



## LAW vision

29 years of the Constitution of Bangladesh

# Today is our 'Constitution Day'

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29 years ago from 'today - 4 November 2001', the people of Bangladesh gave to themselves, a Constitution. "In 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", the preamble of the Constitution of the People's Republic of Bangladesh solemnly testifies. The quest of the Bengalis for political emancipation through constitutional rule and democracy culminated into a liberation war in 1971 out of which Bangladesh was born. The struggle was closely linked with the aspirations of the people for establishing a civil society with an orderly and just government elected through free and fair choice in a democracy where fundamental human rights are guaranteed and where an independent judiciary acts as the custodian of the constitution. This is the genesis of the Constitution of the People's Republic of Bangladesh as the people of Bangladesh made pledge to themselves after a heroic struggle for national liberation. The Constitution came into force on 16 December 1972.

### A voyage to the past

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 original Constitution of Bangladesh introduced a parliamentary form of government with the President as its constitutional head. It provides a responsible executive, a non-sovereign legislature and an independent judiciary with appropriate separation of powers, and checks and balances among them. The supreme law of Bangladesh, the Constitution, confers only limited law making competence on Parliament. Unlike the British Parliament, the Bangladesh Parliament does not possess any intrinsic law-making power, which derives from the constitution. The parliament cannot make any law in contravention with the provisions of the constitution. Article 26(2) iterates, "The state shall not make any law inconsistent with any provision of this part, and any law so made shall, to the extent of such inconsistency, be void."

The Constitution embodies the principle of ministerial responsibility, both individual and collective, to the parliament and ultimately to the people, the source of "all powers in the republic". Bangladesh started its journey with a parliamentary form of democracy, derailed afterwards from the fundamental aspiration of democratic governance by introducing one-party political system with an 'all powerful head of the state-the President'. The change took place in early 1975 by way of a notorious amendment to the Constitution. Through the infamous Constitution (Fourth Amendment) Act, 1975, one party dictatorial system known as 'BAKSAL' was substituted for a responsible parliamentary system. The 12th Amendment to the Constitution re-established the parliamentary form of government in 1991. The last amendment to the Constitution has added a unique feature. The Constitution (Thirteenth Amendment) Act, 1996 introduced the provision of 'Non-Party Caretaker Government' to the Constitution of Bangladesh. 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 parliament

### The preamble of the Constitution

The preamble of the Constitution of Bangladesh proclaims that the high ideals of 'absolute trust and faith in the almighty Allah', 'nationalism', 'democracy' and 'socialism meaning economic and social justice' shall be the fundamental principles of the Constitution. It also states that it shall be a fundamental aim of the State to realise a socialist society in which the rule of law, fundamental human rights and freedom, equality and justice will be ensured. The preamble recognises the fundamental aim of the state as to realise the 'democratic process' for establishing a socialist society, free from exploitation. The framers conceived of a democratically run welfare state to eliminate inequality of income and status and standards of life.

### The fundamental principles of state policy

Part II (Articles 8-25) of the Constitution gives an account of the fundamental principles of State policy. The four 'high ideals' mentioned in the preamble along with other specific economic, social and political goals shall be fundamental the governance of Bangladesh, shall be applied by the State in the making of laws and interpreting the Constitution. They will be the basis of work of the State and of its citizens. They will not be enforceable in the court of law. The principles, among others, include: 1) promotion of local government institutions composed of representatives of the area concerned and with special representations of peasants, workers and woman to build demo-



cratic structures at the grass-root level, (b) participation of women in all spheres of national life, (c) guarantee of fundamental human rights and freedoms and respect for the dignity and worth of human persons and effective participation by the people through their elected representatives in administration at all levels.

In short, the Republic is a people's one, and the process of governance is democratic. One of the most significant characteristics of the democratic governance is representative local government. It guarantees the right of the people to elect their representatives who take charge of the statecraft.

