what should be the national anti-violence women policy to be successful to stop violence against women before violence reaches the more extreme levels of severity in Bangladesh. Government has to take in consideration an international standard and that really reflects women experience of violence. Moreover, the government must carefully consider evidence on the root causes for violence against women in order to develop an adequate, comprehensive policy and strategy to prevent, stop, and assist in cases of violence against women. Anti-violence policy should be a comprehensive complex of social, economic and political approach. Social approach requires looking into the social needs and demands of women. Economic approach emphasizes on the economical

objective of women to be independent financially. Political approach intends to frame policy which will act as to bring women under the same level as of a male. The policy should have three characteristics. Regulatory framework, distributive, redistributive, and implementer structure. Regulatory framework implies that regulates individual behavior, process and action within the legal framework. Distributive and redistributive structure refers to the matter of allocation of values for all people in society. The policy should be down-up policy. What is the real necessity might be more known to local community itself. A parliament member might not know the real scenery where he is in capital. Context of anti-violence policy should be based on local observations.

Bangladesh government may borrow the excellence of effectiveness of women policy and legislation from Brazil. In the 1970s,

Brazil's well-organized and active women's movement became a political force that pushed to adopt national policy agenda for protection from violence against women while Brazil was not state party to CEDAW. In 2006, Brazil adopted the Maria da Penha Law, which specifically addressed domestic violence and met the commitments made when the country had initially ratified CEDAW. This law specifically defined violence against women as a human rights violation and stated that violence included any gender-based "action or omission that causes death, lesion, physical, psychological, or sexual affliction, and moral or patrimonial damage. The law specified that male or female perpetrators may commit violence against women. It laid the foundation for the implementation and strengthening of multidisciplinary networks, including legal aid for victims, psychological support, law enforcement, social services, health, education, work, and housing. As a result of this law, penalties for perpetrators have tripled in cases of detention. The law also created the possibility of preventive imprisonment, and indicated that prevention activities should be carried out in schools. This landmark legislation, which enshrined women's rights to be free from violence, was built on decades of growing resources to support women suffering violence.

If Bangladesh government adopts anti-violence women policy it must have complied with a social service, legal advice center, special Court, shelter, local leader and strong Women's organisation for effective implementation of the policy. The government should facilitate a close social network to help in seeking decision, making decision and controlling violent behaviors.

Now it is a matter before the government to realize the legal obligation to stop violence against women and more important to understand how well these rights are being translated into practice and to realize what limitations are preventing their full actualisation. If the government takes initiative, Collaboration with international agencies and organizations may bless the government to put an end to pathetic suicide of Farhana and brutal rape of Yeasmin. Let's wait until that moment.

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