

The Constitutional Journey of Bangladesh

by Syed Ishtiaq Ahmed

A constitution is a sacred document of a nation. The thoughts and conscience of the people and the basic philosophy of a nation are reflected in the constitution. After the War of Liberation the task of framing a new constitution for independent Bangladesh was taken up. The Constitution of our country was framed and adopted in the Constituent Assembly on 4 November 1972, and came into effect on 16 December of the same year. The framing of such a Constitution in a short span of time post-revolution is a glorious chapter in the history of our country. The basic principles of governance and state policy were reflected in the preamble to the Constitution. While on the one hand the philosophy and ideals reflected our revolutionary tradition, on the other hand, it also reflected the bitter past experiences of the infamous period of despotic, undemocratic and authoritarian rule. The Members of Parliament, with idealism, with commitment to democracy and the rule of law and pledged to the good of the country and people, endeavoured to frame our Constitution reflecting these ideals and experiences in the substantive provisions of the Constitution.

Subsequently, as ill luck would have it, we slowly began to return to the undemocratic, despotic authoritarianism of the past. The Constitution began to be mauled. This began with the addition of the provisions for preventive detention, and by incorporating a power to declare emergency. Till today these ignominious provisions are continuing, and have created a state of affairs in the governance of the country, which is not only against the public interest, but is gradually becoming intolerable and dangerous. These amendments were made not in the interest of the country or the good of the people but for the sole purpose of the protection and perpetuation of the government in power. Constitutional amendments are made to improve a constitution, to add what is not provided but is required, and to overcome possible constitutional crises. It is never desirable to amend a constitution in the interest of individuals or the government in power. The amendments have been made simply in the party-political interest, and not with any consideration of whether or not these would address the welfare of the nation and the people. However, the last three amendments were exceptions to this.

The most dreadful surgery performed on the Constitution was by the Fourth Amendment. The Fourth Amendment struck at the roots of democracy by establishing a one-party system of government. The fundamental rights of the people were turned into mere mockery. The jurisdiction of the Supreme Court to enforce these rights was taken away. Through this, the independence and basic structures of the Supreme Court was destroyed. This disgraceful docu-

ment was a cause of much satisfaction for the anti-liberation forces. It was a rare example of establishing an undemocratic system through democratic means. Its dreadfulness was far-reaching. After this, for a long time political authority was concentrated in the hands of ambitious and anti-people men. Even before the Fifth Amendment, by one of the basic assumptions and principles of the Constitution were destroyed during the first Martial Law. A constitution is a document of a democratic system of government. Democracy is not a matter of religion or non-religion. It is such a doctrine which is naturally secular. If a constitution is framed on the basis of any religious credo, modern notions of democracy, fundamental rights and the rule of law are not likely to be a part of it. In successive ages rulers have attempted to fulfill their designs, taking advantage of the religious sentiments of the people of our country who are simple, straightforward and god-fearing, yet poor and distressed. Our first period of military rule is such an example. The practice of amending the Constitution by military dictat was current during all periods of military rule. The main distinguishing feature of such amendments during the first Martial Law era was firstly to add the name of Allah, the Beneficent and Merciful. If that was all then perhaps there would be nothing more to say; but the intention was to put in place a new paragraph in place of the second paragraph to the preamble, which is still in force. The second paragraph of the preamble to the original Constitution contained our pledge to those great ideals which inspired our heroic people to dedicate themselves to, and our brave martyrs to sacrifice their lives in, the historic struggle for national liberation. These were nationalism, socialism, democracy and secularism. These were declared to be the basic principles of the Constitution. During Martial Law, the main and fundamental basic principle of secularism was replaced by the words "Absolute trust and faith in the Almighty Allah". The historic struggle for national liberation was also termed the war of national independence. Thereafter during the long period of this government the Constitution was freely amended through military dictat without any apparent good cause except for the cause of the military regime. Who will say these amendments were necessary for the good of the people, in the interest of the nation or for overcoming some constitutional crisis? These were done only because they were necessary for the perpetuation of the ruling junta.

In the past ten years, the process of forming two consecutive democratic governments through free and fair elections, for the first time in the history of this country, has created the possibility for establishment of a bi-partisan parliamentary democracy. It has been proved at least that government can be changed through elections. The government in power is obliged to resign at the end of their term due to Constitutional provisions, and elections must be held under a non-partisan, neutral, interim government. That a government will continue to last for more than five years at a stretch is an idea which should not be there anymore. This is a very important philo-

authoritarian rule the Ninth and Tenth Amendments were enacted, mainly to create constitutional impediments in the way of establishing a caretaker government if the revolution succeeded and the government fell. In whose interest were these amendments brought? These were weapons against the revolutionary people engaged in the struggle on the streets. Yet, these weapons could not stop the second and successful revolution on 4 December 1990. Subsequently,

philosophical and political part of the concept of parliamentary democracy.

