

Understanding Constitutionalism: Bangladesh Perspective

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Abstract

Constitution is not only the supreme law of the land but also the embodiment of the political philosophy of a state. Constitutionalism is, as well, not only the rule of law consistent with the Constitution but also in adherence to this political philosophy of the state in all its legislative, executive and judicial actions. The great expedition of constitutionalism in Bangladesh is described and analyzed in this article after a brief theoretical discussion on constitutionalism, short descriptions on the history of framing of the constitution of Bangladesh and its salient features. The practice of constitutionalism under the periods of different rulers of Bangladesh like Sheikh Mujibur Rahman, Ziaur Rahman, H. M. Ershad have been quite elaborately discussed and analyzed. Leading cases on constitutional law have also been shortly described focusing the role of higher judiciary in protecting the Constitution. Thereafter some recommendations have been made for proper practice and advancement of constitutionalism in Bangladesh.

Key words: Supremacy of the Constitution, rule of law, responsible government, fundamental rights, independence of judiciary.

Introduction

‘Constitutionalism’ is the doctrine which governs the legitimacy of government action. By constitutionalism is meant – in relation to constitutions written and unwritten – conformity with the broad philosophical values within a state. Constitutionalism implies something far more important than the idea of ‘legality’ which requires official conduct to be in accordance with prefixed legal rules. A power may be exercised on legal authority; however, that fact is not necessarily determinative of whether or not the action was ‘constitutional’. In summary, constitutionalism suggests the limitation of power, the separation of powers and the doctrine of responsible accountable government.

Defining Constitution

In lay terms, a constitution is a set of rules which governs an organization. Every organization, whether social club, trade union or state, which has defined objectives and departments or offices established to accomplish those objectives, needs a constitution to define the powers, rights and duties of the organization’s members. This set of rules, in addition to regulating the internal working of the organization relates to outside bodies. It can therefore be said that a constitution looks to both internal and external regulation of the body to which it relates.

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In the words of Cooley, in his ‘Treatise on Constitutional Limitations’, Constitution has been defined as “the fundamental law of a State, containing the principles upon which the Government is founded, regulating the division of sovereign powers, and directing to what persons each of these powers is to be confined and the manner in which it is to be exercised”. (Justice Latifur Rahman, *The Constitution of the People’s Republic of Bangladesh with Comments and Case Laws*, 1st ED, 2004, Pg-08)

From this above definition, it can be discerned that a constitution is something which gives legitimacy to the government and defining the powers under which a government may act. As such, the constitution sets limits both to the powers which can be exercised and to the manner in which they may be exercised. Accordingly, the constitution defines the legality of power. This notion is particularly apposite in a country with a written constitution and a Supreme Court which is conferred with jurisdiction to rule on the legality of government action. Under such a constitutional arrangement, it can be said that everything which the government does is either lawful or unlawful depending upon whether or not the contested conduct is held to be ‘constitutional’ or not.

Historical Background

The inception of the present constitution of Bangladesh can be traced back as early as 1947. After being partitioned by the British Sovereign in 1947, the constituency of Pakistan faced ongoing dilemma to constitute a favorable constitution for both of its parts. Ayub Khan during his tenure set up a Constitution Commission to make recommendations for the future constitution and the constitution framed by him came into operation on 7 June 1962. This constitution introduced a system which was euphemistically called a presidential form of government where the normal checks and balances to prevent one-man rule were not incorporated in the constitution. (Mahmudul Islam, *Constitutional Law of Bangladesh*, 3rd Ed, Mullik Brothers, Pg-15)

Two elections were held under the constitution of 1962 which clearly demonstrated that the people could not get persons of their choice elected as their representatives. In 1965 Ayub got himself re-elected as the President. The general impression in the country was that the election was rigged. In 1966 Sk. Mujibur Rahman started a movement in East Pakistan with his 6-Point programme which reflected the genuine grievances of the people of East Pakistan. Towards the end of 1968, an agitation in political parties gradually gathered momentum and was accompanied by wide-spread disturbances throughout the country. The Agartala Conspiracy case started against Sk. Mujibur Rahman and others aborted because of massive movement in East Pakistan. (Mahmudul Islam, *Constitutional Law of Bangladesh*, 3rd Ed, Mullik Brothers, Pg-16) Ayub Khan called a round table conference of political leaders to resolve the political issues which led to the crisis. A solution was near sight, when all on a sudden Ayub Khan by relinquishing his office asked the Defence Forces on 24 March 1969 to step in as, according to him, it was beyond the capacity of the civil government to deal with the then prevailing situation. (Mahmudul Islam, *Constitutional Law of Bangladesh*, 3rd Ed, Mullik Brothers, Pg-17)

Yahya Khan, the Commander-in-Chief, by a Proclamation issued on 26 March 1969, abrogated the constitution of 1962, dissolved the National and Provincial Assemblies and imposed Martial Law throughout the country. On 31 March 1969 he promulgated the Provisional Constitution Order which substantially followed the pattern of the Laws (Continuance in Force) Order, 1958. On 30 March 1970 Yahya Khan promulgated the Legal Framework Order and under its provisions elections were held in December, 1970 to the National and Provincial Assemblies on the basis of adult franchise. After a good deal of political maneuvering, a session of the National Assembly was summoned by Yahya Khan on 3 March 1971 in Dhaka. But the Peoples Party led by Z.A. Bhutto refused to attend the session in Dhaka and Yahya Khan postponed the session indefinitely.

