



# **Sonargaon University (SU)**

## **Research Monograph**

### **On**

### **“Constitutionalism Without Constitutional Culture: Explaining the Fragility of Rule of Law in Bangladesh”**

**Research Monograph Submitted for the partial fulfillment of the award of the degree**

**in**

**LL.B (Hon's)**

**Department of Law**

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### **Submitted To**

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## Letter of Transmittal

To

**Md. Sagor Hossain**

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Subject: Submission of Research Monograph on “**Constitutionalism Without Constitutional Culture: Explaining the Fragility of Rule of Law in Bangladesh**”

Dear Sir,

This is a great pleasure to submit the Research Monograph on “**Constitutionalism Without Constitutional Culture: Explaining the Fragility of Rule of Law in Bangladesh**” as a partial requirement for the fulfillment of my LL.B course under the Department of Law of the Sonargaon University (SU).

I have given due efforts to make this Research Monograph as fruitful one and to make it as informative as possible. I hope that this paper will not be the formality of academic course completion rather it will be a source of information for other purpose on this topic.

Yours sincerely

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## Declaration

I do hereby declare that the Research Monograph Title “**Constitutionalism Without Constitutional Culture: Explaining the Fragility of Rule of Law in Bangladesh**” prepared solely by me and which has been submitted to the department of Law, Sonargaon University (SU) for achieving the LL.B (Hon’s) Degree. This is an original work of mine. No part of this research, in any way or in form, has been submitted to any University or Institution for any Degree, Diploma or for other similar purposes.

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## **Supervisor Certificate**

This is to certify that the work presented in this dissertation is based on the work, carried out by the author herself under my supervision in Department of Law, Sonargaon University (SU).

It is also certifying that the work presented here is original and suitable for submission as the style and contents, for fulfillment of LL.B. program.

.....  
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For giving me the opportunity and support to complete this research on **“Constitutionalism Without Constitutional Culture: Explaining the Fragility of Rule of Law in Bangladesh”**. I am very grateful to him for his proper guidance, helpful discussions, constructive criticism, valuable editorial assistance and advice during the preparation of this research paper. Without his help, it was almost impossible for me to complete the research work. I would like to convey my heartiest respect and special thanks to him. I am also thankful to him for helping me in terms of methodology procedure of the research paper. I would like to express my gratefulness to my friends as well as wishers to me for their motivation from the beginning of my research work.

Thank you

**Afroj Mukty**

## **ABSTRACT**

The implementation of Constitutionalism Without Constitutional Culture: Explaining the Fragility of Rule of Law in Bangladesh continues to pose uncertainties in the modern world. Given that many states constitutionally treat such rights as aspirational and not justiciable, it is difficult to enforce them judicially at the domestic level. Bangladesh has embodied these rights in Part ii of its Constitution as a social welfare goal of the State. This article takes Bangladesh as a case study and examines the international legal framework for the implementation of esc rights at the domestic level. Making a comparison with other jurisdictions, such as India and South Africa, the article examines the approach of the judiciary of Bangladesh (the Supreme Court) in giving effect to these rights. Lastly, the article argues that the court should devise appropriate and effective enforcement mechanisms for these rights.

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# Chapter One

## Introduction

### 1.1 Introduction

The constitution of a nation is its supreme law, wherefrom the powers of government are derived and wherein the rights of the citizens of that nation are outlined. In common usage, a constitution is a document that outlines the structure of a political system. In simple language, a constitution is the instruction book for how things work. Most constitutions also specify individual rights and freedoms. The form of a constitution differs from country to country. Although in most countries it's in written form, however there are exception where there are laws and declarations which serve as constitution, for instance in UK and Israel. The purpose of Constitution has been identified to have a physical written form of the national thoughts, giving a structure to the government, and finally to give the rule of the government justification. Thomas Paine, one of the founding fathers of the US described "A Constitution is not the act of a government but of people constituting government, and a government without a constitution is power without right. A constitution is a thing antecedent to a government and a government only the creature of the constitution." Hilaire Barnett, a famous scholar in law from Queen Mary University of London, further elaborated the thought of Thomas Paine by stating that "from this definition it can be discerned that a constitution is something, which is prior to government, or, as Paine expresses it 'antecedent' to government giving legitimacy to the government and defining the powers under which a government may act."<sup>1</sup>

### 1.2 Objectives of the Study

The preface of the Constitutionalism Without Constitutional Culture: Explaining the Fragility of Rule of Law in Bangladesh.

1. To know about the Constitutionalism Without Constitutional Culture.
2. To explore the doctrine of Constitutionalism in Bangladesh.
3. To find out strength and weakness of the doctrine of Constitutionalism in Bangladesh in the contest of Bangladesh.

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<sup>1</sup> Ahmed (n 17). See Rokeya Chowdhury, 'The Doctrine of Basic Structure in Bangladesh: From "Calfpath" to Matryoshka Dolls' (2014) 14 (1&2) Bangladesh Journal of Law 43, 64–65.

### **1.3 Constitution**

Constitution is the one of the most important law for the people of a country which is related to the state and for all institution and legal entities under it. These rules are used for setting the people's culture, tradition and the countries entity in mind. All countries of the world have few basic characteristics in their Constitution and these rules are to ensure that the basic rights of the people are protected. Constitution also plays an important role to set the rules for forming the rules and regulations for the government, for constructing political party and for arranging the election of the country. All political parties, organizations and institutions set their internal rules according to the constitution of the country so Constitution is very important for a country. The basic principle of the Constitution is to serve the people, organizations and institutions by providing them a proper guide line which is appropriate for the country.<sup>2</sup>

### **1.4 Constitutional Law**

Constitutional Law drawn primarily from constitution, including from such sources as decisions of the Supreme Court, legislation like the Representation of People Order (1972), the Rules of Procedure of Parliament, and constitutional conventions like the convention of consultation with the chief justice regarding appointment of the Judges of the Supreme Court. Adopted by the Constituent Assembly in November 1972, the Constitution of Bangladesh consists of 153 articles and 4 schedules arranged in eleven main parts to regulate the functioning of the state . To begin with, its preamble declares nationalism, socialism and democracy to be the fundamental state principles, and envisages establishment through democratic process of an exploitation free society where the rule of law, fundamental human rights and freedom, equality and justice will be secured for all citizens.

### **1.5. Definition of Constitutionalism in Bangladesh**

The Constitutionalism in Bangladesh means that the Constitution is supreme over the parliament and the parliament can exercise its functions being only within the bounds of the Constitution. Constitutionalism in Bangladesh is possible only where the constitution is written and rigid. This Constitutionalism in Bangladesh is also called

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<sup>2</sup> Kawser Ahmed, 'Misreading or Leapfrogging? SC's Power to Review Constitutional Amendment', The Daily Star (Dhaka), 22 August 2017, 12.

judiciary supremacy in the scene that the judiciary the highest court of the land is supreme over the legislature. Professor Hood Philips says that, “To say that a Constitution is supreme is to describe its relation to the legislature’s power to alter the Constitution is either limited or non-existent.” Actually a constitution with Constitutionalism in Bangladesh not only defines the power of the legislature, it defines and establishes the principal organs of the state. It is a source of their authority. If any organ does anything in violation of the constitutional limitations then court can declare the action and this paramount power of the court is given by the Constitution itself. The Constitution has sanctity over everything in the realm. This position is called Constitutionalism in Bangladesh.

