

LAW OPINION

Constitution-making and unmaking in Bangladesh

In 1972, our Constitution framers might have designed a liberal constitutional order. Whether theirs was a workable one is debatable. The politicians, including the framers themselves, would make and unmake the system in ways that best served their personal or partisan interests over the nation's long-term institutional interests. Power-personalisation must have its consequences. Hence, the Constitution's continuing agony should not surprise us.

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Our Constitution has experienced a roller coaster ride since its adoption. It had a promising start (1972) but soon fell into turbulent phases of constitutional chaos (1975-90). It tried to bounce back for a while (1990) but faced barrages of democracy-defying assaults again. Now, fifty years into its birth, the present appears worrying and the future bleak. In this short opinion piece, I will try to understand why.

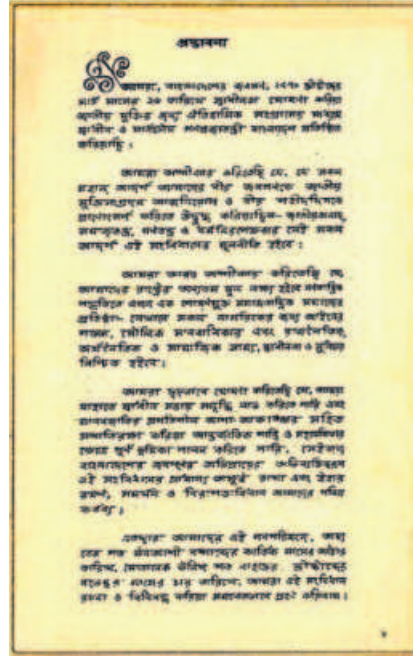
The Constitution of 1972 had solid ideological foundations. The framers had a patriotic conviction in our unique national identity, parliamentary democracy, socialist economy, religious tolerance and fundamental freedoms. Hence, the original scripture was famously based on the four foundational principles - democracy, socialism, nationalism, and secularism (Preamble and Art 8).

It had a structural identity too. The executive and legislative branches were modelled on a Westminster-type parliamentary system. The judicial branch was organised in a US style separation of powers model. Chances of Pakistani-style presidential authoritarianism and military intervention in politics were sealed (Arts 48 and 7). The rulers' accountability to the peoples' representatives (Art 57), judicial oversight of the executive and legislative branches (Art 102) and the citizens' protection against the state excesses (Art 44) were guaranteed. Watchdog institutions like the parliamentary committees (Art 76), Ombudsman (Art 77), Election Commission (Art 118), Comptroller and Auditor General (Art 127), and Public Service Commission (Art 137) were all built to the highest possible

standard of institutional design known in those days.

However, fifty years later, the Constitution's four foundational pillars seem ludicrously contradictory. The post-1975 military rulers hurt the framers' four foundational principles grievously. They discarded "socialism" for a market-based capitalist economy and jubilantly axed the Constitution's principal identity - the "Bangalee Nationalism" (5th Amendment, 1979). They would also wipe out "Secularism" and islamise the state (5th and 8th Amendments, 1979 and 1988 respectively). So clinical was the assault that even the political party responsible for drafting the original script would give in. They would "revive" the four pillars, but with compromises, contradictions and problematic articulations (15th Amendment, 2011). Therefore, the situation stands that the country has either entirely walked away from some of its foundational principles (socialism, for example) or irreparably damaged the others (democracy, nationalism and secularism).

The original Constitution's structural arrangement also fell into hotchpotch. The parliamentary system was discarded almost immediately after its introduction (4th Amendment, 1975). The subsequent military intervention into politics brought back the Pakistani-style presidential authoritarianism (5th and 7th Amendments, 1979 and 1986 respectively). A mass revolution of 1990 sought to revive the parliamentary system (12th Amendment 1992), but the country would only fall into competitively authoritarian party regimes (1991-96, 1996-2001, 2001-06 and 2009-13). The current decade of the country's (extra-)constitutional life is marked by polarisation and monopolisation. During this torturous



journey, the parliament has lost sight of its prime duty - enforcing individual and collective ministerial responsibilities. Governance continues to look like a crude "elective(!) dictatorship" (Lord Hailsham, *The Richard Dimbleby Lecture*, 14 Oct 1976, BBC, London).

The judiciary has been marginalised, bringing its institutional assertiveness to a knee (16th Amendment, 2014 and the 16th Amendment Case, 2016). The nation's electoral machinery has been laid bare. A promising experiment with an election-time caretaker government (13th Amendment, 1996) has been purposefully mishandled. It failed to do the good it was meant to do - contribute to the country's electoral integrity. Instead, it expedited the court-packing, scandalised the judges and then died a controversial death (15th Amendment,

2011). The "Ombudsman" was never created. The Comptroller and Auditor General, Public Service Commission and other "constitutional institutions" fell into the "executive's vortex".