The Awami League led by Sk. Mujibur Rahman which won almost all the seats in East Pakistan and a held clear Majority in the National Assembly reacted sharply and in protest of the action taken by Yahya Khan virtually took over the administration in East Pakistan. To meet the situation, Yahya Khan had talks with the important political leaders in Dhaka which subsequent events clearly indicated was a ruse. Yahya Khan started his military action with unprecedented brutality, gunning down hundreds of innocent people in Dhaka and other places in East Pakistan in the night of 25 March 1971 which was taken by the East Pakistan as an act of betrayal. Thousands took up arms to fight against the Pakistani Armed Forces to liberate the country, Bangladesh. The members of the National and Provincial Assemblies elected in the 1970 election from East Pakistan proclaimed independence on 17 April 1971 forming the Government on 10 April, 1971 with Sk. Mujibur Rahman, then in custody in Pakistan, as the President and Syed Nazrul Islam as the Acting President till the release of Sk. Mujibur Rahman. On 16 December 1971 the Pakistan Armed Forces surrendered and Bangladesh became liberated.

Sk. Mujibur Rahman was released by the Government of Pakistan and he returned to Dhaka on 10 January 1972. The next day he, in his capacity as the President of Bangladesh, issued the Provincial Constitution of Bangladesh Order, 1972 providing for a parliamentary form of government in the interim period and constituting the Constituent Assembly with the members of National Assembly and East Pakistan Provincial Assembly who were elected by the people of East Pakistan for giving the country a democratic constitution. The Assembly adopted a constitution on 4th November which came into operation on 16 December 1972, exactly one year after the liberation of Bangladesh.

Salient Features of the Constitution of Bangladesh

The Constitution containing 153 articles, 1 preamble and 4 Schedules established Bangladesh as a sovereign unitary Republic. It created one government composed of representatives chosen by the people in contrast to the rule of one man, as in kingship, or one class of men, as in aristocracy. The term 'sovereign' indicates that Bangladesh is subject to no external authority and the term 'Republic' denotes that the Head of the State is not a monarch, but an elected functionary. 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 Constitution provided separation of powers between the three organs of the State – executive, legislature and judiciary. It was not a separation of powers of the type practiced in the American jurisdiction. What the Constitution did can be said to be an assignment or distribution of different powers of the Republic to the three organs and it provided for separation of powers in the sense that no one organ could transgress the limits set by the Constitution. (Mahmudul Islam, Constitutional Law of Bangladesh, 3rd Ed, Mullik Brothers, Pg-20)

The Constitution introduced a parliamentary form of government with the President of the Republic as the constitutional head elected by the members of Parliament. The members of Parliament were to be directly elected on the basis of adult franchise. The President would appoint a Member of Parliament who commanded the support of the majority of the members of Parliament as the Prime Minister and would appoint ministers on the recommendation of the Prime Minister. The executive authority of the Republic vested in the Prime Minister who, and also the Cabinet, were responsible to Parliament and through Parliament to the ultimate sovereign, the people. The Prime Minister and the Cabinet could continue so long as they commanded the support of the majority of the members of Parliament. In order to bring in stability of the government, the Constitution made provision prohibiting floor crossing by the members of Parliament. (Mahmudul Islam, Constitutional Law of Bangladesh, 3rd Ed, Mullik Brothers, Pg-21)

The guardianship of the Constitution was given to the Supreme Court. The Supreme Court was given the power of judicial review. Save in some specified situations, the Supreme Court, in exercise of that power, could not only review the State actions to ensure that it did not contravene any provision of the constitution or the laws of the land, but also could strike down any law for inconsistency with any provision of the Constitution including the provisions guaranteeing fundamental rights. (Mahmudul Islam, Constitutional Law of Bangladesh, 3rd Ed, Mullik Brothers, Pg-22)

Parliament was given the power to amend the Constitution. Art. 142 provided for a special procedure for such amendment and prescribed that no Bill for amendment should be presented to the President unless it was passed by the votes of not less than two-thirds of the total number of members of Parliament. (Mahmudul Islam, Constitutional Law of Bangladesh, 3rd Ed, Mullik Brothers, Pg-23)

Supremacy of the Constitution

Supremacy of the Constitution means supremacy over the parliament who can exercise its functions being only within the bounds of the Constitution. Supremacy of the Constitution is possible only where the Constitution is written and rigid.

