

Selected extracts from the November issue of Forum

Bangladeshi constitution: a good governance paradigm



MANZOOR HASAN

MODERN day constitutions or codes of written laws have antecedents which can be traced back thousands of years. Such historic documents have gener-

ally enshrined the legal rights of citizens ranging from issues, such as, the protection of the poor from the usury of the rich to that of non-payment of taxes by widows and orphans. In modern times, states have adopted constitutions which are either written or based on 'usage

and conventions' catering for either unitary states or federal or supranational entities. But essentially the constitution of a state guarantees its citizens certain clearly laid down rights and entitlements and that state of affair has to be achieved by the creation of institutions, on the one hand, and the establishment of accountability relationship between institutions of state and its citizens. In other words, the quality of good governance in any society would eventually depend on the intensity of interface between the 'demand' of citizens' entitlements and the 'supply' of institutions' responsiveness.

The December 2008 general elections' verdict is significant because it has given the government the two-thirds majority required for constitutional amendments. 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, both constitutional and politically. In contrast, changes brought about by force generally tend to be unsustainable.

Given the present debate that is ensuing in the country on possible changes to the Constitution of the People's Republic of Bangladesh, I take this opportunity to put some thoughts forward for the consideration of the readers of FORUM. The new government, with a strong mandate for 'change', is taking a serious look at the present Constitution and has initi-

ated a process of consultation for possible amendments and refinement in light of its nearly 40-year existence. A well thought through and time-bound process of consultation could yield a list of changes, both constitutional and legislative.

Constitution and governance

The Constitution of Bangladesh, which came into operation on December 16, 1972, is as good as any other constitution. The Constitution of Bangladesh is divided into 11 parts containing 153 Articles. The Preamble declares that Bangladesh is a sovereign unitary Republic and the guiding principles would be that of nationalism, democracy and socialism. Given the dynamic nature of our society, it has gone through a number of changes, as has been the case with many such documents, and it is also expected that it will go through further refinement in the future, with the betterment of people's welfare in mind. But in the final analysis, what is important is that the Constitution would bring about within our society a balance between change and stability, tolerance and competition, opportunity and meritocracy.

For the full version of this article please read this month's Forum, available free with *The Daily Star* on November 1.

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Interview with Dr Kamal Hossain On realising our constitutional dreams

KAJALIE SHEHREEN ISLAM

FORUM: How do you view the recent developments regarding the courts' ruling of the fifth and seventh amendments to the Constitution illegal and void?

Kamal Hossain (KH): The developments are not recent as such. The Constitution was written in 1972. The extraordinary events and violent and extra-constitutional interventions of 1975 had assailed this Constitution using martial law proclamations to change it. The first major correction that took place was by High Court judgement in 2005 whereby the martial law decrees embodied in the so-called fifth amendment were declared void; 'so-called', because martial law cannot make amendments. The character of martial law is that it is intended to deal with some emergency or special situation and therefore it is said that the doctrine of necessity authorises measures to deal with that emergency or situation. Changing the basic principles of the Constitution cannot be treated as an emergency or a special situation calling for immediate action, there was no necessity.

A fundamental principle of constitutionalism is that it is adopted on the basis of the will of the people and acquires the character of fundamental law. The supremacy of the Constitution arises from the fact that it derives its legitimacy from the will of the people. This is set out in Article 7 of our Constitution in clear terms. The constitutionality of this amendment was tested in the High Court and the 2005 judgement held that the fifth amendment was unconstitutional. When the matter was put before the Court, the Court acknowledged its responsibility to uphold the supremacy of the Constitution. This is a very important development.

FORUM: How did it feel to be one of the architects of the supreme law of the land and how does it feel now, almost 40 years later?

KH: The experience of making of the Constitution, in the Constitution Drafting Committee and in the Assembly itself, might be described as "the ecstasy of constitution making", in which all of us shared the exhilaration of translating our dreams into the text of the Constitution. What was to follow was the harnessing of our national energies to make this Constitution work and to achieve the goals which we had set out in it.

Today, we can only lament that the dreams, woven into the text of the Constitution are yet to be translated into reality. Pandit Jawaharlal Nehru, in response to a question once put to him about the greatest difficulty since independence, had said, "creating a just state by just means, perhaps creating a secular state in a religious country". So many decades later, these words have a strong contemporary ring in our own society.

For the full version of this interview please read this month's Forum, available free with *The Daily Star* on November 1.

Of chaos, confusion and our Constitution

SHAKHAWAT LITON

JUSTICE ABM Khairul Haque, in the landmark verdict on the Constitution's Fifth Amendment case, said the modern republican form of democratic government is based on the concept of the right of the people to govern themselves through their own elected representatives.

"Those representatives are the agents of the people. They govern the country for and on behalf of the people at large. But those very ordinary people are the owners of the country and their such superiority is recognised in the Constitution," asserted Justice Haque. Haque, now Chief Justice of Bangladesh, was a judge to the High Court Division at the time of delivering the historic verdict in 2005 declaring the Fifth Amendment Act illegal and void.

Article 7 of the Constitution stipulates its supremacy and recognises people's power as it says: "All powers in the Republic belong to the people, and their exercise on behalf of the people shall be effected only under, and by the authority of, this Constitution."

It also says: "This Constitution is, as the solemn expression of the will of the people, the supreme law of the Republic, and if any other law is inconsistent with this Constitution and that other law shall, to the extent of the inconsistency, be void."

The preamble of the Constitution also stipulates its aims and objectives and speaks for its supremacy. "Unlike Preamble of many other countries, the Preamble of our original Constitution has laid down bare in clear terms the aims and objectives of the Constitution and in no uncertain terms it spoke of representative democracy, rule of law, and the supremacy of the Constitution as the embodiment of the will of the people of Bangladesh," the Appellate Division asserted in the case of the Fifth Amendment.

