"ALL CITIZENS ARE EQUAL BEFORE LAW AND ARE ENTITLED TO EQUAL PROTECTION OF LAW"-ARTICLE 27 OF THE CONSTITUTION OF THE PEOPLE'S REPUBLIC OF BANGLADESH ● dslawdesk@yahoo.co.uk

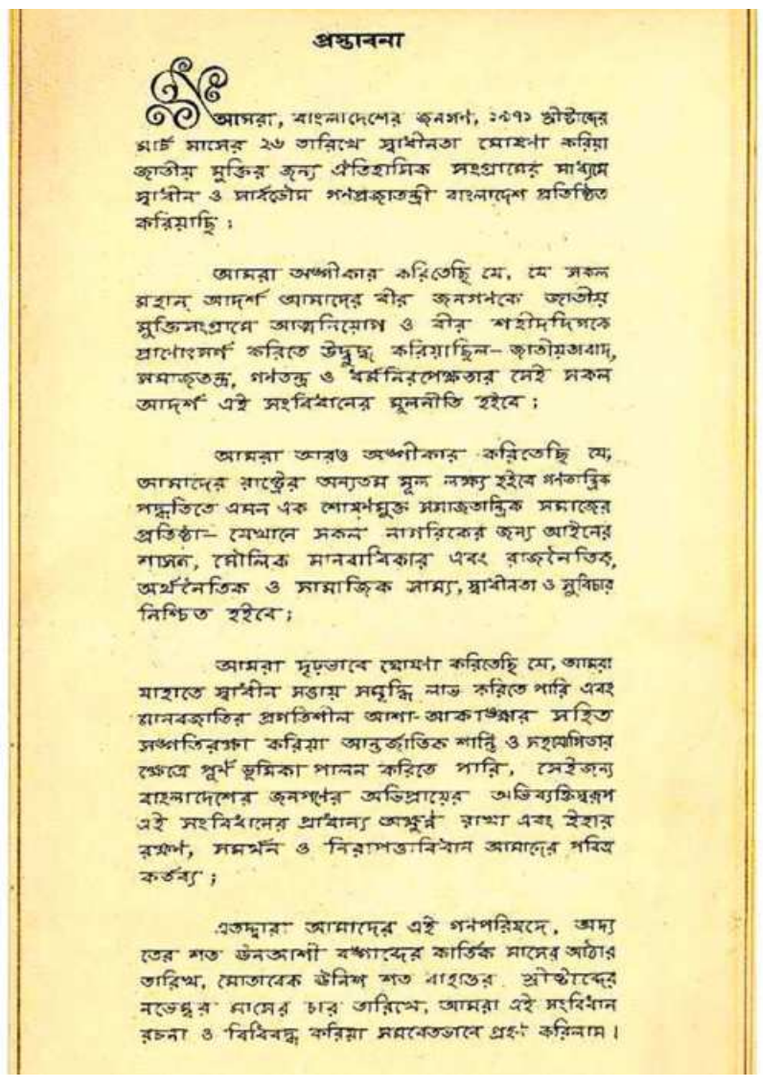
LAW OPINION

A quest for understanding constitutionalism

MD. LOKMAN HUSSAIN

Constitution is supposed to stand against the uncertainty in the political life in the state of nature, and it contradicts the 'hereditary' or 'might is right' order of monarchy, it denies – benevolent or not so – dictatorship or military takeover. It is rather a formula for a stable form of political life. Constitution is not a document of surrender to the destiny but a map to a destination. Discussing constitution only as a piece of law, may be supreme, tends to pull us in the oblivion about its supposed role.

