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**Research Monograph**

**On**

**“The Historical Background of the Constitution of  
Bangladesh and the Necessity of It’s Reformation in the  
Present Context: A Suggestive Analysis”**

**This submitted for the partial fulfillment of the award of the  
degree in LL.B Hon’s (4<sup>th</sup> Year)**

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**Date of Submission: 7<sup>th</sup> January 2025**

**Dedication**  
**Dedicated to my Parent's**

## LETTER OF TRANSMITTAL

To  
Muhammad Ali  
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**Subject: Submission of Thesis Paper.**

Dear Sir,

It is a great pleasure to submit my thesis on "**The Historical Background of the Constitution of Bangladesh and the Necessity of It's Reformation in the Present Context: A Suggestive Analysis.**" which is a requirement of LL.B (Hon's) program. I tried my best to complete this thesis properly and submitting this for your our kind consideration. I have given best efforts to finish the thesis with relevant information that I have collected from various sources. I am confident that this thesis has increased both of my practical experience and theoretical knowledge to a great extent. I requesting and hope that you would be kind enough to accept my thesis and oblige thereby.

---

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## **Certification**

This to certify that the thesis on "**The Historical Background of the Constitution of Bangladesh and the Necessity of It's Reformation in the Present Context: A Suggestive Analysis.**" is done by **Kashfia Kazi** in the partial fulfillment of the requirement for the the degree of LL.B(Final) from Sonargaon University of Bangladesh.

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## **DECLARATION**

I do solemnly declare that the work presented in this thesis has been carried out by me and has not been previously submitted to any other institution. The work I have presented does not breach any copyright. I further undertake to indemnify the University against any loss or damage arising from breach of the foregoing obligations.

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---

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## Abstract

This research aims to identify "**The Historical Background of the Constitution of Bangladesh and the Necessity of It's Reformation in the Present Context: A Suggestive Analysis.**" as a social evil. Child labor is gradually being recognized as a multidimensional social problem in our country. Socio-cultural realities culminate in attempts to identify children's needs or what is considered best for them. Therefore, children often have 'no voice' to express their own needs. The purpose of the present study is to find out the reasons behind child Labor as well as to recommend to protect "the future of the nation" from the oppression of the present money-oriented world.

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# Chapter One

## 1. Introduction

The constitution is called the mirror of the State. It shows the nature of the State, the formation of the government, the rights of the people, and the relationship between the government and the people. Citizens' rights are outlined in a constitution and are safeguarded from governmental misuse. As a result, minority rights are protected. It also restricts and balances government power in relation to other participants and institutions. Bangladesh became independent on 26th March 1971 and she got her constitution, named 'The Constitution of the People's Republic of Bangladesh' on 16th December 1972, on the first victory anniversary, after a historic struggle for national liberation. It is important to note here that there were two interim Constitutions of Bangladesh. During the time of the liberation war, from 10th April 1971 to 10th January 1972, 'The Proclamation of the Independence' and from 11th January 1972 to before the commencement of 'The Constitution of the People's Republic of Bangladesh 1972', and 'The Provisional Constitution of Bangladesh Order', were the two interim Constitutions of Bangladesh. The basic goal of the state is to "realize through the democratic process a socialist society, free from exploitation a society in which the rule of law, fundamental human rights and freedom, equality, and justice, political, economic, and social, will be secured for all citizens," according to the third part of the preamble of the Bangladeshi Constitution. Though the preamble and also some other parts of the Bangladesh Constitution make democracy, rule of law, equality, and justice the fundamental aims of the State, still some provisions in the Constitution are contradicting these aims. Bangladesh Constitution completed its 50 years in 2022 on 16th December. During this journey, it has been amended seventeen times. Except for two or three, most of these amendments were enacted to serve the interests of the ruling party rather than the needs of the nation and its citizens. Still, there are many contradictory provisions in the constitution which create a bar to implement democracy in the state. These inconsistencies will be discussed in this paper along with potential changes.

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The **Constitution of Bangladesh**<sup>[1]</sup> is the supreme [law of Bangladesh](#). Adopted by the 'controversial'<sup>[1][2][3]</sup> and virtually "one-party"<sup>[4]</sup> [Constituent Assembly of Bangladesh](#) on 4 November 1972, it came into effect on 16 December 1972. The Constitution establishes Bangladesh as a unitary parliamentary republic. Directly borrowing from the four tenets of [Mujibism](#), the political ideology of [Sheikh Mujibur Rahman](#),<sup>[5]</sup> the constitution states [nationalism](#), [socialism](#), [democracy](#) and [secularism](#) as its four fundamental principles.<sup>[6]</sup>

## 1.1 Democracy

The word 'democracy' is derived from two Greek terms demos and kratia. The first one is used to mean people and the latter one is used to mean rule [13]. US President Abraham Lincoln defined democracy as, the 'government of the people, by the people and for the people. Democracy is demarcated by John Calhoun as not the rule of the majority but the diffusion of power, representation of interests, and recognition of minorities. Schmitter and Karl described democracy as a form of government in which voters indirectly hold rulers accountable for their public deeds through the conflict and cooperation of their elected representatives. According to the Cambridge Dictionary democracy means the belief in freedom and equality between people, or a system of government based on this belief, in which power is either held by elected representatives or directly by the people themselves. At present, we may define democracy as a form of government system where people rule themselves directly or indirectly through their elected representatives .

### 1.1.1 Requisites of Democracy

In a state to promote democracy, some elements are indispensable such as:

- a) Liberty and Equality of the People: The main basis of democracy is the liberty and equality of the people. People must have the liberty of their person and property and without reasonable ground, there should be no classification among people of the country.
- b) Fraternity: To make democracy a fruitful peaceful atmosphere in the country is essential and without fraternity or brotherliness among citizens, it is not possible.
- c) People are the source of all power: In a democratic State people is the real owner of all power and the government exercises its power on behalf of the people.]
- d) Assurance of fundamental rights of the people: In a democracy, fundamental rights are guaranteed by the constitution of the State and must have judicial enforcement. A democratic country must assure that people will get enough rights and benefits to lead a life with dignity.
- e) Strong Opposition Parties: In a democracy, an opposition party is called an alternative government. By active criticism, the opposition party or parties keep the government under pressure and play a role in making the public aware of government activities.

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While the Constitution nominally declares the protection of fundamental rights and an independent judiciary, it has been often labelled as "[fascist](#)"<sup>[7][8]</sup> and [criticized](#) for fostering [autocracy](#)<sup>[9]</sup> and [failing to safeguard](#) human rights.

### **1.1.2 Liberty and Equality of the People**

In Bangladesh Constitution, there is an assurance of liberty and equality of the people by the preamble, fundamental principles of state policy, and also by the fundamental rights. The preamble of the constitution strongly declares that it should be the basic goal of Bangladesh to establish a socialist society in a democratic way where there shall be no exploitation and for all citizens rule of law, political, social, and economic fundamental human rights, freedom, equality shall be secured. Moreover, article 11 of the Bangladesh Constitution affirms democracy as a fundamental state policy where fundamental human rights and freedom of the people must be guaranteed [15]. Furthermore, there is a provision for equality of opportunity to all citizens in Article 19. Liberty and Equality of the people are also ensured by fundamental rights. In Article 27 it is said that every citizen is equal before the law and no one shall be deprived of life or personal liberty unless in accordance with the law, according to Article 32.

### **1.1.3 Fraternity**

Behind the creation of Bangladesh, the historical war of independence, fraternity, or brotherliness had a great role and for this reason, 'nationalism' is the first fundamental principle of state policy. Under Article 9, it is said that the root of Bangla nationalism shall be the unity and solidarity of the Bangalee nation.

### **1.1.4 People Is the Source of All Power**

In Bangladesh people is the owner of all powers of the state. The preamble's opening sentence reads, "We, the people of Bangladesh, having proclaimed our independence on the 26th day of March 1971 and through a historic struggle for national liberation established the independent, sovereign People's Republic of Bangladesh". Again, directing to democracy, article 11 of the constitution declared that with the actual participation of the elected representatives of the people at all levels, Bangladesh shall be a democracy.

### **1.1.5 Assurance of Fundamental Rights of the People**

From Article 27 to Article 44 there are 18 fundamental rights for the citizens and if any person is deprived of his or her fundamental right shall be through Article 44 and Article 102. But how far these 18 fundamental rights are enough to enable a person to lead a life with dignity is a question of fact.

## **1.2 Strong Opposition Parties**

Multiparty political system is followed in Bangladesh. After a general election, the political party which gets the majority seats in the parliament forms the government and other participating political parties stay as opposition parties.

### **1.2.1 Accountability of the Government**

Constitutionally the ruling party that is the prime minister and other cabinet members shall be accountable to the parliament collectively.

### **1.2.2 Freedom of Media**

As an element of democracy Bangladesh Constitution guaranteed freedom of the press.

### **1.2.3 Independence of the Judiciary**

Independence of the judiciary is considered a basic structure of the constitution. Separation of the judiciary and independence of the judiciary is acknowledged by Bangladesh Constitution. As a fundamental principle of state policy, article 22 creates an obligation on the government to separate the Judiciary from the executive organs of the govt. and finally, the government separated the judiciary in 2007. The Chief Justice and other judges are given the authority to act independently while carrying out their responsibilities under Article 94. According to Article 116A, all members of the judicial branch and all magistrates shall use their judicial powers independently. Additionally, the supreme court has the constitutional power to make judicial reviews of all activities of the government under Article 102 (2) . The Supreme Court could use this authority to invalidate any law if it conflicts with the Constitution's guarantees of fundamental rights or any other provision.

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The Fundamental Principles of State Policy in Part II are often described as [empty rhetoric](#)<sup>[10]</sup> due to their unjustifiability, while Fundamental Rights in Part III are constrained by extensive, impossible restrictions. [Loopholes](#) in the guise of poorly-defined 'restrictions' in rights provisions<sup>[11]</sup> have enabled the continued enforcement of the repressive sections of British colonial laws such as [the Penal Code of 1860](#) and the Code of Criminal Procedure of 1898, and facilitated the enactment of later repressive laws such as the [Special Powers Act of 1974](#), and the [Cyber Security Act of 2023](#).<sup>[12]</sup>

### **1.2.4 A neutral Election Commission**

A neutral election commission is essential to make democracy strong. Bangladesh Constitution ensures the independence of the election commission. Constitutionally the CEC and other EC (maximum 4) shall be appointed by the president for 5 years and shall be removed according to the same procedure that applies to the judges of the Supreme Court according to the Act passed by the Parliament . In this regard, recently the parliament has passed the Chief Election Commissioner and other Election Commissioners Appointment Act 2022. Since 2009 there is a separate Election Commission Secretariat for administering administrative functions of the Commission. To ensure the impartiality of the CEC and other EC, the Constitution prohibits the reappointment of these persons in any other service of the republic .

