## The Constitution Day.

# 26 years of Bangladesh Constitution: Down the History Lane

TN our Constituent Assembly, this eighteenth day of Kartick 1379 BS. corresponding to the fourth day of November 1972 AD, do hereby adopt, enact and give to ourselves this Constitution."

Today is 4th November, 1998. We adopted and enacted our sacred Constitution, an outcome of a historic struggle for national liberation, 26 years ago on 4th November, 1972. Regrettably and most unfortunately we did not ever bother to observe this day as our 'Constitution Day whereas we observe so many days with great hue and cry on every occasion! It crystallises, in fact, the dismal level of awareness, consciousness and understanding of the Constitution and the commitment to defend it among our educated few. Even the legal community has painfully failed to assess its importance and application. Probably this is the reason why our quest for rule of law and good governance has not yet traced its true destina-

Bangladesh was physically liberated on 16 December 1971. The government of Bangladesh immediately set up a Constituent Assembly composed of the members of the Pakistan National and East Pakistan Assemblies elected in 1970, to draft a Constitution for Bangladesh. The Constituent Assembly held its first session on 10 April 1972 and passed the Constitution on 4 November 1972. The Constitution was authenticated by the Speaker on 14 December 1972 and came into force on 16 December 1972.

Our Constitution owes its origin in the Proclamation of Independence (10 April, 1971) which is, no doubt, the culmination of a long struggle of the people through history for achieving self-determination. In tracing the constitutional development in Bangladesh, it is important to first study the Proclamation of Independence

The Constitution: At a Glimpse Our Constitution is divided

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Abdul Momin

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between the Preamble and eleven parts. Part I defines the Republic, its territory, its language, its national anthem, flag and emblem, the capital, citizenship and the most important of all is the supremacy of the Constitution. By the Eighth Amendment religion has been added as an attribute of the state, same being incorporated Part II contains the funda-

mental principles which are described to be fundamental to the governance of Bangladesh, to be applied by the state in the making of the laws and be a guide to the Constitution and other laws of Bangladesh and shall form the basis of the working of the state and of its citizens but shall not be judicially enforceable. Part II contains social aspects of human rights as well as postulates the characteristics of the Republic and that of the democracy "in which fundamental human rights and freedom 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" (Art. 11). It is provided under Art. 9 that the local government institution shall be encouraged by the state.

Part III contains the fundamental rights providing that laws inconsistent with fundamental rights to be void. It further provides equality before law, prohibiting discrimination on the grounds of religion race, caste, sex or place of birth equality of opportunity, prohibition of foreign titles, rights to protection of law, personal liberty, safeguards as to arrest and detention and prohibition of forced labour, protection in respect of trial and punishment, freedom of movement, freedom of assembly, association, freedom of speech, profession, occupation, religion, right to property and protection of home and correspondence.

Part IV deals with the executive, namely, the President, Prime Minister and the cabinet

Chairman

Member

List of Members of the Drafting

Committee of Bangladesh Constitution

Abdul Momin Talukdar

by A H Monjurul Kabir

The Constitutional history of Bangladesh for the last quarter of a century reveals that some major amendments have been accomplished by incumbent governments not in response to genuine needs for modifications but to perpetuate their position in power. This process, no doubt, seriously undermined the dignity and integrity of the Constitution and hampered the growth of constitutionalism in Bangladesh.

CONSTITUENT ASSEMBLY OF BANGLADESH

It also contains a chapter on non-party caretaker government, one on local government, one on defence service and one

on the Attorney General. Part V deals with the legislature, the Constitution and elections of Parliament and its sessions, the committees, the secretariat, the rules, privileges, the legislative and the financial procedures and ordinancemaking power.

Part VI deals with the judiciary, establishment of the Supreme Court and the appointment of judges and their tenure of office, the seat of the court, jurisdiction of the High Court Division and Appellate Division, the issue and process, the review of the judgement, advisory jurisdiction, rule making power, superintendence and control over subordinate courts and the establishment and appointment, control and discipline of the subordinate courts and the independent functioning of the Judiciary.