Post 1947 constitutional events had to deal with two challenges - decolonisation and



প্রস্তাবনা

আমরা, বাংলাদেশের জনগণ, ১৯৭১ খ্রীষ্টাব্দের মার্চ মাসের ২৬ তারিখে স্বাধীনতা ঘোষণা করিয়া জাতীয় মুক্তির জন্য ঐতিহাসিক সংগ্রামের মাধ্যমে স্বাধীন ও সার্বভৌম গণপ্রজাতন্ত্রী বাংলাদেশ প্রতিষ্ঠিত করিয়াছি;

আমরা অঙ্গীকার করিতেছি যে, যে সকল মহান আদর্শ আমাদের বীর জনগণকে জাতীয় মুক্তিসংগ্রামে আত্মনিয়োগ ও বীর শহীদদিগকে প্রাণোৎসর্গ করিতে উদ্বুদ্ধ করিয়াছিল– জাতীয়তাবাদ, সমাজতন্ত্র, গণতন্ত্র ও ধর্মনিরপেক্ষতার সেই সকল আদর্শ এই সংবিধানের মূলনীতি হইবে;

আমরা আরও অঙ্গীকার করিতেছি যে, আমাদের রাষ্ট্রের অন্যতম মূল লক্ষ্য হইবে গণতান্ত্রিক পদ্ধতিতে এমন এক শোষণমুক্ত সমাজতান্ত্রিক সমাজের প্রতিষ্ঠা– যেখানে সকল নাগরিকের জন্য আইনের শাসন, মৌলিক মানবাধিকার এবং রাজনৈতিক, অর্থনৈতিক ও সামাজিক সাম্য, স্বাধীনতা ও সুবিচার নিশ্চিত হইবে;

আমরা দৃঢ়ভাবে ঘোষণা করিতেছি যে, আমরা যাহাতে স্বাধীন সত্তায় সমৃদ্ধি লাভ করিতে পারি এবং মানবজাতির প্রগতিশীল আশা-আকাঙ্ক্ষার সহিত সঙ্গতিরক্ষা করিয়া আন্তর্জাতিক শান্তি ও সহযোগিতার ক্ষেত্রে পূর্ণ ভূমিকা পালন করিতে পারি, সেইজন্য বাংলাদেশের জনগণের অভিপ্রায়ের অভিব্যক্তিস্বরূপ এই সংবিধানের প্রাধান্য অক্ষুণ্ন রাখা এবং ইহার রক্ষণ, সমর্থন ও নিরাপত্তাবিধান আমাদের পবিত্র কর্তব্য;

এতদ্দ্বারা আমাদের এই গণপরিষদে, অদ্য তের শত ঊনআশী বঙ্গাব্দের কার্তিক মাসের আঠার তারিখ, মোতাবেক ঊনিশ শত বাহাত্তর খ্রীষ্টাব্দের নভেম্বর মাসের চার তারিখে, আমরা এই সংবিধান রচনা ও বিধিবদ্ধ করিয়া সমবেতভাবে গ্রহণ করিলাম।

constitution of a (new) political order. But it failed in both. The post 1971 experience has not been much better, if not poor and/or similar. Our kind of constitutionalism suffers from incapacity in terms of decolonisation and negligence in constitution of a (new) political order. Our comfortable indifference to the history of colonisation and its undercurrents in legal system and State mechanisms help us to continue with a manifest failure to reconcile the competing interests and tensions underlying the kind of political order we want; thus, we have failed to carve out a stable political order. In search for a political order, the country was uncertain about the form of government. Even the most agreed form of parliamentary democracy was not diligently maintained. A caretaker system was created for mending the fragility of our political order, but it failed to fulfill the promise it once showed.

Being unaware of the legacy of colonisation of epistemology and jurisprudence may not prevent the temptation to separate the following two questions. Why does a country follow constitutionalism? And why did constitutionalism actually emerge? For the first question, one view, endorsed in Bangladesh, suggests that (post-colonial) countries follow constitutionalism for a fresh start. The vague idea of 'fresh start' may turn out to be that constitutionalism is somewhat a matter of fashion. In other words, in case of Bangladesh, Constitution is like a new piece of legislation that nobody knows what will happen to, when it faces the power it supposes to tame. Will it make the balance between the necessary power of the State and the necessity to control the State?

Constitution is born politically, it grows through judiciary, and some are the believers of 'original is better' when it comes to the question of change by Parliament. However, the constitution continues to grow, perhaps in a wrong way in Bangladesh. If the growth of the text betrays with what the sacrifices of millions were made for, then that is a dangerous and devastating growth. Let me elaborate.

