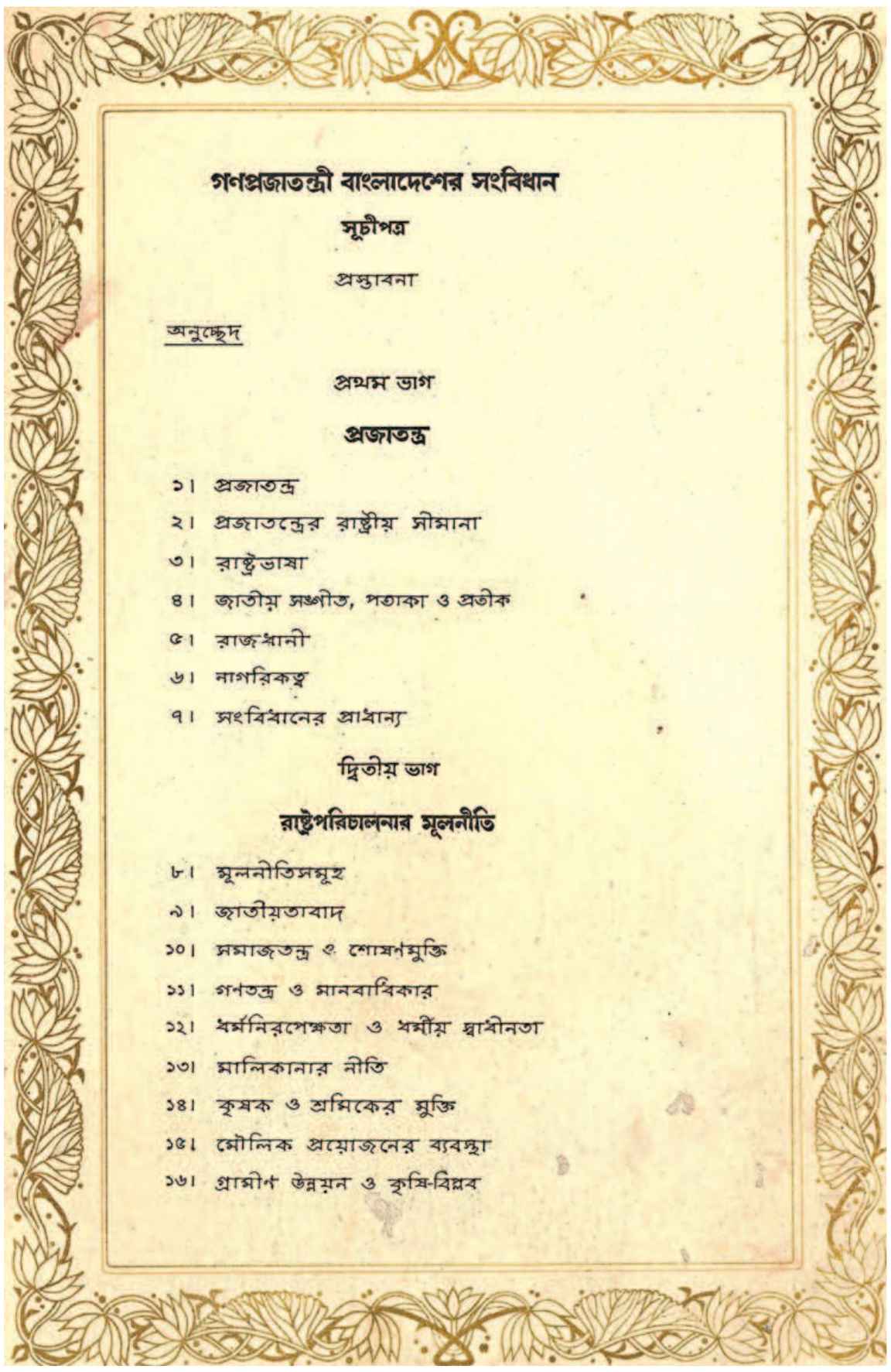
LAW VISION

OUR CONSTITUTION
between resurrection and revolution


গণপ্রজাতন্ত্রী বাংলাদেশের সংবিধান

সূচীপত্র

প্রস্তাবনা

অনুচ্ছেদ

প্রথম ভাগ

প্রজাতন্ত্র

১। প্রজাতন্ত্র
২। প্রজাতন্ত্রের রাষ্ট্রীয় সীমানা
৩। রাষ্ট্রভাষা
৪। জাতীয় সঙ্গীত, পতাকা ও প্রতীক
৫। রাজধানী
৬। নাগরিকত্ব
৭। সংবিধানের প্রাধান্য

দ্বিতীয় ভাগ

রাষ্ট্রপরিচালনার মূলনীতি

৮। মূলনীতিসমূহ
৯। জাতীয়তাবাদ
১০। সমাজতন্ত্র ও শোষণমুক্তি
১১। গণতন্ত্র ও মানবাধিকার
১২। ধর্মনিরপেক্ষতা ও ধর্মীয় স্বাধীনতা
১৩। মালিকানার নীতি
১৪। কৃষক ও শ্রমিকের মুক্তি
১৫। মৌলিক প্রয়োজনের ব্যবস্থা
১৬। গ্রামীণ উন্নয়ন ও কৃষি-বিপ্লব

