

# Constitutional supremacy: The dangers within

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AHRAR AHMAD

The "idea" of a constitution may be old. After all even Aristotle had written about them. However, the reality of "constitutions" as codified rules that define the structure of government, the relationship between its branches, and the rights and liberties of the people, is much more recent. Even though the constitutions of San Marino and Sweden are technically older, it is the US constitution, ratified in 1789, which is generally considered to be the oldest continuously functioning written constitution.

Bangladesh was eager for one when it became independent. This priority was driven by two factors. The first was the region's experience with inscribed rules of governance. Even when India was "ruled" by the East India Company, and certainly after it came under the direct authority of the Crown in 1858, there was an obsessive reliance on written regulations, procedures and protocols through various Acts and Charters passed by the British Parliament. When Pakistan was created, it went through two constitutions in 24 years (the first took 9 years to formulate and 2 to abrogate and the second took 2 to make and 9 to break). Thus, when Bangladesh came into existence, it was heir to a fairly extended "constitutional" history.

Second, the dreams and demands of the people that inspired and sustained the struggle for liberation and the war of independence made a democratic constitution a political necessity and a moral imperative. Hence, within one day of Bangabandhu's triumphal return to Dhaka on Jan 10, 1972 he issued the Provisional Constitutional Order 1972. A 34-member constitution drafting committee was announced on April 11 under Dr. Kamal Hossain, a draft was placed before the Parliament within 6 months, and after its third reading and approval on Nov 4, and upon its coming into effect on Dec 16, Bangladesh established itself as a constitutional republic. Its trust with destiny had been redeemed.

But while Bangladesh had a constitution, its commitment to "constitutionalism", i.e. embracing its principles and ensuring its sanctity and permanence, remained a bit shaky. Drastic changes were introduced through the adoption of the 4th amendment on Jan 25, 1975, which radically shifted the initial focus of the constitution and turned it into a single-party, Presidential system, which curtailed the powers of the Parliament and the Judiciary, as well as the space for free speech or public assembly.

Bangabandhu's heinous assassination in 1975 complicated Bangladesh's democratic journey in more fundamental ways. The path towards democracy became progressively rockier with most regimes seeking to interpret, often to bend, the constitution to meet its interests and, in the process, jeopardize its original

premises and promises.

The resulting democratic deficits are reflected, on the one hand, in the inability to ensure the rule of law, free and fair elections, economic justice, free speech, human rights and civil liberties which are all specifically enjoined in the constitution. On the other hand, increasing levels of corruption, violence, intolerance, communalism, political hyper-polarization, and civic distrust led to the erosion of democratic norms and values without which any constitution becomes hollow and futile.

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Bangabandhu putting his signature in the Constitution. December 14, 1972.  
Photo courtesy: The Bangladesh Observer.

Admittedly, this is not unique to Bangladesh. Arthur Schlesinger had indicated it in his "The Imperial Presidency" (1973), which was gradually manifested in the notion of the "unitary executive". This referred to the claimed privileges and prerogatives of the executive branch which protected it from legislative controls in some critical areas and allowed it to exert much greater power beyond the spirit of the constitution.

It was argued that the economic complexities of a globalized environment which required specialized knowledge and quick decisions, as well as the military challenges the world faced which demanded a high level of secrecy and centralized command structures, both privileged executive powers at the expense of other branches

of government. This process has not gone unchallenged by the legislative or judicial bodies, but was not able to significantly limit executive over-reach throughout the last century.

In Bangladesh there have been some enabling conditions that have facilitated, and later intensified, this tendency. First, in Weberian terms, it is "charismatic leadership" that prevails in Bangladesh (as opposed to rational/legal or coercive/traditional leadership). The ability to appeal to the public through deploying the rhetorical, psychological and institutional instruments to "routinize" charisma also gives leaders an aura of absoluteness, and supports the fetishization of the "strong man" approach to leadership. Leaders "rule" through manipulating fear and favor. Subordinates measure their importance in terms of their closeness to the leader which is cultivated through loyalty, service and sycophancy. Ordinary people are encouraged to demonstrate subservience through regular and ritual affirmation of the leader's supremacy in

class structure, where the economically prosperous flaunt their power and the underprivileged are cowed into accepting their inferior status, further complicates the constitutional assumptions and expectations of equality and inclusiveness.

