



CONSTITUTIONAL ANALYSIS

Article 1: The Republic

KAWSER AHMED

"Bangladesh is a unitary, independent, sovereign Republic to be known as the People's Republic of Bangladesh."

Using words like 'independent' and 'sovereign' before the word 'republic' is to make it emphatically clear to the rest of the world that Bangladesh was no longer a constituent unit of Pakistan in any form whatsoever.

It will not be an exaggeration if article 1 is called the most important of all the provisions of Bangladesh Constitution. It was adopted as part of the Constitution Bill by the Constituent Assembly unanimously and without any amendments on 31 October 1972.

A moment's reflection will make one realise that article 1 signifies the *ex post facto* endorsement of the fact that the political will of the people to establish a state has been materialised. Besides, it contains important assertion about elements of a state such as sovereignty and government. State being the highest-ranking public entity it is typical that a Constitution, being the highest-ranking public law, will contain statements about relationship among the elements of state. Article 1 signifies at least three things- (1) establishment of a sovereign state, (2) form of government -which is a unitary republic, and (3) official name of the state. The provisions of article 1 states that Bangladesh is a unitary, independent, sovereign republic which has been recognised by the Supreme Judiciary as one of the basic features of the Constitution [Anwar Hossain Chowdhury & Others v Bangladesh, 41 DLR (AD) 165, paragraph 292]. Provisions similar to article 1 of Bangladesh Constitution are also present in the Constitutions of India, Pakistan, South Africa, Canada, USA and Australia.

As it has been already stated, article 1 in its entirety signifies establishment of a state by the name of the People's

Republic of Bangladesh. It is noticeable that the word 'republic' is qualified by two preceding synonymous words, 'independent' and 'sovereign'. Although according to the dictionary one meaning of the word 'republic' is a 'state', in practice it is not always the case. It may be mentioned that the federating units of the then Union of Soviet Socialist Republics (USSR) and the Socialist Federal Republic of Yugoslavia (SFRY) had the word 'Republic' in their official designations. For instance, the Georgian Soviet Socialist Republic or the Socialist Republic of Serbia, they were the federating units of the USSR and SFRY respectively.

It appears that the reason for using similar words like 'independent' and 'sovereign' before the word 'republic' is to make it emphatically clear to the rest of the world that Bangladesh was no longer a constituent unit of Pakistan in any form whatsoever. The words 'independent' and 'sovereign' also signal a clear message about the political and legal status that Bangladesh claims among the international community.

The term 'republic' also refers to the form of government which is generally understood as opposite to monarchy. In a republic the state power, at least theoretically, is held by the people or by their elected representative(s). Article 7 of the Constitution by providing that all powers in the Republic belong to the people shed light on the concept of republic. It is noticeable that the article 1 does not refer to Bangladesh as a 'democracy' (article 11).

Again in popular sense, a unitary system of government refers to the kind of political organisation in which the governmental power is not shared or divided between the central govern-

ment and the provincial government. The unitary system contrasts with the federal system of government. In a unitary system although the central government may delegate authority to the local government institutions, it is the central government that holds the ultimate superintendence and control over the local government. Parliament's plenary power of legislation (article 65) and the vesting of the executive power solely in the hands of the Prime Minister (article 55) are the main characteristics of unitary system of government in Bangladesh.

In Anwar Hossain Chowdhury's case all of the concurring judges in general accepted the argument that setting up of permanent benches of the High Court Division of the Supreme Court outside the capital did not agree with the unitary character of state. In this regard, it would be an interesting jurisprudential issue whether the unitary character of state (a concept of political science) as stated in article 1 can have normative application to annul a constitutional amendment.