Supremacy of the Constitution is also called judicial supremacy in the sense that the judiciary i.e. the highest court of the land is supreme over the legislature. Because the judiciary is invested with the power to examine the validity and constitutionality of any legislation made by the

parliament and can declare a law void on the ground of inconsistency with the Constitution. (Md. Abdul Halim, Constitution, Constitutional Law and Politics: Bangladesh Perspective, 5th Ed, CCB Foundation, Pg-58)

Supremacy of the Constitution implicitly presupposes the existence of an independent authority to examine the constitutionality of actions taken by the legislative and the executive. To that end the Constitution of Bangladesh has ensured in Articles 94 and 95 an independent organ – the Supreme Court. Under article 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 the historic Eighth Amendment case. In that case the Supreme Court held the Eighth Amendment to the Constitution unconstitutional and invalid.

The 15th Amendment to the Constitution enacted in 2011 by the Awami League-led alliance government has introduced some fundamental changes in the judicial review provisions. A new Article 7B has been added to the effect that some basic provisions of the Constitution like Preamble, provisions of fundamental principles of the Constitution, fundamental rights of the Constitution, all articles of Part I, II & III and article 150 cannot be amended in future. This ban on amending power by any future parliament seems not only unrealistic but also unconstitutional.

Rule of Law

The term ‘rule of law’ is used as opposed to the concept of ‘rule of man’. The primary meaning of rule of law is that the ruler and the ruled must be bound by the same law. No separate law or system can be provided for the ruler. The general conception of the rule of law or rule of law as a principle of constitutional government has become identified and crystallized with professor Dicey’s usage of that phrase in his work ‘the Law of the Constitution’ first published in 1885. (A.V. Dicey, Introduction to the Study of the Law of the Constitution, 10th Ed, London: ELBS and Macmillan, 1973, Pg-202) He gave three meanings of the concept of rule of law – (i) the supremacy of regular law as opposed to the influence of arbitrary power and the persons in authority do not enjoy wide, arbitrary or discretionary powers, (ii) equality before law, that is, every man, whatever his rank or position, is subject to ordinary laws and the jurisdiction of ordinary courts, and (iii) individual liberties legally protected not through any bill of rights but through the development of common law. His thesis has been criticized from many angles, but his emphasis on the subjection of every person to the ordinary laws of the land, the absence of arbitrary power and legal protection for certain basic human rights remains the undisputed theme of the doctrine of rule of law. (Mahmudul Islam, Constitutional Law of Bangladesh, 3rd Ed, Mullik Brothers, Pg-79)

The preamble of the Constitution of Bangladesh states ‘rule of law’ as one of the objectives to be attained. To attain this fundamental aim of the State, the Constitution has made substantive provisions for the establishment of a polity where every functionary of the State must justify his

action with reference to law (Articles 7 and 31). Article 27 guarantees that all citizens are equal before law and are entitled to equal protection of law. Article 31 guarantees that to enjoy protection of law, and to be treated 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 detrimental to the life, liberty, body, reputation or property of any person shall be taken except in accordance with law. 18 fundamental rights have been guaranteed in the Constitution and Constitutional arrangement for their effective enforcement has been ensured in Articles 44 and 102. Articles 7 and 26 imposed limitation on the legislature that no law which is inconsistent with any provision of the Constitution can be passed. In accordance with Articles 7, 26 and 102 (2) of the Constitution the Supreme Court exercises the power of judicial review whereby it can examine the extent and legality of the actions of both the executive and legislative and can declare any of their actions void if they do anything beyond their constitutional limits. Right to be governed by a representative body answerable to the people has been ensured under Articles 7(1), 11, 55, 56, 57 and 65 (2) of the Constitution.

Responsible Government

The term ‘responsibility’ in relation to modern democratic governmental system means political responsibility i.e. responsibility to the people or a body representing the people. This political responsibility may be used in two senses – (i) Direct Responsibility; and (ii) Indirect Responsibility. Both presidential and parliamentary forms of government are responsible government but the presidential system has no, in a sense, direct responsibility; its responsibility is indirect whereas the parliamentary system has direct responsibility. (Md. Abdul Halim, Constitution, Constitutional Law and Politics: Bangladesh Perspective, 5th Ed, CCB Foundation, Pg-197)