However, it has to be said, with sadness, that for most of this year period both main political parties as respective opposition parties have continued to boycott Parliament. As there is a majority Government party in Parliament, the number of opposition members was not very small at any time. There is no reason for our politicians not to understand that in order to institutionalise democracy, the presence in Parliament of a large number of opposition members, free debate, discussions on policy and constructive political steps are an absolute necessity.

The pressure which can be created on the Government in Parliament, cannot be so created on the streets. Both main parties were in Parliament as the opposition, first Awami League, and now B.N.P. Yet both have been engaged in the politics of boycotting Parliament, and strikes, the politics of confrontation, the politics of resentment and hatred. This is not constructive politics.

In established democracies of the world, it would be impossible to win elections and form governments on the basis of this kind of politics. Yet that is what happens in our country. This kind of politics has to be shunned. A constructive political process, political tolerance, consensus between the government and the opposition on basic national issues, or at least dialogue and consultation, is desirable. Complaints are heard that the Speaker in Parliament is biased, and there is inequality in the time set aside for the opposition to speak. Even so, a strong opposition party can get this imbalance redressed and build up a strong resistance to it while staying in Parliament. They can build up strong public opinion against such iniquity. Even if the television serves singularly as the mouthpiece of the Government, the radio transmits the Parliamentary proceedings word for word. Restrained perseverance, systematic and lawful protest and resistance cannot be as successful on the streets as they can be in Parliament. The politics of strikes, violence, confrontation and hatred is distressing and by and large the people abhor it.

Society and people have to be protected and secured from terrorism, which is manifesting itself in frightening dimensions and many forms. The general perception in people's minds is that all political parties harbour terrorists. The terrorists, or mafias, of either party remain above the law when that party is in power. Law-enforcing agencies are unable to apprehend and bring them to justice. On the contrary, they are used to harass the mafias or supporters of the opposition party, and in certain cases, to keep them in custody under the preventive detention laws.

Political parties need mafias to maintain their ascendancy in elections and to strengthen their political power in constituencies. Politicians, mafias, and the police and administration have fallen into such vicious circle, which if not pierced, will endanger the entire civil society. Everyone is aware of its negative impact on economic activities. This will

have to be resolved politically in Parliament and through dialogue and understanding among the major political parties in and outside Parliament. There is still time to control the mafias, who are criminals. Otherwise, the mafias will become Frankensteins of those who created them. A little goodwill, a little foresight, a little patriotism, love for people, with these we can initiate a new social system where our future progeny will be able to live in a healthy, civilised and secure, free environment.

Even if one party cannot show respect to the convictions of the other party, mutual tolerance is essential. This kind of political attitude, tolerance, constructive competition will enable the realisation of our dream, the dream we had of an exploitation-free society where the rule of law, political, economic and social equality, justice and freedom would be ensured for our people. Through this we wish to establish such a social system which will be a better system for our future generations than the one which we would have lived through.

Every constitution is an eternal and dynamic document. In this document, in a small compass it contains the principles of governance. The responsibility of interpreting the constitution is that of the Supreme Judiciary, and if that interpretation fails to meet the needs of the changing society then the constitution becomes a dead letter, which is like dead leaves shed from a live tree. Therefore, the primary and sacred duty of the Judges of the Supreme Judiciary is to give such a progressive interpretation of the constitution as will be able to meet the needs of the unfolding future. In underdeveloped countries like ours, this duty can only be discharged through "judicial activism". Our Judiciary will have to take a leading role in interpreting our Constitutional law. This process was impeded in the past because of disruption of the workings of the Constitution and the absence of democracy. However, for the past ten years at a stretch a constitutional system has been in place. In this period although sometimes our Supreme Judiciary has undertaken a bold role, a dearth of a clear or consistent trend of "judicial activism" or "creativity" can be felt. We can certainly hope that our Judges, imbued with a befitting and progressive attitude towards ensuring and enforcing the fundamental rights of people, and above all towards safeguarding the rights of the poor, indigent and unorganised people, will go forward on this path. A clear beginning of this process will be a very timely and big step for us.

An uneasiness has been discernible recently in the relationship between the Executive and the Judiciary. The prudent and respected persons at the helm of these two limbs of the State will be able to avoid all unpropitious conflict or confrontation. That will certainly be beneficial for all of us. This is the wish and yearning of all right-thinking people.

The writer is a senior advocate of Bangladesh Supreme Court. This is an edited version of his "Constitution Day 2000" lecture delivered on 4 November at a programme organised by Bangladesh Legal Aid and Services Trust (BLAST).