The Provisional Constitution of Bangladesh Order, 1972 is the first legal instrument to be credited with applying the designation 'the People's Republic of Bangladesh'. Earlier in the Proclamation of Independence and the Laws Continuance Enforcement Order (both dated 10 April 1971) only Bangladesh appeared as the name of the state. Sheikh Mujibur Rahman was the person who first proposed the name Bangladesh in the place of East Pakistan on 5 December 1969 (Bangladesher Tarikh, 1998, p. 32). In this regard, it is worth mentioning that the Indian Independence Act, 1947 abolished the then Province of Bengal and constituted in lieu thereof two new




গণপ্রজাতন্ত্রী বাংলাদেশের
সংবিধান

Provinces, to be known as East Bengal and West Bengal respectively. After partition in 1947, West Bengal became part of India and East Bengal became part of Pakistan. The name, East Bengal officially continued till 1955 and thereafter was changed to East Pakistan. Application for admission to membership of the UN was made by the then Minister for Foreign Affairs by the name of the People's Republic of Bangladesh in August 1972.

Government of Bangladesh may sue or be sued by the name of Bangladesh. A reading of Bangla text of the Constitution denotes that at least for litigation purpose it would not be mandatory to use the full official name of the country. In the light of this provision the practice of writing 'The State' as a party in the criminal proceedings needs to be changed in order to be in consistent with the stipulation of the Constitution.

THE WRITER IS AN ADVOCATE, SUPREME COURT OF BANGLADESH.



LAW NEWS

Labour's right at stake

HUMAN Rights Watch in world report 2015 summarises the key human rights issues in different countries of the world. Among those we addressed the area of labour rights in the context of Bangladesh. April marked one year since the collapse of the Rana Plaza building, in which over 1,100 garment workers died and an estimated 2,500 were injured. Six months prior, a deadly factory fire at Tazreen Fashions killed at least 112 people. Survivors and relatives reported that they continue to suffer from life-changing injuries, psychological trauma, and lost income.


After the Rana Plaza accident, a compensation fund set up through the International Labour Organization (ILO) was designed to raise US\$40 million. But one year later, only \$15 million had been raised, with most funds coming from just one company. After the Rana Plaza tragedy, the Bangladesh government and Western retailers set up an inspection regime for more than 3,500 garment factories to ensure structural integrity and fire and electrical safety. A group of North American retailers inspected about 587 factories. A second body, formed by mainly European retailers, inspected 1,545 factories.

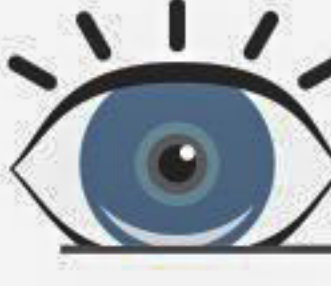
While they published details of their inspections, at time of writing, the government had not published information on the remaining inspections it had conducted. The government amended its labour laws to make it easier for workers to form and join unions. However, workers said they continued to face tremendous pressure including intimidation, mistreatment, and even death threats from managers, not to do so.

Workers in the tanneries of Hazaribagh, a residential area in Dhaka, continue to suffer from highly toxic and dangerous working conditions. Although some tanneries have begun to build new premises at a dedicated industrial zone in Savar, their planned relocation continued to be delayed. Residents of nearby slums complain of illnesses caused by the extreme tannery pollution of air, water, and soil. The government continues its de facto policy of not enforcing labour and environmental laws with respect to the Hazaribagh tanneries.