Third, political parties are not based on ideology or principles but typically tend to be clusters of people around a dominant leader. The parties are formed and splinter for essentially personal reasons and interests. The fact that 80 parties have applied for registration with the Election Commission this year indicates the irresponsible nature of their formation and agendas. It is not unusual for these leaders to change colors, shift parties, and juggle alliance partners - coalitions which are forged as cynical, transactional and temporary arrangements depending on perceived benefits. Since most of these parties do not practice internal democracy, are not committed to a constitutional polity, and function at the behest of a leader, it is natural for them to support expanded executive authority when a particular party comes to power.

Fourth, like many other constitutions, Bangladesh has detailed the respective roles of the three supposedly co-equal branches of government. But the Parliament in Bangladesh is struggling with its institutional credibility and moral authority.

The composition of the Parliament contributes to a perception of its irrelevance. The overwhelming ascendancy of one party (almost 90% of the seats in the current legislature belong to the ruling party); the fact that legislators cannot vote their conscience but must support the party line (article 70 of the constitution); and the physical dominance of the business sector whose interests are usually more material (more than 60% of legislators list "business" as their profession), have all helped to nurture this impression.

Moreover, doubtful elections (made questionable by the rampant use of money, muscle power and administrative shenanigans), committee ineffectiveness, anemic attendance, insipid debates (which sometimes reveal a lack of parliamentary decorum), and the inability and unwillingness to perform its oversight and investigative functions, have also bolstered the notion that it is merely a rubber-stamp entity functioning as an extension of Executive will.

Fifth, the strongest protection of constitutional supremacy is the Judiciary. It is supposed to serve as the final interpreter and guardian of the constitution with the ability to declare any act of the Legislature or any action of the Executive to be null and void if it violates any constitutional provisions.

In Bangladesh, the Courts have been a bit shy in this regard. The number of constitutional cases has been very limited. If the Courts do, indeed, decide adversely on a constitutional issue against the interest of the ruling

regime, the super-majority that parties enjoy in the Legislature easily enables a constitutional amendment to make the judgment moot. The last Supreme Court justice who tried to be bold not only had his decision overturned, but eventually had to leave the country.

Moreover, Courts are overwhelmed by political cases filed against supposed regime opponents and alleged "free speech criminals" (apparently in Bangladesh those who "hurt sentiments" generate swifter legal attention than murderers, rapists, money launderers, or environment destroyers). Also, the Courts are becoming the primary source of protection and support for a variety of initiatives and causes through Public Interest Litigations and *Suo Moto* rulings, which should ideally be addressed through a political process involving executive or legislative leadership.

It should also be pointed out that the Courts remain woefully under-staffed and over-burdened (17,500 cases in the Appellate Division which currently has only 5 justices, and more than 5,00,000 cases with the HC bench with less than 100 judges). The sheer number of cases hampers its primary obligation to dispense justice to litigants, and causes delays which can be exasperating, unjust and unconstitutional. It also distracts attention away from its constitutional obligation to check the other branches of government. The swagger of the Executive branch remains unabashed.

While Bangladesh's struggle for a constitutional/democratic order has been long, rich and intense, and while people have dreamed, mobilized, struggled, fought, and died for it, the achievements in this regard appear to be slightly discouraging. Many aspects of life in Bangladesh have improved significantly, and economic performance has been most impressive and widely lauded. However, the promise and the conviction that the constitution would serve as the anchor of a free, fair, progressive, inclusive, rights-based polity has been rudely shaken by cultural dynamics, political expediency and personal ambitions.

The "Divine Right of Kings", for long a staple of European rule, was gradually supplanted by the notion of "popular sovereignty". Instead of the monarch, it was the people who were heralded as sovereign. This transition was not easy, swift or peaceful. The process reached its conclusion through the adoption of the legal instrument of the written constitution, and establishing its supremacy. In Bangladesh, the accumulation of powers in the hands of the executive has made that journey a bit fraught and incomplete, and the destination itself slightly ambiguous.

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## Constitutional Law of Bangladesh

**In a parliamentary democracy, parliament's oversight of the executive and judiciary requiring their powers to be exercised within the constitutional limits and accountable to the people remains to be realised. Parliament has become the law-making organ of the executive, which is also reluctant to relinquish its control over the judiciary.**

MRAFIQUL ISLAM

Bangladesh enacted and implemented its Constitution in 1972 featuring parliamentary democracy. Since then, the constitutional rule of law has had a turbulent journey. Its inherent pliancy and resilience have helped it survive and installed somewhat stable governance and economic prosperity. This article, written at the historic juncture of its 50th anniversary, briefly examines constitutional progression and transformation over the last 50 years, to learn lessons for strengthening its operational ambits for good governance in the 21st century and beyond.

