

## The Constitution Day

## 26 years of Bangladesh Constitution: Down the History Lane

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.

IN our Constituent Assembly, this eighteenth 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 destination.

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 itself.

**The Constitution: At a Glimpse**  
Our Constitution is divided

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 in Part I.

Part II contains the fundamental 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 to 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.

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 its sessions, the committees, the secretary, the rules, privileges, the legislative and the financial procedures and ordinance-making 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.

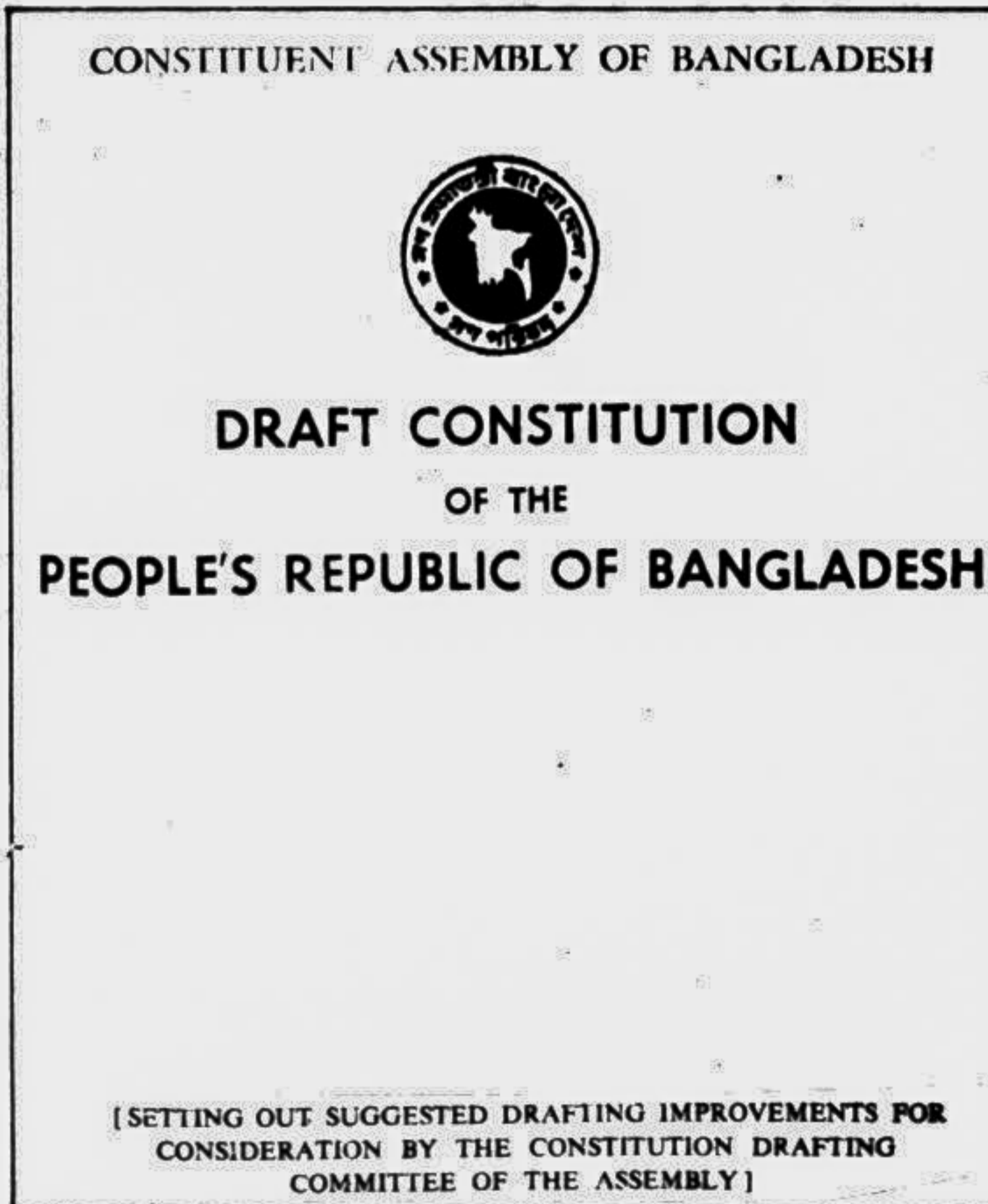
Part VII deals with election, constitution and power of Election Commission, preparation of the electoral roll and the conduct of the election.

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 XA 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 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 wide-ranging matters and engendering widespread controversies.

There have been thirteen amendments to our Constitution up to 1998. These are as follows:  
**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 rights.

**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



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 January, 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 office 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 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 Nationalism and not Bangali Nationalism.

b) 'Bismillah Hir-rah-manir-Rahim' was added at the beginning of the Preamble of the Constitution.  
c) Two out of four fundamental principles of State policy — nationalism, democracy, socialism 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.  
i) It may be noted that the Constitution (Fifth Amendment) Act was passed when the Constitution was not fully restored.  
**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 Parliament.

**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.

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**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:** The thirteenth amendment was made in March 28, 1996. It introduced the provision of a non-party caretaker government. It will work during the period from the date of which the Chief Adviser of this government enters upon office after parliament 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 consist 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 law-making to sustain 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 daunting uphill task today than before.

The writer gratefully acknowledges the following valuable source of information: *Constitutional Law of Bangladesh by Mahmudul Islam (BILLA-1995)*

## 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.

CONSTITUTION 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 people."

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, continued for the next two decades.

Following the mass upsurge of 1990 civilian law 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 anti-secular 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.

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 to enforce fundamental rights.

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

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

supported by no less than two-thirds 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 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 Minister 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 class.

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 arbitrary way.

By the Proclamation of

April 23, 1977, laws made during 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. Provisions were made under which the amendments to the Constitution 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 34/A of the Fourth Schedule). Although subsequently martial law was lifted, the rights and privileges which were suspended during the operation of the law were to remain so even after such revocation.

After the assassination of President Ziaur Rahman, Justice Sattar became the new President. He was subsequently elected to the office but within months his government was overthrown by General Ershad 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 withdrawn. The Seventh Amendment 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 religion of Bangladesh under the 8th amendment to the Constitution.

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. Efforts must be geared to develop awareness about the 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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## List of Members of the Drafting Committee of Bangladesh Constitution

No.	Name	Position
1.	Dr Kamal Hossain	Chairman
2.	Syed Nazrul Islam	Member
3.	Tajuddin Ahmed	"
4.	Khondokar Moshtaq Ahmed	"
5.	A H M Kamruzzaman	"
6.	M Abdur Rahim	"
7.	Abdur Rouf	"
8.	Md Iqbal Rahman	"
9.	Abdul Momin Talukdar	"
10.	Prof Abu Sayeed	"
11.	Mohammad Baftullah	"
12.	Amir-ul-Islam	"
13.	Badal Rashid	"
14.		