### **1.3 Contradictory Provisions of Bangladesh Constitution with Democracy**

#### **1.3.1 Responsible Government Is Not Ensured by the Constitution**

A Westminster-style parliamentary form of government was promised in the 1972 Bangladesh Constitution, but due to certain of its repressive elements, it was unable to be implemented. According to article 55(3) of the current Constitution, the government is jointly accountable to the parliament. In practice, this kind of accountability is ineffective because the parliament lacks the authority to remove any minister for failing to uphold their obligations. In Bangladesh Constitution, there are provisions for the impeachment of the president under Article 52, and the impeachment of the Speaker and Deputy Speaker under Article 74 but there is nothing in the Constitution for the

#### **1.3.2 Lack of Independence of the Judiciary**

An independent judiciary is a prerequisite of democracy. Though in articles 22, 94, and 116A the Constitution declares for the independence of the judiciary due to the presence of some other provisions of the Constitution like 96, 98, and 99 the independence of the judiciary cannot be ensured. Article 96: This article is related to the security of service of the judges of the Supreme Court. Following the 16th amendment, Parliament now has the authority to dismiss Supreme Court justices. Based on the writ petition, named, Advocate Asaduzzaman Siddiqui and others vs. Bangladesh (WP 9989/2014), the Supreme Court declared this amendment void and viewed it in favor of the re-establishment of Supreme Judicial Justice. A review of the writ petition is still pending before the Appellate Division. If Article 96 is not revived with the re-establishment of the

Supreme Judicial Justice and the power is given to the parliament, then the independence of the judiciary will be threatened.

### **1.3.3 Deficiency of a Neutral Election Commission**

The neutral functioning of an organization highly depends on the impartial appointment of eligible persons. This is indispensable for Election Commission. Article 118 of the Constitution states that the President shall appoint the Chief Election Commissioner and other Election Commissioners in accordance with the Act that was passed by the Parliament [15]. To comply with this Constitutional mandate finally, the parliament has passed the Chief Election Commissioner and other Election Commissioners Appointment Act 2022.

## **1.4 Required Constitutional Reforms to Ensure Democracy in Bangladesh**

### **1.4.1 Necessary Reforms for Responsible Government**

Under Article 55(3) ministers should be made responsible individually and also to the parliament. Impeachment provisions for the Prime minister and ministers must be inserted in articles 57 and 58. Moreover, interestingly the Bangladesh Constitution is silent about who shall exercise the powers and functions of the Prime Minister in his absence. The constitution has been amended seventeen times but still, this issue fails to draw the attention of the lawmakers. So, the provision relating to the exercise of powers in the absence of the Prime minister should be included. Abolition of Article 70 so that members of the parliament can give their votes freely.

### **1.4.2 To Ensure the Impartial Role of the President**

As the president must carry out all of his duties on the advice of the prime minister, with the exception of appointing the chief justice and the prime minister [15], it is essential to have a president who is more democratic. That provision of ‘Secret Ballot’ of the original Constitution should be revived in the Constitution. Furthermore, the ambit of the prime minister’s advice to the president under Article 48(3) must be limited. Some important issues like the appointment of the Chief Election Commissioner and other Election Commissioners and additional judges of the Supreme Court must be made without involving the Prime Minister's advice.

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Part IV vests the executive power of the government in the prime minister-led Cabinet, which is accountable to Parliament.<sup>[13]</sup> This structure seems democratic but, in practice, results in a concentration of authority in the hands of the prime minister due to the dominant position within the Cabinet and the control over MPs through party discipline and party-loyalty enforcing provision [Article 70](#).<sup>[13]</sup>

### 1.4.3 To Safeguard the Independence of the Judiciary

Under Article 96, the removal power of the judges of the Supreme Court should be in the hand of a judicial organization under the control of the Supreme Court. Then while appointing additional judges of the Supreme Court under Article 98, advice from the Chief Justice to the president must be required. Again, the reappointment of retired judges of the Supreme Court in non-judicial posts though not the office of profit must be prohibited. It would be better to increase the age limit of the judges of the Supreme Court.

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Part IV further solidifies the prime minister's control by granting them authority over Cabinet affairs, overshadowing other ministers and centralizing executive decisions.<sup>[14]</sup>

The Constitution has undergone 17 amendments, reflecting its susceptibility to political pressures over its pledge to ensure justice, equality, and liberty.<sup>[15]</sup> Considering the unlimited powers granted to the prime minister and the people's limited civil rights, [Badruddin Umar](#) has famously termed it "A Constitution for Perpetual [Emergency](#)."<sup>[16][17][18]</sup>

## **Chapter-Two**

### **Why constitutional reform is essential**

#### **2.1 To ensure a balanced, inclusive, and accountable system of governance, several key issues must be addressed**

1. Term limits for the prime minister: A constitutional provision should be introduced to prevent any individual from serving more than two terms as prime minister. In addition, the selection process for the prime minister could be modified to resemble that of the president, with an indirect election by members of parliament, ensuring a more democratic and less autocratic process.
2. Separation of key leadership roles: The constitution must ensure that the positions of party leader, head of the executive (prime minister), leader of the parliamentary party, and leader of parliament are never held by the same individual. This separation is crucial to avoid the dangerous concentration of power in a single person, which undermines both democracy and accountability.
3. Abolition of Article 70: Article 70 infringes on the independence of MPs and contradicts the spirit of parliamentary democracy, as it eliminates the possibility of meaningful debate and dissent within parliament and prevents MPs from voting against their party. Its removal is essential for ensuring government accountability through a truly functional legislature.
4. Balancing powers between the prime minister and president: There must be a redistribution of power between the prime minister and the president to prevent an excessive concentration of authority in the hands of a single person. Furthermore, the constitution must include mechanisms to ensure "checks and balances" among the three branches of government executive, legislative, and judicial so that no single branch can dominate the others unchecked.
5. Framework for transfer of power: A clear and robust framework for peaceful power transfer, including provisions for an interim government (caretaker government), is essential to safeguard free and fair elections. The reintroduction of a caretaker government system, with necessary amendments, should be considered.

6. Bicameral legislature: To reduce the concentration of power within a single political party, a bicameral (two-chamber) legislative system should be established. This would allow for broader representation and promote a more inclusive democratic process, ensuring that different voices are heard and represented in the legislative process.
7. Value-based constitution, not ideology-based: The constitution should be rooted in universal values such as democracy, equality, human dignity, and justice rather than any particular political ideology. Divisive issues should be excluded from the constitution to help prevent further division and conflict in society.

Without substantial reform of the constitution, it is impossible to create a balanced system of governance where power is properly distributed among different branches of the government and the democratic process is safeguarded. A revised constitution must prioritize the establishment of checks and balances, ensure the independence of parliament, and place meaningful limitations on executive power, including term limits for the prime minister. Only then can Bangladesh hope to restore true democratic governance and prevent the rise of authoritarianism.

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The [advent of British rule](#) in the 18th century displaced the centuries of governance developed by South Asian empires. The [Regulating Act 1773](#) passed by the [Parliament of the United Kingdom](#) was the first basic law in the [Bengal Presidency](#). The [British Empire](#) did not grant universal suffrage and democratic institutions to its colonies. The British slowly granted concessions for home rule. The [Government of India Act 1858](#), [Indian Councils Act 1861](#), [Indian Councils Act 1892](#) and [Indian Councils Act 1909](#) were later important laws of government. The [legislatures of British India](#) included the [Bengal Legislative Council](#) and the [Eastern Bengal and Assam Legislative Council](#) in the early 20th century. The [Nehru Report](#) recommended for universal suffrage, a bicameral legislature, a senate and a house of representatives. The [Fourteen Points of Jinnah](#) demanded provincial autonomy and quotas for Muslims in government. The [Government of India Act 1935](#) established provincial parliaments based on separate electorates.<sup>[24]</sup>

## Chapter Three

### Constitutional amendments in Bangladesh: political trends

#### 3.1 Research Methodology

The research article is grounded on the outcome of comprehensive observation and analysis of various primary and secondary sources based literature. As part of primary sources, the Constitution of the Peoples Republic of Bangladesh 1972 and the subsequent 16 amendments along with relevant judicial decisions of the Supreme Court (SC) of Bangladesh on relevant matters have been reviewed. Simultaneously, secondary data has been collected and analyzed from noted books, peer reviewed journal articles, research reports, newspaper articles, and also relevant materials from websites. In completing the research, mainly qualitative approach has been adopted to make an analytical reasoning in identifying the trends of politicization of the constitutional amendments in the country and their consequences. Qualitative approach has been adopted to explore the idea and in assessing an understanding of underlying reasons, opinions and socio-political consequences of the research.

#### 3.2 Idea on Constitution

Constitution is a dynamic document and treated like a living tree. Constitution in every country is designed for liberty, order, and justice of people (McClellan, 1989). The term constitution has diverse meaning to different people depending on social structure, culture, politics, and needs of people apart from philosophical underpinnings (Muigai, 2006). Generally, it denotes certain rules, norms and principles, precedents, dealing with three broad ideas namely freedom, equality and justice. It entails the basic structure, powers, functions, and limitations of the government bodies as well as fosters relationship between the rulers and the ruled. Bangladesh after its hard earned independence in 1971 defeating Pakistan framed a constitution on 4 November 1972 and it came into effect on 16 December 1972. It has 153 articles and 16 Amendments. The founding fathers dreamed of a better written constitution for the war ravaged nation. Accordingly a 34-member Constitution Committee headed by Dr. Kamal Hossain, took immense pains to learn from the constitutional experiences from around the world especially from the UK, USA, and India and meticulously drafted the constitution.

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The 1940 [Lahore Resolution](#), supported by the first [Prime Minister of Bengal](#), asked the British government that "the North Western and Eastern Zones of (British) India should be grouped to constitute 'independent states'".

### 3.3 Concept of Constitutional

There are debates and discourse for and against the necessity, procedure, and outcome of constitutional amendment. Sometimes, the changing needs of circumstances and time instigate the legitimate authority for necessary amendments of a constitution. For most constitutionalists, constitutional amendments are designed to fix imperfection and to allow for the correction or improvement of a constitution evolving political experience or understandings (Denning and Vile 2002). The existence of an amending clause in a constitution shows a belief that the fundamental law is a human apparatus subject to human refinement and better function of state machinery (Gray, 1999). The purposes of amendments include protection of basic rights for people, expediting the rule of law, accountability, transparency, and public participation in decision making. The method of amendment is typically written into the constitution itself. The amendment process is indispensable to the velocity and stability of a constitution over time, but it can also open up scope for abuse by legislatures and constitutions can be amended in a way that they begin to reflect the will of particular political interests rather than the will of the people (Dellinger, 1983). There are either rigid or flexible provisions for constitutional amendment with two-third or three-fourth support of the legislature. The proportion of rigid constitutions surpasses the number of flexible ones. However, a constitutional amendment refers to the modification, change or alteration of the constitution. In USA, an amendment means only addition but no modification, substitution, and repeal while in Bangladesh the term amendment as per article 142 implies four means i.e. addition, alteration, substitution, and repeal by two-third majority of parliament members (MPs).