The Unilateral Declaration of Independence (UDI) of April 10, 1971 of Bangladesh was the first constitution with retrospective effect from March 26, 1971. This UDI avoided constitutional vacuum caused by independence from Pakistan, ensured the continuity and stability of Bangladesh's statehood from March 26, 1971, and legitimised all actions, rights, and duties of its provisional government. This legitimacy emanated from the success of the UDI.

Immediately upon his return on January 10, 1972, Bangabandhu proclaimed the Bangladesh Provisional Constitution Order

on January 11, 1972, pledging to introduce a parliamentary democratic government as the "manifest aspiration of the people of Bangladesh" (para 4). He stressed the pressing need of enacting a constitution, assembled the Constituent Assembly and formed the Constitution Drafting Committee, which adopted the Constitution on November 4, 1972, to be effective from December 16, 1972.

The Constitution has a hybrid model - it has borrowed from the UK and US constitutional experiences, blended and tailored to reflect those cherished ideals that led to the birth of Bangladesh. Adopting a parliamentary form of government, it has departed from the British Westminster system of parliamentary sovereignty. Enacting through a formal law-making process in written form, the Constitution has created Parliament as a non-sovereign law-making body, the validity of whose acts is contingent upon their constitutionality under Article 8(2). It has adopted the principle of separation of powers with checks and balances that are usually found in a presidential form of government like the US. This feature separates the independent yet complementary powers and functions of the three co-equal organs of the government - the executive, legislature, and judiciary

- all to be accountable to the people. Unlike the constitutional power of the US president, the Bangladesh president is a ceremonial head. The Constitution has incorporated international human and democratic rights as "fundamental rights" with provisions for enforcement. Being the Constitution of a unitary state, it has established the Supreme Court with two integrated divisions - the High Court and Appellate Divisions - to be the guardian of the Constitution. This unitary apex court was meant to avoid the creation of multiple High Courts in major divisional cities and be complementing each other in exercising original and appeal jurisdictions independent of the executive government.

The multiparty parliamentary democratic Constitution turned to a single-party presidential system through the 4th amendment in 1975, which was interrupted by military interventions in the mid-1970s and early 1980s and held gerrymandered elections to perpetuate their power. Instead of suspending or abrogating the Constitution, they kept it in force to create a sham constitutional order subservient to the martial law. These regimes formed their ductile parliaments that validated their rules through the 5th and 7th amendments and pursued a pervasive policy of

executive power to prevail over the constitutional due process and law. The bureaucratic domination over the public administration during 1975-1990 was inviolable and unaccountable, thus creating an all-powerful authoritarian executive. Instead of attempting to regain control over the civil bureaucracy, subsequent civilian governments found it expedient to minimise or avoid accountability. This trend of bureaucratic reliance is perhaps partially responsible for the introduction of a culture of public unaccountability in Bangladesh.

The military and military-turned civilian rules ended in 1990 with the reintroduction of parliamentary democracy, which has since been continuing. Both military and civilian governments have enacted some amendments that have maligned the basic constitutional structure of parliamentary democracy. The boycott of the 1996 elections by all opposition political parties on the allegation of vote rigging and result manipulation precipitated a national political crisis. The politically besieged BNP government and its parliament enacted the 13th amendment providing an interim non-political and neutral caretaker government to hold free and fair elections. The unconstitutionality of this amendment

was apparent in that it vested real and absolute powers on the president which were otherwise unavailable in the Constitution. It enabled the figurehead president to exercise executive powers beyond the reach of the caretaker government and its chief adviser with the prime minister's status. It allowed the incumbent political party to appoint the president whose only moral accountability rested with the appointing political party. The ceremonial president became all-powerful, and an interim presidential form of government composed of advisors selected and appointed by the president was created. This form of government contravened the constitutionally ordained parliamentary form of government. It ignored the constitutional requirement that the Republic is a democracy in which people are entitled to be governed by an elected government (s 11). None of the members of the caretaker government, including the president, was elected - but selected. These rickety aspects of this amendment were inconsistent with, and repugnant to, the basic structure of the Constitution. It sought to achieve the legitimate end of free and fair elections through an unconstitutional means,