### **1.6 Definition of Parliamentary Supremacy**

Parliamentary Supremacy means that parliament is supreme over the Constitution. It is also called legislative supremacy because the legislature is not a body created by the Constitution neither the power of the legislature is limited by the Constitution. Legislature exercises an unlimited and supreme power in law making. Such legislative supremacy is possible only where the Constitution is unwritten and flexible. Three essential feature of parliamentary supremacy:

- There is no law which parliament cannot change or modify.
- There is no distinction between constitutional law and ordinary law.
- There is no body which can declare the law passed by the parliament illegal or inconsistent.

### **1.7 Supreme Law**

The Constitution is the Supreme Law of Bangladesh. Article 7(2) runs for the Supremacy of the Constitution as “This Constitution is, as the solemn expression of the will of the people, the supreme law of the Republic, and if any other law is inconsistent with this Constitution that other law shall, to the extent of the inconsistency, be void”. However, the Constitution is the supreme law of the Republic, the fundamental law from which all public authorities derive their powers, all laws their validity and all subjects their rights. It is supplemented by laws enacted and adopted by the legislature for regulating the exercise of powers through organs established by the Constitution.

## **1.8 Supremacy of Constitutional Law**

In a nation that is governed and has a legal system that functions under the rules of an adopted Constitutional form of government, then the Constitution IS the supreme law of the land.

## **1.9 Constitution and Sovereignty in the World**

According to Harley G A Wright it was natural once the conflict with Britain reached the stage where independence was the only real alternative to submission that the men of the Revolution should turn to constitution making. In Constitutional law, it was appeared to many that the High Court had adopted a new norm of constitutional interpretation: “parliamentary sovereignty” was replaced with “sovereignty of the people”. This change was most marked in the “free speech” cases. While some celebrated with promises of a new sense of citizenship and revitalized democratic traditions others saw these promises as empty and warned that judicial implication of rights threatened positivist legal values and judicial independence. 1998 Sovereignty of the People – The New Constitutional norm 167 PART I – SOVEREIGNTY OF THE PARLIAMENT OR SOVEREIGNTY OF THE PEOPLE – THE THEORETICAL FRAMEWORK Rooted in the basic norm, ultimately, is the normative import of all the material facts constituting the legal system. A shift in the basic norm of constitutional interpretation compels examination, in both the old norm and the new, of the fundamental assumptions made about the people, the political process, the judiciary and the relationships between them. To focus such a potentially broad discussion, it is necessary to analyze the points at which the theoretical structures underlying each norm compete and clash. The familiarity of many of these arguments is perhaps explained by their thematic nature; the issues sketched below recur in different guises throughout constitutional discourse and lie at the bottom of many constitutional disagreements.

As the most renowned legal minds have always known, cogency depends upon acknowledging the unknowable. 191 Part of the attractiveness and persistence of Diceyan theory is its open embrace of its limits, its open reliance upon political solutions in the extreme case. It is fitting perhaps, as the “inevitable” republic advances and as the constitutional ties with Britain are severed, “that the men of the Revolution should turn to constitution making”. However there are doubts as to the

identity of the constitution makers. It should not be the responsibility of the judiciary alone. The revolution lacks just one thing – the consent of the sovereign people. 190 Wade has noted that “The closer judges come to constitutional bedrock the more prone to disorientation they seem to be”: H R W Wade and C Forsyth, *Administrative Law*, (7 ed 1994) at vi, cited by Justice Kirby, “The Struggle For Simplicity – Lord Cooke and Fundamental Rights”, speech delivered at the New Zealand Legal Research Foundation, 45 April 1997 at 59. As Dixon J stated in *Melbourne Corporation v Commonwealth* [1947] HCA 26 ; (1947) 74 CLR 31 at 82, “[i]t is not a question whether the considerations are political, for nearly every consideration arising from the Constitution can be so described, but whether they are compelling.” In a similarly open characterization, Sir Anthony Mason has referred to judgment as involving “objective and principled elaboration”: A Mason, “The Role of a Constitutional Court in a Federation: a Comparison of the Australian and the United States Experience” (1986) 16 F L Rev 1 at 28.<sup>3</sup>

### **1.0 Characteristics of Constitutionalism in Bangladesh**

- The Constitution is written.
- The Constitution must be rigid.
- There must be, in constitution, either or implied declaration that this Constitution shall be the supreme law and any other law inconsistent with this Constitution shall be void.
- The parliament is created by the Constitution itself and it exercises its legislative power being within the bounds of the constitutional limit

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<sup>3</sup> Kawser Ahmed, ‘Misreading or Leapfrogging? SC's Power to Review Constitutional Amendment’, *The Daily Star* (Dhaka), 22 August 2017, 12.

# Chapter Two

## Constitution In The World

### 2.1 Concept of Constitutionalism

Constitutionalism is a political and legal philosophy that advocates the limitation of governmental power through a constitution and the rule of law. It is based on the principle that governmental authority should not be exercised arbitrarily but must operate within a framework of established legal norms and democratic values. Constitutionalism seeks to ensure accountability, separation of powers, protection of fundamental rights, and respect for democratic governance. A constitution under constitutionalism serves not merely as a legal document but as a mechanism for controlling state power and safeguarding citizens' liberties. In modern democratic states, constitutionalism requires that all public institutions, including the legislature, executive, and judiciary, function within constitutional boundaries and remain subject to legal scrutiny.<sup>4</sup>

The essence of constitutionalism lies in the supremacy of the constitution over all governmental actions. It emphasizes limited government, checks and balances, judicial review, and the protection of individual freedoms. Constitutionalism also requires political actors to respect constitutional norms and values beyond the literal text of the constitution. Therefore, a constitution alone does not guarantee constitutionalism; rather, constitutionalism depends upon adherence to constitutional principles by both state institutions and citizens.<sup>5</sup>

### 2.2 Constitutional Culture: Meaning and Importance

Constitutional culture refers to the attitudes, beliefs, values, and practices that shape how citizens and public officials understand, interpret, and implement constitutional principles. It encompasses the shared commitment of society to constitutional norms, democratic governance, and the rule of law. Constitutional culture develops through historical experiences, political traditions, educational systems, and civic engagement.

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<sup>4</sup> Carl J. Friedrich, *Constitutional Government and Democracy: Theory and Practice in Europe and America* (Boston: Ginn and Company, 1950), 25.

<sup>5</sup> Giovanni Sartori, *Comparative Constitutional Engineering: An Inquiry into Structures, Incentives and Outcomes* (2nd ed., New York: New York University Press, 1997), 309.

Unlike the formal constitution, constitutional culture represents the informal practices and societal expectations that sustain constitutional governance.<sup>6</sup>

The importance of constitutional culture lies in its ability to transform constitutional provisions into living realities. A constitution may guarantee rights and establish institutions, but without a supportive constitutional culture, those provisions often remain ineffective. Strong constitutional cultures encourage respect for legal procedures, peaceful transfer of power, judicial independence, and protection of minority rights. In contrast, weak constitutional cultures may lead to constitutional violations, political instability, and abuse of power. Consequently, constitutional culture is often regarded as the foundation upon which successful constitutionalism rests.