#### SIXTEEN CONSTITUTIONAL AMENDMENTS OF BANGLADESH AT A GLANCE

From 1973 to 2014 Bangladesh constitution has been amended 16 times which are given below:

Amendments	Enactment Dates	Synopsis of the Amendments
1 <sup>st</sup> Amendment	15 July 1973	To make way for prosecution of crime against humanity and war crimes committed in the liberation war of 1971.
2 <sup>nd</sup> Amendment	22 September 1973	Inclusion emergency provision, suspension of fundamental rights and preventive detention.
3 <sup>rd</sup> Amendment	28 November 1974	To give effect to the boundary line treaty between Bangladesh and India.
4 <sup>th</sup> Amendment	25 January 1975	One party system and Presidential form of government were introduced replacing multi-party system.
5 <sup>th</sup>	6 April 1979	Legalizing all acts done by the first Military

Amendment		Authority in the name of Islamisation Added utmost trust and faith in the almighty in the preamble scrapping secularism Bismillah-ar-Rahman-ar-Rahim also added
6 <sup>th</sup> Amendment	10 July 1981	To make way for the Vice President to be a candidate in president election.
7 <sup>th</sup> Amendment	10 November 1986	Legalizing all acts done by the 2 <sup>nd</sup> Military Authority.
8 <sup>th</sup> Amendment	9 June 1988	Setting up six permanent Benches of the High Court Division Islam as a religion declared as the state religion
9 <sup>th</sup> Amendment	11 July 1989	Direct election of the president and the Vice-President simultaneously.
10 <sup>th</sup> Amendment	23 June 1990	Period for reservation of 30 women members seats in the parliament was extended for 10 years.
11 <sup>th</sup> Amendment	10 August 1991	Legalizing the appointment of Shahabuddin Ahmed, Chief Justice (CJ) of Bangladesh as Vice President of Bangladesh and his all activities as the Acting President and then the return to his previous position of the CJ.
12 <sup>th</sup> Amendment	18 September 1991	Reintroducing the Parliamentary System
13 <sup>th</sup> Amendment	28 March 1996	Provision for Caretaker Government (CTG)
14 <sup>th</sup> Amendment	16 May 2004	Increase of women reserve seat to 45 from 30, Increase of retirement age of Supreme Court Judges from 65 to 67 years
15 <sup>th</sup> Amendment	25 June 2011	Abolition of Caretaker Government (CTG). Increased women reserve seats to 50 from 45. Inserted articles 7(a) and 7(b) in a bid to end takeover of power through extra-constitutional means. Restored secularism and freedom of religion but Islam remained as state religion. Nationality of people as Bangladeshi but identity as Bangalee as a nation Acknowledged Sheikh Mujibur Rahman as the Father of the Nation.
16 <sup>th</sup> Amendment	17 September 2014	Impeachment of Supreme Court Judges by Parliament in lieu of Supreme Judicial Council (SJC)

It further proclaimed "that adequate, effective and mandatory safeguards should be specifically provided in the Constitution for minorities in these units and in the regions for the protection of their religious, cultural, economic, political, administrative and other rights". The resolution's status is akin to the magna carta in [Pakistan](#), in terms of the concept of independence. <sup>[25][26][27]</sup>

### **3.4 Trends and Debates**

The legislature in disguise of political affiliation has shown a cunning attitude in amending the constitution since its beginning. The dominant debates on politicisation of constitution and constitutional amendments include secularization of constitution, Islamisation of constitution, one party government to multi-party democracy, basic structure doctrine, military intervention and martial law, provision to referendum to amend the constitution, insertion and abolition of caretaker government, appointment and impeachment of the SC Judges.

### **3.5 Islamisation of Constitution**

Similar to secularism, the idea of Islamisation of the constitution also has a shocking background. After the tragic death of Bangabandhu in 1975 the military ruler turned President Ziaur Rahman added utmost trust and faith in Almighty Allah in the Preamble in lieu of secularism. He also added Bismillah-ar-Rahman-ar-Rahim (In the name of Allah, the most gracious, the most merciful) above preamble of the constitution. Then the criticism was reversed by the leftist and progressive groups of people against the Islamisation.

It is alleged that after the tragic demise of Ziaur Rahman on May 30, 1981 his successor Hussain Muhammad Ershad did the unfinished task of using religion to stay in power grasping same popular public sentiments. President Ershad as a military turned ruler was also tactful in amending the constitution using majority Muslim peoples religious sentiments. He set up six permanent benches of the High Court Division (HCD) outside the capital Dhaka and made Islam as the state religion by the 8<sup>th</sup> amendment seeking mass support during a campaign by major political parties to oust him from power (Hossain, 2016). Before that he cleared his ways to state power through the 6<sup>th</sup> amendment and by the 7<sup>th</sup> amendment he legalized all the actions taken during his military regime from 1981 to 1986. In the wake of movement, he was forced to leave the autocratic regime on December 6, 1990 by rarest unity in mass agitation by the AL, BNP, and Jamaat heralding the new bud of democracy which was strangulated in 1975. The 8<sup>th</sup> amendment was partially declared unconstitutional by the SC in 1989 because of its clash with the basic structure doctrine and the six benches of the HCD was removed from the constitution but Islam as a state religion kept unchanged. It is believed that judges also understand the sensibility of religious issues in the country and as a result they have kept the religious issue untouched. The AL led government by the 15<sup>th</sup> amendment on June 25, 2011 added Islam as a state religion with the provision of equality for other religions. It may be mentioned that the HCD of the SC of Bangladesh in 2016 rejected

the locus standi (right to sue) of a petitioner who filed a writ in 1988 challenging the legality of Islam as a state religion (Bergman, 2016).

### **3.6 Appointment and removal of the Supreme Court Judges**

The president of Bangladesh is empowered in appointing judges of the SC. In appointing the CJ, the president will be independent as per article 95(1) while in appointing judges of the AD and HCD s/he will consult with the CJ as per article 94(2). The problem is in appointing judges in both the divisions of the SC there is huge influence of politics of the ruling party. No fixation of number of judges is another discrepancy to the provision. In line with the prescription of the constitution, there may be a separate law in appointing the judges of the SC. It is ridiculous to change the constitution for impeachment of judges without making firm provision for their merit based and non-partisan appointment. This shows the true image of political trends in amending the constitution. However, through the 15<sup>th</sup> amendment the president was empowered to appoint the SC judges by consultation with the CJ. Previously s/he was to consult with the prime minister for the same purpose. Since, president is devoid of having real executive power; the changes after the 15<sup>th</sup> amendment do not have any impact on neutrality or quality change in the process.

The constitution of 1972 had the provision impeachment of SC judges by the parliament. The 4<sup>th</sup> amendment passed in 1975, vested the power of impeaching SC judges to the president. The 5<sup>th</sup> amendment, brought on during the regime of military strongman Ziaur Rahman, made way for the formation of the SJC to impeach judges. The 16<sup>th</sup> amendment was passed by parliament on September 17, 2014, empowering the members of parliament (MPs) to impeach the top court judges for incapability or misconduct. The HCD of the SC on May 5, 2016 declared the 16<sup>th</sup> amendment unconstitutional (Asaduzzaman Siddiqui and Others vs. Bangladesh, 2014).

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administrative and other rights". The resolution's status is akin to the magna carta in [Pakistan](#), in terms of the concept of independence.<sup>[25][26][27]</sup> On 20 June 1947, the [Bengal Legislative Assembly](#) voted on the [partition of Bengal](#). It was decided by 126 votes to 90 that, if Bengal remained united, it should join the [Constituent Assembly of Pakistan](#). At a separate meeting of legislators from West Bengal, it was decided by 58 votes to 21 that the province should be partitioned and that West Bengal should join the [Constituent Assembly of India](#). At another separate meeting of legislators from East Bengal, it was decided by 106 votes to 35 that Bengal should not be partitioned and 107 votes to 34 that East Bengal should join the Constituent Assembly of Pakistan if Bengal was partitioned.<sup>[28]</sup>

### **3.7 Election and non-party Caretaker Government**

Holding of free and fair election is a major challenge of democracy since the birth of Bangladesh. No political party in power has lost election staying in power as every party has used the state power, mechanism, and political influences for winning election. The elections of 1973, 1979, 1986, 1988, February 1996, and 2014 bear the testimony of vote rigging and manipulation of the elections by the party in power. As a result the provision for the non-political caretaker government (CTG) emerged on 28 March 1996 by the 13<sup>th</sup> amendment. The enactment of the CTG was a result of contentious politics as opposition parties were never agreed in taking part in national elections under ruling party (Haque, 2015). The CTG system was the result of AL movement during 1995 to 1996 for a free and fair election. This system was a violation of the basic spirit of constitution because all ten members of CTG are to be unelected. The CTG was polluted by the BNP through the 14<sup>th</sup> amendment in 2004 through increase the retirement age of Chief Justice (CJ) from 65 to 67 to take advantage of the system. Following the controversy after the 14<sup>th</sup> amendment the state of emergency was declared in 2007 and lasted until the 10<sup>th</sup> election in December 2008. Despite some loopholes of the CTG, it served as a benchmark of credible election for three times. As the interim non-partisan and non-elected 10-member body the CTG was headed by two former chief justices and former head of Bangladesh Bank (BB) convincing the general mass about its effectiveness. AL won two elections during the 1996 and 2008 with the CTG system while BNP won one the general election in 2001.

### **3.8 Constitutional Spirit and Politics**

The constitutional spirit of Bangladesh is basically enshrined in the preamble of the constitution emanating from the struggle-sum socio-political and economic background coupled with the will of the people of all strata. Besides, the constitutional spirit is embodied in part II of the constitution titled as the fundamental principles of state policy (FPSP) and also in fundamental rights (FR) under part III of the constitution. As a touchstone of constitutional spirit and part of long term goal for the nation, the preamble started like American constitution with the Power of We (American Constitution, 1789) and recognized the sacrifice of indomitable heroic people and martyrs for the historical struggle in the liberation war. The four foundational principles namely nationalism, democracy, socialism, and secularism are enshrined in paragraph two of the preamble as core principles and guidelines for the rulers and the ruled. The seeds of Bengali nationalism were sown in 1948 when Muhammad Ali Jinnah, the father of the nation of Pakistan, declared in Dhaka that Urdu will be the state language of the entire Pakistan despite Bengali language was spoken by 54% of the population of Pakistan. Jinnah believed that Bengali language

and culture were influenced by Hinduism and according to his wish the central Minister for education in 1949 proposed the introduction of Arabic scripts for Bengali (Salik, 1977). The Bengali intellectuals doing politics during that period of time were influenced by theories of modernism, liberal socialism, and Marxism. They argued for an independent Bangladeshi state, where a fusion of liberalism and communism had triggered them to endorse the four principles in 1972 constitution as guidelines for the nation (The Daily Star, 2015). Along with the ideals of these four basic principles, the preamble in its paragraph three also pledges to establish parliamentary democracy, exploitation free socialist society, rule of law, human rights with dignity implying freedom, equality and justice for all in political, economic and social aspects. In attaining the goals of a state the legislative organ is the main player and the repository of the supreme will of society (Binkley and Moos, 1952). The constitution recognized people as the supreme power house for state functions as per article 7. Moreover, the supremacy of the constitution is ensured in Articles 7, 26(1), and 65(1) entailing the constitutional spirit and expectations of the founding fathers and all people.

The following chart shows the gradual increase of involvement of business persons into politics in Bangladesh:

<b>Parliament Elections</b>	<b>Businessmen Elected</b>
1954	4%
1973	13%
1979	34%
1996	48%
2001	51%
2008	63%
2014	80%

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On 6 July 1947, the [Sylhet referendum](#) voted to partition [Sylhet Division](#) from [Assam Province](#) and merge it into East Bengal. On 11 August 1947, [Muhammad Ali Jinnah](#), the president of the Constituent Assembly of Pakistan, declared that religious minorities would enjoy full freedom of religion in the emergent new state.<sup>[29]</sup>

### **3.9 Constitutional Amendments: Expectation VS. reality**

Jurisprudential development of constitution in Bangladesh has not been very easy and smooth. The constitutional baby was born healthy but grew up with illness and wounds due to unhealthy social, economic and political development of the nation (The Daily Star, 2015). The constitution had undergone massive alterations, manipulations, suspension, and amendments in the last 47 years. The original constitution of Bangladesh in 1972 was characterized by genuinely true norms and principles of democratic governance. But the socio-economic and political development of post-liberation Bangladesh rendered the constitution almost unworkable. Harsh realities dictated the 2<sup>nd</sup> amendment providing for declaration of state emergency, suspension of fundamental rights, and preventive detention apparently failed to fulfill the objectives for which it was enacted. The emergency imposed by the military dictator Ayub Khan from 1965 to 1969 had a bitter impression and experience of AL government for the suppression and imprisonment of hundreds of citizens leading the party to make an avowed commitment to repeal not only black laws but also remove any scope which can retard the process of democracy (Maniruzzaman, 1988). Subsequently, the AL government passed the Special Powers Act 1974 which was more misused than used by successive governments in the name of public interest and state security (Ahmed, 1991).