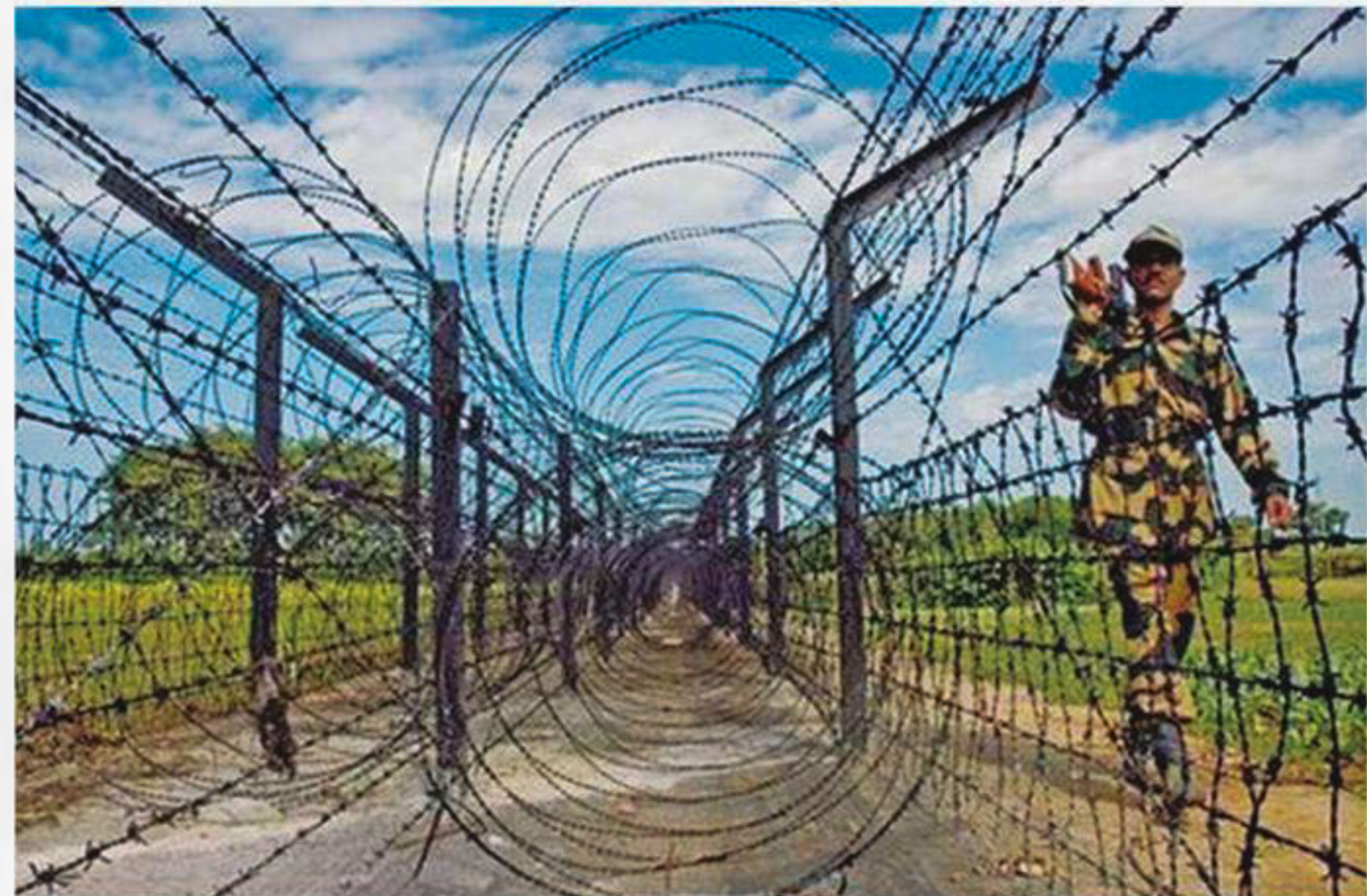
Bangladeshi migrant workers, especially in the construction and domestic service sectors in the Gulf, are often deceived by recruiters about their contracts and charged excessive fees that leave them deeply in debt and vulnerable to abuse abroad, including passport confiscation, unpaid wages, hazardous work, and forced labour. Migrants rarely receive effective assistance from their embassies.

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LAW VISION



ABIR ABBAS CHOWDHURY

STATES possess broad authority to regulate the movement of foreign nationals across their borders. They exercise their sovereign powers to determine who will be admitted and for what period. However, it is essential to ensure that non-nationals enjoy all of the inalienable rights applicable under international law. The International Covenant on Civil and Political Rights (ICCPR) defines basic rights of all persons such as the "right to life", liberty and security, the right not to be subjected to torture or to cruel, inhu-

Securing rights at the border area

entities and to the areas where political entities exercise border governance measures on their territory. As a result, the principle of non-discrimination shall be at the centre of all border governance measures. Prohibited grounds of discrimination shall include race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, nationality, migration status, age, disability, statelessness, marital and family status, sexual orientation or gender identity, health status, and economic and social situation.