### **2.3 Rule of Law: Definition and Core Principles**

The rule of law is a fundamental principle of constitutional governance which requires that all individuals and institutions, including government officials, are subject to and accountable under the law. It rejects arbitrary exercise of power and ensures that legal authority is exercised according to established legal procedures. The concept has evolved from the writings of legal scholars such as A.V. Dicey, who emphasized equality before the law and the supremacy of regular legal processes.<sup>7</sup>

The core principles of the rule of law include legality, equality before the law, accountability, transparency, access to justice, and protection of fundamental rights. Legality requires that governmental actions be authorized by law. Equality before the law ensures that no individual or institution enjoys special privileges. Accountability demands that public officials answer for their actions, while access to justice guarantees effective legal remedies. Together, these principles create a framework that protects citizens from arbitrary state action and promotes democratic governance.<sup>8</sup>

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<sup>6</sup> Robert C. Post, "The Supreme Court, 2002 Term—Foreword: Fashioning the Legal Constitution: Culture, Courts, and Law," *Harvard Law Review* 117, no. 1 (2003): 8.

<sup>7</sup> David S. Law and Mila Versteeg, "The Evolution and Ideology of Global Constitutionalism," *California Law Review* 99, no. 5 (2011): 1183.

<sup>8</sup> David S. Law and Mila Versteeg, "The Evolution and Ideology of Global Constitutionalism," *California Law Review* 99, no. 5 (2011): 1183.

## **2.4 Relationship between Constitutionalism and Constitutional Culture**

Constitutionalism and constitutional culture are deeply interconnected concepts. Constitutionalism provides the formal legal framework that limits governmental power and protects citizens' rights, while constitutional culture supplies the social and political environment necessary for the effective operation of that framework. Constitutionalism without constitutional culture often remains fragile because legal rules alone cannot guarantee compliance with constitutional principles.<sup>9</sup>

A strong constitutional culture reinforces constitutionalism by encouraging respect for democratic institutions, constitutional procedures, and the rule of law. Citizens who understand and value constitutional principles are more likely to resist unconstitutional actions and demand accountability from public officials. Similarly, political leaders operating within a strong constitutional culture are more likely to observe constitutional constraints voluntarily. Therefore, constitutional culture serves as the practical foundation that transforms constitutionalism from a legal ideal into an operational reality.<sup>10</sup>

## **2.5 Theoretical Perspectives on Constitutional Governance**

Constitutional governance has been examined through various theoretical perspectives. Liberal constitutional theory emphasizes limited government, protection of individual rights, and separation of powers. Thinkers such as John Locke argued that government exists to protect natural rights and must remain accountable to the people.<sup>11</sup>

Institutionalist theory focuses on the role of formal institutions in maintaining constitutional order. According to this perspective, effective constitutional governance depends upon strong and independent institutions capable of enforcing constitutional norms. Democratic constitutionalism, meanwhile, stresses the participation of citizens in constitutional processes and the importance of democratic legitimacy.<sup>12</sup>

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<sup>9</sup> A.V. Dicey, *Introduction to the Study of the Law of the Constitution* (10th ed., London: Macmillan, 1959), 188.

<sup>10</sup> Brian Z. Tamanaha, *On the Rule of Law: History, Politics, Theory* (Cambridge: Cambridge University Press, 2004), 114.

<sup>11</sup> Mark Tushnet, *Advanced Introduction to Comparative Constitutional Law* (Cheltenham: Edward Elgar Publishing, 2014), 52.

<sup>12</sup> Ran Hirschl, *Comparative Matters: The Renaissance of Comparative Constitutional Law* (Oxford: Oxford University Press, 2014), 138.

Another influential perspective is constitutional pluralism, which recognizes the existence of multiple sources of constitutional authority within a political system. This theory highlights the interaction between courts, legislatures, civil society organizations, and international legal norms in shaping constitutional governance. Together, these perspectives provide a comprehensive understanding of how constitutional systems operate and evolve in different political contexts.<sup>11</sup>

## **2.6 Indicators of a Strong Constitutional Culture**

A strong constitutional culture can be identified through several indicators that reflect society's commitment to constitutional values and democratic governance. One important indicator is widespread public awareness of constitutional rights and responsibilities. Citizens who understand constitutional principles are better equipped to participate in democratic processes and hold public officials accountable.<sup>13</sup>

Another indicator is respect for judicial independence and the impartial administration of justice. In societies with strong constitutional cultures, courts are trusted to resolve disputes fairly and protect constitutional rights without political interference. Regular adherence to constitutional procedures, peaceful transfers of political power, and acceptance of electoral outcomes also signify a healthy constitutional culture.<sup>14</sup>

Furthermore, active civil society participation, a free and independent media, governmental transparency, and effective accountability mechanisms contribute significantly to constitutional culture. Educational institutions that promote civic education and constitutional literacy further strengthen public commitment to constitutional values. These indicators collectively demonstrate whether constitutional principles are embedded within the political and social life of a nation.

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<sup>13</sup> Ran Hirschl, *Comparative Matters: The Renaissance of Comparative Constitutional Law* (Oxford: Oxford University Press, 2014), 138.

<sup>14</sup> John Locke, *Two Treatises of Government* (Cambridge: Cambridge University Press, 1988), 350.

# Chapter Three

## How Is Constitutionalism In Bangladesh Ensured In Bangladesh

The concept of Constitutionalism in Bangladesh though can be traced in the nature of its written characteristics, rules of construction, its rigidity and special procedure required for amendment, and by applying the doctrine of basic structure but in substance, Constitutionalism in Bangladesh would become meaningless unless people could be made active participants and beneficiary from the constitutional governance, i.e. the rule of law, enjoyment of rights and freedom with dignity and honour as an equal citizen enjoying protection of law and equal treatment and opportunity in accordance with law. They must also have the right to information, freedom of opinion and association with active participatory role in policymaking. People are not only to be perceived as source but also as owners of power, a power which can be exercised through effective mechanism of representation coupled with accountability at all levels. Such mechanism is necessary for ensuring the peoples participation into the entire process of governance. People therefore must be empowered not merely in theory as may now belong to them but such powers need to be exercised in actual practice, almost on daily basis and in all interaction as citizens.<sup>15</sup>

### 3.1 Constitutionalism in Bangladesh Exists In Bangladesh Are Illustrates Below

The following points will help clarifying how the constitution supremacy is ensured in the constitution of Bangladesh.

Firstly, the constitution of Bangladesh is a written one. It specifies the organs of the government will be exercised. It is a rigid constitution. Because it can be amended only by two thirds majority (Art.142). Again, to amend some provisions like the preamble, the form of government ( Article 48 & 56) and fundamental principles of state policy (Art.8) a more stringent method has been provided for. In these cases even after the bill has been passed by two-thirds majority, a referendum is essential. This rigidity, therefore, impose restriction on the power of the parliament on the one hand and ensures distinction between ordinary law and fundamental law on the other hand.

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<sup>15</sup> Article 1 of the Bangladesh Constitution provides: 'Bangladesh is a unitary, independent, sovereign Republic to be known as the People's Republic of Bangladesh'.

Secondly, It is the constitution and not the parliament which is supreme under the constitution of Bangladesh. This is because, firstly, it is stated in the preamble that “.....it is our sacred duty to safeguard, protect and defend this constitution and to maintain its supremacy as the embodiment of the will of the people of Bangladesh.”