Increasingly worsening political situations in the post-liberation Bangladesh ultimately led to adoption of the 4<sup>th</sup> amendment which was almost absurd in nature. It was termed as the revision of the constitution rather than the amendment. The 5<sup>th</sup> and 7<sup>th</sup> amendment started with militarization of the constitution in the name of Islamisation. Both the military rulers tactfully sensing the perception of general people brought some changes in the constitution. However, inclusion of the referendum system and supreme judicial council (SJC) for impeachment of judges by the 5<sup>th</sup> amendment were hailed by most people. The 1<sup>st</sup> amendment applauded by the people as it added the provision of trial for war criminals and put restriction on some fundamental rights to them. The AL government can take the full credit the trial of war criminals. By amendments during the authoritarian years from 1975 to 1990, military rulers used to manipulate the basis of the formation of the nation in order to promote each leaders vision of Bangladesh identity. A qualitative change in the constitutional development occurred after a popular movement had overthrown General Ershad's autocracy in December 1990. As a result Bangladesh joined what Samuel P. Huntington called the third wave of democracy (Huntington, 1991). The parliamentary form of democracy was restored under the 12<sup>th</sup> amendment in 1991. But unfortunately rigged polls on February 15, 1996 again posed a threat undermining the democratic provisions of the constitution. Subsequently, a Non-party caretaker government (CTG) was inculcated in the constitution and the CTG was successful from 1996 to 2009 in holding free and fair polls. But with the repeal of the CTG the hope of free and fair election has been the most excruciating challenge for the democracy. The election in 2014 is a glaring example of historical vote rigging, absence of voter, and unfair competition selecting a total of 153 MPs out of 300.

The 5<sup>th</sup> amendment was repealed but it retained the SJC for the removal of SC judges but retained the nationality of people as Bangladeshi in lieu of Bangalee as per 1972 constitution. The AD of the SC used trick of beneficent construction of constitution as to nationality, otherwise the Bangladehi people living in the country and abroad from 1975 to 2010 had to change their legal documents as to names, deeds, and certificates spending lots of money. The court also reflected its sagacity as to retention of the SJC as the similar provision is staying in many counties including

USA, UK, Canada, Hongkong, Germany, Sweden, Pakistan, Malaysia, Singapore, Israel, Zambia, Trinidad and Tobago, New South Wales, Victoria and others (The Independent, 2017).

As the insertion of the 13<sup>th</sup> amendment has ensured three elections with credibility and fairness, it also embodied the unique feature in the growth of democratic culture. Justice Abdul Wahab Miah, (the then judge of the AD of SC) in a case (Abdul Mannan Khan vs. Government of Bangladesh, 2012) opined that there were widespread allegations of vote rigging and manipulation of the elections by the party in power in the Parliament election held in 1973, 1979, 1986, 1988 and February 1996.

The 14<sup>th</sup> amendment with 50 reserve seats for women has galvanized the idea of positive discrimination towards women empowerment in compliance with constitutional mechanism under articles 19(3) and 28(4). The provision for 30 reserve seats for women was added by the 10<sup>th</sup> amendment on 23 June 1990 by the 10<sup>th</sup> amendment. The 11<sup>th</sup> amendment on 10 August 1991 legalized the appointment of the Chief Justice (CJ) Shahabuddin Ahmed as Vice President of the country and his activities as the Acting President and then the return to his previous position of the CJ. Justice Shahabuddin Ahmed faced many critical political situations during that time.

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The first constituent assembly was arbitrarily dissolved by the Governor General in 1954. This led to the court challenge of [Federation of Pakistan v. Maulvi Tamizuddin Khan](#), in which the federal court supported the Governor General's decision, although Justice [A. R. Cornelius](#) expressed dissent. The dissolution of the assembly was one of the first major blows to democracy in Pakistan.<sup>[30]</sup>

The Constitution Bill was introduced in the Assembly on 12 October. Its first reading began on 19 October and continued till 30 October. The second reading took place from 31 October to 3 November. [Manabendra Narayan Larma](#) made an impassioned appeal to declare the term of citizenship as "Bangladeshi" instead of "Bengali".<sup>[31]</sup> Larma argued that labeling all citizens as Bengali discriminated against non-Bengali communities, including his own [Chakma](#) ethnic group. In 2017, the Supreme Court declared the Sixteenth Amendment Act of 2014 illegal and void. The amendment had introduced the provision of impeaching judges in parliament. The Supreme Court held that since parliament cannot hold [conscience votes](#) due to [Article 70](#), the provision would have undermined [judicial independence](#).<sup>[32]</sup>

## Chapter Four

### The Agenda and Dilemmas of Constitutional Reform

#### 4.1 What Reforms are on the Table?

Bangladesh's Constitution of 1972 was modeled on a UK-style parliamentary system combined with a US-style "strong form" of judicial review that allows the Supreme Court to test the constitutionality of legislation. The President acts as a ceremonial head of state bound by the Prime Minister's advice. The Prime Minister, the leader of the majority party, is accountable to the parliament. However, a paradoxical provision—Article 70—forces MPs to vote strictly on the party line or lose their parliamentary seats. Though the framers of the Constitution defended it as a stabilizing measure against the frequent fall of governments, the provision has allegedly taken partisan whipping to an extreme level, paving the way for a prime ministerial dictatorship. Though the judicial branch has been granted substantial independence in the Constitution, the Supreme Court of Bangladesh has been severely politicized, while the subordinate courts are controlled by the executive branch. The Election Commission and other integrity institutions have also been subordinated to the government.

During the civil service quota reform movement, the student protesters had no other reform agenda. Most of the reform demands were voiced by civil society groups calling for transparency, accountability and orderly transfer of powers during the AL regime's sixteen-year-long rule. After the fall of the AL government on 5 August 2024, student protesters accelerated their push for constitutional reform. Alongside calls for adopting an entirely new constitution, there are proposals for reducing the prime minister's powers and balancing them with those of the president, term limits for the prime minister, establishing a bicameral legislature, and even changing the parliamentary system to presidential.

Currently, AL, arguably the country's largest political party, is not expected—and perhaps not welcome to submit any proposal. The second of the Big Two—the Bangladesh Nationalist Party (BNP)—published a 31-point reform agenda in 2023, which resonates with issues such as depoliticizing appointments in the higher judiciary, election commission, and other accountability institutions; creating a bicameral legislature; introducing a two-term limit for the prime minister; restoring the election-time caretaker government; and reviving Bangladeshi nationalism. The Jamaat Islami (JI), the third-largest party and arguably the chief beneficiary of this regime change, has come out with its own 10-point reform proposal, including a shift to a proportional

representation (PR) system rather than the current first-past-the-post (FPTP) system. It has been argued that the PR system may ensure fairer and more credible representation in the parliament and government, as the FPTP system often disproportionately benefits the Big Two—AL and BNP. Interestingly the JI has remained silent about the fate of the foundational pillars of the Constitution, particularly secularism.

The BNP and JI's reform proposals are also silent on the daunting task of professionalizing the bureaucracy and making it accountable to the legislature. Another conspicuous omission in the conversation is internal reform within the political parties themselves. Parties being the chief constitutional actors, any constitutional reform that does not require the political parties to be internally democratic is likely to fall flat once the patriarchal party leaders take the reins of power in the future. In the past, Bangladeshi political parties have almost universally abused their constitutional amendment powers for their partisan and coterie interests.

#### 4.2 The Dilemmas

The Constitution Reform Commission faces at least four major dilemmas. The first one is whether to reform the existing constitution or adopt a new one. As Professor Ngoc Son Bui outlines, arguments to replace a constitution may stem more from ideological inclination than a genuine need for structural realignment. Understandably, the student protest leaders' enthusiasm for replacing the 1972 Constitution appears to arise from their doubts about its foundational principles. If the student leaders' zeal for constitutional replacement is acted upon, it will surely reopen the old wounds of the ideological battle. Despite the AL's fall, there remains deep societal reverence for the liberation war and its ideals. Currently, there are no serious demands from the political parties to write a new constitution. Instead, opposition to the idea of constitutional replacement and the demand for transferring power to the people's elected representatives are growing. It appears that the opportunity cost of making a new constitution could be higher than the protest leaders anticipate. Unchained from over 50 years of Bangladesh Supreme Court constitutional jurisprudence, a new constitution will risk further replacement, particularly if the AL comes back to power, which is not at all impossible. Opening the door to frequent constitutional replacements may make the foundation of constitutionalism shaky particularly risky for societies as divided as Bangladesh.

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States that Bangladesh is a unitary republic.<sup>[33]</sup> Demarcates the territory of the Republic.<sup>[34]</sup> Proclaims that [Islam](#) is the state religion, but guarantees equal status and equal rights to all religions.<sup>[35]</sup> Declares [Bangla](#) as the state language.<sup>[36]</sup> Specifies the [national anthem](#), [national flag](#), and [national emblem](#) of the Republic.<sup>[37]</sup>

The second challenge for the Commission centers on participation and inclusivity, again originating from the ousted AL regime and its huge social base. How can the Commission achieve a reform acceptable to all while simply ignoring the AL? As seen in 1972, excluding the Islamist and conservative forces from the constitution-making process left a deep participation gap, undermining the constitution's longer-term endurance. Ironically, the same seems to be the case this time. A relatively pragmatic approach could be to show 'an optimal level of constitutional deference' to ideologically contested issues and focus on the 1972 Constitution's design flaws only. However, there are signs that the student leaders might not be interested in this. Therefore, the reform initiative carries a visible Achilles' heel.

The third question for the Commission is how to materialize the reforms. There is a perception that the Commission's eight members primarily practicing lawyers and legal academics connected with a single Bangladeshi university, the University of Dhaka and the chairperson, who is on deputation from a U.S. university, lack the representativeness needed to dictate something as significant as the constitution of a country. Considering that the 1972 Constitution was drafted and adopted by a democratically elected 469-member Constituent Assembly, a strong argument can be made that this reform commission does not have the democratic mandate to replace or amend it. It has been proposed that any constitutional reform or replacement in Bangladesh must be pursued through democratic and participatory processes such as a constituent assembly, elected parliament or referendum. Although the interim government has declared that it will take the Commission's proposals to the political parties (excluding the AL and its allies) and consult them before finalizing the reform packages, it is not clear when and how the reform will be executed. The BNP has demanded that the Commission simply prepare a set of recommendations and leave the reforms to an elected parliament. While this strategy might facilitate some sort of political compromise between the parties, the student protesters and the interim government do not seem to be very enthusiastic about this idea. Moreover, uncertainty persists over which political parties or coalitions may come to power through the next election and how the interim government would negotiate with them. The most uncertain is the tenure of the interim government and when the election would be held.

