

OUR EXPERIENCE WITH CONSTITUTIONALISM*

Justice Muhammad Habibur Rahman**

Ours is an old country. The land of Bangladesh, though not its name, can easily be identified in Ptolemy's map. Thanks to the Greek chroniclers, our written history can be traced from about 300 years before the birth of Christ. Ours is a much invaded country, less than India and Pakistan though. Our land experienced numerous political boundaries. The Palas had their fatherland in Varendra of Bangladesh. Their political empire extended from Varendra up to the heart of Northern India. Their cultural influence went beyond the Bay of Bengal and spread in South-East Asia. In the beginning of the thirteenth century the turuskas, the contemporary name for both the Turks and the Muslims, founded a small principality in Northern Bangladesh. Muslim rulers in Bangladesh had always been resentful of Delhi's suzerainty. Two hundred years of independent Sultans of Bangola ended in 1538. Thereafter there was a Mughal Padshahi which was replaced by the British Raj in the second half of the eighteenth century.

After nearly 200 years, the British rule in India came to an end in 1947, and two independent states, India and Pakistan, came into being. Our whole political thinking both before and after 1947 revolved round grievances of exploitation. We demanded self-determination for the Muslims in the northeastern zone of India before and after 1947, and full autonomy for East Bengal after 1947. Our demand for autonomy was reflected in the 21 points of the United Front in the fifties and the

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six points of the Awami League in the late sixties. The question of autonomy ultimately ripened into a struggle for liberation in 1971.¹

On 7 December 1971, elections were held in Pakistan to elect representatives for framing the Constitution of Pakistan. The people of East Pakistan elected 167 representatives belonging to the Awami League, out of a total of 169 for the province. The scheduled inaugural session of the National Assembly for 3 March 1971 was suddenly and arbitrarily postponed for an indefinite period on 1 March. On the night of 25/26 March 1971, "disregard and contempt for human rights" by the Pakistani military junta "resulting in barbarous acts" in Bangladesh and hence we were "compelled to have recourse, as a last resort, to rebellion against tyranny and aggression". The quoted words are from the Preamble to the Universal Declaration of Human Rights, 1948 which so correctly envisages a situation like the one in 1971 in Bangladesh. The non-cooperation movement that started on 7 March was transformed into a war of liberation. On 26 March 1971, a declaration of independent of Bangladesh was made from Chittagong radio in the name of Sheikh Mujibur Rahman.

On 10 April 1971, the elected representatives of the people of Bangladesh constituted themselves into a Constituent Assembly and declared and constituted a sovereign People's Republic and confirmed the Declaration of Independent made on 26 March 1971.² The

¹ After years of doldrums, it is encouraging to note the recent outpouring of historical scholarship on our contemporary political history, particularly of the twentieth century. See for example, Rashid, H., The Foreshadowing of Bangladesh: Bengali Muslim League and Muslim Politics, 1936-47, Dhaka, 1990; Murshid, T.M., The Sacred and the Secular: Bengal Muslim Discourses, 1871-1977, New Delhi, 1977, Ahmed, K, "'A Land of Eternal Eid' - Independence, People and Politics in East Bengal" 46:1 (1989) Dhaka University Studies, Part A, Islam, S. (ed), History of Bangladesh, 1704-1971, 3 volumes, revised edition, Dhaka. Needless to say, the above is only an eclectic selection.

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.... Whereas in the conduct of a ruthless and savage war the Pakistani authorities committed and still continuously committing numerous acts of genocide and unprecedented tortures, among others, on the civilian and unarmed people of Bangladesh

We, the elected representatives of the people of Bangladesh ... declare and constitute Bangladesh to be a sovereign Republic ...

Proclamation was the first interim constitution of the Republic. On 16 December 1971, the liberation struggle came to a victorious end. On 11 January 1972, the people of Bangladesh declared, among others, that it was the manifest aspiration of the people of Bangladesh that a parliamentary democracy shall function in Bangladesh.

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Words, phrases and concepts of our Constitution were heavily borrowed from constitutions of other countries and international human rights instruments. We have two texts of the Constitution. It is provided in Art. 153 that between the two texts, the authentic text is provided that in the event of conflict between the Bengali and English texts, the former should prevail.