In the year of its birth, the constitution was slim due to non-existence of some tumorous amendments and the few fatty judgements loaded with non-law literature. The present corpus of the constitution consists of nearly 23 thousand words, and around 112 thousand characters. It was several thousand less in 1972, the year of drafting of the constitution. A wise man has asked to imagine: how many martyrs have sacrificed their lives in 1971 for each letter of the constitution? Should one be oblivious of the spirit of constitutionalism that sprouts from the million souls sacrificed for this cause in this land?

Several metaphors may help us to understand the idea of constitution. One may think of it as an operating system for what we know as a computer, a constitution is an operating system for a political order. The drivers that connect different elements of the machine (computer) to the operating system should not malfunction. But this is something that happens to constitutional political order. One may opt to find an upgraded version of a driver for a computer programme to run. However, it is not easy to find upgraded versions of human actors who tend to run the political order according to the Constitution.

People also use the metaphor of Odysseus. He bound himself – the power binds itself – to avoid the siren calls of sea, the illusive pitfalls for power. The State should bind itself with the rules of constitution so that it does not bring danger for its people. It keeps the people safe from abuse of power, and it keeps safe the ones who are bestowed with the power from the vices of power.

In our country, we are more supernatural than the Greek gods. We all know that Behula made her journey to heaven and brought back Lakhindar into life. Behula's raft is very fragile in comparison to the

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warship of Odysseus, and it symbolises the land and people of Bengal. One who has ever floated on a raft of banana trees for crossing waters knows that it takes courage to rely on such a fragile vehicle and it requires a subtle sense of balance to safely cross the waters. In her journey Behula had these two virtues for making the journey. Moreover, she had an unusual mixture of courage and hope for which she travelled with the dead to return it to life. This unusual mixture, incomparable to the bravery of Greek epic heroes for different reasons, is uncommon to the ordinary mortals who run the political orders.

Let me speculate two alternative futures for constitutionalism. The first comes from Behula's journey. The heaven is rather an intermediate phase of Behula's journey where her ultimate end is to 'live happily ever after'. This is the common dream of the people of this land told and retold through the thousand years of fairy tales. Then, they lived happily ever after. Did the people of Bangladesh live happily ever after they started their journey as a constitutional democracy? Or are they just continuously reminded of the American wisdom that 'eternal vigilance is the price of liberty'?

The second future considers constitution as a fashion for a historical time. If we think of the future of constitutionalism, the people emotionally loaded with the aura of the fashion of written and pre-designed political order may become sad, if not unwilling, to accept that the fashion of constitutionalism may also disappear. But the hope to live happily ever after continues, riding on the raft of banana trees with Behula.

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FOR YOUR INFORMATION

Marital rape and the law

LAW DESK

Recently, a child bride's death in Bangladesh has stirred the whole country and brought the issue of marital rape or marital sexual abuse to the forefront. A combined reading of the Penal Code, 1860 and the Nari O Shishu Nirjaton Daman Ain, 2000 reveals that marital rape is not recognised in Bangladesh. This leads us to visit some neighbouring legal frameworks in understanding the status of law there. Among the neighbouring countries, Nepal and Bhutan explicitly recognises marital rape, Pakistan, implicitly creates a scope. On the other hand, India does not legally recognise marital rape. Afghanistan's law acknowledges the possibility of sexual assault within marriage but with a vital exception for the Shia community. Sri Lanka recognises marital rape only conditionally.

In India, marital rape is not criminalised. Exception 2 to Section 375 of Indian Penal Code exempts nonconsensual or unwilling sexual intercourse with women by stating that "sexual intercourse by a man with his own wife, the wife not being under fifteen years of age, is not rape."

In Bhutan, marital rape is explicitly recognised as an offence and penalised. Section 199 of the Bhutanese Penal Code defines marital rape as a coercive or forcible sexual intercourse within a marriage. Section 200 stipulates that a person guilty of marital rape shall have to undergo imprisonment for a minimum period of one year and a maximum period of three years.