Fourthly, there are some legitimate questions looming around the interim government's own commitment to the reforms that it advocates. Pending the work and recommendations of the reform commissions on the judiciary, electoral system, anti-corruption, police, public administration, and mass media, the government has sent some acting Supreme Court judges into forced leave and appointed new ones seemingly for political reasons, constituted a Search Committee under an AL-made law for appointing a new Election Commission, dismissed trainee police officers in controversial ways, forced the entire public service commission and anti-corruption commission to resign and reconstituted those with individuals of its own choosing. The government's decision to cancel the accreditation of around sixty journalists has drawn protest from international press freedom bodies. All these actions raise critical questions about the government's sincerity regarding its reform commitments and could potentially shake the moral base of those reforms in future.

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Declares [Dhaka](#) as the [national capital](#).<sup>[38]</sup> Provides eligibility for citizenship.<sup>[39]</sup> States that all powers are derived from the people, and the exercise of such powers will be by the authority of the Constitution. Proclaims that the Constitution is the supreme law of Bangladesh, and that any laws inconsistent with the Constitution are void and of no effect.<sup>[40]</sup> Article 7A prohibits the suspension or abrogation of the Constitution.<sup>[41]</sup> States that certain parts of the Constitution are unamendable.<sup>[42]</sup>

## **Chapter-Five**

### **Constitutional disaster & 'legal' impunity**

#### **5.1 Constitutional Past in Futuristic Perspective**

Bangladesh has, since independence, been viewed as a country of natural calamities. In 1974, it was called a “bottomless basket”. It made others look good, literally so, when Bangladeshis subsequently took to dressing everyone up across the globe in quality garments. Infamy greeted the moderate Muslim country as a result of the brutal killing of its most celebrated leaders, in

1975 and 1981. The autocratic tenure of Ershad, a reincarnation of Pakistan’s Ayub Khan, followed. And, since 1990, Bangladesh has been witnessing the golden era of female premiership, a period that has made both friends and foes wonder how colorful, progressive, and tolerant Bangladesh is as a nation.

For masses and voters, constitutional issues and amendments have been a distant reality – nothing to do with real life in terms of practical social, political, and economic predicament. Voters have been rather happy to see two of the most powerful ladies of the country alternate for the chair of premiership. In terms of trade and business, apparently, Bangladesh is doing fine. In agricultural sectors, production and distribution methodologies have started to work inclusively. Industrial sectors have been growing steadily. Wild capitalistic mode of production and distribution has hardly allowed time for issues of constitutional development, the rule of law, and human rights.

The innocent people and naïve voters have not thought much about the consequence of a brute majority in parliament. Any overwhelming brute majority in the highest legislative body can go wild at any time, especially in an immature democracy. This is exactly what has happened with constitutional legacy, political culture, and constitutional amendments in Bangladesh.

The Bangladesh Constitution is rigid; it was not supposed to be changed so quickly and easily. It does matter how many times Bangladesh changes its constitution so dramatically, diminishing characteristics of the supreme law of the land. What is the content or substance of any constitutional amendment and what is the purpose of a particular amendment? The ways adopted and the means resorted to make sweeping changes to the written and rigid constitution is what really counts, to understand the mentality and pattern of behavior of political parties in power and the puppeteers behind the curtain.

In this article, the Fifteenth Amendment to the Constitution<sup>1</sup> will be analyzed, an amendment that promised to restore the spirit of the original 1972 Constitution. Even a superficial reading of the Fifteenth Amendment will show that the present-day Constitution is in no way close to the original one. A deeper reading will show how the Fifteenth Amendment has frustrated the spirit of the original 1972 Constitution, which had claimed to reflect the hopes and aspirations of the Bengali nation.

Constitutional amendment may sometimes bring a supposedly serious impact on the ongoing legal, political, and economic narratives of the time, touching the very core of the fundamental principles of the governance and system of the concerned nation. More importantly, the entire fabric of constitutionalism may be directly affected by such amendments to the constitution by pushing its “overall operational scheme” down the wrong path.

For example, the British and Pakistani constitutional laws were standing in the way of freedom for the Bengali nation. After Bangladeshis achieved their hard earned political independence, they were keen to achieve economic prosperity and overall emancipation with the help of a legally sound constitutional framework, to be implemented and followed by the ruling elite first. However, often politicians and business lobbies have failed Bangladeshis miserably. At the outset of almost every constitutional amendment, Bangladeshis were promised to be better served by our politicians and by the representation of the ruling class. Constitutionally, lawmakers are the people’s representative in parliament, empowered with the legal authority to change the constitutional system or any of its provisions.

However, why the apex court was so intimately involved in bringing about some of the latest constitutional amendments made conscientious circles of the country wonder. It appears that we have been much involved in circular logic of changing constitutional principles back and forth without giving deeper thought to the hopes and aspiration of the masses, who should have gotten the first priority for modern amenities of life such as safe food, drinking water, decent shelter, enlightened education, and proper health care, and first and foremost a constitutional guarantee to life, liberty, and happiness.

How, did Bangladesh end up here, with one constitutional disaster after another?

Historical Look at the 15th Constitutional Amendment: Reminiscing BAKSAL

The Fifteenth Constitutional Amendment is indeed a disaster for the constitutional mechanism in Bangladesh, as well as the rule of law based on the will of the people, without which no government can be legitimate. With the help of a brute majority in parliament, no ruling party can

make constitutional provisions that cannot be changed even by referendum or by any successive legitimate government. In fact, the present constitution is a footnote-based constitution;<sup>2</sup> there is no other such example of its kind in the world. By incorporating the Fifteenth Amendment, the ruling party lawmakers at the helm in parliament have made about one-third of the constitution a “holy text” that can never be changed or amended. The argument advanced is that the apex court of the country ordered Parliament to change the Constitution based on a controversial verdict.

The way the then Chief Justice passed the Short Order and wrote this verdict, after fourteen long months of retirement, is by itself a mockery of the supreme law of the republic.<sup>3</sup> Moreover, the Awami League government adopted the Fifteenth Amendment even before the nation could see what the judges had to say about Thirteenth Amendment in a divided verdict that contained diverse opinion about the system of Non-Party Caretaker Government (CTG).

Traditionally, in Bangladesh, judges are mostly appointed on the basis of their commitment to political leaders and ideologies. A report by Asian Human Rights Commission has meticulously proved this reality.<sup>4</sup>

In the following timeline, consider a glimpse about how this controversial Fifteenth Amendment was adopted:

## 5.2 Critical Timeline of 15th Amendment

On July 21, 2010, the Prime Minister formed a 15-member special parliamentary committee to push for another constitutional amendment. In the next 11 months this committee orchestrated

27 sessions to demonstrate that it was holding various types of consultations with so-called experts. However, it had failed to justify why Bangladesh needed a sweeping constitutional amendment that would practically change one-third of the constitution.

On March 29, 2011, in its 14th meeting, the committee arrived at a consensus that CTG should not be abolished from the Bangladesh constitution.

On April 27, 2011, the Prime Minister suggested that the committee should not abolish the CTG, but amended its provisions.

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States that [nationalism](#), [socialism](#), [democracy](#) and [secularism](#) are the fundamental principles of state policy.<sup>[43][44][45][46][47]</sup> Pledges to ensure the emancipation of peasants and workers.<sup>[48]</sup> States that education will be free and compulsory.<sup>[49]</sup> Endeavours to protect and improve the environment.<sup>[50]</sup> States that the Republic will ensure equality of opportunity to all citizens. States that endeavours will be made to ensure the equality of opportunity and participation of women in all spheres of life.<sup>[51]</sup> Declares the [separation of powers](#) between the judiciary and the executive.<sup>[52]</sup> States that measures will be adopted to conserve cultural traditions and the heritage of the people.<sup>[53][54]</sup> Ensures the protection of national monuments.<sup>[55]</sup> States that the Republic will promote international peace and to support oppressed people throughout the world.<sup>[56]</sup>

On May 10, 2011, a 4-3 split judgment of the Appellate Division of the Bangladesh Supreme Court was delivered. It stated that CTG is unconstitutional, and it has been declared void prospectively. Chief Justice Khairul Haque observed that the Parliament may keep a renovated form of CTG for tenth and eleventh parliament elections, and that the Parliament needed to be abolished before 42 days of the next parliamentary elections.<sup>5</sup>

On May 16, 2011, the parliamentary committee discussed the issue of CTG again.

On May 29, 2011, the committee decided to keep CTG as a constitutional system of holding election and transfer of power from one government to another. Two changes were proposed:

1) CTG must hold parliamentary elections within 90 days; 2) if CTG signs any treaties with any foreign states or governments during its tenure, then those treaties will need to be ratified by the forthcoming Parliament.

On May 30, 2011, the committee met with the Prime Minister Sheikh Hasina. Despite her earlier position against the removal of CTG system, in that meeting everything had changed overnight and abolishment of CTG was recommended.

On June 20, 2011, the Fifteenth Constitutional Amendment Bill was approved by the cabinet, which abolished the CTG, before the final judgment of the Supreme Court was written or pronounced, with the ill motives of the then CJ of the Bangladesh Supreme Court.

On June 25, 2011, the 15th Constitutional Amendment Bill was introduced in Parliament and, on the same day, was passed in fashion similar to that witnessed by Bangladesh with regard to the 4th Amendment, i.e. the one party rule of BAKSAL. Lawrence Ziring considers the Fourth Amendment as the biggest tragedy of Bangabandhu's fate.<sup>6</sup>

The Fifteenth Amendment to the Constitution, as it stands, has virtually made one-third of the Constitution unamendable by any successive parliament<sup>7</sup>. Such a constitutional amendment is unheard of across the world in recent centuries. Moreover, the Amendment introduced apparent self-contradictory provisions in Article 7B and Article 142 of the Constitution. Article 7B begins with the words, "notwithstanding anything contained in article 42" and Article 142 starts with "notwithstanding anything contained in this Constitution". Use of the notwithstanding phrase in both the articles makes it ambiguous which article will prevail over the other. It is a jurisprudential fallacy of an extreme kind. It would be unimaginable for any sound person to think of such a constitutional amendment that prohibits lawmakers from amending any existing constitutional provision adopted unilaterally by a ruling party. Prior to gaining a brute majority in Parliament, Awami League never expressed its intention to abolish CTG.

From BAKSAL to Rampal, we have been witnessing the same political trend amongst a section of Awami stalwarts, many of whom find it easy to sacrifice national interest for personal or group financial gains. In more than four decades of Bangladesh history, as a ruling party, the Awami League has never demonstrated any deep respect for public opinion or commitment to national security, which should never be compromised under any circumstances. The history of

constitutional changes during the Awami League regime is full of incidents of betrayal of the true spirit of constitutionalism. One may consider Omar Khasru's take on this for further details.

It is unfortunate that General Ziaur Rahman was falsely named as one of the perpetrators of the tragic events of 1975. History has demonstrated that General Zia wanted to pull out the country from Awami misrule, and the Bangladeshi people from the tragic aftermath of aborted military coups, directly related to BAKSAL politics that banned all political parties. Zia had to deal with these tragic consequences of Bangladesh national politics. After the demise of Zia, the democratic process was interrupted for about a decade and an autocratic dictatorial rule shrouded the nation. Both Awami League and BNP had to deal with the unfortunate reality of autocratic rule led by General Ershad, who, on his part, has continued playing a nasty game of power politics in the country.

The year 1986 witnessed orchestrated national parliamentary elections. Awami League was the main collaborator of General Ershad in the third parliamentary assembly election. Sheikh Hasina was the main opposition party in the Parliament and could capture only 67 seats. Awami League leaders were convinced that they should not be the main collaborator of the Ershad regime for a longer period of time and, along with Jamaat-e-Islami, Sheikh Hasina demanded another fresh parliamentary elections.