Thirdly, ‘The Constitution declares that the sovereignty lies with the people and the Constitution is the embodiment and solemn expression of the will of the people.’ The topic statement is taken from the article 7 of Bangladesh constitution which is given as follows: “The Constitution is, as the solemn expression of the will of the people, the supreme law of the Republic, and if any other law is inconsistent with this Constitution that other law shall, to the extent of the inconsistency, be void. “This article 7 is a declaration that Constitution is the supreme and fundamental law of the country and every other law should be consistent with it. The focus of the statement assumes that rather than parliamentary Supremacy which is in Britain, Bangladesh has Constitutionalism in Bangladesh. That means Constitution is supreme over the Parliament and the Parliament requires to work within the boundary set by the Constitution. The constitution supremacy is further characterized by its written form and rigidity.<sup>16</sup>

Fourthly, Article 26 states that “All existing laws inconsistent with the provisions of this part (i.e. fundamental rights) shall, to the extent of such inconsistency, become void on the commencement of this constitution. The state shall not make any law inconsistent with the provisions of this part, and any law so made shall to the extent of such inconsistency be void.

Fifthly, Article 65 states that the legislative powers of the republic shall, subject to the provision of this constitution, be vested to the parliament. The declaration of Constitutionalism in Bangladesh in the constitution implicitly presupposes the existence of an independent authority to examine the constitutionality of actions taken by the legislative and executive. To that end the constitution of Bangladesh has ensured in Articles 94 and 95 an independent organ- the Supreme Court. Under articles 102 the Supreme Court has been empowered to scrutinize the governmental actions done in violation of fundamental rights. Again, under Articles 7 and 26 the Supreme Court exercises the power of judicial review i.e to examine the constitutionality of any law passed by the parliament. And a glaring example to this is

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<sup>16</sup> Ibid. p. 35

the historic Eight Amendment case. In that case the Supreme Court held the Eight Amendment to the constitution unconstitutional and invalid.

Furthermore, the Constitution created the Parliament where the latter works within the bindings set by the constitution itself. Judiciary Supremacy is the other name for the Constitutionalism in Bangladesh. The reason lies in the fact that highest court of the land is supreme over the legislature and look over the legislation made by the parliament in order to make sure that it fall within the limitations of the Constitution. Thus it is clear that the constitution declares itself to be supreme over the parliament.

### **3.2 Survival and supremacy of the constitution of Bangladesh**

Constitution is framed for ages to come and is designed to approach immortality as near as human institutions can approach. In tracing the immortality of constitution, Chief Justice Marshall conceptualizes the basic structure of the constitution as he reminds that ‘The people have an original right to establish, for their future government, such principles as, in their opinion, shall most conduce to their own happiness. The exercise of this original right is a very great exertion: nor can it nor ought it to be frequently repeated. The principles therefore, so established, are deemed fundamental. And as the authority from which they proceed is Supreme, and can seldom act, they are designed to be permanent. ‘Constitution has close relationship, as already indicated, with culture and convention based on its history and past civilization. Working of it ultimately depends on the genius of the people who work the constitution.’<sup>17</sup>

### **3.3 Context in which the constitution should be read**

In order to understand the true meaning and message of the constitution, it is most important to know the history and background in which the constitution was originally crafted by the framers. The proclamation of independence, the first constitutional document, asserted the sovereignty of ‘the people of Bangladesh whose will is supreme.’ We fought for our independence, for self-governance, equality, dignity and social justice and in order to achieve those goals we formed an orderly and just government to pursue the war of independence by way of reiterating and

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<sup>17</sup> Article 1 of the Bangladesh Constitution provides: ‘Bangladesh is a unitary, independent, sovereign Republic to be known as the People's Republic of Bangladesh’.

confirming the declaration of the independence made by the undisputed leader of the people, Bangabandhu Sheikh Mujibur Rahman, at the striking hour of the midnight of March 25, 1971 while Yahia's army was committing orgy of genocide in Dhaka killing students and teachers on the campus of Dhaka University, vendors and dwellers, burning newspaper offices, and employees of the media and the press club, street dwellers and those living in bastis. Our voice of independence rung with a clarion call for the people to rise in unity to repel the enemies with the strategy to act at the striking hour as indicated by the father of the nation in his historic speech on March 7, 1971.

The oath of allegiance as was taken in the name of our martyrs and freedom fighters as the first government took oath under the proclamation of independence (recognised as the genesis of the Bangladesh constitution by Justice Badrul Haider Chowdhury in his judgement in 8th amendment case.) This continues to create the bonding of our people as reflected in the preamble of the constitution by virtue of its eternal oath echoed in each generation passing like torch of freedom from one generation to another.<sup>18</sup>

### **3.4 Themes of Our Constitution**

The main theme of the constitutional system from its genesis is the empowerment of our people to whom all the powers of the republic belong (Article 7). The vitality of our republic depends on the vitality of our people and those who are assigned—elected and otherwise—for managing the affairs of the republic. They must act not as masters but as trustees for, and on behalf of, the people. It is they who must be made accountable in every respect being actively conscious that any and all the powers that they exercise do not belong to them but those powers belong to none but the people. They are duty bound in ensuring each citizen the most important right 'to enjoy the protection of the law and to be treated in accordance with the law, and only in accordance with law is the inalienable right of every citizen wherever he may be and of every other person for the time being within Bangladesh and in particular no action

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<sup>18</sup> Article 152(1) of the Bangladesh Constitution defines the term, 'law' as any Act, ordinance, order, rule, regulation, by-law, notification, or other legal instruments, and any custom or usage, having the force of law in Bangladesh.

detrimental to the life, liberty, reputation or property of any person shall be taken except in accordance with law' (Article 31).

'Human dignity' as perceived in the proclamation of independence itself is further expounded in the whole chapter of fundamental Rights (Part II) in a composite form not only to be protected but sustained by blowing life into it by fulfilling the fundamental principles of state policy (Part III). Such basic features as the rule of law (Article 31), republican character, separation of power, independence of judiciary, representative government, secular and equal participation in the republic are integral and inalienable part of the concept that all powers of the republic belong to people. Republic is defined as a democracy working of which should ensure fundamental rights, human dignity as provided under Article 11 as follows: 'Republic shall be a democracy in which fundamental human rights and freedoms and respect for the dignity and worth of human person shall be guaranteed and in which effective participation by the people through their elected representatives in administration at all levels shall be ensured.'

### **3.5 Amendments of Constitution**

As of until 2013 the Constitution of the People's Republic of Bangladesh has been amended 15 times.

Summary of 15 Amendments:

| Amendments    | Date                 | Summary of substance                                                                                                  |
|---------------|----------------------|-----------------------------------------------------------------------------------------------------------------------|
| 1st Amendment | 15th July 1973       | To make way for prosecution of genetic crime against humanity and war crimes committed in the liberation war of 1971. |
| 2nd Amendment | 22nd September, 1973 | Inclusion emergency provision suspension of fundamental rights and preventive detention.                              |
| 3rd Amendment | 28th November 1974   | To give effect to the boundary line treaty between Bangladesh and India.                                              |
| 4th Amendment | 25th January, 1975   | One party dictatorial system was subsisted for a responsible parliamentary system.                                    |
| 5th Amendment | 6th April, 1979      | Legalising all acts done by the first Military Authority                                                              |
| 6th Amendment | 10th July, 1981      | To make way for the Vice President to be a candidate in president election.                                           |

|                |                      |                                                                                                                                                                                                                                              |
|----------------|----------------------|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| 7th Amendment  | 10th November, 1986  | Legalising all acts done by the 2nd Military Authority.                                                                                                                                                                                      |
| 8th Amendment  | 9th June, 1988       | Setting up six permanent Benches of the High Court Division and making 'Islam' the state religion.                                                                                                                                           |
| 9th Amendment  | 11th July, 1989      | Direct election of the president and the Vice-President simultaneously.                                                                                                                                                                      |
| 10th Amendment | 23rd June, 1990      | Period for reservation of 30 women members seats in the parliament was extended for 10 years.                                                                                                                                                |
| 11th Amendment | 10th August 1991     | Legalising the appointment of Shahabuddin Ahmed, Chief Justice 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 Chief Justice of Bangladesh. |
| 12th Amendment | 18th September, 1991 | Reintroducing the parliamentary system.                                                                                                                                                                                                      |
| 13th Amendment | 28th March, 1996     | Provision for Caretaker Government.                                                                                                                                                                                                          |
| 14th Amendment | 16th May 2004        | Provision regarding women in the parliament                                                                                                                                                                                                  |
| 15th Amendment | 30th June 2011       | Omitted of Non-party Care-Taker Government                                                                                                                                                                                                   |

### **3.6 Importance of Separation of Power**

The constitution itself tries to give some design and the basic structure. The first step is to make sure that there is no absolute power. Human experience is that power corrupts and absolute power corrupts absolutely.