About its supremacy, former Chief Justice Shahabuddin Ahmed in the Constitution Eighth Amendment case said that "validity of a law is tested by the touchstone of the Constitution: but there is no such touchstone to test validity of the Constitution. Its validity is inherent and as such it is unchallengeable."

Unfortunately, both the political government and military usurpers disregarded the supremacy of the Constitution and undermined the people's sovereignty in the name of amendments since 1973.

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The courts to the rescue

JULFIKAR ALI MANIK and KAJALIE SHEHREEN ISLAM

SOMETHING was wrong. A college student at the time, MA Salam had gone from Jhalakathi to the racecourse maidan in Dhaka in order to witness the historic speech of March 7. He had attended the meetings and processions. After the Pakistani crackdown on the night of March 25, at first it had seemed like trouble, but later he knew that it was war. Independence had been declared and soon he, too, joined the freedom struggle.

"Wherever we went, people were saying, 'Bangabandhu has declared independence!'" says Dr MA Salam, recalling the days after March 26.

Thus, when 38 years later, he came across documents which claimed a history -- of which

he had been a part -- that was unknown to him, he knew that it had to be wrong. Thinking it to be a printing error, Salam sent a notice to the government asking that it be corrected, but there was no response. In April 2009, challenging the distortion of history in the documents of the independence war, Dr MA Salam went to court.

Earlier that year, Salam had found written in a section of the 15-part History of Bangladesh War of Independence: Documents, a government publication edited by Hasan Hafizur Rahman, that Major Ziaur Rahman had proclaimed the independence of

Bangladesh on March 27, 1971. When he compared it to the first edition of the same documents published in 1982, he saw that certain changes had been made. In the 2004 edition, the fact that independence had been declared on behalf of Sheikh Mujibur Rahman had been deleted and the proclamation was credited to Ziaur Rahman himself.

Salam says that he had heard such propaganda before, on the streets, in political meetings; but when he saw it in written text, he knew something had to be done. On June 21, 2009, the High Court ruled that Sheikh Mujibur Rahman had proclaimed the nation's independence on March 26, 1971.

"It was a historical fact and there should have been no debate about it," says Dr MA Salam. "The change was a gross distortion of history and it had to be corrected. As a freedom fighter, as a good citizen of this country, it was my duty to protect our history for our children to learn." If the relevant authorities had done their duty, however, says Salam, he would not have had to go to court, the last resort.

The question of good governance, that is whether the relevant authorities are discharging their duties and ensuring people's rights and services, has come to the fore in recent years. A myriad of issues has been placed before the courts and the latter, too, have had to rule on various matters in an effort to address the grievances of people long deprived of basic rights and facilities.



The list of issues ranges from the individual to the national, from the social to the political, from issues of public health to personal faith. It starts from basic rights and ends up endangering personal freedoms. While government bodies exist to protect these rights and provide these facilities, people have had to seek legal intervention in matters as basic as the

supply of pure and safe food and water. The courts have become the last place of refuge for deprived citizens.

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Multiculturalising secularism through constitutional recognition of Adibashis



DEVASISH ROY WANGZA

The idyllic non-communalism

THANKS to the Supreme Court's judgment in the fifth amendment case, we are on board the ship of state, about to journey back to a secular Bangladesh. Anyone who believes in non-

discrimination -- which is a peremptory norm of international human rights law -- cannot but be happy with this. We would, however, be living in a fool's paradise if we thought that we could return to that idyllic land that the framers of our Constitution dreamed of in 1972: a society free of "communalism (o-shamprodayikota) in all its forms" and one in which there is no

"abuse of religion for political purposes" (original Article 12, Constitution of Bangladesh). Freedom from the various forms of 'communalism' (read racism) can only come if our Constitution not only gets back its stolen pillar of secularism, but is also supplemented with provisions that expressly, accurately and respectfully acknowledge the identities of the different peoples that have lived in Bangladesh since time immemorial.

Our secular heritage

No doubt, communalism -- or religion-based discrimination, or racism (especially where perpetrated through state power) -- was the greatest threat to social progress and democratic practices from 1947 to 1971, when we found ourselves huddled into the state of Pakistan, which had religious identity as its raison d'etre. Our tryst with 'Pakistanhood' was necessarily uncomfortable at best and stifling and oppressive at worst, because the legacy bequeathed to us by the forbears of our ancient heritage impelled us, as a society, to remain tolerant and multicultural. We could, and still do, recall the proud heritage of the multicultural and secular Bangladeshi rulers of the past: of the Buddhist Pala civilisation, the Hindu Sena rajas, the Muslim sultans and nawabs and Adibashi rajas and chiefs. Blood was spilt over land, wealth and people, but never over religion. The torch of secularism was carried, equally vigorously by so many of our poets and philosophers:

from Lalon Fakir to Hasan Raja, Nazrul Islam to Shamsur Rahman.

From 1972 to 2010

However, the circumstances of 2010 are so very different to those of 1972, at least in some very fundamental respects. In 1972, we were trying to rid ourselves of the hangover of a religion-based identity that purported to subsume the cultural identities of the different peoples of Bangladesh. The medicine given was secularism. It did make sense in many contexts. Or so some would say. But where it concerned the identity of those peoples who now choose to call themselves Adibashi, it was regarded as assimilative. We may recall Manobendra Narayan Larma's one-man walkout from the Constituent Assembly in 1972, when his demands of multiculturalism fell upon deaf ears. Larma rejected the Constitution because the national identity that was espoused in 1972 was monocultural; oriented around an identity based upon Bangaleeness, which again minoritised the indigenous peoples; this time on account of ethnicity and language, rather than religion (while in 1947, it was religion). But let me come to that later.

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