It was in the fitness of things that this should be so. Our language was the main cohesive force in our liberation movement. In a sense, the struggle for national independence started on 21 February 1952. Framing of the Constitution in Bengali for the first time in our history was a momentous event. It was a great step forward towards internalising modern constitutional concepts in our legal culture. Unfortunately, during the martial law period, many articles of the Constitution were amended and it was provided in paragraph 3A of the Fourth Schedule that the English text would prevail in so far as it related to anyone amendment in any of the texts by Proclamation Order No. 1 of 1977. It appears that in times of stress and turmoil English was found handier by our rulers. As a back-handed compliment Art. 3 of the Constitution was amended in 1988 and the word 'Bangla' was

³ History of our constitution-making is yet to be comprehensively attempted. See, however, Alam, Md. S., *Bangladesher Shongbidhanik Itihās and Shongbidhaner Shohoj Pat*, Chittagong, 1996 (in Bangla) and Nath, B.P., *Bangladesher Shongbidhanik O Rajnaitik Dolil*, Dhaka, 1982 (in Bangla).

substituted for the word 'Bengali'. The word 'Bengali' in Art. 153, however, escaped notice and remained unamended.

Like the deltaic land of our country, our Constitution has experienced several avulsion and various kinds of *reformation in situ*. Far reaching and radical changes had been introduced in the Constitution both during the time when it was functioning under a duly democratically elected regime and during the time when it was not allowed to function by generals who succeeded for a while to hold the people in thralldom. The words "struggle for national liberation" in the Preamble were substituted by the words "war for national liberation struggle".⁴

The Constitution has so far been amendments thirteen times. Some of the amendments were made in an agonising situation. The Constitution suffered manipulation for the sake of its continuity. It travelled through a tortuous path. The Constitution was amended for protecting legislation for trial for genocide, crimes against humanity and other crimes under international law from being challenged on the ground of derogation from fundamental rights.⁵ It was amended to provide for preventive detention and for a declaration of emergency and for suspension of certain fundamental rights (specifically, Arts. 36, 37, 38, 39, 40 and 42);⁶ and for giving effect to the agreement entered into between Bangladesh and India over Berubari and some other territories;⁷ for changing the form of government from parliamentary to presidential and back again to parliamentary;⁸ twice for validating acts and deeds, and orders and laws passed during the martial law regimes;⁹ twice for qualifying an individual who was otherwise

⁴ First by the Proclamation (Amendment) Order, 1977 and then validated by the Constitution (Fifth) Amendment Act, 1979.

⁵ Constitution (First Amendment) Act, 1973 (Act XV of 1973).

⁶ Constitution (Second Amendment) Act, 1973 (Act XXIV of 1973).

⁷ Constitution (Third Amendment) Act, 1974 (Act LXXIV of 1974).

⁸ Constitution (Fourth Amendment) Act, 1974 (Act II of 1974) and Constitution (Twelfth Amendment) Act, 1991 (Act XXVIII of 1991), respectively.

⁹ Constitution (Fifth Amendment) Act, 1979, (Act I of 1979) and Constitution (Seventh Amendment) Act, 1986 (Act I of 1986).

disqualified to hold a particular constitutional post;¹⁰ for the return of the Chief Justice to this Supreme Court;¹¹ for creating the post of Vice President and then abolishing it;¹² for limiting the terms for the office of the President and that of Vice President;¹³ for extending the period to 120 days from 60 that may intervene between the end of one session and the first sitting of Parliament in the next session and then restoring the earlier provision;¹⁴ and for providing a Non-party Caretaker Government before holding the general election for Parliament.¹⁵ Part VI of the Constitution that deals with the judiciary, the least "dangerous" part of the government, was amended at twenty-one different places. 43

The Fourth Amendment was passed on 25 January 1975. Shahabuddin Ahmed J, as he was then observed in the *Eighth Amendment Case* that the Fourth Amendment

changed the constitution beyond recognition in many respects and in place of a democratic Parliamentary form of Government on the basis of multiple party system a Presidential form of Government authoritarian in character on the basis of a single party was brought about overnight thereby. Fundamental rights to form free association was denied, all political parties except the Government party were banned and members of Parliament who did not join this Party lost their seats though they were elected by the people. Freedom of the press was drastically curtailed; independence of the judiciary was curbed by making the judges liable to removal at the wish of the Chief Executive; appointment, control and discipline of the subordinate Judiciary along with Supreme Court's power of superintendence and control of subordinate courts were taken away from the Supreme Court and vested in the Government. The change was so drastic and sudden, friends were bewildered, Enemies of the Liberation had their

¹⁰ Constitution (Sixth Amendment) Act, 1981 (Act XIV of 1981) and Constitution (Eleventh Amendment) Act, 1991 (Act XXIV of 1991).

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¹⁴ Constitution (Fourth Amendment) Act, 1974 (Act II of 1974) and Constitution (Twelfth Amendment) Act, 1991 (Act XXVIII of 1991), respectively.

¹⁵ Constitution (Thirteenth Amendment) Act, 1996 (Act I of 1996).

revenge and the critics said with glee that it is all the same whether damage to democracy is caused by democratically elected persons or by undemocratic means like military coup.¹⁶

President Sayem tells us that Sheikh Mujib told him in February/March 1975 that the Fourth Amendment was a temporary measure and that he would restore the Constitution as it was before the said amendment.

