



Sonargaon University (SU)

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On

“Constitutionalism in Bangladesh: An Analytical Study of Constitutional Governance, Judicial Practice and Democratic Transformation”

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Program: LL.B (Hon’s)

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Submitted To

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Letter of Transmittal

To

Professor Dr. A. S. M. Tariq Iqbal

Professor of Law& Dean

Faculty of Arts and Humanities

Sonargaon University (SU)

Subject: Submission of Research Monograph on “**Constitutionalism in Bangladesh: An Analytical Study of Constitutional Governance, Judicial Practice and Democratic Transformation**”

Dear Sir,

This is a great pleasure to submit the Research Monograph on “**Constitutionalism in Bangladesh: An Analytical Study of Constitutional Governance, Judicial Practice and Democratic Transformation**” 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 in Bangladesh: An Analytical Study of Constitutional Governance, Judicial Practice and Democratic Transformation**” 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 of or in from, 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.

.....
Professor Dr. A. S. M. Tariq Iqbal
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Acknowledgement

***In the name of Allah, the Beneficent, the Merciful".** Praise by Allah & thanks to Allah for patronizing me to finish this Research Monograph. I am very happy to finish it. It is a great Research of my life. It is a long cherished hope of my life to become a great lawyer. That's why I have admitted in the Department of Law in Sonargaon University (SU) to fulfill my dream. But through my whole study life in this field, I did not get much more opportunities to examine and show my knowledge and skill in this wide field. Lastly I have got a great chance to make my study meaningful when I got the chance to prepare a Research Monograph on **Constitutionalism in Bangladesh: An Analytical Study of Constitutional Governance, Judicial Practice and Democratic Transformation**

I acknowledge my grateful to respected course teacher **Professor Dr. A. S. M. Tariq Iqbal** for instructing me how to prepare a Research Monograph and his famous Books lectures on this subject help me to complete my task sincerely.

I am also thankful to my classmate as they help me to complete the Research Monograph. I am extremely paying my solitude to all the authors and writers whose works help me to draft this original Research Monograph.

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Thank you

Mariam Masud Anisa

ABSTRACT

The preface of the Constitution also required its aims and objectives and speaks for its supremacy. Unlike the starting of many other countries, the starting of our original Constitution has laid down exposed in clear terms. The aims and objectives of the Constitution was so unclear and in certain terms it spoke of representative democracy, rule of law, and the supremacy of the Constitution as the embodiment of the will of the people of Bangladesh. Even the validity of a law is tested by the benchmark of the Constitution: but there is no such benchmark to test validity of the Constitution. Its validity is natural and as such it is unchallengeable. 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. 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 .

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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."¹

1.2 Objectives of the Study

Board Objectives

The preface of the Constitutionalism in Bangladesh: An Analytical Study of Constitutional Governance, Judicial Practice and Democratic Transformation.

Spefice Objectives

1. To know about the nature of constitution of Bangladesh.
2. To explore the doctrine of Constitutionalism in Bangladesh.

¹ 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.

3. To find out strength and weakness of the doctrine of Constitutionalism in Bangladesh in the context of Bangladesh.

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.²

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.

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

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 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. 190 191 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 28.³

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

³ 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

A constitution is a set of fundamental principles or established precedents according to which a state or other organization is governed. These rules together make up, i.e. constitute, what the entity is. When these principles are written down into a single document or set of legal documents, those documents may be said to embody a written constitution; if they are written down in a single comprehensive document, it is said to embody a codified constitution. Constitutions concern different levels of organizations, from sovereign states to companies and unincorporated associations. A treaty which establishes an international organization is also its constitution, in that it would define how that organization is constituted. Within states, whether sovereign or federated, a constitution defines the principles upon which the state is based, the procedure in which laws are made and by whom. Some constitutions, especially codified constitutions, also act as limiters of state power, by establishing lines which a state's rulers cannot cross, such as fundamental rights. An example is the constitution of the United States of America. The Constitution of India is the longest written constitution of any sovereign country in the world, containing 444 articles in 22 parts, 12 schedules and 118 amendments, with 117,369 words in its English-language translation while the United States Constitution is the shortest written constitution, at 7 articles and 27 amendments.⁴

2.1 U.S Constitution

2.1.1 Background

The Constitution of the United States was written in 1787. It is still used as the plan for the US government. This first section of the Constitution is called the Preamble. The Preamble lists the reasons that the Constitution was created. The writers of the Constitution wanted people to be protected and free. They wanted peace at home. By starting with the phrase “We the People,” the Preamble shows that citizens of the United States created this plan to govern themselves.