Now, what could explain this disastrous failure of a remarkable Constitution? Many of us (specially those on the left) tend to blame the framers' "lack of institutional imagination" for this constitutional debacle. While this view could make sense in several areas of constitutional design (the executive-legislature relations, the government's absolute appointment power, for example), I would argue something else. The constitution-making itself carried, inevitably perhaps, some clues to its future unmaking. Two of them were prominent.

First, the total exclusion of the religious-conservative political elements from the constitution-making process (how logical it appeared in 1972) had reduced (if not dislodged) the Constitution's political morale. In 1972, an essential requirement of the parliamentary system - conservative liberal bipartisanship, was conspicuously missing. The conservative political elements of undivided Pakistan - the Muslim League (ML) and Jamaat-e-Islami (JI), actively opposed the liberation of Bangladesh. They lost their right to exist in the newly independent country, but the pro-Soviet leftists could not fill the vacuum with their insignificant mass base in society. So, the seismic political change of 1975 led to a quick resurgence of the radical right. From that point onwards, Bangladesh's constitutional unmaking has been rapid. Avenging their exclusion from the constitution-making process, the

religious nationalists would actively deconstruct the Constitution and its foundational pillars.

Secondly, the framers of the Constitution lived in a society where politics had always been about personalising public power rather than institutionalising it. Even the drafters were drawing from a personalistic leadership style that would only be aggravated during military rule. After the democratic revival of 1990, persons, egos and political dynasties would block the prospect of internal democracy, mass-based recruitment and merit-based promotion system within the political parties. Distrust and distaste for democratic opposition would only yield violence, election rigging and back-door conspiracies for ascending or clinging to power. It led to radicalisation, polarisation and extra-constitutional intervention in politics.

When we talk about a Constitutional democracy, we talk about its "Democratic Instrumental Vision" (Johan P. Olsen, *Governing through Institution Building*, Oxford 2010). Institution building is key to the project. Putting persons before institutions is like putting the horse before the cart. In 1972, our Constitution framers might have designed a liberal constitutional order. Whether theirs was a workable one is debatable. The politicians, including the framers themselves, would make and unmake the system in ways that best served their personal or partisan interests over the nation's long-term institutional interests.

Power-personalisation must have its consequences. Hence, the Constitution's continuing agony should not surprise us.

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50 Years of Bangladesh Constitution IN A NUTSHELL

PROCLAMATION OF INDEPENDENCE (10 APRIL 1972)

Given effect from 26 March 1971, the Proclamation along with the Laws Continuance Enforcement Order, 1971 played a huge role in restoring internal legal system and solidifying the creation of the new sovereign state. From an international law perspective, the proclamation is a form of 'Unilateral Declaration of Independence', which is one of the legitimate ways for the creation of a new sovereign country as established by the ICJ in its advisory opinion concerning the Independence of Kosovo in 2010.

MAKING OF THE 1972 CONSTITUTION

A Constituent Assembly was formed on 23 March 1972 through the Constituent Assembly of Bangladesh Order, 1972. In the first session of the new Constituent Assembly, a 34-member drafting committee was formed to be led by Dr. Kamal Hossain to draft the Constitution. Adopted on 4 November 1972, the Constitution came into force on 16 December 1972. To note that until the Constitution was officially launched, the Provisional Constitution of Bangladesh Order, 1972 and the Constituent Assembly of Bangladesh Order, 1972 together facilitated the governance of the Republic.

1st Amendment (1973): Any law made for the purpose of detention, prosecution or punishment of any person, who is a member of any armed or defence or auxiliary forces or who is a prisoner of war, for committing genocide, crimes against humanity, war crimes or other crimes under international law will not be declared to be void. Moreover, certain rights such as right to protection of law (art 31), right against retrospective operation of law (art 35.1), right to a speedy and public trial by an independent and impartial court (art 35.3), and right to enforcement of fundamental rights (art 44) were made non-applicable for any person falling under the newly amended provision.

2nd Amendment (1973): Any amendment made under art 142 would not be declared to be void under art 26. Art 33 was also substituted whereby changes were brought in for facilitating prevention detention under law. Moreover, arts 141A-141C were inserted empowering the President to proclaim emergency on the ground that the security or economic life of Bangladesh, or any part thereof, is threatened by war or external aggression or internal disturbance. Certain fundamental rights such as freedom of movement (art 36), freedom of assembly (art 37), freedom of association (art 38), freedom of thought and conscience, and of speech (art 39), freedom of profession or occupation (art 40), right to property (art 42), and right to enforce fundamental rights (art 44) were made subject to suspension during emergencies.

3rd Amendment (1974): The newly amended art 2 was made to facilitate the Agreement between the Governments of Bangladesh and India (1974) regarding the exchange of enclaves. However, the legality of the treaty itself was challenged in *Kazi Mukhlesur Rahman v Bangladesh and Others* (1974) 26 DLR (AD) 44, but the court opined that the case was premature. The exchange of enclaves finally took place on 31 July 2015.