MD. IMAMUNUR RAHMAN

Into the fifty-fourth year of the Constitution's commencement, the mood in Bangladesh is less about celebration and more about its forensic post-mortem. We stand in the shadow of the July Uprising of 2024, a seismic event that did not merely topple an autocratic regime but shattered the illusion of constitutional continuity. For over a decade, we witnessed what is termed 'autocratic legalism': the weaponisation of the law to dismantle the rule of law. Today, as an interim government navigates the turbulent waters of the 'July Charter' and the Supreme Court resurrects the caretaker government system, we must ask a discomforting question: Is the Constitution of 1972 still the supreme law of the Republic, or have the events of the last eighteen months rendered it a 'zombie' document: walking, but spiritually dead?

The conventional narrative has always been one of reverence for the Constitution's 'founding moment' of 1972. Yet, the constitutional reality of 2025 perhaps demands we abandon this fetishism. The 1972 text, for all its transformative promise, failed to prevent the authoritarian slide. It was not suspended by martial law this time; it was hollowed out from within, amendment by amendment. Into the fifty-fourth year now, we are witnessing a unique collision between two jurisprudential forces: the restorative impulse of the judiciary and the reconstructive demand of the people.

The recent judicial activism, specifically the Appellate Division's judgment restoring the Thirteenth Amendment, offers a fascinating case study in 'judicial repentance'. By reviving the non-party caretaker government system, the Court has arguably attempted to correct the 'original sin' of its 2011 judgment, which many argue paved the way for successive uncontested elections. However, this 'resurrection' is fraught with peril. In the *Anwar Hossain Chowdhury* case, the Court famously established the basic structure doctrine to protect the Constitution from legislative vandalism. But for the last decade, this doctrine was dormant when it mattered the most. The sudden revival, while politically popular, raises a profound question of constituent power. Can the judiciary, a constituted power, unilaterally rewrite the political rules to atone for its past silence? This aligns with the theory of 'unconstitutional constitutional amendments', but in reverse. We are witnessing a 'judicial un-amendment', where the Court strips away the accretions of the authoritarian era. While the outcome, fair elections, is desirable, the process entrenches judicial supremacy over a political sphere still in flux.

The elephant in the room is indeed the 'July Charter'. This document, born from the 2024 uprising, represents what legal theorists call a 'constitutional moment'. It is an expression of the residual constituent power- the raw, uncodified sovereignty of the people that emerges when the formal legal order loses legitimacy. The tension between the 1972 Constitution and the July Charter is the defining legal struggle of our time. While the Constitution assumes continuity, the Charter assumes rupture. The recent gazette announcing a referendum on the Charter's provisions frames this explicitly: it is an exercise of 'sovereign will and authority', bypassing the amendment procedures of Article 142. This brings us to the core of the crisis. If we proceed with the referendum and any subsequent 're-founding', we are effectively admitting that the 1972 Constitution has lost its *grundnorm* status. We are moving from a Kelsenian continuity to a Schmittian decisionism, where the validity of the new order rests not on the old text, but on the political will emanating from July 2024.

The 1972 text, for all its transformative promise, failed to prevent the authoritarian slide. It was not suspended by martial law this time; it was hollowed out from within, amendment by amendment. Into the Constitution's fifty-fourth year now, we are witnessing a unique collision between two jurisprudential forces: the restorative impulse of the judiciary and the reconstructive demand of the people.

Comparing this trajectory with our Commonwealth neighbours is instructive. In India, the *Kesavananda Bharati* judgment created a firewall that has largely held, despite severe political pressure. The Indian Supreme Court's robust application of the basic structure doctrine prevented the kind of 'abusive constitutionalism' that decimated Bangladesh's institutions. Conversely, the UK's uncodified constitution relies on 'political constitutionalism', the idea that political checks will correct excesses. Bangladesh, tragically, fell between these two stools. We had neither the robust judicial shield of India nor the political culture of the UK. We had a codified constitution that was manipulated with the ease of a statute. The Commonwealth experience shows that post-authoritarian transitions often fall into the trap of 'isomorphic mimicry', mimicking the forms of democracy without addressing the functions of power. If this anniversary serves only to reinstate the mechanisms of 2008 or 1996, we have learned nothing. The 'residual power' unleashed in 2024 demands structural innovation, not just archival restoration.