I had no reason to think that what he was saying then did not correspond to what was in his mind, Parliament was his, that is, much more than two-thirds of its members belonged to his party.¹⁷

Unfortunately, Sheikh Mujib had not had the luck of Julius Nyerere whom, it appears, he tried to emulate. Sheikh Mujib was assassinated on 15 August 1975. On that day, Khandaker Mushtaque Ahmed took over full powers of the Government and adopted the name of "President", suspending the relevant provisions of the Constitution regarding election to the office of President. On 6 November 1975 he handed over the office of President to Chief Justice Sayem who also assumed the powers of Chief Martial Law Administrator. Soon he had to hand over all power to General Ziaur Rahman.

We have even changed the Preamble of the Constitution. We deleted secularism and spelt out a meaning of the term 'socialism'.¹⁸ On 23 April 1977 by Proclamation Order No. 1 of 1977 the words, *Bismilla-Ar-Rahman-Ar-Rahim* (in the name of Allah, etc.) were substituted in the Preamble. The nomenclature of citizenship was changed from Bengali to Bangladeshi.¹⁹

On 6 April 1979 by the Fifth Amendment, Paragraph 18 was inserted in the Fourth Schedule for ratifying and confirming all Proclamations, Orders, etc., all orders made, acts and things done and actions and proceedings taken, etc. during the period between 15th August 1975 and 9th April 1979. On 11 November 1986, the Seventh Amendment revived Parliament and restored the Constitution subject to the provisions of Paragraph 19 inserted in the Fourth Schedule. On 9 June 1988, by the Eighth Amendment, Art. 2A was added and Islam was made the State religion. There is no requirement, either legal or

¹⁶ *Anwar Hossain Choudhury vs Bangladesh* 1989 BLD(Spl).

¹⁷ Sayem, A., *At Bangladesh: Last Phase*, Dhaka, 1988, at p. 25.

¹⁸ Constitution (Fifth Amendment) Act, 1979 (Act I of 1979).

¹⁹ *Id.*

constitutional, that one is to be a Muslim for holding a constitutional post or that in taking oath or making an affirmation before entering into any constitutional post one is to invoke any religious creed. Art. 100 was substituted by a new Art. 100 creating six Permanent Benches of the High Court Division at Barisal, Chittagong, Comilla, Jessore, Rangpur and Sylhet. The English spelling of "Dacca" in Art. 5 was changed to Dhaka.

On August 1991, by the Eleventh Amendment, Paragraph 21 was added in the Fourth Schedule ratifying and confirming the appointment of Justice Shahabuddin Ahmed as Vice President and all his actions, etc. during the period of 6 December 1990 and the date of commencement of the Eleventh Amendment. By a referendum, a Parliamentary form of government was introduced to bring back the *status quo ante*. On 15 September 1991 a referendum was held to meet the constitutional requirement for getting the President's assent on the Twelfth Amendment Bill passed unanimously by Parliament on 6 August 1991. The Twelfth Amendment was endorsed by the nation and deemed to have been assented by the President.

The two judges of our Supreme Court applied the doctrine of basic permanent structure in the *Eighth Amendment* case. A part of the Amendment that set up six Benches outside the capital was struck down. In that case I said that the doctrine

developed in a climate where the executive, commanding an overwhelming majority in the legislature, gets snap amendments of the Constitution passed without a Green Paper or White Paper, without eliciting any public opinion, without sending the Bill to any select committee and without giving sufficient time to the Members of the Parliament for deliberation on the Bill for amendment.²⁰

The latest amendment, the Thirteenth one, is a result of the mistrust among political parties. It was grudgingly conceded to a popular demand for a Caretaker Government. The President enjoys enormous powers during the Caretaker Government. As the Supreme Commander of the defence services, he administers all laws that regulate the defence services. If the President is satisfied that the country is engaged in a state of war, he may recall the Parliament that existed immediately before its dissolution. The executive power of the Republic shall, during the interim period, be exercised by or under the

²⁰ *Anwar Hossain vs Bangladesh* 1989 BLD (Spl) 1, commonly known as the *Eight Amendment* case.

authority of the Chief Adviser in accordance with the advice of the Non-Party Caretaker Government; the latter shall carry on the routine functions of government and except in the case of necessity for the discharge of such functions it shall not take any policy decision. Thanks to the political climate in the country and the good sense that prevailed with all concerned, the constitutional arrangements mandated by the Thirteenth Amendment has worked well, so far. The interim Government succeeded in giving all necessary aid and assistance to the Election Commission and the general election was held in June, 1996 rather peacefully, fairly and impartially with a few untoward incidents.