4th Amendment (1975): Presidential system of government was introduced in place of parliamentary system, and one-party system was made to replace multi-party democratic system. Right to enforce fundamental rights was taken away from the Supreme Court through changes in art 44. According to amended art 95, the President was made the sole authority to appoint the Chief Justice and other judges in the Supreme Court. Amendment in art 96 made it possible to remove judges on ground of misbehaviour or incapacity by an order of the President. In art 116, the President was again made the absolute authority to control and discipline the subordinate court judges. New art 116A was added to spell out that subordinate court judges and magistrates will be independent in the exercise of their judicial functions.

5th Amendment (1979): All changes made in the Constitution during the martial law regime from 15 August 1975 till 9 April 1979 were legalised. It also replaced 'secularism' as a constitutional principle with 'absolute trust and faith in Almighty Allah'. Bismillah-ar-Rahman-ar-Rahim was added to the top of the Preamble. Supreme Judicial Council was introduced for the removal of higher court judges. Moreover, the one-party democratic system established by the 4th amendment was replaced with a multi-party democracy. This amendment was declared unconstitutional in 2005 by the High Court Division in *Bangladesh Italian Marble Works Ltd v Bangladesh* (2006) BLT (Special) (HCD) 1. Subsequently, the Appellate Division upheld the decision of the High Court Division (with a few exceptions) in *Khondker Delwar Hossain v Bangladesh Italian Marble Works Ltd and Others* (2010) 62 DLR (AD) 298.

CONSTITUTIONAL AMENDMENTS

6th Amendment (1981): If a Vice-President is elected as President, his/her office as Vice-President will be vacated on the date he/she enters the office of President. Moreover, if any President or Vice-President is elected as a Member of Parliament (MP), he/she will have to vacate the office of President or Vice-President in order to become an MP.

7th Amendment (1986): All orders and regulations given during the martial law regime from 24 March 1982 to 11 November 1986 were given legitimacy. Moreover, the amendment made it impossible to raise queries regarding such orders and regulations in any court or panel on any ground whatsoever. This amendment was declared unconstitutional in *Siddique Ahmed v Bangladesh* (2011) 33 BLD (HCD) 84 by the High Court Division.

8th Amendment (1988): By amending art 100, six permanent benches of the High Court Division were established outside the capital; however, this amendment was declared to be unconstitutional in *Anwar Hossain Chowdhury v Bangladesh* (1998) 41 DLR (AD) 165. This amendment also made 'Islam' the State Religion through the insertion of art 2A.

9th Amendment (1989): The amendment presented for the direct voting of the Vice-President and limited a person in holding the office of the President for two successive terms of five years each. It also provided that a Vice-President might be chosen in case of a vacancy, but the selection must be permitted by the National Parliament.

10th Amendment (1990): Art 65 guaranteed the reservation of 30 seats entirely for women for the next 10 years in the National Parliament, who will be elected by the MPs.

11th Amendment (1991): All actions taken by the caretaker government headed by the then Chief Justice Shahabuddin Ahmed (later the Acting President from 6 December 1990 to 10 August 1991) were validated. In addition, the amendment also established and made possible the return of Acting President Shahabuddin Ahmed to his preceding post as the Chief Justice of Bangladesh.

12th Amendment (1991): Parliamentary form of democracy was reintroduced.

13th Amendment (1996): Non-party Caretaker Government was introduced to provide all potential aid and assistance to the Election Commission for holding the general election of MPs. In *Saleem Ullah v Bangladesh* (2005) 57 DLR (HCD) 171, the High Court Division validated the caretaker government system. Subsequently, the decision was challenged in the Appellate Division which, in *Abdul Mannan Khan v Bangladesh* (2012) 64 DLR (AD) 1, decided against the High Court Division and by a four-to-three decision prospectively declared the 13th amendment unconstitutional.

14th Amendment (2004): 45 seats for women were reserved for the next 10 years. Retirement age of Supreme Court Judges was increased from 65 to 67 years.

15th Amendment (2011): Secularism as a constitutional principle was restored to bring back the spirit of 1972's Constitution. New art 23A was added with a mandate to preserve the culture of tribes, minor races, ethnic sects and communities. Reserved seats for women were increased once again from 45 to 50.

16th Amendment (2014): The role of Supreme Judicial Council to remove the higher court judges was transferred to Parliament, but eventually the amendment was challenged and declared unconstitutional by the High Court Division in *Asaduzzaman Siddiqui and Others v Bangladesh* (Writ Petition No. 9989 of 2014; decision of 5 May 2016). The Appellate Division upheld the High Court Division's decision in *Government of Bangladesh and others v Advocate Asaduzzaman Siddiqui and others* (2019) 71 DLR (AD) 52. The case is now in review stage in the Appellate Division of the Supreme Court.

17th Amendment (2018): The tenure of 50 women parliamentarians who are elected in the women reserved seats was renewed for another 25 years.