'Political liberty is to be found only when there is no abuse of power. But constant experience shows us that every man invested with power is liable to abuse it, and to carry his authority as far as it will go.... To prevent this abuse, it is necessary from the nature of things that one power should be a check on another... when the legislative and executive powers are united in the same person or body.... there can be no liberty.... Again there is no liberty if the judicial power is not separated from the legislative and the executive.... There would be an end of everything if the same person or body, whether of the nobles or of the people were to exercise all these powers. 'Although a complete separation of powers without some overlapping or coordination may not be possible, the prime caution as contained in this doctrine remains valid. There is the need for expert committees to sit and study the working of judicial administration in other neighbouring countries including the one in Singapore

so that a sinless administrative mechanism for judicial administration may play its rightful role relieving the judges the extra load they have to carry with poor administrative and support service.

# Chapter Four

## Case Report

### 4.1 Case Reports of Constitution Amendment Issues

Our constitution has been amended 15 times and some of the amendments like the 5th amendment purporting to legitimize the extra-constitutional taking over the power by martial law proclamation by Khondokar Mushtaq Ahmed, ultimately inherited by General Zia. Since having been declared as ultra vires to the constitution, there seems to be no scope for usurping the power under the constitution same fate was met by the 7th amendment.<sup>19</sup>

### 4.2 The Fifth Amendment and Seventh Amendment Case

The common aspects of the 5th and 7th amendments of the constitution of Bangladesh are that they both were promulgated by the military rulers. In both amendments it tried to legitimise the martial law executed during their dictatorial presidential period. *Khondker Delwar Hossain v Bangladesh Italian Marble Works Ltd*. Ultimately and at last both the High Court Division and the Appellate Division as finally gave judgement in *Delwar Hossain v Bangladesh Italian Marble Works Limited*. The Appellate Division reviewed in this case the judgement delivered in *Halima Khatun v Bangladesh* and that of *Ehteshamuddin v Bangladesh* and of *Haji Jainal Abedin* and of *Nasiruddin*. The Appellate Division gave its final judgement and the salient features of the judgement are: ‘This is no amendment of the Constitution even in the plain eyes, but destruction of the basic character of the Constitution by a Proclamation Order issued by the CMLA. But the Second Parliament ratified and validated the said Proclamation Order No. 1 of 1977 by the Fifth Amendment. Not only the Proclamations but also Martial Law Regulations and Martial Law Order made under the various Proclamations, were also ratified and validated. ‘Under the above noted Proclamations, a couple of hundred MLRs and MLOs were made from time to time to suit the needs of the usurper, since the promulgation of the Martial Law on August 20, 1975, till it was withdrawn on April 7, 1979. All those validated by the Fifth Amendment, passed on April 6, 1979. ‘We have already discussed as to how our Constitution is supreme and under the Constitution all the powers and functions of the

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<sup>19</sup> *Abdul Mannan Khan v Bangladesh* [2012] 64 DLR (AD) 169 (*Abdul Mannan case*).

Republic are vested in the three organs of the Government, namely, Legislature, Executive and Judiciary and since all these organs owe their existence to the Constitution, which is the embodiment of the will of the people as held by the superior Courts, the basic features of the Constitution cannot be changed by Proclamations, Martial Law Regulations or Orders.

‘From the analysis of Proclamations, MLRs, and MLOs and the findings of our Apex Court as stated above, it is crystal clear that the Constitution was made subordinate and subservient to the Proclamations dated August 20, 1975, November 8, 1975 and November 29, 1976 and the Martial Law Regulations and as such those are ultra vires the Constitution. There is no provision in the Constitution which is ‘Supra Constitutional’ or to put it mildly, ‘Extra Constitutional’. All laws or provisions and actions taken thereon must, without any exception, conform to the Constitution. Any law or provision, which is beyond the ambit of the Constitution, is ultra vires and void and as such non-set in the eye of law. The doubtless supremacy of the Constitution is far above all institutions, functionaries and services it created.’ The Appellate Division also held that: ‘We have held earlier in general that there was no legal existence of Martial Law and consequently of no Martial Law Authorities, as such, all Proclamations etc. were illegal, void ab initio and non est in the eye of law. This we have held strictly in accordance with the dictated of the Constitution, the supreme law to which all the Institutions including the Judiciary owe its existence. We are bound to declare what have to be declared, in vindication of our oath taken in accordance with the Constitution, otherwise, we ourselves would be violating the Constitution and the oath taken to protect the Constitution and thereby betraying the Nation. We had no other alternative; rather, we are obliged to act strictly in accordance with the provisions of the Constitution.’ The Appellate Division finally held dismissing the leave petition that: ‘While dismissing the leave petitions we are putting on record our total disapproval of Martial Law and suspension of the Constitution or any part thereof in any form. The Perpetrators of such illegalities should also be suitably punished and condemned so that in future no adventurist, no usurper, would dare to defy the people, their Constitution, their Government, established by them with their consent. However, it is the Parliament which can make law in this regard. Let us bid farewell to all kinds of extra constitutional adventure forever.’ The 7th amendment was conducted by another military authority Hussein Muhammad Ershad. There was

not much adding to the constitution unlike the 5th amendments, may be because after the 5th amendment the model of the constitution pretty much suited to Ershad for remaining in the power as president.