THE JUDICIARY AND CONSTITUTIONALISM

There is no express provision in the Constitution for conferment of the State's judicial power on the Judiciary. On reviewing the Preamble, Arts. 7, 26(1) and 108, the Supreme Court held in *Jamil Haq vs Bangladesh*²¹ that full judicial power has been conferred by the Constitution on the supreme judiciary as an independent organ of the State.

The superior courts in our country have very liberally construed the *locus standi* of an aggrieved person and vigorously protected citizen's rights guaranteed under the Constitution. In *the Berubari* case, the Appellate Division held:

The fact that the appellant is not a resident of the southern half on South Berubari Union No. 12 or of the adjacent enclaves involved in the Delhi Treaty need not stand in the way of his claim to be heard in this case. We heard him in view of the constitutional issue of grave importance raised in the instant case involving an international treaty affecting the territory of Bangladesh and his complaint as to an impending threat to his certain fundamental rights guaranteed by the Constitution, namely to move freely throughout the territory of Bangladesh, to reside and settle in any place therein as well as his right of franchise. Evidently, these rights attached to a citizen are not local. They pervade and extend to every inch of the territory of Bangladesh stretching up to the continental shelf.²²

The Court further observed:

... that the question of *locus standi* does not involve the Court's jurisdiction to hear a person but of the competency of the person to

²¹ 34 (1982) DLR (AD) 125.

²² *Kazi Mukhlesur Rahman vs State*, 26 (1974) DLR (SC) 44, at p. 52.

claim a hearing, so that the question is one of discretion which the Court exercises upon due consideration of the facts and circumstances of each case.²³

It was also held that in peace time the plea of war is not available, involving deprivation of rights and liberties of the citizens.²⁴

In *Dr. Mohiuddin Farooque v. Bangladeshi*²⁵, where a petitioner challenged part of the Flood Action Plan on the ground, inter alia, that it would adversely affect more than a million human lives and natural resources and the natural habitat of man and other flora and fauna, the Court expansively interpreted the term *locus standi*. It was held that a writ petition is maintainable in case of a violation of any fundamental right of the citizens, affecting particularly the weak and downtrodden or deprived section of the community, or if there is a public cause involving public wrong or public injury any member of the public or an organisation, whether being a sufferer himself/itself or not may become a person aggrieved if it is for the realisation of the objectives and purposes of the Constitution.

I have rather disproportionately dwelt on the role of the Supreme Court. After all, the Constitution is in large measure what the Supreme Court says about it. The people of Bangladesh hold the Supreme Court in high esteem. They have often invoked its intercession in difficult times. In the last two decades, three Chief Justices were called upon to take upon themselves very onerous tasks. In 1975, Chief Justice Sayem assumed the role of the Chief Martial Law Administrator. Soon he became the President as well. He could not hold the promised general elections in February 1977. Unfortunately, he did not get the desired assistance from the Special Assistant, a former judge of the Pakistan Supreme Court, he himself appointed.

Adam Przeworski thinks that poverty and economic stagnation combine to leave poor democracies brittle, while wealthy democracies remain immune to sudden economic downturns. He found that the expected life of a very poor democracy (per capita income of less than \$ 1,000 a year) is less than five years. He said no democracy with per capita annual income of more than \$4,335 has ever died, regardless of

²³ *Ibid.*, at p. 56.

²⁴ *Ibid.*, at p. 57.

²⁵ 17 (1997) BLD (AD) 1.

economic performance.²⁶ What will happen to Bangladesh where the per capita income is not even \$300?

Liberation struggles generate monolithic parties and do not brook opposition. After attaining liberation old habits continue. The political party under whose aegis independence was achieved is often found reluctant even to share power with their fellow comrades. In the first Parliament only six Members were in the opposition. Now the main opposition party has 113 Members. In the last election (1996), out of the top first ten vote-winners, five were from the main opposition party. The difference in the total number of votes received by the Party in power and the main opposition party is less than 4%.

Reviewing the parliamentary practice in England, Crossman had said:

Theoretically, the task of checking and controlling the executive, which previously belonged in a real sense to the House as a whole, has now passed to the Opposition. But the Opposition is incapable of adequately fulfilling it. For with good management and even a moderate sized majority, any modern government can survive, whatever the Opposition may do, until the Prime Minister decides to dissolve. Modern Oppositions are often accused of ineffectiveness, and rebuked for shadowboxing. But this is all they can do unless they are willing over a period of months to obstruct legislation and so halt the process of government. But by taking opposition to this level, an Opposition lays itself open to the charge of extremism and irresponsibility and may well lose the support of that mass of floating voters which it must hope to win in order to turn out the government. Hence the tendency of the modern Opposition to play safe.²⁷

Our opposition did not play safe. In the last Parliament, on 28 December 1995, 147 Members of the opposition resigned. On 23 February 1995 the Speaker held that the collective resignations of MPs contained in three separate bundles were against the requirement of submitting resignation separately by each individual member and was contradictory to the spirit of Parliamentary democracy. The country was thrown in great difficulty. The party in power did not hold the by-elections or opt for dissolution of Parliament. Instead the President

²⁶ Przeworski, A., Proceedings of the World Bank Annual Conference on Development Economics, World Bank, 1994, at p. 229.