In 2006, a revision in the Pakistan Penal Code has created a scope for acknowledging marital rapes as offences. Prior to 2006, rape was defined as an act of coercive or forceful sexual intercourse with a woman, other than a man's wife. In the year 2006, the law was revised, and upon revision, Section 375 of the Penal Code says that "a man is said to commit rape who has sexual acts with a woman without her approval."

Under the Sri Lankan Penal Code, marital rape is not criminalised except when the man and the wife are judicially separated. Section 363 (a) of the Penal Code provides that "a man is said to commit 'rape' that he has sexual intercourse with a woman without her consent, even where such woman is his wife, and she is judicially separated from the man."

In Afghanistan, the Law on Elimination of Violence Against Women 2009 criminalised sexual assault against an adult woman by a man and does not exempt marital rape/sexual abuse from its purview. It is to be mentioned however that the Shiite Personal Status Law (applicable to the Shia community) explicitly legalises rape within marriage by providing that it shall be the duty of the wife to submit to the husband. The personal status law stirred the entire Afghanistan, fueled a massive scale protest in Afghanistan's recent history and invited international disparage.

RIGHTS WATCH

RIGHT TO ACCESS INFORMATION

SUPTI HOSSAIN

All individuals as citizens of any country have the right to seek and receive information held by government (except those concerning national security) and private authorities with a view to ensuring transparency. In 2009, Bangladesh has enacted the Right to Information Act, 2009 for ensuring the free flow of information to the citizens to establish good governance. Right to access information is an integral part of the right to freedom of thought, conscience, and expression. Moreover, knowing and receiving information is pre-requisite of the transmission of knowledge and information which is widely executed by journalists.

The freedom of expression is guaranteed in the Article 39 of the Constitution of Bangladesh as a fundamental right. Though the right to seek and receive information is not cited explicitly in the constitution, the Preamble of the Right to Information (hereinafter RTI) Act declares this right as an inalienable part of freedom of expression. Therefore, to make the RTI Act effective, Information Commission of Bangladesh (ICB) has been delegated to deal with publishing and providing information on demand of the citizens. However, the genus of this right can be traced back to Resolution 59 of the UN General Assembly adopted in 1946 and Article 19 of the Universal Declaration of Human Rights (UDHR), 1948, where the freedom to seek, receive, and impart information was encapsulated as part of the fundamental right of freedom of expression. Moreover, right to information has been enshrined in the International Covenant on Civil and Political Rights, 1966 (ICCPR).

Despite the legal framework, in Bangladesh, journalists face considerable challenges in accessing information held by public or private authorities due to misuse and shortcomings of this Act. According to the Section 7 of RTI Act, none of the authorities is obliged to provide information concerning state security, international relations, intellectual property rights, law enforcement, judicial and investigation activities and so forth to the citizens. Inclusion of section 7 of RTI Act is undoubtedly crucial to secure state security and privacy of individuals. In pursuance of this, journalists are often excluded from receiving information and thereby are left with no option but to take resort to usual 'sources' to gather information while investigating on any private or public authorities. In accordance with Bangladesh Right to Information (RTI) Survey 2019, conducted by the World Bank, journalists are pointed as majority of requesters. As per this Survey, majority of journalists observed that RTI Act does not provide enough benefit in terms of receiving information due to its slow and time-consuming process. For this reason, they lose eagerness to use this Act. For extensive and efficacious use of the RTI Act, the practice of disseminating information to the journalists should be improved. Furthermore, to give effect to the right to information, necessary procedures have to be taken for timely processing of requests of citizens for information and the reasonable reasons should be given by the authorities in case of any denial or refusal.

As of now, 113 States have adopted right to information legislation to ensure effective and practical access to information. All states introduced this legislation not only to fulfill the international obligations but also to accelerate transparency and credibility between citizens and government. The RTI Act, 2009 of Bangladesh is certainly appreciable but not comprehensible to all people especially in countryside areas. Recently, some NGOs are adding their utmost efforts for individual incentive of accessing information by using RTI Act. Overall, government intervention and co-operation are essential to overcome the challenges of this Act with a view to securing the right to information as a fundamental right of people.