As we look to the future, the Constitution at present stands at a bifurcation point. One path leads to a 'restored' 1972 order- a comfortable, nostalgic fiction where we pretend the lack of a sustainable politico-constitutional culture was merely a bad dream. The other path, the harder one, is to accept that the 1972 Constitution, for all its historic weight, was insufficient. This acceptance would require us to formalise the July Charter not as a mere amendment, but as a valid exercise of primary constituent power. It would mean acknowledging that the 'basic structure' of 1972 is negotiable if the people, in a moment of revolutionary clarity, decide to renegotiate it. The danger is that we are trying to pour new wine, the revolutionary mandate, into old wineskins. The restoration of the Supreme Judicial Council and the Caretaker Government are valiant attempts to patch the hull, but the ship itself may be obsolete.

Years ago, the Constitution of Bangladesh was born out of a War of independence. It was a document of hope. Today, it is a document of survival. The task for legal scholars, judges, and the citizenry is not to blindly worship the text of 1972, but to interrogate it. If the July Uprising taught us anything, it is that sovereignty does not reside in the Ramna buildings of the Supreme Court or the *Sangsad Bhaban*; it resides, ultimately and dormant, in the streets. As we mark this day, let us not celebrate the survival of the Constitution, but rather the revival of the constituent power that created it. In this moment, we must confront the paradoxical truth our situation presents: The Constitution is dead; long live the Constitution.

The writer is Assistant Professor of Law and Chair of the Department of Law at ZH Sikder University of Science and Technology.

LAW IN THEORY

Conceptualising mob justice in post-uprising Bangladesh

If justice is thought to be a thesis, mob justice appears to be the antithesis to the very crux of it. Therefore, the expression 'mob justice' itself is a misnomer, for the actions of a mob negate, rather than uphold, the fundamental values of justice.

MD ASHIFUZZAMAN ANIK

While mob justice is a worldwide concern, its impact in Bangladesh has severely intensified in the post-uprising period. However, the term 'mob justice' cannot be meaningfully analysed without first understanding the concept of 'justice' itself.

Justice is one of the most aspired yet least defined terms in political theory. Philosophers spanning from Plato to Adam Smith have formulated theories of justice that include certain elements. However, in my opinion, these definitions, *per se*, fail to capture the comprehensive domain of justice. For instance, Plato defined justice as the peculiar excellence of mind and injustice as its defect. Although this definition covers a broad area by employing a teleological approach, Plato's tripartite division of society into entrepreneurs (appetite), auxiliaries (spirit), and guardians (reason) can be criticised for promoting a static and hierarchical social order. John Rawls' theory of justice, comprising 'equal liberty principle' (everyone has the same basic rights and freedoms) and 'difference principle' (social and economic inequalities are permissible only if they benefit the least advantaged members of society) show promise. However, it stands weak when it is concerned with legal justice, whether substantive or procedural. Robert Nozick's entitlement theory is confined to property allocation. Hence, a thorough grasp of justice warrants a context-sensitive approach for better understanding. Yet, it is clear that fairness is a common term underlying all dominant theories.

Contrarily, a typical mob justice scenario involves hostile conflicts and deaths or injuries of the so-called accused. It can be defined as a situation where a crowd of people take the law into their own hands, act as accusers, jury and judge and punish a criminal suspect or an alleged criminal on the spot (Robin *et al*). In other words, the mob in these cases usurp the role of the executive to investigate a case, that of the judiciary to try the case, convict and punish the wrongdoer, and that of the legislature to legislate the punishment for the alleged person. By arrogating to themselves the functions of the State, the mob, therefore, strikes at the very foundation of a State built on a social contract. Emphasising the indispensability of an organised State, Thomas Hobbes aptly observed that 'without a common power to keep them all in awe, they are in that condition which is called war [...] of every man against every man'.

If justice is thought to be a thesis, mob justice appears to be the *antithesis* to the very crux of it. By usurping the power of the state in whose hands they have no excellence, the mob acts contrary to the Platonian theory of justice. Mob justice also defeats the Aristotelian formulation of distributive justice by indiscriminately killing or injuring every alleged offender, whether minor, female or the aged. Rawls' equal liberty principle and Nozick's entitlement theory are beats of a distant drum. Evidently, no theory of justice offers a synthesis in the Hegelian dialectics sense to harmonise 'mob justice' with 'justice'. Therefore, the expression 'mob justice' itself is a misnomer, for the actions of a mob negate, rather than uphold, the fundamental values of justice.

Within our constitutional dispensation, Articles 27 (equality before law), 28 (prohibition on discrimination), 31 (right to protection of law) and 32 (right to life and liberty) are necessary concomitants of distributive justice, whereas Articles 33 (safeguards as to arrest and detention) and 35 (protection in respect of trial and punishment) reflect procedural justice. However, the procedural legal justice outlined in Articles 33 and 35 is shattered into pieces when the mob arbitrarily executes punishments.

To conclude, mob justice in Bangladesh has now escalated to an alarming extent, with incidents of accused persons being attacked even on court premises. The recent incident of a Hindu man getting lynched to death over allegations of blasphemy in Bhaluka, Mymensingh bearing the evidence of it. If the continued exposure to so-called 'mob justice' persists, it will inevitably result in a loss of public confidence in the legal system and a blatant erosion of the rule of law.

The writer is law student at the University of Dhaka.