⁴ Kawser Ahmed, ‘Review of a Constitutional Amendment: What Does Legally Matter?’, The Daily Star (Dhaka), 29 May 2018, 14.

2.1.2 Primary Source

“We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defense, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.”

2.1.3 Structure of the U.S Constitution

The Constitutionalism in Bangladesh is evident in US Constitution, where it is known as “The Supreme Law of the Land”. While selecting the government, democracy is seen well in act. The general people are allowed to voice their choice through the election, where they choose the party of their choice to rule the country.

Article VI, section 2 of the U. S. Constitution which reads: “This Constitution, and the Laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any state to the contrary notwithstanding.” Thus a Supreme Court ruling can be binding on state courts if involving a constitutional issue. Article VI, Section 2, of the U.S. Constitution is known as the Supremacy Clause because it provides that the “Constitution, and the Laws of the United States ... shall be the supreme Law of the Land.” It means that the federal government, in exercising any of the powers counted in the Constitution, must persist over any contradictory or discrepant state exercise of power.

2.2 UK Constitution

The British Constitution is unwritten or in other words uncoded. The main reason of this is Britain constitution has evolved over centuries and they were already established with their old customs so they do not want any constitution. Basically the concept of constitution is being followed by the countries that have become independent very recently for example United State of America.

2.2.1 Sources of the British Constitution

As the UK does not have a codified document, we have look for the key rules and practices of the British system in a number of places, Statute Law is one of them. This law is created by Parliament. Acts of Parliament are approved by the Commons, Lords and the Monarchs, gain the force of law, and are then implemented by the executive and enforced by the courts. Any law that involves constitutional relationships becomes part of the constitution. Examples of this include the Parliament Act of 1911 (established the dominance of the House of Commons), the European Communities Act of 1972 (by which the UK joined the EEC) and the Human Rights Act of 1999 (which enshrined key rights into UK law) Statute Law is the most important source of the UK constitution as, under the doctrine of Parliamentary Sovereignty, the UK Parliament is the supreme law-making body.⁵

Common Law is another sources of British Constitution This law is that has been developed and applied by UK courts. Where there is no clear statute law, the courts have to interpret and clarify the law. As no law is so precise that it needs no interpretation, judges are constantly contributing to the constitution. Royal Prerogative is also another importance source of UK Constitution. This refers to discretionary powers of the Crown that are employed by Government Ministers in the name of the Monarch. The Crown retains a number of powers that date back to before Britain became a constitutional monarchy in the C17th. These include the power to declare war, to dissolve parliament, to appoint government ministers and judges. Today these powers lie with the Prime Minister and Government Ministers, the Prime Minister will inform the Monarch of their decision but the Monarch has not real power to veto their chosen course. Conventions are habits, norms and rules that through long usage have come to be considered binding on those who should abide by the constitution. They are neither codified nor enforced by courts of law, and as such there is no punishments if there are breached. Conventions include individual and collective ministerial responsibility. Conventions may not have the force of law, but breaking them can have political repercussions. For example if a minister refuses to resign in the light of mistakes made in their department, then the minister's position is weakened, they are open to parliamentary and media criticism, and this can even

⁵ Ibid. p. 59

reflect on the authority of the Prime Minister. Some famous commentators have, through political and legal texts, become such influential observers and commentators on the UK constitution that their works have become accepted as works of authority on the UK constitution. They act as guides, for both those who study the UK system and those who are involved in the UK system, to the workings of the institutions and political system. International treaties and agreements are the sources of UK constitution. By the signing international treaties and agreements (with groups such as the UN and NATO) the British Constitution is constantly being added to. The most significant new source of the Constitution in recent years has been the EU. When Britain signed the Treaty of Rome in 1972, the superiority of European Law was accepted, and parliament was no longer sovereign (although the UK can leave the EU any time it wishes). Thus British Courts now have the power to review Acts of Parliament and in the light of EU legislation, to suspend Statute Law. Today all legislating from the EU and judgments from the European Court of Justice become part of the UK constitution.