Notwithstanding the above, the border killing turned out to be one of national crisis for many states over the decades and Bangladesh has been one of them. As reported by the Legal Aid & Human Rights Organisation of Bangladesh, namely, Ain-o-Salish Kendra (ASK), the Border Security Forces (BSF) of India killed 27 civilian-Bangladeshis in 2014 (until 31st October, 2014), 26 people in 2013 and 48 people in 2012 along the Bangladesh-India border. The statistics clearly stipulates the gross violation of human rights of the people residing within the Bangladeshi territory and it has been a significant concern over the years not only for our state-running authorities but also for the international organisations working for guarantee of human rights globally.

Although over the past years our Government raised the issue of killing Bangladeshis along the border and the

Indian authorities reaffirmed to bring down the killing to zero level. It is necessary to appreciate that any bilateral relations do not depend only on government-to-government relations but also the sum of the many ways individuals and institutions, public and private manage relations between Bangladesh and India in which people of both countries are involved.

On Jan 7, 2011, a 15-year-old Felani was shot dead by a trooper of BSF's Choudhuryhat camp while trying to cross the barbed-wire fencing at Anantapur border point in Kurigram's Phulbari Upazilla on her way back to Bangladesh. The victim's body was left hanging from the fence for quite a while and the killing provoked huge outrage in both Bangladesh and India. One of BSF's constable was accused and tried for the killing but could not be found guilty because of inconclusive and insufficient evidence against him. Due to heavy critics thereafter, the revision trial of Felani killing has been started by the Indian Border Security Force (BSF) at its sector headquarters in Cooch Behar of India.

As appears from the statistics above, we can say the reality has been something different. The rate of killing civilians around the Bangladeshi border not only inflated over the years, the victims of the incidents were also arbitrarily denied the access to justice.

THE WRITER IS BARRISTER-AT-LAW (LINCOLN'S INN, UK).



LAW CAMPAIGN

A new report commissioned by the Bangladesh Legal Aid & Services Trust (BLAST) and the Thomson Reuters Foundation, provides an insight into the laws regarding use of character evidence about complainants in rape trials in seven countries.

The report titled Character Evidence in Rape Trials- 'A Comparative Study of Rape Shield Laws and the Admissibility of Character Evidence in Rape Cases' reviews in-depth the laws on character evidence from seven jurisdictions including Canada, India, Pakistan, South Africa, Singapore, United Kingdom and the United States of America. It identifies reforms that have now resulted in enactment of 'rape shield' laws, which prohibit any questioning on the complainant's character and past sexual history during rape trials. BLAST will use this report to support its advocacy before the Law Commission of Bangladesh seeking reform of the colonial era Evidence Act, 1872 which still allows use of character evidence in such cases. The report will help to identify the options for law

Admissibility of character evidence in rape cases

reform in Bangladesh on this issue, whether to simply repeal the law, or also put in place 'rape shields', preventing questioning on character of the complainant.

As part of its efforts to address barriers to access to justice in cases of violence against women, BLAST undertakes research and advocacy on law and policy reform, with rape legislation being a key focus area. Following recent public interest litigation led by BLAST, the Hon'ble High Court directed the Ministry of Health and Family Welfare to set up an expert committee to review the process for medical evidence collection in rape cases, to provide guidance for lawyers and health professionals, and forensic experts, and in particular to address concerns over the so-called 'two-finger test'. This report is pending consideration. In the meantime, the law that permits use of character evidence to draw conclusions about and to question women's character remains in place.

Ms. Sara Hossain, Honorary Executive Director, BLAST said, "Globally, the laws

on rape have evolved from narrow definitions requiring proof of force to requiring proof of consent. Section 155 (4) of the Evidence Act 1872 represents an archaic understanding of rape requiring the complainant to prove that she is of 'good' character." She also added, "Our experience suggests that the use of this provi-

tion is a major barrier to women and girls securing justice in rape cases. It contradicts our constitutional guarantees of equality, as well as provisions of CEDAW. It's time to repeal this discriminatory and arbitrary legal provision."

FROM LAW DESK.