Finally in *Siddique Ahmed v Bangladesh* 2010 the 7th amendment was been declared void as it stated that 'Martial law is totally alien a concept to our Constitution.'<sup>20</sup>

### **4.3 Caretaker Government and the 13th Amendment**

Background: In 1991 the historic fifth Parliamentary Election was held under acting president Justice Shahabuddin Ahmad with a view to restoration of liberal democracy from the bondage of military dictatorship forcing President Ershad to resign on the face of mass upsurge against the military rule. The election was nationally and internationally recognized as free and fair. The BNP won majority seats in parliament and formed the government. In the meanwhile there were number of bi-elections run in a manner which could hardly be termed as free and fair. Most naked and glaring violation took place in Magura bi-election. The chief election commissioner himself left Magura in despair soon before the poll. Worst, the chief election commissioner put his rubberstamp on the election result which was known to everyone as being heavily rigged. This election manipulation has earned a branding of 'Election Magura' in the election politics of Bangladesh. This further infuriated the opposition who demanded that the following elections ought to be held under a neutral caretaker government, if necessary by amending the constitution. They started boycotting parliament and decided that they would not go back to parliament till a 'caretaker government' was introduced in parliament. The government did not pay heed to this demand. On December 28, 1994 about 147 MPs resigned in protest. When the government proceeded to hold by-election in 142 vacant seats the political impasse took more outrageous condition leading to continuous countrywide strike. On November 24, 1995 the government dissolved the 5th parliament and the 6th parliamentary election was scheduled on February 15, 1996. But since the government did not pay any attention to the demand for caretaker government by the opposition, all the opposition parties boycotted election. The ruling party BNP alone proceeded to contest election and the result of the election added fuel to the fire-like opposition movement. All the opposition parties launched their countrywide

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<sup>20</sup> *Anwar Hossain Chowdhury and Others v Bangladesh* [1989] BLD (SPL) 1 (*Anwar Hossain Chowdhury case*).

movement and demanded the fall of government as well as the dissolution of the 6th parliament. The whole politico-economic condition of the country was leading towards a complete deadlock. Lastly finding no other way out BNP government introduced the caretaker government Bill (the 13th amendment of the constitution) on March 21 at the first session of the 6th parliament. The bill was passed on March 26. Then the 6th parliament after seven days of its life was dissolved on March 30 and Justice Habibur Rahman, last retired chief justice, was appointed as the chief adviser of the caretaker government as envisaged under the 13th amendment.

#### **4.3.1 The 13th amendment**

This amendment was passed with 268-0 votes on March 26, 1996 and it became law on March 28. The amendment added a new chapter (Chapter IIA: Non-Party Caretaker Government) in part IV of the Constitution with 5 new articles (58A, 58B, 58C, 58D and 58E). It also amended articles 61, 99, 123, 147, 152, and the Third Schedule of the constitution.

#### **4.3.2 Controversy Over the Role of Caretaker Government**

Caretaker government under our constitution is an institution which is the result of the collective wisdom of our people achieved through a great struggle and sacrifice for the purpose of bringing back democracy on the track. We cannot forget that it was often dislodged and distorted through unconstitutional means. In the past there had been many unconstitutional interventions in which the generals and even some judges (i.e. Justice Sayem, Justice Sattar, Justice Ahsan Uddin) joined. In order to avoid such catastrophe, the interim government was designed as an institution to be composed not only of people but of clear guide lines were provided. That is why former chief justice was designated to head this government, on the assumption that they would exercise prudence and restraint as demanded of them in this circumstance, which the judges are used to by virtue of their own discipline, as expected.

However, during the last caretaker government, the president assumed the office of the chief adviser. It was without any valid legal and constitutional claim to the office. It was challenged by way of a writ petition in the High Court Division on the premises that Justice KM Hasan having expressed his unwillingness and by refusing to assume the office of the chief adviser vide a letter dated 27.10.06 addressed to the

president. This letter was not made public causing an undue delay of one day. And in the evening of 28.10.2006 the president through his military secretary approached Justice Mahmudul Amin Choudhury and enquired whether he will also feel embarrassed to be the chief of the caretaker government, to which Justice Choudhury responded by saying that he never felt embarrassed in hearing of any case before his court, nor would he feel embarrassed now to accept the responsibility as chief adviser. On the same evening the same military secretary to the president approached Justice Hamidul Haque to scout for a letter of embarrassment. However, Justice Hamidul Haque also was willing if it was acceptable to all. In this backdrop it will continue to haunt our history how President Iajuddin could assume or rather usurp the power of chief adviser skipping over all the steps stipulated under the constitution.<sup>21</sup>

All the opposition parties instead of going on the street advisedly came before the court for declaring the assumption by President Iajuddin as chief adviser to be declared illegal and for the direction for Justice Mahmudul Amin Chowdhury to be appointed chief adviser according to the constitutional mandate; and for cancellation of the election schedule published without lawful preparation and publication of the voter list as directed by the apex court.

The High Court Division consisting of Justice Awlad Ali and Justice Mainul Islam Chowdhury heard the case for two days and was about to dictate the rule already formulated whereupon the then attorney general pleaded that the rule be issued at 2:00pm after the lunch break when he wanted to cite a precedent. After the break he arrived with a paper containing an order of the chief justice obtained from his residence staying the proceeding in both the writ petitions. The rest of the story that followed since 1/11 is known to all and need not be repeated. On that day, I realised the greatest fault with the interim government to be headed by a former chief justice.

#### **4.3.3 Omitted of Non-party Care-Taker Government on 15th Amendment**

The Supreme Court on May 10, 2011 declared that ‘The Constitution (Thirteenth Amendment) Act 1996 (Act 1 of 1996) is prospectively declared void and ultra vires the Constitution’, which means that the constitutional provision for the creation of a

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<sup>21</sup> Ibid. p 55

non-party caretaker government system in the country was illegal. The apex court repealed the 13th amendment in the constitution, but observed that the next 10th and 11th parliamentary elections may be held under the system to avoid any chaos. The apex court, however, observed that parliament, meanwhile, is at liberty to amend the law under which the former chief justice or any other former judges of the Appellate Division of the Supreme Court are not involved in the non-party government system in the next two elections.

One has to admit that in the desperate rush in 1996 the 13th amendment was made under the increasing pressure of popular demand for a former chief justice to head the non-party caretaker government without giving heed to the time honoured caution by great constitutional philosophers including Montesquieu about the need for keeping the Judiciary out of politics in whatever form as may be. Even the involvement of a retired chief justice does not give the immunity. Justice Mostafa Kamal is right in saying ‘they shall never be mixed as oil cannot mix with water.’ History in the past has shown that military leaders, social and business elites, bureaucracy as well as the political elites worked for cross purpose and running for inconsistent goalpost which are neither compatible to constitutional aspiration nor in the interest of its continuity or supremacy. It is this lack of understanding on the part of the power elites which makes the constitution of Bangladesh ever so fragile and vulnerable, what however is the redeeming feature that we have always been able to overcome the crisis with courage and confidence, be it man-made or nature-made. But we must remember that we need calm and time to ponder and device various options exploring all the alternatives and bringing all the relevant issues over the table in the parliamentary chambers. However, we also need to keep in mind that too many convulsions in public and political life could be self destructive. Particularly in the existing global order or the lack of order that we live under, one should not allow the luxury of chaos and confusion on an issue of a free and fair election which is not so difficult to ensure without even a non party care taker government as is being practised in other democracy with a powerful, independent election commission with limited governance during election period. There is no reason why the major political parties cannot put their heads together. If it works in other democracies with limited power of the elected government with a small cabinet and the chief election commission strengthened as practised in some neighbouring countries (e.g. India and Sri Lanka).