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LAW WATCH

Absence of the office of ombudsman: 48 years and counting

NADIM ZAWAD AKIL

Ombudsman is a nonpartisan independent official outside the bureaucracy, who is vested with the power to detect administrative lapses and faults, investigate, recommend corrective measures, issue reports, among others. The office of Ombudsman oversees and inspects whether the administrative officials are exercising their jurisdictional powers legally or not. It creates procedures for redressing individual grievances to safeguard individual rights. But, in comparison with the umpteen institutionalisation of this office in the western developed countries, the office of Ombudsman is stillborn in Bangladesh, even after forty years post-adoption of the Constitution.

Article 77 of the Constitution and the *Ombudsman Act, 1980* respectively stipulate the legitimate existence and detailed provisions regarding the functioning of this office. Probably since the establishment of the office was not made mandatory, rather was left to the sagacity and discretion of the parliament, the vacuum of an ombudsman was not filled by the passage of time.

It is needless to mention that, if the administrative activities remain derelict and of unfettered type, tyranny becomes the norm. As Bangladesh emerged from the British colonial rule afterward through the neo-colonialism of the then Pakistan, it inherited an asymmetric political order where administration has had dominance over maximum institutions. From Bangladesh's perspective, the method of repressing administrative malpractices is casual in nature and quite abortive. The Annual Confidential Report (ACR) is largely subjective and is not of much use. To minimise the maladministration, inefficiency, arrogance and abuse of power, the appointment of ombudsman has become a crying need. Formal investigations are cumbersome, time-consuming and protracted, contrariwise the investigation of an ombudsman is informal. To administer the operations of Government officials, executives and agencies, the installation of ombudsman is highly preferred.

The prerequisite of good governance is uprooting corruption. But this malpractice is so deeply rooted in Bangladesh that it has affected every sector, including the administrative apparatus. Simply put, our administration has been grappled by this gluttonous monster. Though the Anti-Corruption Commission has been established to oversee these malpractices, they hardly deliver fruitful remedies. To shut off the corruptive, permeating different sectors, including the upper echelon of the country malpractices, the office of ombudsman should be put forwarded.

Though the *Ombudsman Act, 1980* is an exhaustive and distinctive Act, it has multiple shortcomings. Only the head of the State has the discretionary power to appoint the ombudsman considering the recommendations of parliament. Naturally, the ruling party will appoint the ombudsman as to their conveniences. For proper functioning, it should be amended to ensure that an ombudsman acceptable for all is put in place through parliamentary consensus. Furthermore, the *Ombudsman Act, 1980* excludes the allegations on certain public functionaries such as MPs, ministers, judges etc. The Act also does not include "acts of corruption" and "illegal acquisition of property". In a country like Bangladesh, where corruption and impropriety has crossed all the endurable limits, such a limitation can render the office of ombudsman teethless.

Since the population of Bangladesh is huge and rapidly expanding, one parliamentary ombudsman is rationally not sufficient. Bangladesh needs to appoint non-parliamentary ombudsmen i.e. equal opportunities ombudsman, children ombudsman, the press ombudsman, ombudsman against ethnic division, consumer ombudsman and so on. Denmark, Sweden, Finland have institutionalised these sorts of non-parliamentary ombudsmen. So far, parliamentary ombudsman has been appointed in 46 countries along with the neighbouring country India, Pakistan. Bangladesh must appoint the legislative and executive ombudsman both to confront the challenges.

Bangladesh requires the appointment of such ombudsmen who can scrutinise the complaints made against every public official including cabinet ministers, MPs, central bureaucracy, local representatives, military personnel, judicial bodies etc. and who can guarantee to take lawful, non-discriminatory, fair actions without extraneous considerations. Corruption, nepotism, biases in the public administration will be rooted out via them. The installation of ombudsman will affirm stronger and more disciplined democracy and mostly rule of law will prevail in Bangladesh.

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