²⁷ Crossman, H.R., "Introduction", in Bagehot, W., The English Constitution, London, 1963.

asked for an advisory opinion of the Supreme Court whether the absence of the MPs from Parliament without leave of the Speaker could be construed as absence. The Supreme Court held in a Special Reference that:

We are plainly at a loss to appreciate why the physical absence of the members of the opposition should not be construed as absence within the meaning of Art. 67(1)(b) and be regarded as presence? Does it enhance the cause of constitutionalism or the cause of an effective Parliament by construing their absence as presence. To act according to democratic norms is a trust which has been reposed upon all sections of the Parliament and what is called democratic culture is required to be practiced by all those who are in the business of politics. The court can not resolve political difficulties by putting an artificial meaning to a particular word or provision in the Constitution that it will be onerous for holding by-election if such a large number of seats fall vacant at a time is no ground for giving a twisted and laboured meaning to the word "absent" because in that case the Court will permit a whole body of people to remain unrepresented in the Parliament.²⁸

The President is the Head of the Republic. His powers are nominal, less than those of the President of the Indian Republic. In the exercise of all his functions, save only in appointing the Prime Minister and the Chief Justice, he shall act in accordance with the advice of the Prime Minister. In our country the Chief Executive has always exercised enormous powers, wider than those of the US President. It appears that he does not share power with anyone else. Similarly, the leader of the opposition wield vast powers over his party men. There is a lack of trust between the Chief Executive and his associates. There is equally a lack of trust between the leader of the opposition and his followers. So far, no shadow-cabinet has been constituted by any opposition party. For the first time a vote of no confidence was tabled on 5 August 1992. The Government survived by 168 to 122 votes in the 330 member Parliament.

There are adequate financial procedures for the Parliamentary control over the public purse, but they are not scrupulously followed. Art. 83 stipulates that no tax be levied without an Act of Parliament. Art. 84 provides for a Consolidated Fund in which all money was to be credited to Public Accounts of the Republic. Art. 127 stipulates that the office of the Controller and Auditor General would audit all

²⁸ 15 (1995) BLD (AD) 194.

government expenditures and relay the reports of public accounts to the President to be laid before Parliament. In spite of adequate provisions in the Constitution, Parliament has so far failed to have an effective control on the purse of the nation.

In the field of legislation, Parliament's record is hardly impressive. At the instance of the Treasury Bench, rules 78, 79, 82 and 91 of Parliamentary Procedure were suspended again, for example in case of the Emergency Power Act, 1975 and the Fourth Amendment Bill, 1975. Many important bills concerning abridgment of fundamental rights, freedom of press, setting up of a paramilitary force, or special provision for preventive detention were passed without eliciting public opinion or being sent to the select committees. The Constitution (Fourth Amendment) Bill was passed within less than half an hour.

In our constitutional practice, there has been a tendency to bypass Parliament and resort to decree-making powers by the President. Till the commencement of the Constitution, four Acting President's Orders and as many as 156 President's Orders were made from 17 January to 15 December 1972. These Orders are of great importance. They superimposed new layers on the existing legal order. After the commencement of the Constitution, 44 President's Orders, 7 in 1972 and 37 in 1973, were proclaimed. Out of a total of 202 President's Orders, 36 were protected from being challenged under Art. 47 on the ground of inconsistency with fundamental rights. Ten of them were subsequently repealed. Twenty six now stand as protected and the rest of the President's Orders are part of the existing laws of the country. Whatever may be the explanation for the making of these laws, the fact remains that Parliament had no say with regard to the making of some of the more significant laws of the country.

The Executive has facily resorted to the Ordinance-making power of the President as and when it pleases. In the First Parliament, 110 Acts were passed out of which 91 were Ordinances. It has been held by the Supreme Court that the President's satisfaction as to whether circumstances exist for taking immediate action under Art. 93 is not totally excluded from judicial inquiry, but to date no Ordinance has been struck down on the grounds of its either being *ultra vires* or *malafides*.²⁹

²⁹ *Kudrat E Elahi Panir & others v. Bangladesh*, 44 (1992) DLR (AD) 319.

It is often said that democracy has never been given a chance in our country. This self-serving assertion has no basis at all. Our political leaders fought against foreign rules taking the people along with them. Had they been united enough to carry the whole people with them, I have got reasons to believe that the generals would not have dared to take over power whether in Pakistan before 1971 or in Bangladesh after 1972. The politicians are to realise that an intervention by a general, or an intercession by a judge will not solve our political problems unless the politicians are ready to work together and solve their own problems and resolve that they would not in any circumstance allow or welcome a general to intervene or invite a judge to intercede. The absence of an elective process within political parties and the practice of delegating most powers, including that of nominating members in the party's central committee, to the leader of the party, the absence of effective local constituency bodies, wide use of money and muscle power are some of the disturbing factors we are to reckon with.