There is an additional inspector general of police exclusively assigned to the Election Commission in Sri Lanka for regulating and enforcing law in election-related matters maintaining in each police station separate diary with respect to election-related cases and complaints. Why can't our leaders be able to think of various alternatives sitting over the table? Why should there be so much spill-over on the street, particularly on matters which need close deliberation and understanding and accommodating each other's view without compromising the constitutional basics. In dealing with the 13th amendment one should be able to look beyond the next election. Debate regarding the interim caretaker government as it now turns out seem to give an impression that what form would suit the particular party in the next ensuing election asking itself whether 'I love it or love it not'. They often forget that what may seem most attractive choice now may turn out to be most disagreeable in the next round. The 13th amendment, which was forced down upon the government of the day by the opposition, now has become most unattractive and seems to have adverse effect on judicial independence and further offsetting the balance of power which is the basic structure of the constitution. Must we not therefore put our thoughts and efforts together in finding a better option for ensuring of free and fair election empowering the Election Commission to perform its job taking the front seat while the representative party government is limited in its governance for the interim period as is done in other democracies? There may be other options which parties can explore and discuss with experts and on such issue as election as on other. Such vital matters the country must be able to unite on the basis of constitutional integrity so that people may prosper with freedom and dignity under a democratic polity. It is now time for calm when parties must be able to deliberate within the public view and people at the same time must maintain an eternal vigil so that no under current erosion can divert us from the main theme of the constitution.<sup>22</sup>

#### **4.4 Case of constitution Article**

##### **4.4.1 Case on Articles 27**

In the case of M.A. Gafur and others vs. Bangladesh, 56 DLR (AD) 205, the Appellate Division took note of two previous decisions of this Division, namely, 33 DLR (AD) 201 and 35 DLR (AD) 72 and held that retirement with pension benefits

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<sup>22</sup> Anwar Hossain Chowdhury case (n 4) 46 para 5.

after completion of 25 years of service is not punishment nor does it contain any stigma and it is altogether different from dismissal, removal or compulsory retirement.

#### **4.4.2 Case on article 102 (2)**

High courts power of reconsideration of its own judgement.

In the case of Md. Serajuddin Ahmed and others vs A.K.M saiful Alam and others, 24 BLD (ad)145, md.Ruhul Amin, J. held in para 28 as follows: Moreover provision of Article 102 (2) or any other provisions of the Constitution do not preclude the High Court Division either to reconsider or to review or to see the correctness of its judgement earilier made on furnishing of fresh materials by a party to the case which according to him if were before the the judgement would have been otherwise than the one made.’’ Thus it was observed that the High Court Division was Competent to reconsider or review its judgement on the ground of justice, equity and good conscience.

#### **4.4.3 Case on Articles 104 & 105**

In the case of ETV vs Dr. Chowdhry Mahmood Hasan, 55 DLR 99 (AD)-37, K.M.Hasain, J.while Rejecting the review petition observed at para 25, that the fundamental is that an error is necessary to be a ground for review but it must be one, which is apperent on the face of the record, and so obvious that keeping it on the record will be legally wrong Above all the cases are established constitution is supreme over the law of Bangladesh.

# Chapter Five

## Criticism Of Amendments Of Constitution

### 5.1 Criticism of Repeatedly Amendments

Constitution is an instrument which is made in order to voice the right of the people. It is a tool which is meant to use by the nation to keep the right of the people intact. So one should be careful while dealing with the Constitution, which is the highest law of the nation. Moreover, written constitution possesses several problems. And the major one is amendments. Although it is true that amendments is inevitable in an ever changing society of a nation, which changes with the flow of time. Different situations give rise to different issues following which changes are required to be brought in the constitution. However, the ruling parties of Bangladesh, whenever whoever came to power has misused this tool of amending the Constitution. They have brought change to the highest law of the country for their own benefit and did it without valid ground. To bring a halt to this misuse, accountability of the elected leaders need to be brought. Good governance need to be practiced at every sphere of the national system of governing then. Following independence, a constitutional presidential order created a constituent assembly. A 34-member constitutional committee was formed. This committee drafted the Constitution in 1972. Democracy, secularism, Bengali nationalism and socialism were the four fundamental pillars of the Constitution. But those who lost the war could not accept this. They conspired and killed the father of our nation, Bangabandhu Sheikh Mujibur Rehman, and changed the Constitution. Short of making Bangladesh an Islamic republic, a sort of Muslim Bangla emerged. The 15th Amendment seeks to go back to the 1972 Constitution and its secular tenets.<sup>23</sup>

### 5.2 Change Does Amendment Bring

Although it's called the 15th Amendment, it is actually much more. It replaces as many as 51 articles. The amendment flows from the historic judgment of our Supreme Court last year, which said whatever changes had been made in the Constitution through extra-constitutional means are illegal. The Constitution can only be amended in the manner prescribed in the Constitution itself. Under martial law after Mujib's

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<sup>23</sup> Anwar Hossain Chowdhury case (n 4) 85 para 150.

assassination, the military regime unconstitutionally amended the Constitution, including introducing the phrase 'Bismillahir Rahmanir Rahim' on top of the Preamble. They then indemnified the military law proclamations through the infamous 5th Amendment. The same happened during the military dictatorship of Hussain Muhammad Ershad when he made Islam the state religion. The 15th Amendment undoes most of the martial law proclamations and restores secularism as the fundamental principle of the Constitution. In certain areas, we've had to take cognizance of ground realities. After all, it's been 35 years. Take, for instance, 'Bismillahir Rahmanir Rahim' above the Preamble. It is a sensitive issue. If we change it, there's bound to be a major hue and cry. We did not want to give communal forces a handle. So we retained 'Bismillahir Rahmanir Rahim' but added another line, 'Param korunamoy naame shuru korilam' (In the name of the all-compassionate we start). In doing so, instead of hatred, we have sought unity. As far as Islam being the state religion is concerned, we have added that Hinduism, Buddhism, Christianity and any other religion will have the same patronage from the state as the majority religion.

# Chapter Six

## Concluding Remarks

### 6.1 Summery of Total Discussion

After the nine month long war of liberation, Bangladesh was liberated and got its independence on 16 December 1971. Having been released from Pakistani jail, Bangabandhu Sheikh Mujibur Rahman returned to Bangladesh on 10 January 1972. The next day he, in the capacity as the President of Bangladesh, issued the 'Provisional Constitution of Bangladesh Order 1972.' It provided for a parliamentary form of government in the interim period and constituted the Constituent Assembly with the members of National Assembly and East Pakistan Provincial Assembly who were elected, predominantly on six point demands, by the people of East Pakistan in December 1970 for giving the country a democratic Constitution. The Constituent Assembly adopted a Constitution which came into operation on 16 December 1972, exactly one year after liberation of Bangladesh.<sup>24</sup>

### 6.2 Recommendation

- Bangladesh has a written and rigid constitution with Constitutionalism in Bangladesh, but we experienced that the spirit of its supremacy is ignored, suspended or amended several times with parlous motives by usurpers.
- No doubt, it is a herculean task for judiciary to uphold Constitutionalism in Bangladesh continuity in Bangladesh.
- It is relevant to note the Maxim Quad initio no valet, fraction temprise no vated means 'what is void in the beginning does not become valid by passage of time'. So, it should be a zealotry role of judiciary to scrutinize the validity of any legislation inconsistent with the constitution to uphold its supremacy.
- I can conclude that, an easy procedure of amendment of the constitution should be restricted, and developing country like Bangladesh.
- But it may make the constitution the play thing at the hands of a brute majority of a party in power. There is no check or brake on it, no provisions for reconsideration, or revision, no scope for "an appeal to Philip drunk to Philip sober". At least the president should have been given right to return it back to parliament for reconsideration.

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<sup>24</sup> Bangladesh Italian Marble Works Ltd v Bangladesh [2010] 62 DLR (HCD) 70.