Part VII deals with election. constitution and power of Election Commission, preparation of the electoral roll and the conduct of the election.

Part VIII deals with the Comptroller and Auditor General, his functions and form of keeping public accounts. Part IX deals with the services of Bangladesh, the appointment and tenure of office, the Public Service Commission and its functions. Part IXA provides for emergency provision including the power to suspend certain articles during emergency. Part X deals with the amendment of the Constitution and Part XI deals with the executive authority and how that is to be exercised in relation to trade, treaties, suits, etc., oaths of office, savings for existing laws, transition, temporary provisions, repeals, interpretation, commencement, citations and authenticity. Besides, there are four schedules attached to this Constitution.

#### Constitutional **Amendments**

The 1972 Constitution has undergone profound transformation through multiple amendments involving wideranging matters and engendering widespread controversies.

There have been thirteen amendments to our Constitution up to 1998. These are as fol-

First Amendment: In 1973 the Constitution (First Amendment) Act was passed inserting sub-art (3) in art 47 whereby any law providing for the detention and trial of war criminals was kept out of the purview of the provision of Part III relating to fundamental

Second Amendment: The Constitution did not provide for proclamation of emergency and suspension of fundamental rights during emergency and in view of the provisions of art. 33 preventive detention was not possible. It was felt that the Constitution should be amended to provide for these. Accordingly, by the Constitution (Second Amendment) Act of 1973 art. 33 was amended providing for preventive detention and Part IXA was inserted conferring power on Parliament and the executive to deal

DRAFT CONSTITUTION OF THE PEOPLE'S REPUBLIC OF BANGLADESH

[SETTING OUT SUGGESTED DRAFTING IMPROVEMENTS FOR CONSIDERATION BY THE CONSTITUTION DRAFTING COMMITTEE OF THE ASSEMBLY

with emergency situations and providing for suspension of enforcement of the fundamental rights during the period of emergency.

Third Amendment: The Constitution (Third Amendment) Act, 1974 was passed to give effect to the agreement with India giving up the claim in respect of Berubari and retaining Dahagram and Angorpota.

Fourth Amendment: In Jan-

uary, 1975 the Constitution (Fourth Amendment) Act, 1975 was passed transforming the Constitution beyond any resemblance with the original. Part VIA was incorporated prescribing that there would be only one political party in the State, thereby rendering a severe blow to the democratic set up of the Constitution. Art 102(1) which conferred power on the High Court Division to enforce the fundamental rights was repealed and by an amendment of art 44 Parliament was empowered to establish by law a constitutional court, tribunal or commission for enforcement of the fundamental rights. The parliamentary form of government was replaced by a form of government which was an apology of a presidential form as the normal checks and balances of presidential form of government were not incorporated. A provision was made for a Vice-President who was to be appointed by the President. The President became the repository of the executive power of the Republic which he would exercise with the assistance of ministers selected by him. The President was to appoint the Prime Minister and other ministers from among the members of Parliament or persons qualified to be elected as members of Parliament. The President would preside over the meetings of the Council of Ministers, and the Prime Minister and all other ministers would hold of-

fice during the pleasure of the President. Ministers had the right to speak and take part in the proceedings of Parliament, but they were not entitled to vote unless they were members of Parliament. The Judges of the Supreme Court were made removable by the President on the ground of misbehaviour or incapacity. The provision for consultation with the Chief Justice in respect of the appointment of puisne Judges of the Supreme Court was repealed. The control in respect of subordinate courts and judges was taken away from the Supreme Court and vested in

the President. Fifth Amendment: The Constitution Fifth Amendment Act 1979 came to legitimize all Proclamations, Proclamation Orders, Martial Law Regulations, Martial Law Orders and other laws made during the period August 15, 1975 to April 9, 1979. All amendments, additions, modifications, etc. made in the Constitution along with Orders, actions and proceedings taken thereunder were ratified and confirmed and declared to have been validly made.