FUNDAMENTAL HUMAN RIGHTS AND CONSTITUTIONALISM

Our Constitution has tried to make a balance between the majoritarian rule of the administration and fundamental rights of individuals. During the recent past there had been a vigorous public debate on the Constitution and the general will of the people is in favour of the continuation of the present-day constitutionalism.

Democracy and Human Rights were our war cries in the War of Liberation. We invoked them in the Preamble of the Constitution. Concepts and even language from international human rights instruments were borrowed heavily for internalising certain fundamental human rights. In drafting the International Crimes Act, 1973 we have borrowed from international conventions relating to genocide, crimes against humanity and other crimes under international law. Our Supreme Court has internationalised some salutary features of international conventions like the one on Reduction of Statelessness, yet to be ratified by us.³⁰

Our younger generation expects that the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights are ratified by us and the necessary

³⁰ *Golam Azam vs Bangladesh*, 46 (1994) DLR (AD) 194.

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After nearly 200 years, the British rule in India came to an end in 1947, and two independent states, India and Pakistan, came into being. Our whole political thinking both before and after 1947 revolved round grievances of exploitation. We demanded self-determination for the Muslims in the northeastern zone of India before and after 1947, and full autonomy for East Bengal after 1947. Our demand for autonomy was reflected in the 21 points of the United Front in the fifties and the

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Words, phrases and concepts of our Constitution were heavily borrowed from constitutions of other countries and international human rights instruments. We have two texts of the Constitution. It is provided in Art. 153 that between the two texts, the authentic text is provided that in the event of conflict between the Bengali and English texts, the former should prevail.

It was in the fitness of things that this should be so. Our language was the main cohesive force in our liberation movement. In a sense, the struggle for national independence started on 21 February 1952. Framing of the Constitution in Bengali for the first time in our history was a momentous event. It was a great step forward towards internalising modern constitutional concepts in our legal culture. Unfortunately, during the martial law period, many articles of the Constitution were amended and it was provided in paragraph 3A of the Fourth Schedule that the English text would prevail in so far as it related to anyone amendment in any of the texts by Proclamation Order No. 1 of 1977. It appears that in times of stress and turmoil English was found handier by our rulers. As a back-handed compliment Art. 3 of the Constitution was amended in 1988 and the word 'Bangla' was

³ History of our constitution-making is yet to be comprehensively attempted. See, however, Alam, Md. S., *Bangladesher Shongbidhanik Itihās and Shongbidhaner Shohoj Pat*, Chittagong, 1996 (in Bangla) and Nath, B.P., *Bangladesher Shongbidhanik O Rajnaitik Dolil*, Dhaka, 1982 (in Bangla).

substituted for the word 'Bengali'. The word 'Bengali' in Art. 153, however, escaped notice and remained unamended.

Like the deltaic land of our country, our Constitution has experienced several avulsion and various kinds of *reformation in situ*. Far reaching and radical changes had been introduced in the Constitution both during the time when it was functioning under a duly democratically elected regime and during the time when it was not allowed to function by generals who succeeded for a while to hold the people in thralldom. The words "struggle for national liberation" in the Preamble were substituted by the words "war for national liberation struggle".⁴

The Constitution has so far been amendments thirteen times. Some of the amendments were made in an agonising situation. The Constitution suffered manipulation for the sake of its continuity. It travelled through a tortuous path. The Constitution was amended for protecting legislation for trial for genocide, crimes against humanity and other crimes under international law from being challenged on the ground of derogation from fundamental rights.⁵ It was amended to provide for preventive detention and for a declaration of emergency and for suspension of certain fundamental rights (specifically, Arts. 36, 37, 38, 39, 40 and 42);⁶ and for giving effect to the agreement entered into between Bangladesh and India over Berubari and some other territories;⁷ for changing the form of government from parliamentary to presidential and back again to parliamentary;⁸ twice for validating acts and deeds, and orders and laws passed during the martial law regimes;⁹ twice for qualifying an individual who was otherwise

⁴ First by the Proclamation (Amendment) Order, 1977 and then validated by the Constitution (Fifth) Amendment Act, 1979.

⁵ Constitution (First Amendment) Act, 1973 (Act XV of 1973).

⁶ Constitution (Second Amendment) Act, 1973 (Act XXIV of 1973).

⁷ Constitution (Third Amendment) Act, 1974 (Act LXXIV of 1974).