### Fundamental rights

For realisation of the aim mentioned in the preamble and some of the fundamental principles of the state policy, Part III of the Constitution provides for a catalogue of rights as fundamental, which the state is mandated to guarantee for its citizenry. Provisions of the Constitution including fundamental rights governing political activity and the ways in which they are operated/interpreted in practice can be summarised as follow:

Equality before Law and Equal Protection of Law: Article 27 pro-

vides that all citizens are equal before the law and are entitled to equal protection of law. It combines the English concept of equality before law and the American concept of the equal protection of law.

**Freedom of Movement:** Article 36 provides that subject to reasonable restrictions imposed by law in the public interest, every person has the right to move freely through out Bangladesh, to reside and settle in any place in Bangladesh and to leave and re-enter Bangladesh.

**Freedom of Assembly:** Article 37 provides that every citizen shall have the right to assemble and participate in public meetings and processions peacefully and without arms. This right can be restricted only by a law imposed in the interest of the public order or public health.

**Freedom of Association:** Article 38 secures the freedom of association of citizens upon which the very existence of democracy is dependent. Right to form associations or unions is guaranteed subject to any reasonable restrictions imposed by law in the interests of morality or public order.

**Freedom of Expression:** Freedom of expression is secured in Article 39, which provides guarantee for freedom of thought, conscience, speech and press. Restrictions on the exercise of freedom of speech and expression can be imposed by law on a number of grounds: security of the state, friendly relations with foreign states, public order, decency, morality or in relation to contempt of court, defamation, or intention to an offence.

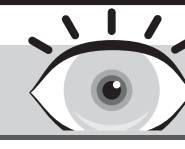
**Enforcement of Fundamental Rights:** Article 44 categorically states that the right to move the High Court Division in accordance with Article 102(1), for the enforcement of fundamental rights enumerated in Part III including the above-mentioned rights.

There are other constitutionally guaranteed rights too. The future of the constitutional governance lies with the implementation of the liberal provisions of the Constitution. When rights will be guaranteed, scopes for social responsibilities will be widened.

### A difficult journey towards constitutional governance

The whole process of institutionalisation of democracy perhaps begins with the process of having representatives at various levels of governance. Being under military rule for almost one-third of the period since the independence of the country, when the supreme law of the land- the Constitution was either suspended or parts of it remained in abeyance, the people of Bangladesh hardly had the opportunity to exercise democratic rights and practice freedom. The local government units have been routinely manipulated by all the previous governments. The purpose was to create respective rural support base for the ruling party. The effective participation by the people through their elected representatives in administration at all levels, as envisaged in article 11 of the Constitution, has not yet been ensured.

A Constitutional government is enshrined with a value system, which ensures societal change as well as justice. Every country has a constitution but may not have a constitutional government. A constitutional government requires primacy of rule of law. Bangladesh is abundant with constitutional provisions and statutory laws guaranteeing political freedom. However, the existence of a number of repressive laws undermines the 'de jure' pledges of freedom. Sadly the 'hard earned democracy' has not yet obtained an institutional shape. Bangladesh's politics remain confrontational and inimical to reform. There is no system of accountability within the existing 'political party mechanisms'. The judiciary is still not functionally independent of the executive. The aspiration of the Constitution as reflected in Article 22 ("The state shall ensure the separation of the judiciary from executive organ of the state") has not yet been materialised. With the installation of a newly elected government in power, it is the earnest hope of the people that they will act to preserve, protect and defend the Constitution both in letter and in spirit.



## RIGHTS corner

# Constitutional changes and governance

MANZOOR HASAN

The 1<sup>st</sup> October 2001 general election's verdict is significant because it has given the two-thirds majority required for constitutional amendments. But constitutional amendments should not be equated with enactment of new statutes. The last constitutional amendment was the 13<sup>th</sup> amendment carried out in 1996 to incorporate the provision of the 3-month neutral interim caretaker government to be juxtaposed between two elected governments. In general terms, constitutional changes can come about in two circumstances: either through political consensus or by force (political or military). It is also accepted that constitutional changes through consensus are robust and defensible, constitutional and politically.