The main features of this amendment were: a) The citizens of Bangladesh would be known as Bangladeshis. The nationalism

would be Bangladesh National-ism and not Bangali Nationalb) 'Bismillah Hir-rah-manir Rahim" was added at the begin-

ning of the Preamble of the Constitution. c) Two out of four fundamental principles of State policy -. nationalism, democracy, so-

cialism and secularism — have been altered. Absolute trust and faith in Almighty Allah in place of secularism and socialism in the sense of social and economic justice instead of 'socialism' had been provided for. d) Provision for nominating special representatives of

women, labour and peasants to the local self-governing institutions was provided for. e) Provision for establishing

brotherly relations with all Muslim countries was incorporated into our Constitution. f) The independence of the

Judiciary was enhanced. The Judges of the Supreme Court and High Court would be appointed by the President as before but could not be removed by him without the recommendation of a supreme judicial council. Further the provision of writ petition to be made by any citizen was reinstated.

g) The Ministers would be answerable to the Parliament though not accountable to it. They would be accountable to the President.

h) There would be one Prime Minister and one or more Deputy Prime Ministers in the Cabinet.

It may be noted that the Constitution (Fifth Amendment) Act was passed when the. Constitution was not fully re-

Sixth Amendment: On the death of Ziaur Rahman, Justice Abdus Sattar, the then Vice-President, became the Acting

President. In the election of the President in 1981 he was a candidate and the question arose whether he could contest in the election without resigning from the office of Vice President. To remove any doubt the Constitution (Sixth Amendment) Act, 1981 was passed providing, among others, that if a Vice-President is elected as President, he shall be deemed to have vacated his office on the date on which he enters upon the office of President.

Seventh Amendment: On the withdrawal of Martial Law on 10 November 1986 the then President Ershad got Parliament to pass the Constitution (Seventh Amendment) Act, 1986 following the pattern adopted in the Constitution (Fifth Amendment) Act 1979. By the same amending Act, the retiring age of the Judges of the Supreme Court was fixed at 65 in place of 62.

Eighth Amendment: Constitution (Eighth Amendment) Act, 1988 was passed amending art. 100 of the Constitution and thereby setting up six permanent Benches of the High Court Division outside the capital and authorising the President to fix by notification the territorial jurisdiction of the permanent Benches. By the same amending Act, Islam was made the State religion of Bangladesh.

Ninth Amendment: The Constitution (Fourth Amendment) Act 1975 made provision for a Vice-President to be appointed by the President. In the absence of the President the Vice-President would act as the President. The Constitution (Ninth Amendment) Act, 1989 was passed in respect of the terms of office of the President and Vice-President.

Tenth Amendment: Art 65(3) originally provided for reservation of 15 seats for women for 10 years to be elected by Parliament. By Second Proclamation Order No IV of 1978 the number of the reserved seats was increased to 30 and the period was increased to 15 years. By the Constitution (Tenth Amendment) Act, 1990 the period was extended for another 10 years from the date of the first meeting of the next Par-

Eleventh Amendment: The Parliament passed the Constitution (Eleventh Amendment) Act, 1991 ratifying all actions taken by the caretaker government and the appointment of Justice Shahabuddin as the Vice President. It also removed the constitutional hurdles to the Acting President's return to his previous position in the Supreme Court, Library of the

Twelfth Amendment: Except for a few articles the spirit and language of the Twelfth Amendment are similar to those replaced by the Fourth Amendment. The Parliament passed the Constitution (Twelfth Amendment) Act, 1991 restoring the parliamentary form of government substantially as provided in the original Constitution.

Thirteenth Amendment: Thirteenth amendment was made in March 28, 1996. It introduced the provision of a nonparty caretaker government. It will work during the period from the date of which the Chief Adviser of this government enters upon office after parlia-ment is dissolved or stands dissolved by reason of expiration of its term till the date on which a new Prime Minister enters upon his office after the constitution of parliaments.

This government shall consists of the Chief Adviser at its head and not more than ten other advisers, all of whom shall be appointed by the President. The Chief Adviser and other advisers shall be appointed within fifteen days after parliament is dissolved or stands dissolved.