⁸ Constitution (Fourth Amendment) Act, 1974 (Act II of 1974) and Constitution (Twelfth Amendment) Act, 1991 (Act XXVIII of 1991), respectively.

⁹ Constitution (Fifth Amendment) Act, 1979, (Act I of 1979) and Constitution (Seventh Amendment) Act, 1986 (Act I of 1986)..

amending or repealing laws are passed by Parliament.³¹ Our courts will on proper persuasion find out ways to avoid conflict with provisions of the International Human Rights Bill and provide effective remedies in cases of serious derogation of human rights.

The Supreme Court has jealously protected citizen's rights, mentioned in Art. 32 of the Constitution, that no person shall be deprived of life or personal liberty save in accordance with Law. When the Constitution was framed there was no provision for preventive detention, but within less than one year, by a constitutional amendment, provisions for preventive detention were introduced. The Supreme Court held again and again that the High Court Division is obliged to examine not only the legality, but also the manner in which the order for detention is passed. It was held in *Sajeda Farvin vs Government of Bangladesh*³² that a rule issued in habeas corpus matter was wrongly discharged as infructuous on the ground that the order of detention had already expired, because it was not the order but the *factum* of detention is in issue in a habeas corpus matter. The High Court has powers wider than the one under Section 491 of the Code of Criminal Procedure and can grant ad-interim bail in a pending writ proceeding, as it did in *Bangladesh vs Ahmed Nazir*.³³

In view of the exceptional circumstances when on two previous occasions the Court's order of release were frustrated by serving a fresh order of detention on the detenu in Jail, our High Court Division in *Alam Ara Huq vs Government of Bangladesh*³⁴ resorted to habeas corpus *ad subjiciendum et recipiendum* (that you have the body for submitting and receiving) and the detenu was directed to be brought before the Court. After hearing, the Court directed the immediate release of the detenu from the Court premises.³⁵

³¹ International Covenant on Economic, Social and Cultural Rights was ratified by Bangladesh on October 5, 1998.

³² 40 (1988) DLR (AD) 178.

³³ 27 (1979) DLR (AD) 41.

³⁴ 42 (1990) DLR (HCD) 98.

³⁵ On detention cases under the Special Powers Act, 1974, see Chowdhury, B.H., *The Long Echoes*, Dhaka, 1990 and Malik, S., "Bangladesh", in Harding A. And Hatchard J. (eds), *Preventive Detention and Security Law: A Comparative Survey*, Dordrecht/Boston/London, 1993, pp. 41-58.

In *State vs Deputy Commissioner, Satkhira & Others*³⁶ where a boy of 12 was not released even after his acquittal and languished literally under fetters for twelve years the High Court Division issued a *suo motu* rule on the basis of a newspaper report. The victim who had been tried in violation of the Children Act, 1974 was freed. Various directions were sent to the Ministry of Home Affairs with regard to the similarly situated victims of prison mismanagement.

The Supreme Court has also jealously protected freedom of press. The Government's refusal to authenticate the declaration in respect of a daily newspaper was struck down when there was no valid ground for the refusal. When the relevant documents of an weekly newspaper and its printing matters were seized for alleged illegal authentication of the declaration by the Additional District Magistrate, instead of the District Magistrate, the Court found in *Waliul Bari Chowdhury vs District Magistrate, Kushtia and others*³⁷ that the cancellation of the authentication was done *malafide* after a long lapse of time and in respect of the publication of the criticisms of a few actions of the District Magistrate in the weekly. The printing press was released and the publication of the weekly was allowed. In another case it was held that "the law that singled out a printing establishment for taking over was violative of the freedom of press."³⁸ It was held by the Supreme Court in *Saleemullah vs State*

Freedom of press being recognised in our Constitution, a Court is to suffer criticism made against it, and only in exceptional cases of had faith or ill motive, it will resort to law of contempt.³⁹

CONCLUDING REMARKS

While commenting on democracy in America, Alexi de Tocqueville said in 1835 that the great privilege of the Americans does not consist in being more enlightened than other nations, but in being able to repair faults they may commit. He, however, had added that a democracy may not profit by past experience unless it has arrived at a certain pitch of knowledge and civilisation. There are nations, Alexis de Tocqueville had observed, 'whose first education has been so vicious and whose

³⁶ 45 (1993) DLR 643.

³⁷ 38 (1986) DLR (AD) 256.

³⁸ *Hamidul Huq Chowdhury vs Bangladesh*, 34 (1982) DLR 190.