One can find examples of constitutional changes in many 'transitional' Eastern European and developing countries. Thailand is a case worth citing. The Thai Constitution has made provisions for an elected civil society Senate whereas previously it was a creature of the government. The majority of the senators will be representatives of civil society representing a cross-section of diverse national interests. The Constitution has embodied an important role for the Senate in appointing nominees to the new independent agencies mandated by the Constitution to promote transparency and accountability. These agencies include the Constitutional Court, the National Counter Corruption Commission, the Election Commission, Ombudsmen, the National Human Rights Commission, and the State Audit Commission.

The new Thai Constitution has for the first time enshrined civic involvement as both state policy and a civic right. It stipulates that the government must encourage public participation as a matter of policy and states: "A person shall have the right to participate in the decision-making process of State officials in the performance of an administrative act which affects or may affect his or her rights and liberties, as provided by law." In terms of resource management the Thai Constitution has made significant public participation an essential requirement and it is not possible for bureaucrats to implement government or state-enterprise projects or grant concessions. The Constitution takes it even further by giving communities and local governments the right to participate in the management, maintenance, preservation and exploitation of natural resources and the environment. The constitution requires public hearings for any project or activity that may affect the quality of the environment, the quality of life, or any other interests of an individual or a community.

The new Thai Constitution has also incorporated certain mechanisms to promote accountability and transparency. An independent agency with broad powers of investigation has been established. It has the power to overrule the attorney general and initiate prosecution. An elaborate process has been chalked out for the appointment of the Commission members in order to eliminate any political interference. The new commission has been given the power to investigate accumulation of 'unusual wealth'. The Thai courts will presume any significant increase in disposal income or assets as outcome of corrupt activities. It is then up to the individual to discharge the onus of proof that the wealth was legally obtained.

The new government, with a strong anti-corruption and anti-terrorism mandate, could take a serious look at the present constitution and initiate a process of consultation with political parties and relevant civil society organizations. A well-thought-through and time-bound process could yield a list of changes, both constitutional and legislative. But time is of the essence as any new government has a limited duration within which to undertake significant policy changes.

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## FACTS file

# Chronicle of constitutional amendments

LAW DESK SPECIAL

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 now. 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 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 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 legitimise 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:

- The citizens of Bangladesh would be known as Bangladeshis. The nationalism would be Bangladesh Nationalism and not Bangali Nationalism.
- 'BISMILLAH-AR-RAHMAN-AR-RAHIM' was added at the beginning of the Preamble of the Constitution.
- 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.
- Provision for nominating special representatives of women, labour and peasants to the local self-governing institutions was provided for.
- Provision for establishing brotherly relations with all Muslim countries was incorporated into our Constitution.
- 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.
- The Ministers would be answerable to the Parliament though not accountable to it. They would be accountable to the President.
- 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 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 with-

drawal 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.

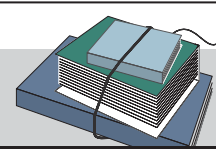
**Tenth Amendment:** Article 65(3) originally provided for reservation of 15 seats for women for 10 years to be elected by Parliament. By Second Proclamation Order No IV of 1978, the number of the reserved seats was increased to 30 and the period was increased to 15 years. By the Constitution (Tenth 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.

**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 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.



## LAW watch

# The Constitution of the Republic of South Africa, 1996



Act 108 of 1996

The Constitution of the Republic of South Africa, 1996 is a unique example of pro people Constitution safeguarding democracy and civil liberties. It has many distinguished features including making economic, social and cultural rights enforceable in the court of law. It also provides for a number national institutions supporting constitutional democracy, e.g., The Public Protector, The Human Rights Commission, The Commission for the Promotion and Protection of the Rights of Cultural, Religious, and Linguistic Communities, The Commission for Gender Equality etc. Any law or conduct inconsistent with the Constitution is invalid and the obligations imposed by it must be fulfilled.

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