### **5.3 The Fourth National Parliamentary Elections held on March**

3, 1988, were boycotted by BNP. As a result, along with Jamaat leaders, Awami League had to follow the suit to save face. The Jamaati leaders had been working closely with Awami League to third parliamentary assembly. In fact, it was the collaboration make its efforts successful to be the main opposition party in the between Awami League and Jamaat that ultimately prompted these two political parties to fight for CTG during early years of 1990s.

**The Fifth National Parliamentary Elections were held on February 27, 1991** and this time again, the Awami League failed to capture power, winning only 88 seats in the National Assembly. This is the short historical background that helped Awami League return to the helm. Despite the Awami League having a history of collaboration with General Ershad and Jamaat leaders for a longer period of time, it did not share governmental powers with them. Awami League appears to love sharing governmental politics with so-called left-leaning politicians, who were the main collaborators in the process of establishing BAKSAL, the one party misrule that still haunts every fair-minded Bangladeshi citizen.

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Declares that all laws inconsistent with the fundamental rights of the Constitution are to be void.<sup>[57]</sup> Enshrines the principle of equality before the law.<sup>[58]</sup> Prohibits discrimination on the basis of religion, race, caste, sex or place of birth.<sup>[59]</sup> States that there will be equality of opportunity for people who seek public employment.<sup>[60]</sup> Prohibits citizens of the Republic from receiving foreign titles, honours, awards or decorations without prior approval by the President.<sup>[61]</sup> Declares that the protection of the law is the inalienable right of all citizens.<sup>[62]</sup> Proclaims that no person shall be deprived of life and personal liberty.<sup>[63]</sup> Provides safeguards for those in detention.<sup>[64]</sup> Prohibits the use of forced labour.<sup>[65]</sup> Provides protections for persons in respect of trial and punishment.<sup>[66]</sup> Enshrines freedom of movement;<sup>[67]</sup> freedom of assembly,<sup>[68]</sup> freedom of association;<sup>[69]</sup> freedom of thought, conscience and speech,<sup>[70]</sup>

Failing to capture state power in 1991, the Awami League became paranoid; this prompted its leaders to adopt strategies to collaborate with Jamaati leaders openly, so they could destroy the politics of BNP. Failing to capture the majority seats in Parliament in the national elections of 1991, along with Jamaati leaders, Sheikh Hasina launched vicious attacks on the BNP government and held 173 days of *hartal* (complete standstill) in the country.<sup>11</sup>

#### **5.4 Tenth Parliamentary Elections: Reminiscence of 1996 & 1973 Elections?**

Many analysts think that the tenth parliamentary elections held on January 5, 2014 is a reminder of the 1973 and 1996 parliamentary elections. Such an observation lacks in objectivity and credibility in a number of ways.

Firstly, 1973 elections were held under the pressure of unruly leaders and activists of Jatio Samajtantric Dal, which had served foreign interests to discredit the leadership of Bangabandhu. The first parliament was in serious dilemma with its Pakistani origin, supposed to work for the Pakistani legislative body. The Constituent Assembly created by the lawmakers of the Pakistani election was suffering from a serious lack of legitimacy.

Secondly, Bangabandhu had resigned from the post of Premiership to make the 1973 election creditable and legitimate. Sheikh Hasina took oath as a Prime Minister for the third time on January 14, 2014, while she was holding the same post of Prime Minister of the country.

Thirdly, the tenth parliamentary election was held on January 5, 2014, while the 9th Parliament was dissolved 20 days later on January 24, 2014, just a day before its tenure ended.

Fourthly, neither did Members of Parliament (MP) of the 9th Parliament lose their seats during the 10th Parliament election, nor did they resign from their parliamentary seats. Thus, the legal and political position of all MPs and other ministers remained the same. They contested seats in parliament, while they had been occupying those very seats and the powers associated with them. In other words, after January 5, 2014 Bangladesh got two parliaments, in a country with a unitary form of government.

Fifthly, the tenth parliamentary election can be termed as a constitutional necessity, as much a necessity as the 1996 election held under a politically charged and legally obligated situation. But neither were the political forces behind those two parliamentary elections the same, nor did their foreign patrons belong to the same group. Thus, Bangladesh national interest and ethnic pride has been stolen and destroyed. Of course, Bangladeshis cannot forget and forgive their leaders for their betrayal to the nation and the people.

#### **5.5 Constitutional Adventurism vis-à-vis Political Correctness**

General Ershad captured power illegally from the elected Presidency of Justice Abdus Satter. Ershad wanted legitimacy for his government, and Awami League had been cooperating with the Ershad government secretly. On the surface, Awami League was cooperating with BNP to oust Ershad from power in the 1980s, and this mysterious political dynamic had started to play a

stronger role in shaping the power politics of Bangladesh. Ideological fights, based on sound strategies, began to become things of the past. Grabbing state power and misuse and abuse of national resources had become the only reason most politicians began waging battles against each other.

Being part of a ruling force in the country, many BNP leaders had never tried to understand Awami policies of capturing and retaining power. In fact, neither BNP nor Jamat understood too well the strategies and policies Awami leaders were pursuing while they were in and out of power.

Following the independence of Bangladesh, Awami League wanted to transform itself into a party similar to that led by Ataturk of Turkey or Nasser of Egypt. The untimely and unwanted demise of Bangabandhu did not permit this happen.

Ziaur Rahman wanted to be a leader like Mahathir Mohammed of Malaysia. Foreign forces did not want this for obvious reasons. More importantly, BNP, as a driving force in the hands of Ziaur Rahman, failed to provide a political platform to allow him to achieve his reformative and constructive policies. Fighting Ershad, Begum Khaleda Zia emerged as an uncompromising leader in Bangladesh. As a result, she was a natural choice for BNP leadership, as it had happened with Sheikh Hasina.

Most political analysts and observers tend to argue that both of these powerful ladies of Bangladesh do not maintain any real differences, ideologically speaking. Such an assumption is incorrect; despite both being supporters of democracy and free market economy, their ideology of governance and development models are fundamentally different. However, the idea that both the female leaders could be influenced and dominated by Big Brothers from New Delhi gets support. Since 1/11 of 2007, the leadership of Sheikh Hasina took a different turn, witnessed clearly in the tenth parliamentary elections of the country.

## **5.6 Tenth Parliamentary Elections**

As a ruling party, Awami League has won 232 in a total of 300 parliamentary seats in the latest elections. This is no source of wonder for anybody. The unprecedented events that led to this result knows no parallel in any democratic exercise in the history of any country of the world. Out of 300 seats, 153 seats were won uncontested, while in 1973 this number was 8. Moreover, this time, the Awami League itself won 127 seats uncontested. In 1973, all 8 uncontested seats were in the pocket of the ruling party.

This time Awami League used the autocratic military junta and General Ershad and his faction of Jatiya Party to orchestrate the parliamentary elections, while Bangabandhu was very reluctant to use other political forces or state powers in his election endeavors. Apparently, ten tiny political parties contested in this January 2014 elections, but in reality less than 10% (many estimates show the figure less than 5%) voters participated in these elections that made it the most unrepresented elections of Bangladesh. The IFEX report has elaborated these events in details.

Most Western observers are in consensus about the credibility of the tenth parliamentary elections. However, Awami League, as a ruling party, was and is determined to remain in power by hook or crook. On December 21, 2013, *The Economist* stated that in these elections the Awami League would win, but the nation will fail definitely. This is not a new thesis about Awami leadership in Bangladesh and it has become rather the most important political strategy of the party. Even before the demise of first Awami League government under the leadership of Bangabandhu, Ahmed Sofa, a great patriot of Bangladesh, reiterated that Awami League was no more interested to win with the people it wishes to win power by defeating Bengali people.

The people of Bangladesh have increasingly becoming hostages in the hands of rulers and their cronies, who claim themselves as representatives, but are destroying all the hope and potential Bangladesh as nation can aspire to.

### From Original Constitutional Flaws to Utter Manipulation & Virtual Suspension of Fundamental Rights

The chief architect of the 1972 Constitution, Dr. Kamal Hossain, would possibly agree that the text of the first supreme law of Bangladesh suffered from two major flaws, which could diminish the entire envisioned system of Bangladesh.

#### **The two major flaws were:**

1. Poor application of the theory of separation of powers<sup>17</sup>, which should give shape to the constitutional framework for a state and its legal system. Who was it that, for the first time, conceptualized the theory of separation of powers might a debatable issue in legal research or political discourse. But without its application one cannot expect a check and balance in state power at the highest levels of governance. Members (34 of them) of the first Constituent Assembly must have known the substance of the theory of separation of powers, and being well-versed in jurisprudential studies of constitutional theories Dr. Kamal Hossain was probably aware that without some Aristotelian thought – that the rule of law is always better than kind of application of Montesquieu’s theory, originating from the absolutism exercised by kings or monarchs – no modern constitutionalism can work for the people. During the lifetime of Montesquieu, the Bourbon monarchy in France was horribly despotic; the monarch was an absolute Lawgiver, the Highest Executor, and the Chief Judge for France. In fact, Louis XIV declared: “I am the State”. Possibly, Dr. Kamal Hossain could not have imagined that Bangladesh could repeat this history. Still, the 1972 constitution was marked with some nominal and very formal distribution of powers at the highest levels of state machinery.

2. The original 1972 Constitution did not contain any provision for declaring emergency under any circumstances. In other words, neither the Head of State (President) nor the Head of the Government (Prime Minister) could declare emergency in the country and the Chief Justice could not endorse any kind of state emergency declared or undeclared by any Bangladeshi citizen of force in disguise of constitutional necessity. Most of the constitutional experts would tell us that this is a very profound constitutional flaw in the 1972 Supreme Law of Bangladesh.

However, if we take these two theoretical shortcomings of the 1972 Constitution of Bangladesh in context and allow them to be exposed simultaneously, then Dr. Kamal Hossain would possibly argue that these two negative notes about the original text of the constitution might have neutralized the pulses of absolutism and anarchism on one hand and could leave Bangladesh alone for the fulfillment of the original intention and declared commitment to the fundamental rights of all citizens, including people claiming themselves as religious minorities or having non-Bengali ethnic identities.

With the help of the second Amendment to the Bangladesh constitution, constitutional provisions necessary for the declaration of state emergency were introduced. But, neither the framers of the constitution nor the lawmakers elected in the 1973 parliamentary elections could seriously ponder about the method of using the power of declaring emergency.

Thus, the establishment of one-party rule brought with it the adoption of the fourth Amendment to the constitution in 1974. This is the beginning of the constitutional disaster, which turned into a tsunami that has buried many of cherished democratic traditions and hard earned fundamental rights. Surprisingly, all this was done in the name of the consolidation of the objectives of the glorious liberation war and for the sake of the preservation of the basic structure of the constitution, which will be discussed shortly.

Consider what the Fifteenth Amendment to the constitution has achieved. Firstly, in the name of returning to the original

1972 constitution, the nation has been lied to. This is sheer deception, if not utter hypocrisy. No investigation has proven that the present Constitution of Bangladesh is a reminiscence of

1972 Constitution. Now we have state religion as a constitutional principle and all powers vested in the hands of one person, i.e. the Prime Minister, who can control all major work of the President and even the Chief Justice. Chief Justice K. Haque has proven this in front of the nation. Abdul Halim offers a critical assessment of Khairul Haque's legacy. Secondly, even the right to have referendum over any vital national issue has been taken away as such a provision is completely absent in the constitution.