#### Towards a Just Society based on Constitutionalism

The Constitutional history

of Bangladesh for the last quarter of a century reveals that some major amendments have been accomplished by incumbent governments not in response to genuine needs for modifications but to perpetuate their position in power. This process, no doubt, seriously undermined the dignity and integrity of the Constitution and hampered the growth of constitutionalism in Bangladesh.

The Bangladesh Constitution is a sacred and authenticated norm setter for lawmaking to sustain a just and orderly society. Though it is not a convenient magic tool for overcoming legal and political barriers, it is the supreme law of the land and as such it is the most important document. As we enter the 21st century within a couple of months, the preservation and maintenance of the Constitution as the will of the people and "the Supreme Law of the Republic" is no less dauntingly uphill task today than be-

The writer gratefully acknowledges the following valued source of information: Constitutional Law of Bangladesh by Mahmudul Islam (BILIA-1995) by benew

April 23, 1977, laws made dur-

ing the period between August

15, 1975 until the revocation of

the said Proclamation were

deemed to be valid and made

free from questioning in any

Court of law or tribunal. Provi-

sions were made under which

the amendments to the Consti-

tution affected by such extra-

legislative means were to be

deemed "as if (these) were made

in accordance with and in

compliance to the requirements

of the Constitution" (Article

Although subsequently martial

law was lifted, the rights and

privileges which were sus-

pended during the operation of

the law were to remain so even

President Ziaur Rahman, Jus-

tice Sattar became the new pres-

ident. He was subsequently

elected to the presidency, but

within months his government !

was overthrown by General Er-

shad by the proclamation of

martial law on 24 March 1982.

General Ershad suspended the

Constitution and reserved the

power to revive it in stages. The

final revival of the much-

amended Constitution took

place on 10 November 1986

when martial law was with-

drawn. The Seventh Amend-

ment ratified and confirmed

the Proclamation of 24 March

1982 and validated all orders

and actions made under the

Proclamation. In an effort to

gain legitimacy General Ershad

declared Islam as the state reli-

gion of Bangladesh under the

8th amendment to the Constitu-

cessive regimes in Bangladesh

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34/A of the Fourth Schedule).

### Restoration of the 1972 Constitution

## Breaking the Civil Society Divide

by Chowdhury R Abrar

Thus, it is apparent that successive regimes in Bangladesh contributed to the erosion of democratic ideals set forth and articulated in the 1972 Constitution. Time has come to reckon with the past and move forward.

→ ONSTITUTION is the most important document of a state. Bangladesh became independent through a process of long-drawn democratic movement, culminating in an armed struggle. The Constitution of independent Bangladesh, framed in 1972. reflected, at least to an extent, the democratic aspirations and values that evolved during the course of the nationalist movement. Dr Kamal Hossain, the principal framer of the Bangladesh Constitution, in a recent seminar stated that the "dreams which were woven into the constitutional demands were those of a democratic political order in which power would truly belong to the

Article 7 of 1972 Constitution affirmed that all powers in the Republic belonged to the people. It upheld the principles of fundamental human rights, freedom and dignity of individuals. The most important feature of the constitution was that it did not have provisions for authoritarian instruments such as preventive detention and suspension of fundamental rights. However, the democratic character of the constitution could not be upheld for long. The political party that took over the rein of power following independence and gave leadership in framing the constitution, itself could not cope with the demands of the Constitution and compromised its ideals. The assault on the democratic content of the constitution, which started within nine months of its adoption, contin-

ued for the next two decades. Following the mass upsurge of 1990 civilian rule was restored. Since then the country has experienced two civilian governments, following relatively free and fair elections. It is the general will of the people that the civilian regimes should continue to govern the country and work towards dismantling the authoritarian and antisecular provisions of the Constitution. The people of Bangladesh

and various sections of its civil society have a major role in making the civilian regimes committed to such goal. Unfortunately there is yet to emerge a civil society that would take up the responsibility of demanding the restoration of the high ideals of the democratic struggle and the liberation war in the Constitution. The civil society that we know is sharply divided along party lines, and have immersed itself into the controversy of who is to be blamed for undermining the democratic principles that were laid down in the 1972 Constitution. I would argue that from 1973 to 1990 all regimes have played their part in such a process. A quick glance at some major amendments to the Constitution would substantiate this.

to enforce fundamental rights.