গণপ্রজাতন্ত্রী বাংলাদেশের সংবিধান

গণপ্রজাতন্ত্রী বাংলাদেশ সরকার
আইন, বিচার ও সংসদ বিষয়ক মন্ত্রণালয়
১৯৯৮ সালের ৩১শে ডিসেম্বর পর্যন্ত সংশোধিত।

A.N. WIKTOR

প্রকাশন প্রতিষ্ঠান
গণপ্রজাতন্ত্রী বাংলাদেশ

the Eleventh and Twelfth Amendments were framed, for the first time, in the interest of the people, to preserve the revolutionary changes and to meet the constitutional crisis. Parliamentary democracy was reestablished by deleting several amendments which had been enacted in the past. The Thirteenth Amendment was passed to meet another constitutional crisis. It was inserted in the Constitution to provide for the establishment of the caretaker government. Other than the First, Third, Eleventh, Twelfth and Thirteenth Amendments, no other amendment to the Constitution was made in the interest of the people, the country, the nation or to overcome any constitutional crisis.

In the past ten years, the process of forming two consecutive democratic governments through free and fair elections, for the first time in the history of this country, has created the possibility for establishment of a bi-partisan parliamentary democracy. It has been proved at least that government can be changed through elections. The government in power is obliged to resign at the end of their term due to Constitutional provisions, and elections must be held under a non-partisan, neutral, interim government. That a government will continue to last for more than five years at a stretch is an idea which should not be there anymore. This is a very important philosophical and political part of the concept of parliamentary democracy.

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From Law Desk ...

A Supreme Court without An E-mail Address!

Forget about the urgent need of introducing computerized case management system in the courts of Bangladesh. The highest court of justice, the Supreme Court of Bangladesh lacks even basic communication tools. There is only one fax machine in the Supreme Court of Bangladesh and most of the time that remains out of order. As a consequence, judges and officials have to experience faxjam due to chronic mechanical faults it faces. In this era of electronic communication the apex court does not have even an e-mail address. Recently Chief Justice Latifur Rahman publicly expressed his dismay and frustration over such pathetic state of communication system of Bangladesh Supreme Court. While attending an international conference, the Chief Justice found himself the only Chief Justice without any official e-mail address. Logistic facilities like photocopying, binding are also in a very bad shape. Lawyers and court officials have been demanding for quite a long time to improve the existing amenities of the country's highest seat of justice.

Absence of Environmental Courts Stands in the Way of Penalising Offenders

The Department of Environment (DOE) served the 'third notice' on more than 1200 factories and other establishments in Dhaka, Chittagong and Khulna for severely polluting the environment. The notice was issued a long time ago.

The DOE asked the owners to take preventive measures against pollution being caused by their establishments, to avoid legal actions. Most of the owners did not respond. Ultimately, it referred over 1000 offences (cases) to district courts for legal actions, in the absence of environment courts. But nothing happened. The DOE could not pursue the cases because of an acute shortage of manpower.

A high official in the DOE said the department cannot take action against the offenders because it has no policing authority or magisterial power to penalise an offender.

Of late, the DOE has given clearance for setting up new industrial establishments and construction or high-rise buildings. But the department itself cannot take action if factories of high-rise buildings are constructed without obtaining clearance certificates from them.

The Rajdhani Unnayan Kartripakkha (Rajuk), to some extent, plays a regulatory role in the Dhaka city. But, if they do not do that wholeheartedly there is nothing to compel the offenders to abide by the environment regulations.

The most important functions of the DOE are (a) enforcement of environment acts and (b) motivation and creation of awareness among the people about environmental degradation.

The watchdog function includes preparation of data on the state of environment and the monitoring of pollution (air, water, etc.). The organisation has developed some data and monitored the quality of air and water in some specific areas across the country, including the Dhaka city. But it could not prepare complete reports. It has been able to create an awareness to some extent among the people about the environmental degradation, in cooperation with government bodies or non-government organisations (NGOs). It provides technical advisory services to government and NGOs.

The total staff strength of the DOE at present is 160, including officers and peons, against the approved strength of 173. Of them, about 60 per cent are based in Dhaka and the rest 40 in four divisional towns. The organisation has no office and staff in the Sylhet and Barisal divisional towns. It has no man in the district headquarters.

About the state of environment in the Dhaka city, the official said major environmental problem for the city is its over-population. The city has lost its sustainable capacity to hold such a load. The ecosystem in the city has been affected severely and all types of pollution are on the increase, he said.

Announcement

For last five years 'Law and Our Rights' page has been expressing your views and concerns on legal and human rights issues of public importance. On past occasions this page underwent several changes in response to your suggestions.