Thirdly, Bangladesh has lost a system of parliamentary supremacy that could change laws, including constitutional provisions whenever necessary. What kind of constitutional rigidity is this? No credible answer can be found elsewhere in the world.

Fourthly, Bangladeshis were told that they now lived under constitutional supremacy for which national parliamentary elections are orchestrated, where less than 5% voters exercise their voting rights. All major opposition parties were blamed for their non-participation in 5 January 2014 elections. But, the fact of the matter is that the ruling party did not want any other popular party to contest in the 10th parliamentary elections.

Fifthly, any criticism of the Fifteenth Amendment may result in any citizen being accused of sedition against the State, a crime for which the constitution itself declares a punishment of death.

All this has happened in the backdrop of a kind of fascist onslaught on the political right to protest and assemble in any place in Bangladesh.

Lastly, by virtue of the Fifteenth Amendment to the constitution, the principle accepted worldwide that sovereignty belongs to people has been violated completely and in many ways. Even with an overwhelming majority, support within and outside the parliament, Bangladeshis supposedly should not even try to change their constitution for the better. Any serious and consistent efforts to bring about progressive changes to the constitution may lead to death penalty for those who voice their right to act or speak against impractical, unhealthy, unacceptable, and discredited provisions of the constitution. Who and how people will enjoy the right to free speech and political opinion is not a debatable question in terms of constitutional principles.

However, under the present constitution, a huge number of constitutional principles, provisions, and rules must be kept above all kinds of criticism and those constitutional letters must be regarded as “sacred words” not to be amended by the nation or by any highest legislative body genuinely elected.

Thus, the present constitution has to be regarded as a religious scripture and its injunctions to be followed blindly; any number of people can be hanged by the government if it thinks that the accused have been engaged in sedition against government. In other words, we have diminished the differences between religious injunctions and constitutional rules on one hand, and on the other hand, have taken the concepts of statehood and government as synonymous.

It makes one wonder how the authors of the Fifteenth Amendment to the Constitution claim themselves as secularists. For some secularists in Bangladesh, anti-Islamism is the real essence of state-secularism, which will promote all non-Islamic religious activists so that they can kill any religious man or woman just by labeling them as Islamic fundamentalists. This is a dangerous phenomenon that recent history has registered in some countries including India, which is now engulfed by Hindu fanatic forces at all level of its polity and governance. Surprisingly, these Hindu fanatic forces are termed as “nationalist”, and have also been credited for their wish to unite South Asian countries under the political ideology of Hinduism.

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Declares that Bangladesh will have a [President](#) who will serve as [Head of State](#) of the Republic. States that the President will be elected by members of the [Jatiya Sangsad](#). Prescribes that the President will only act in accordance with the advice of the Prime Minister, with the exception of the appointment of the [Prime Minister](#) and the [Chief Justice](#). Specifies that the President must have attained the age of 35 years, and must be qualified for election as a member of parliament.<sup>[77]</sup> States that the President has the power to grant [pardons](#) and to commute or suspend the sentences of individuals convicted in a court.<sup>[78]</sup> Specifies that the President is limited to serving two 5-year terms in office, regardless of whether they are consecutive or not. Outlines that in order to tender their resignation, the President must write under their hand addressed to the [Speaker](#).<sup>[79]</sup> Outlines the process of impeachment and removal from office of the President.<sup>[80]</sup> Specifies the process of removal from office of the President on grounds of physical or mental incapacity.<sup>[81]</sup> States that the Speaker will discharge the duties of President in the event of the President's absence.<sup>[82]</sup>

## 5.7 The Doctrine of Basic Structure

Initially, those that framed the constitution had been pondering over fundamental constitutional principles. Combining socialism, nationalism, secularism, and democracy, they wanted to have a legal philosophy for constitutionalism in Bangladesh.<sup>21</sup> However, the ideological basis of the Bangladesh constitutional system did not resonate with the hopes and aspirations of the vast majority of people, who wanted to see the materialization of proclaimed goals of economic emancipation.

Politicians, as always, were, and are, very keen to keep citizens engaged in political rhetoric to monopolize power in running state affairs. State ideology is a self-severing agenda for most political parties, which have been engaging in deadly internecine fighting for capturing and retaining power. Neither the empty words of patriotism, nor the religious commitment to the betterment of fellow-citizens can anymore serve as an effective tool to generate popular support to the political parties and their activists as they have lost their credibility as genuine patriots and leaders committed to the causes of nation building. Moreover, most people have been talking consciously about their leaders' hypocritical behaviors and life-style.

In this backdrop, the role of the 'doctrine of necessity' has increased tremendously at every turning point of Bangladesh national history and constitutional development. The doctrine of necessity has been used by politicians, judges, and military-backed governments; they have used it in diametrically opposite ways; thus Bangladesh has not achieved any maturity in its political and constitutional system. Amendment after amendment to the constitution has failed to produce any lasting result to consolidate fundamental rights, the rule of law, and political stability. Political instability, along with endemic corruption and vicious cycles of poverty, has pushed Bangladesh toward a system tantamount to a police state, something the Bangladesh nation has hated since British domination over people and resources.

Since the hard-earned independence of Bangladesh in 1971, the Bangladeshi people wanted to have their own constitutional framework and legal system conducive to the protection of their national glory, dignity, identity, and for the creation of a society based on fairness, decency, equality, and progressive ideals of economic and constitutional growth. Our brutal colonial and Pakistani legacy either hurt the people deeply and/or Bangladeshis have just been indulging in reactionary squabbling, leading to a kind of intellectual bankruptcy. As a result, Bangladesh decided to make political speeches or statements an integral part of the constitution, despite committing fundamental blunders during and after the liberation war.

The instrument of surrender is one example of such a blunder, where neither the Bangladesh Chief of Staff of Freedom Fighters, nor his deputy was seen beside General Jagjit Singh Aurora as the surrender was signed. General Aurora signed as the General Officer Commanding in Chief, India and Bangladesh Forces, Eastern Theatre. Since the Deputy Chief of Staff of Bangladesh weapons, he should have signed the Instrument on behalf of the Bangladesh Force.<sup>22</sup>

The Simla Treaty is another post-liberation blunder of the Ruling Awami League, wherein India and Pakistan were party to the decision of releasing 93,000 Pakistani prisoners of war who were really war criminals.<sup>23</sup> The agreement should have been tripartite, and included Bangladesh; it should not have been bilateral, between India and Pakistan. Both these blunders undermined and lowered the sovereignty of Bangladesh, becoming a permanent shame for the nation.

Not Bangabandhu's immensely popular speeches, but his Six

### **5.8 Livable**

Points Formula along with Bangladesh's Shwadhinota Shonod (Proclamation of Independence on April 17, 1971), could serve well as Bangladesh's constitutional ideology. Even the brutal Pakistani leaders, including Z.A. Bhutto, acknowledged the strength of the Six Points Formula to lay down the foundation of a constitution of any federal government. Bangladesh is still based on a unitary form of government; it does not need federal constitutionalism as yet. The separate currency issue within Bangladesh territory is completely irrelevant.<sup>24</sup> But the spirit of the Six Points and Shadhinota Shonod is quite relevant to Bangladeshi constitutionalism.

Bangladeshis desperately need a constitutional framework and legal system that can make their motherland livable, and can keep it sustainable environmentally, with harmonious economic growth. For this Bangladesh really needs constitutional provisions that would remain above all kinds of partisan politics and extremist political or religious ideas.

Should that be named as the Basic Structure of the constitution that would maintain some order in distributing State Powers from top to bottom? Maybe not! As State constitution primarily refers to the formation of national institutions at all important levels and their rules of engagement in contributing to nation building as a whole, so, in final analysis, the interplay between vital state institutions determine speedy and smooth growth towards statehood.

Does Bangladesh really need some non-amendable, permanent, perpetual, infallible, and eternal Articles or constitutional rules in our constitution? One doesn't need serious legal or constitutional acumen to conclude that such kind of audacious rigidity cannot work for the betterment of nation building. Moreover, it creates a paradoxical situation: no future and fully accredited and credible highest legislative body will be able to make necessary constitutional amendments or changes without which Bangladesh can get locked into a dysfunctional system, in which it exists today. The main challenge at hand is how to fight corruption, poverty, and prevailing impunity, which has been widely used by ruling elite, especially the party in power.

The catastrophic erosion of our prevailing political and constitutional system is the outcome of the concentration of State power in the hands of very few who claim that they have the birth right to dominate the people in every aspect of their existence and activities. These 'fortunate' few are seeking life-long sole-agency over the destiny of the people and national interests, which should remain above partisan politics and all kinds of fanaticism. To this date, we have not reached national consensus over any important national and state-building issue.

Some politicians are still partial toward a Pakistani type of politics, with power mongering at any cost. And, the so-called patriotic and largest political party, in particular its central leaders, are out to make Bangladesh completely subservient to its mightiest neighbor, whose ruling elite are reaping benefits at the cost of total destruction of the motherland: Golden Bengal.

### **5.9 Indulging in a Myth of Alien Constitutional Doctrine**

Whatever way we wish to discover a textual justification for the Basic Structure of the Bangladeshi constitution, we may fail to find one, as there is no "constitutional text" for it. In fact, it is impossible to insert such a provision in a state's constitution, as then many other constitutional principles and provision would also claim such a special status. As a result, all the

defenders of the “Basic Structure” of the constitution have to argue merely based on some presumed underlying spirit of constitutional principles and provisions that cannot be found in the constitution.

The doctrine of basic structure is nothing but an abstract hypothesis that tends to curtail the powers of the highest legislative body of a democratic country where some sections or some families look for sole agency in the process of the amending the constitution. In a narrower sense, this perceived doctrine, it may be argued, for the sake of political and constitutional stability, tries to keep some pillars of the constitutional framework irremovable or unchangeable, so that no unconstitutional forces can intervene in the system of governance in any unwanted manner.

However, such an impractical rigidity may prove uncalled for and may even provoke the vast marginalized majority to resort to various types of anarchism to have their stake in running the affairs of the State. In a broader sense, the ruling elite may feel unable to resist its ideological and religious adversaries through constitutional means that cannot be challenged in any court of law within the country. In both ways, this doctrine may put the State mechanism in a precarious situation, which may go out of hand at any time. To avert that possibility, the 15th Amendment to our constitution made all kinds of national referendum of getting public support for any amendment unconstitutional and can therefore be regarded as anti-constitutional. This is one of the greatest strategies of constitutional history and development of our time.

The 15th amendment of our constitution has created way too many controversies, too many for a Supreme Law of a modern State. Not only has it attempted to change many age-old and universally accepted formulas of jurisprudence and constitutionalism, it has created too many ambiguities for a sound legal document.

### **5.10 The Fifteenth Amendment taking us nowhere**

The ill-conceived ideology of the two-nation theory of colonial London and its agents made both barbaric Pakistan and fanatic India a reality for all people of the subcontinent. However, India remained on the path of some kind of constitutionalism, and Pakistan opted for militarism. Pakistan has failed to produce any kind of system for its own federalism, but India was sincere to keep its federal government running to avoid any catastrophe such as a dismantling of Indian federalism that encompasses thousands of ethnic and linguistic groups living in the Indian territories.