The first Awami league government's experiment with multi-party parliamentary

Another important feature

of subordinate courts and judges was taken away from the Supreme Court and passed over

to the President.

Following the overthrow of the Mujib government in August 1975 Martial Law was promulgated and the Constitution was temporarily subordinated to it. Drawing his authority from various proclamations issued in the second half of 1975 Gen. Ziaur Rahman brought about a series of change to the Constitution. Presidential Orders were kept free from Constitution limitation by the then Chief Martial Law Administrator Justice Sayem's Proclamation of 8 November 1975. On the one hand, Part VIA of the Constitution which dealt with the formation of a single party state under the Fourth Amendment was deleted, on the other, by the authority of the Second Proclamation Order, Article 38 of the Constitution was amended. This amendment lifted restriction on individuals from forming or belonging to any religious organisations and societies with political aims and purposes. These changes laid bare the contradictions that were thought to have been resolved during the course of the Bengali's long struggle against the Pakistani ruling

to develop awareness about the

tion.

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### "I will preserve, protect and defend the Constitution ..."

• • will preserve, protect and defend the Constitution ..." is a part of the oath of office for the constitutional

The Third Schedule of our Constitution contains the oath of office required for the nine 'constitutional' offices. Of these nine offices, the oaths of eight, i.e., the President; Prime Minister, including Ministers, Ministers of State and Deputy Minister (Chief Advisors and Adviwhen applicable) Speaker; Deputy Speaker; Chief Justice and Judges (of the Supreme Court); Chief Election Commissioner and Election Commissioners: Comptroller and Auditor General; and Chairman and Members of the Public Service Commission contain the above phrase.

A Member of Parliament also takes an oath of office but her/his oath does not include the obligation to "preserve. protect and defend the Constitu-

We, as citizens, have become somewhat used to seeing these oaths being administered, usually as an item of BTV news. However, the focus of such telecast or the subsequent reporting in the print media usually go under the heading of "oath taking ceremony" or some other variation of the message. The person and the post to which the person are appointed is mentioned elaborately, but not the content of the oath. Hence this write-up about the content of the oath and, derivatively, about an aspect of our Constitu-

"I ... do solemnly swear (affirm) that will preserve, protect and defend the Constitution..... In addition to this phrase, there by Dr Shahdeen Malik

are, usually, three other components of this oath (with some variations for different posts): - faithfully discharge the duties of the office; faith and allegiance to Bangladesh; and not be influenced by personal interest in the official conduct or de-

I would term these three components of the oath as affirmative ones while the oath to "preserve, protect and defend the Constitution" as a positive one. To discharge the duties entrusted faithfully, to be faithful to Bangladesh, and to act according to law and not personal interest do not specifically cast the onerous obligation of "preserving, protecting and defending" the Constitution.

Surely for the framers of the Constitution, the Constitution was the most important instrument which needed to be preserved, protected and defended and the most important offices of the country, created by the Constitution, were not only entrusted to function according to the Constitution but specifically given the task and responsibility of preserving, protecting and defending the Constitution and they are required to take an oath to that

Lest we think that the Constitution should or can be preserved, protected and defended only by those who take this oath, the Constitution in the Preamble provides that:

... it is our sacred duty to safeguard, protect and defend this Constitution and to maintain its supremacy as the embodiment of the will of the peo-

ple of Bangladesh... And in similar vein, article 21 of the Constitution provides:

"... it is the duty of every citizen

to observe the Constitution....' As the Preamble of the Constitution provides, we, the people of Bangladesh had given "to ourselves" this Constitution on the 4th November, 1972, i.e., on this very day 26 years ago and in the Constitution we declared that it was our duty to safeguard, protect and defend this Constitution. . We have laid down that it is the duty of every citizen to observe the Constitution and the highest office

> oath, to "preserve, protect and defend the Constitution." There can hardly be any other better way to impress the importance of the Constitution. However, our public conduct and discourse have, for what-

holders of this Republic take

ever reason or reasons. marginalised the centrality of the Constitution to our collective lives. Our ways of conducting public lives beyond and above the law, in addition to a number of other facts, also stem from this

marginalisation of the Consti-

tution. It is widely recognised that ours was one of the best Constitutions of the post colonial era. Unfortunately, in terms of constitutionalism, we have regressed from the starting point in 1972 and it is surely time to start with renewed oath and affirmation of our commitment to the Constitution, without which our collective lives can not be constructed in meaningful ways for a better future.