The Daily Star intends to make this page more people friendly, informative and practical. We cordially invite you to be a part of our team to make this happen. Please send us your ideas, thoughts and recommendations to:

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Section 54: Twisted with Reasonable Suspicion

An Investigative Report by Odhikar

UNDER Section 54 (S54) of the Code of Criminal Procedure of 1898, individuals may be arrested under suspicion of criminal activity without any order from a magistrate or a warrant. According to the Section, there are nine specific reasons for which the police may arrest someone under this law. These reasons (summarised from the original) are:

If the person arrested has been concerned in any cognizable offence or if there has been credible information against him or the police have reasonable suspicion to think so.

If the person has in his possession any implement of house-breaking and cannot give a lawful excuse for doing so.

If a person has been arrested under this or any other Code, or by Government Order, to be an offender;

If there is reasonable suspicion to believe that the person possessed stolen property;

If the person obstructs a police officer on duty; or if he has or attempts to escape from lawful custody;

If the person is a deserter from the armed forces of Bangladesh;

If the person has been concerned in or if there is credible information of his being so involved in; or there is reasonable suspicion that he is concerned in committing any act abroad which would have been a punishable offence in Bangladesh (if committed in this country). He would be detained under custody in Bangladesh under the Fugitive Offenders Act 1881 or under extradition laws.

If the person is a released convict, he can be arrested if he does not notify the sentencing judge of his change in address or absence from residence;

or petition, for detention under the Special Powers Act, is submitted to the District Magistrate from the concerned police station, through the Superintendent of Police. The District Magistrate will then issue a detention order and send it for approval to the Ministry of Home Affairs.

There have also been cases where the police have arrested a person under S 54 of the Code of Criminal Procedure and then included his name in a criminal case even though his name was not found in the First Information Report (FIR). Thereafter, the unfortunate detainee is charged.

Investigations carried out by Odhikar from August 2000 have shown that the large majority of persons arrested under S 54 of the Code of Criminal Procedure are from very poor economic backgrounds. They are either homeless persons, rickshaw pullers, Political activists: another victim of twisted suspicion

or petition, for detention under the Special Powers Act, is submitted to the District Magistrate from the concerned police station, through the Superintendent of Police. The District Magistrate will then issue a detention order and send it for approval to the Ministry of Home Affairs.

Other investigations by Odhikar have shown that women and children are picked off the streets at random, charged under S 54 and sent to the various shelter homes and jails in the country, as being under 'safe custody'. During times of political unrest, arrested under Section 54 of the Code of Criminal Procedure have been incarcerated for more than 2 years. They were arrested solely on mere suspicion. This law, though innocent in appearance, has given enormous power to the police to detain whomever they

arrested under Section 54 on the streets asking for money.

The police officer in Munshiganj Thana admitted that

Section 54 of the Code of Criminal Procedure was a way for the police to get money to the person he was looking for and on the way home was accosted by the police.

On interviewing some of them who had been released from Munshiganj and Narayanganj thana, they said that after they had been picked up, the police asked them for Taka 100/200 and said that they would be freed from the police van if they paid up. Those who could not pay found themselves in the police lock-up, where the police demanded Taka 2000/3000 for their release.

If the person was affluent, more money was demanded. Occasionally, the police threatened those who could not pay. One of the most common wishes was to include the unfortunate's name in an unresolved police case. Some were also beaten.

Case study

Narayanganj: Md. Shirajul Islam had returned from abroad a couple of months before arrest. Before leaving the country, he married the girl he loved. This marriage was not accepted by his or his wife's family. After returning from abroad, his wife came to stay with him but she was ousted by his mother. As a result he suffered a mental breakdown and became addicted to Ganja. On 2 September 2000, his mother handed him over to the police, who arrested him under S54. The arresting police officer, Saiful Islam, told the investigators that Shirajul Islam is drug addict who used to torture his wife. She will probably be sent to safe custody.

section 54 on 3 August at around 10:30 at night. He is a vegetable vendor who went to Malipatior to borrow some money for his business and buy medicine for his sick child. He could not find the person he was looking for and on the way home was accosted by the police.

The police asked him for Taka 200 and said they would let him go if he paid up. He begged the police that he was a poor vegetable seller and did not have so much money. He also told them that the money he had was to buy medicine for his child. The police took him to the police station and kept him in the lock-up. He repeatedly told the police that his child was ill and he had to buy medicine for him. Instead, the police tied him with a gamcha's and beat him with a ruler. He was given no food during his detention.

Odhikar investigators have also come across a case in Narayanganj police station, where the parents of a man, dissatisfied with his choice of wife, had managed to have him arrested under S54.

According to the government, 1,329 persons were detained in Dhaka under this section from January to September 1999 and, in 1998, the Home Ministry acknowledged that police abused S 54. The various governments, which have come to power in Bangladesh (if committed in this country), would have occasionally abused this provision to harass and intimidate members of the political opposition and their families.

It is common for persons arrested under S 54 to find themselves later charged under the Special Powers Act 1974. This conversion occurs when a prayer