In 1951, the Indian Parliament decided to make its first constitutional amendment, while, at that time the Pakistanis were still fighting for what type of constitution it should have. Indian politicians understood very well that the concentration of huge capital in private hands might be detrimental to the interests of the growing Indian state. The constitution amendment brought in 1951 known as the First Amendment Act of parliament consolidated powers in the hands of government to resist individuals and groups aspiring to grab properties of all kinds in the name of right to private property. This legal idea of governmental preeminence over national wealth was in the line of socialistic ideals about nationalized economy, where sectors of private economy must be under the strict control of governmental agencies. After independence in 1971, the Bangladesh government also followed the same strategy, leading to disastrous consequence, including the devastating famine of 1974.

In *Sajjan Singh vs. State of Rajasthan*, the 17th Amendment Act of the Indian Constitution, relating to fundamental rights, was challenged but it was also rejected like *Sankari Parsad Unfettered amendment privilege of the Parliament* remains untouched in this case but the opinion was divided 3:2. Two dissenting judges, Hidayatullah, based on non-amendability of a fundamental right, and Mudholkar JJ, based on non-amendability of basic structure, raised doubt as to the amendability of all the provisions of the constitution.

The petitions against constitutional amendment were recurrently rejected but objections against amendment were not stopped. After the above cases, came the *Golaknath* case. The *Golaknath* case is the first to breach parliamentary power of unfettered amendment. *I.C. Golaknath vs. State of Punjab* established the principle of non-amendability of fundamental rights, based on the argument of Hedayatullah J. in the *Sajjan Singh* case in favor of non-amendability of fundamental rights and not on the argument of basic feature of Mudholkar J. in *Sajjan Singh* case that was the base of the later *Kesavananda* case.

*KesavanandaBharati vs. State of Kerala* is the landmark case establishing the doctrine of basic structure. Parliament acted to undo the effect of the *Golaknath* case and declared that parliament can amend any part of the constitution. The *Kesavananda* case discarded the argument against the non-amendability of the provision of constitution that affects the basic structure of the constitution. There are many other subsequent cases where the decision of *Kesavananda* has made the basic structure dubious in some matters and made favorable matters of fundamental rights that should not come under the attack of any ruling party or government. We can observe here that *Indira Gandhi vs. Raj Narain*, popularly known 'Election case', was filed against 39th amendment and the decision of *Kesavananda* was also affirmed in this case. Other cases in favor of the basic structure doctrine to be noted are *Minerva Mills vs. Union of India*, *Waman Rao vs. Union of India* and *A. K. Roy vs. India*.

### **5.11 Doctrine of Basic Structure in Bangladesh**

The present-day Bangladeshi constitution has been apparently designed along the lines of Indian jurisprudential understanding of constitutionalism; the constitution can be regarded as a broader legal framework for all national institutions and for the branches of Law yearning for a decent system of Rule of Law. Problems with many jurists and legal minds in Bangladesh is that they believe that the overriding and overarching powers of some people sitting at the top of important national institutions can meet the challenges by empowering them only through dogmatic activism or partisan politics. Power sharing at the State level is not a simple legal mechanism that can ensure the supremacy of one state organ over others.

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States that the Republic is to have a [Cabinet](#) with the [Prime Minister](#) as its [Head](#). Prescribes that the executive power of the Republic is to be exercised by or on the authority of the Prime Minister.<sup>[83]</sup> States that appointments to the Cabinet will be determined by the Prime Minister and made by the [President](#). Specifies that not less than nine-tenths of members of the Cabinet must be Members of Parliament. States that the President will appoint as Prime Minister the member of parliament who appears to command the confidence of the [Jatiya Sangsad](#).<sup>[84]</sup> States that the office of Prime Minister will become vacant in the event they: tender their resignation to the President; cease to be a member of parliament or cease to retain the confidence of the majority of members of the [Jatiya Sangsad](#). There are no term limits specified for the Prime Minister.<sup>[85]</sup> Specifies the tenure of office of other Ministers.<sup>[86]</sup>

## **5.12 Conclusion**

As the will and aspiration of the people of Bangladesh, democracy is considered one of the main pillars of the Bangladesh Constitution. The state has a constitutional obligation to create a socialist society through a democratic process and to protect everyone's basic human rights. But some of the Constitutional provisions are contradicting the concept of democracy which has been pointed out in the paper. Bangladesh Constitution has been amended seventeen times but still, these contradictory provisions were not amended. In an interview with *New Age*, the head of the Constitution Drafting Committee (1972), D. Kamal Hossain, indicated his support for constitutional changes to increase government accountability while preventing restrictions on the activities of other political parties [8]. Though the government has already announced its choice to transmit the constitution for an A-to-Z review to the Law Commission [7] still no such effective step is taken by the government to fulfill this announcement. Now it becomes essential to form a constitutional reform committee with experts and according to their recommendations bring necessary reforms to the constitution.

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- **Constitution of Bangladesh**<sup>[a]</sup> is the supreme [law of Bangladesh](#). Adopted by the 'controversial'<sup>[1][2][3]</sup> and virtually "one-party"<sup>[4]</sup> [Constituent Assembly of Bangladesh](#) on 4 November 1972, it came into effect on 16 December 1972. The Constitution establishes Bangladesh as a unitary parliamentary republic. Directly borrowing from the four tenets of [Mujibism](#), the political ideology of [Sheikh Mujibur Rahman](#),<sup>[5]</sup> the constitution states [nationalism](#), [socialism](#), [democracy](#) and [secularism](#) as its four fundamenta.
- While the Constitution nominally declares the protection of fundamental rights and an independent judiciary, it has been often labelled as "[fascist](#)"<sup>[7][8]</sup> and [criticized](#) for fostering [autocracy](#)<sup>[9]</sup> and [failing to safeguard](#) human rights.
- The Fundamental Principles of State Policy in Part II are often described as [empty rhetoric](#)<sup>[10]</sup> due to their unjusticiability, while Fundamental Rights in Part III are constrained by extensive, imposable restrictions. [Loopholes](#) in the guise of poorly-defined 'restrictions' in rights provisions<sup>[11]</sup> have enabled the continued enforcement of the repressive sections of British colonial laws such as [the Penal Code of 1860](#) and the Code of Criminal Procedure of 1898, and facilitated the enactment of later repressive laws such as the [Special Powers Act of 1974](#), and the [Cyber Security Act of 2023](#).<sup>[12]</sup>
- Part IV vests the executive power of the government in the prime minister-led Cabinet, which is accountable to Parliament.<sup>[13]</sup> This structure seems democratic but, in practice, results in a concentration of authority in the hands of the prime minister due to the dominant position within the Cabinet and the control over MPs through party discipline and party-loyalty enforcing provision [Article 70](#).<sup>[13]</sup>
- Part IV further solidifies the prime minister's control by granting them authority over Cabinet affairs, overshadowing other ministers and centralizing executive decisions.<sup>[14]</sup>
- The Constitution has undergone 17 amendments, reflecting its susceptibility to political pressures over its pledge to ensure justice, equality, and liberty.<sup>[15]</sup> Considering the unlimited powers granted to the prime minister and the people's limited civil rights, [Badruddin Umar](#) has famously termed it "A Constitution for Perpetual [Emergency](#)."<sup>[16][17][18]</sup>
- The [advent of British rule](#) in the 18th century displaced the centuries of governance developed by South Asian empires. The [Regulating Act 1773](#) passed by the [Parliament of the United Kingdom](#) was the first basic law in the [Bengal Presidency](#). The [British Empire](#) did not grant universal suffrage and democratic institutions to its colonies. The British slowly granted concessions for home rule. The [Government of India Act 1858](#), [Indian Councils Act 1861](#), [Indian Councils Act 1892](#) and [Indian Councils Act 1909](#) were later important laws of government. The [legislatures of British India](#) included the [Bengal Legislative Council](#) and the [Eastern Bengal and Assam Legislative Council](#) in the early 20th century. The [Nehru Report](#) recommended for universal suffrage, a bicameral legislature, a senate and a house of representatives. The [Fourteen Points of Jinnah](#) demanded provincial autonomy and quotas for Muslims in government. The [Government of India Act 1935](#) established provincial parliaments based on separate electorates.<sup>[24]</sup>

- The 1940 [Lahore Resolution](#), supported by the first [Prime Minister of Bengal](#), asked the British government that "the North Western and Eastern Zones of (British) India should be grouped to constitute 'independent states'".
- It further proclaimed "that adequate, effective and mandatory safeguards should be specifically provided in the Constitution for minorities in these units and in the regions for the protection of their religious, cultural, economic, political, administrative and other rights". The resolution's status is akin to the magna carta in [Pakistan](#), in terms of the concept of independence.<sup>[25][26][27]</sup>
- administrative and other rights". The resolution's status is akin to the magna carta in [Pakistan](#), in terms of the concept of independence.<sup>[25][26][27]</sup> On 20 June 1947, the [Bengal Legislative Assembly](#) voted on the [partition of Bengal](#). It was decided by 126 votes to 90 that, if Bengal remained united, it should join the [Constituent Assembly of Pakistan](#). At a separate meeting of legislators from West Bengal, it was decided by 58 votes to 21 that the province should be partitioned and that West Bengal should join the [Constituent Assembly of India](#). At another separate meeting of legislators from East Bengal, it was decided by 106 votes to 35 that Bengal should not be partitioned and 107 votes to 34 that East Bengal should join the Constituent Assembly of Pakistan if Bengal was partitioned.<sup>[28]</sup>
- On 6 July 1947, the [Sylhet referendum](#) voted to partition [Sylhet Division](#) from [Assam Province](#) and merge it into East Bengal. On 11 August 1947, [Muhammad Ali Jinnah](#), the president of the Constituent Assembly of Pakistan, declared that religious minorities would enjoy full freedom of religion in the emergent new state.<sup>[29]</sup>
- The first constituent assembly was arbitrarily dissolved by the Governor General in 1954. This led to the court challenge of [Federation of Pakistan v. Maulvi Tamizuddin Khan](#), in which the federal court supported the Governor General's decision, although Justice [A. R. Cornelius](#) expressed dissent. The dissolution of the assembly was one of the first major blows to democracy in Pakistan.<sup>[30]</sup>
- States that Bangladesh is a unitary republic.<sup>[33]</sup> Demarcates the territory of the Republic.<sup>[34]</sup> Proclaims that [Islam](#) is the state religion, but guarantees equal status and equal rights to all religions.<sup>[35]</sup> Declares [Bangla](#) as the state language.<sup>[36]</sup> Specifies the [national anthem](#), [national flag](#), and [national emblem](#) of the Republic.<sup>[37]</sup>
- Declares [Dhaka](#) as the [national capital](#).<sup>[38]</sup> Provides eligibility for citizenship.<sup>[39]</sup> States that all powers are derived from the people, and the exercise of such powers will be by the authority of the Constitution. Proclaims that the Constitution is the supreme law of Bangladesh, and that any laws inconsistent with the Constitution are void and of no effect.<sup>[40]</sup> Article 7A prohibits the suspension or abrogation of the Constitution.<sup>[41]</sup> States that certain parts of the Constitution are unamendable.<sup>[42]</sup>
- States that the Republic is to have a [Cabinet](#) with the [Prime Minister](#) as its [Head](#). Prescribes that the executive power of the Republic is to be exercised by or on the authority of the Prime Minister.<sup>[83]</sup> States that appointments to the Cabinet will be determined by the Prime Minister and made by the [President](#). Specifies that not less than nine-tenths of members of the Cabinet must be Members of Parliament. States that the President will appoint as Prime Minister the member of parliament who appears to command the confidence of the [Jatiya Sangsad](#).<sup>[84]</sup>