It is rather interesting to note that we are almost afflicted with proliferation of "days". We hardly have a fortnight without some "day" or other to celebrate or commemorate. Various UN

related "days", environment, housing immunisation, peace, disarmament "day" and so on are mentioned and 'covered' by the media with all kinds of messages from high and far. We also have profusion of 'special supplements' on special occasions of other countries as

What about our own Constitution? It may not be out of place to mention that the last act for someone to become a citizen of the United States of America, after fulfilling the host of required conditions, is to take and pass an examination on the Constitution of USA and then take an oath of allegiance to observe and preserve the Constitution of American. One becomes an American citizen only after taking such an oath.

Can we not take a day to remind ourselves of our Constitution and thereby begin the process of preserving, protecting and defending the Constitution. Today is the day in which, we. the people of Bangladesh. adopted, enacted and gave to ourselves this Constitution, 26 years ago. It is better late then never and hence, we may start celebrating our Constitution by making this day, the 4th of November, a special one and more so in view of the fact that vesterday, the 3rd of November. was one of the starkest reminders of days and times without a Constitution when no one was under the oath to preserve, protect and defend the Constitution, as the Constitution meant, intended and provided for.

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Under Article 33 of the 1972 constitution an individual was protected from being subjected to preventive detention without trial. Within nine months of the commencement of the Constitution the ruling party introduced the Second Amendment. This amendment provided for preventive detention. It also made provision for the proclamation of emergency and during the period of emergency, suspension of fundamental rights concerning freedom of movement, assembly, association, thought, conscience and speech etc. Under Article 141C the President was given powers to curtail the court's judicial authority to enforce fundamental rights conferred by the Constitution. During the period 1972-75 fundamental rights were enforceable for only two years. Emergency was proclaimed on 28 December 1974 and enforcement of fundamental rights was suspended. It was not until November 1979 that Supreme Court was empowered

democracy came to an abrupt end with the introduction of the Fourth Amendment. The Amendment changed the basic structures of the Constitution and transformed the Westminster-type parliamentary system of government to single party presidential rule with the President exercising supreme executive, legislative and judicial authority of the state. Under Article 72 of the original constitution there could not be more than sixty days interval between two sessions of Parliament. However, under the new arrangement two sessions of Parliament in a year would suf-

of the Fourth Amendment was the encroachment on the independence and jurisdiction of the judiciary. Under the original Article 96 (2) a judge was irremoveable except by an order of the President following a resolution in the parliament

supported by no less that twothird members of the Parliament, on ground of "proved misbehaviour or incapacity". Under the Fourth Amendment a judge could be removed by order of the President on similar. grounds. The provision for consultation with the Chief Justice with regard to appointment of judges of the Supreme Court was repealed. The control in respect

In January 1977 General Ziaur Rahman took over the offices of the President and CMLA from Justice Sayem. Soon after he brought important amendments to the Constitution. While the amendments retained the principles of democracy and nationalism, they deleted secularism altogether and qualified the word socialism to mean "economic and social justice". An additional clause was incorporated in Article 8 which read "Absolute trust and faith in the Almighty shall be the basis of all actions" of the State. General Zia engineered a total renovation to the Preamble and the Fundamental Principles of State Policy parts of the Constitution of Bangladesh in an arbi-

frary way.

By the Proclamation of

Constitution and build up public opinion for necessary, amendments for restoring the basic character of the 1972 Constitution, which to an extent embodied the aspirations of the people. It is up to the civil society to take up this task. In order to unite on a common platform on issues of such national import the civil society has to free itself from the partisan divide.

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