³⁹ 44 (1992) DLR (AD) 309.

characters present so strange a mixture of passion, ignorance and erroneous notions upon all subjects that they are unable to discern the causes of their own wretchedness, and they fall sacrifice to ills of which they are ignorant'.⁴⁰

✓ A considerable part of our post-liberation history is strewn with broken promises. A significant portion of our immediate past has been termed as "the legacy of blood".⁴¹ One does not like to look at one's face in a broken mirror. Our commitment to constitutionalism, parliamentary democracy, representative local government and the rule of law are yet to be demonstrably honoured. I am not, however, worried that constitutionalism in our country has been badly jolted by the self-serving exercises of both politicians and members of the defence services. I feel assured that our people have withstood all kinds of machinations that were resorted to degrade and defame them. Amidst fragmentation in our political parties, rebellions in our army and outlandish ideas as to nation-building amongst our intellectuals, constitutionalism has survived with the same resilience and the people have withstood numerous natural calamities throughout their history. For there is no attraction for polemics like "the end of history"⁴² or the "unattainability of self-rule for some nations." There is nothing in science or human history that indicates convincingly that a person's destiny or a nation's destiny is a pre-programmed one, and yet plenty of deterministic ideas abound.

In one of my depressed moods, I had a feeling that there was a jinx on writings on constitutional matters. While inaugurating Kaminikumer Dutta Memorial lectures in March 1991 at Dhaka University, I gave vent to my foreboding. In May 1958, A.K. Brohi's "Fundamental Law of Pakistan" was published. Brohi was the Law Minister of Pakistan. Within six months, the Constitution was abrogated. Brohi was reported to have taken a vow that he would never write again on constitutional matters.

A lesser misfortune visited Sharfuddin Pirzada, another Law Minister of Pakistan. Before he could complete his book on "Fundamental Rights and Constitutional Remedies in Pakistan",

⁴⁰ Tocqueville, Alexi de, Democracy in America, Mayer, J.P. (ed), New York, 1969.

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published in 1966, an emergency was proclaimed on 6 September 1965 and the enforcement of fundamental rights was suspended. Justice Amin Ahmed's Kamini Kumar Dutta Memorial lectures on "Judicial Review of Administrative Actions" were made over to Dhaka University in February 1969. Within less than six weeks on 25 March 1969, the Constitution was abrogated. While Justice Fazle Munim's "Rights of the Citizen under the Constitution and Law" was still in press, an emergency was proclaimed on 28 December 1974 and the Fourth Amendment of the Constitution was enacted on 25 January 1974. I fervently hope and believe that this jinx is no longer there.

Our people has rallied again and again to the Constitution. In the first quarter of 1996, the Constitution was the best seller. All copies were all sold out. Educated citizens were all agog with various constitutional formula for the formation of a caretaker government. The people, generals as well as judges, some of them assumed or could not help assuming power unconstitutionally, were eloquent on the continuity of the constitution and got their acts and deeds validated and ratified by amendments of the constitution. The representatives of the people, unlike some radicals who think of framing a new constitution, had no stomach either for revolution or for the laborious task of constitution-making afresh. The people want peace and to settle down.

Our people's participation in elections has increased steadily from 34% in 1954 to 73% in the last one (1996). This unmistakably shows our commitment to the electoral process. A noticeable feature in the last general election was the participation of women. Holding a fair election is, however, only one of several tasks for the smooth working of constitutionalism.

In 1972, fifteen seats were reserved in Parliament for women for ten years. Subsequently, the number was increased to thirty. Reservation was found to be in accord with Art. 28(4) and not violation of the requirement of a single electoral roll on the basis of adult franchise as per Arts, 121 and 122.⁴³

The young generation in Bangladesh wants our inherited laws and traditions to be adjusted to contemporary conditions. Young men and women in our country, just like any other country in the West, are

⁴³ *Dr. Ahmed Hossain vs Bangladesh*, 44 (1992) DLR (AD) 44.

trying to evolve a new jurisprudence, new designs of legal activism and modes of legal services.

There are good signs. A task force, headed by the Speaker, worked on plans as how to strengthen Parliament and enhance its role in governance of the country, to improve committee systems and to give more freedom to the Comptroller and Auditor-General. A commission on local government deliberated how best the constitutional requirement of effective participation in local levels could be ensured. A bill for the separation of the judiciary from executive organs is to be considered in Parliament. The Law Ministry set up a consultative committee for finding out ways and means for improving human rights conditions in the country.

Our constitution has endured for more than a quarter century now. There is a growing consensus in that the national and political problems are to be solved as nearly as possible on the basis of the Constitution. It was because of that consensus a solution was found, though not wholly constitutional, for transfer of power from President Ershad to Chief Justice Shahabuddin Ahmed.

The future of the Constitution lies in the commitment of all citizens who are obliged under Art 21 "to observe the Constitution and the laws, to maintain discipline, to perform public duties and to protect the public property". Unless we genuinely respect the rights of citizens, the latter will not, however, be well encouraged to perform their duties and all plans of development, however well devised or generously funded, will come to nothing if we fail to discharge the State's basic function of maintaining law and order in the country.