2.2.2 Structure of UK Constitution

A constitution is a body of rules or laws coming in varied shapes, sizes and formats; determining the organization of Government and the basic principles on which its powers are exercised. Lord Bryce states that “The constitution of a state or a nation consists of those of its rules or laws which determine the form of its government and respective rights and duties of it towards the citizens and of citizens towards Government. “British constitution is the Mother of all the Constitution British constitution is an inspiration to most of the constitution of the world. It is the oldest constitution of the world that is why it is rightly termed as Mother of all Constitutions. British Constitution is the result of more than fifteen centuries and it is still growing. It is of an evolutionary growth. It would be very precise to call it a child of wisdom and chance. It has grown gradually and no fixed time or a fixed number of people created it. UK Constitution is a non-codified. This is the most important and most distinguishing feature of it. It is based on Conventions and Customs that have been prevailing from a long time in UK. Such unwritten sources form the major part of the constitution. There are many Acts, Treaties which are in written form and they make it partly written and even then Non-codified. These were also gradually added and adopted. The first written piece being “Magna Carta 1215”, “Bill of Rights 1689”,

“Parliamentary Acts of 1911 & 1949” and so many others. Conventions are deeply rooted in the British Constitution. If anyone wants to know the British Constitution, must study the conventions carefully. There are many conventions which are only known to the Cabinet, Judiciary and Parliament. These form the excessive unwritten part and being an important feature are also a major source of Constitution. Prime Minister is chosen from House of Commons. Queen must give her assent to all the bills passed by Parliament. House of Lords benches are red, while House of Commons benches are Green. Though the constitution is not in a proper codified form, it has a great adaptability character. It is very easy to amend and make new laws. It requires a simple majority to pass an amendment. Regardless of its flexibility, there have been a very few changes made till date.

British constitution is the Bicameralism. It literally means divided into two parts. British Legislative authority, the Parliament is divided as follows (a) House of Lords (b) House of Commons. House of Lord consists of 26 Bishops and Archbishops of Church of England called as ‘Spiritual Peers;’. There are 92 Hereditary Peers, 1 Irish Peer, 16 Scottish Peers and several hundred Life Peers. These are nominated by the Crown on the advice of PM. House of Common consists of 650 members elected by citizens of Britain. This house is more powerful than the House of Lords. Money bills can only originate from House of Commons. PM is also selected from House of Commons.

Sovereignty of British Parliament: British Parliament is very powerful and supreme. Following are the major points that describe it and clarify its character: (a) there is no Law which British Parliament cannot make or undo. (b) No Court can challenge the acts or laws passed by the parliament.(c) It rules the monarch and can decide its fortune and acts.(d) It can prohibit the King to marry a woman of his choice. (e) It can change the hereditary rule of throne by just one simple act. (f) It can abolish monarchy, abolish House of Lords and distribute Powers to its Citizens. (g) It can do anything, except make a man a woman and conversely.⁶

⁶ Kawser Ahmed, ‘Review of a Constitutional Amendment: What Does Legally Matter?’, The Daily Star (Dhaka), 29 May 2018, 14.

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.⁷

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.

⁷ 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.⁸

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

⁸ 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.’⁹

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

⁹ 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.¹⁰

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

¹⁰ 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.¹¹

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

¹¹ *Abdul Mannan Khan v Bangladesh* [2012] 64 DLR (AD) 169 (*Abdul Mannan case*).

Constitution is supreme and under the Constitution all the powers and functions of the 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.’¹²

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

¹² *Anwar Hossain Chowdhury and Others v Bangladesh* [1989] BLD (SPL) 1 (*Anwar Hossain Chowdhury case*).

opposition movement. All the opposition parties launched their countrywide 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.¹³

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

¹³ Ibid. p 55

the Constitution’, which means that the constitutional provision for the creation of a 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.¹⁴

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

¹⁴ Anwar Hossain Chowdhury case (n 4) 46 para 5.

DLR (AD) 201 and 35 DLR (AD) 72 and held that retirement with pension benefits 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.¹⁵

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

¹⁵ Anwar Hossain Chowdhury case (n 4) 85 para 150.

in the manner prescribed in the Constitution itself. Under martial law after Mujib's 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.¹⁶

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

¹⁶ Bangladesh Italian Marble Works Ltd v Bangladesh [2010] 62 DLR (HCD) 70.

sober”. At least the president should have been given right to return it back to parliament for reconsideration.

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.¹⁷

¹⁷ Bangladesh Italian Marble Works Ltd v Bangladesh [2010] 62 DLR (HCD) 70.

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- 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.
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- 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).