### 6.3 Conclusion

From overall discussion we found that Constitution is very important embodiment for a country & “Constitution is the supreme law of Bangladesh” [Art. 7(2)]. It is the reflection of peoples’ wishes and desires. The government should think very carefully before making any fundamental changes in it. It should refrain from making major changes unless a national consensus is reached. History tells us fundamental changes of the Constitution by the unilateral action of the government have not brought fruitful result. Rather, it created bitter hostility and division within the country when stability and unity were immensely needed for national prosperity. In any event, if any fundamental changes are to be made in the current Constitution, the prescribed procedure outlined in the very Constitution must be followed. By the Constitution a country get some rules and regulations by which they become able to drive the country properly. By the rules and regulations of the Constitution a country get the way to drive different industry, business and organization. As a result Constitution is very important. But all over the world in the Constitutional Law even in Bangladesh also we found that people play a vital role to complete all the things in an efficient way. So People are the main player of the Constitution and constitution is the perfect embodiment for a country.<sup>25</sup>

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<sup>25</sup> Bangladesh Italian Marble Works Ltd v Bangladesh [2010] 62 DLR (HCD) 70.

## Bibliography

### Books:

- Ahmed (n 17). See Rokeya Chowdhury, ‘The Doctrine of Basic Structure in Bangladesh: From “Calpath” to *Matryoshka* Dolls’ (2014) 14 (1&2) *Bangladesh Journal of Law* 43, 64–65.
- Ahmed (n 45). Ridwanul Hoque termed the basic structures as the fundamental cores of the Constitution and/or the fundamental constitutional cores: Ridwanul Hoque, ‘Eternal Provisions in the Constitution of Bangladesh: A Constitution Once and for All’ in Albert and Oder (n 14) 195, 197–200.
- Kawser Ahmed, ‘Misreading or Leapfrogging? SC’s Power to Review Constitutional Amendment’, *The Daily Star* (Dhaka), 22 August 2017, 12.
- Kawser Ahmed, ‘Review of a Constitutional Amendment: What Does Legally Matter?’, *The Daily Star* (Dhaka), 29 May 2018, 14.
- Kawser Ahmed, ‘Revisiting the Majority Opinion in the 16th Amendment Case’, *The Daily Star* (Dhaka), 25 September 2018, 12.
- Kawser Ahmed, ‘The Supreme Court’s Power of Judicial Review in Bangladesh: A Critical Evaluation’, 1 April 2015,
- Kawser Ahmed, ‘What is Actually the Basic Feature Doctrine?’, *The Daily Star* (Dhaka), 5 June 2018, 15.
- Mustafa Kamal, *Bangladesh Constitutions: Trends and Issues* (University of Dhaka 1994, reprint 2001) 92–94.
- Ridwanul Hoque, ‘Implicit Unamendability in South-Asia: The Core of the Case for the Basic Structure Doctrine’ (2018) 3 *Indian Journal of Constitutional & Administrative Law* 23, 25–26. Haque (n 29) 123–25.
- Ridwanul Hoque, ‘The Judicialization of Politics in Bangladesh: Pragmatism, Legitimacy, and Consequences’ in Mark Tushnet and Madhav Khosla (eds), *Unstable Constitutionalism: Law and Politics in South Asia* (Cambridge University Press 2015) 261, 278–79.
- Roznai is of the view that unamendability should permit a certain level of flexibility by allowing constitutional amendments to enable constitutional progress on the one hand, and shield the core features of the constitution from amendment on the other: Roznai (n 12) 218. See also Hoque (n 53) 219.

## Articles & Journals

- *Anwar Hossain Chowdhury* case (n 4) 88–89 para 166. Contrariwise, Justice Ahmed and Justice Rahman argued that a constitutional amendment could not be labelled as ‘law’ after incorporation of Article 26(3) in the Constitution: *Anwar Hossain Chowdhury* case (n 4) 142, 167, paras 339, 421–23. We will discuss this point in Section 3.
- Article 1 of the Bangladesh Constitution provides: ‘Bangladesh is a unitary, independent, sovereign Republic to be known as the People's Republic of Bangladesh’.
- Article 152(1) of the Bangladesh Constitution defines the term, ‘law’ as any Act, ordinance, order, rule, regulation, by-law, notification, or other legal instruments, and any custom or usage, having the force of law in Bangladesh.
- Article 152(2) of the Constitution provides that the General Clauses Act 1897 shall apply in relation to the Constitution as it applies in relation to an Act of Parliament. s 3(1A) of the General Clauses Act 1897 provides that an Act of Parliament shall mean an Act passed by Parliament and shall include any Act passed or made by any legislature or any person having authority to legislate under any Constitutional instrument in force in Bangladesh or any portion thereof.
- Article 7(2) provides that any law inconsistent with the Constitution shall be void to the extent of its inconsistency.
- *Bangladesh Italian Marble Works* (n 5) 113–14 para 135; *Siddique Ahmed* (n 21) 612 paras 242–43; *Abdul Mannan* case (n 23) 257 paras 614–15; *Asaduzzaman* case (n 1) 86–87 para 77.
- Civil Appeal No 06 of 2017, [2019] 71 DLR (AD) 52 (*Asaduzzaman* case).
- Civil Petition for Leave to Appeal Nos 1044 & 1045 of 2009, reported as *Khondker Delwar Hossain and Another v Bangladesh Italian Marble Works Ltd and Others* [2010] 62 DLR (AD) 298.
- Civil Review Petition No. 751 of 2017.
- Constitution of the People's Republic of Bangladesh 1972, arts 101, 103.
- *ibid* 111 paras 255–57 (Justice Chowdhury); *ibid* 151, 156–57 paras 361, 378 (Justice Ahmed); *ibid* 171, 179 paras 443, 483 (Justice Rahman). The Appellate Division allowed the appeal by a 3:1 decision.

- On implicit unamendability and the basic structure doctrine, see Yaniv Roznai, *Unconstitutional Constitutional Amendments: The Limits of Amendment Powers* (Oxford University Press 2017) 39–49. On interpretative unamendability and the basic structure doctrine, see Richard Albert, *Constitutional Amendments: Making, Breaking and Changing Constitutions* (Oxford University Press 2019) 149–53.
- See Legislative and Parliamentary Affairs Division, *The Constitution of the People's Republic of Bangladesh* (2011) i–ii.
- The Constitution (Fifteenth Amendment) Act 2011, s 31.
- The Constitution (Sixteenth Amendment) Act 2014, s 2.
- The original Article 96(2) of the Bangladesh Constitution provided for the assent of a minimum of two-thirds of the total members of Parliament for removing any Supreme Court judge on the grounds of proved misbehaviour or incapacity.
- The Supreme Court of Bangladesh is made up of two Divisions: the High Court Division and the Appellate Division.
- The term ‘any law’ in Article 7 includes a constitutional amendment: *Anwar Hossain Chowdhury* case (n 4) 85, 87 paras 150, 166.
- Writ Petition Nos 1252 and 1176 of 1988, Judgment delivered on 15 August 1988: *ibid* para 1.

#### Case:

- *Abdul Mannan Khan v Bangladesh* [2012] 64 DLR (AD) 169 (*Abdul Mannan* case).
- *Anwar Hossain Chowdhury and Others v Bangladesh* [1989] BLD (SPL) 1 (*Anwar Hossain Chowdhury* case).
- *Anwar Hossain Chowdhury* case (n 4) 46 para 5.
- *Anwar Hossain Chowdhury* case (n 4) 85 para 150.
- *Anwar Hossain Chowdhury* case (n 4).
- *Anwar Hossain Chowdhury* case (n 4).
- *Bangladesh Italian Marble Works Ltd v Bangladesh* [2010] 62 DLR (HCD) 70.
- *Bangladesh Italian Marble Works Ltd* (n 5).