Apart from individual responsibility of ministers in a parliamentary system, the principle of collective responsibility of the Cabinet is the essence of responsible government and is fundamental to the working of a parliamentary form of government. Article 55(3) specifically lays down that the Cabinet shall be collectively responsible to Parliament. It means that the Cabinet is responsible to Parliament for the general conduct of the affairs of the government. All Ministers shall stand or fall together and the government is carried on as a unity. The Ministers work as a team, the decision of the Cabinet is the joint decision of all Ministers and the Cabinet commands confidence of Parliament as a body. Inside the cabinet, the Ministers may express their individual views freely, but once the decision is taken, all the Ministers are to support it and it is absurd for a Minister even to give an impression that he did not agree to it. He cannot disown responsibility for any cabinet decision so long as he remains a Minister. If a Minister is morally convinced that a decision taken is absolutely wrong and he cannot support it, he has only the option of tendering resignation. If Parliament passes a vote of no-confidence, the Prime Minister has to resign and with him the entire Council of Ministers falls. (Mahmudul Islam, Constitutional Law of Bangladesh, 3rd Ed, Mullik Brothers, Pg-411-412)

Fundamental Rights

When certain human rights are written down in a Constitution and are protected by constitutional guarantees they are called fundamental rights. They are called fundamental rights in the sense that they are placed in the supreme or fundamental law of the land which has a supreme sanctity over all other law of the land. Following the footsteps of the French Declaration of Rights of Man and Citizen, 1789 and the American Declaration of Independence, 1776 and then the incorporation of the Bill of Right in the US Constitution in 1791 most of the democratic countries with written constitution included a chapter for Fundamental Rights with special sanctity.

It is a claim of a written constitution that embodying fundamental rights can provide effective constitutional remedies. But practical experience shows that some of the written constitutions do not specifically provide for the remedies in the Constitution. The US and the French Constitutions are two of them. (Md. Abdul Halim, Constitution, Constitutional Law and Politics: Bangladesh Perspective, 5th Ed, CCB Foundation, Pg-99) But most of the written constitutions provide for the right to constitutional remedies in case of violation of fundamental rights. This right to constitutional remedy has two dimensions – judicial review and judicial enforcement. Judicial review in relation to fundamental rights is provided for with a view to enforcing fundamental rights against the legislature. In other words, if the legislature passes any law which is inconsistent with the fundamental rights, the highest seat of the judiciary must have the jurisdiction to declare that law unconstitutional. The Supreme Court of Bangladesh can exercise this jurisdiction under Articles 26 and 102 of the Constitution. Judicial enforcement, on the other hand, is provided for with a view to enforcing fundamental rights against the executive. In other words, if any public authority violates any of the fundamental rights enumerated in the Constitution, the right to move the highest court of the land for enforcing that right must be specifically guaranteed in the Constitution and it should be guaranteed as of an independent fundamental right. This right is guaranteed in article 44 and the High Court Division of the Supreme Court is empowered to enforce fundamental rights under Article 102 of the Constitution.

Independence of Judiciary

A sound and independent judiciary is the sine qua non and pre-requisite of a healthy society. A society without crime and dispute is unthinkable and society laden with the influx of crimes and disputes is not at all safe for human habitation. So a balance must be maintained to live in a society which is maintained by the judiciary administering justice. But if the judiciary is not independent, it can hardly be expected to render impartial justice. “There is no better test of the excellence of a government”, rightly says James Bryce, “than the efficiency of its judicial systems, for nothing more nearly touches the welfare and security of the average citizen than his sense that he can rely on the certain and prompt administration of justice if the law be dishonestly administered, the salt has lost its savour; if it be weakly or fitfully enforced, the guarantees or order fail, for it is more by the certainty than by the severity of punishment that offences are repressed. If the lamp of justice goes out in darkness, how great is that darkness!” (James Bryce, Modern Democracies (1929), Pg-384, Quoted in The Dhaka University Studies Part. F. Vol.4,

Pg-4) To know how far the judiciary in Bangladesh is independent, first of all we have to evaluate our system and provisions and in doing this it would be convenient to discuss the present system of judiciary in two broad divisions: A) Higher Judiciary; B) Lower Judiciary.

A) **Higher Judiciary:** The provisions for appointment of judges of the Supreme Court under the present Constitution are not healthy enough to satisfy the requirement of its independence. The present provision for appointments is that the Chief Justice and other judges shall be appointed by the President (Article 95). Thus the appointment depends on the sole wish of the executive which may create personal favoritism and political bias. Article 98 empowers the President to appoint additional judges for two years. But there the objectionable point is the 'proviso' of the Article where the President was empowered to regularize or further appoint such additional judges as regular judge. This is objectionable in the sense that the power-expectation among such additional judges for regular judgeship may greatly hamper their discharging impartial justice. Under Article 99 a retired or removed judge may be appointed by the President in judicial or quasi-judicial offices which are not regarded as profitable posts under Article 66(2). This provision is a great hindrance to the independence of judiciary as Ahmed J. said, "opening up of opportunities for appointment after retirement will serve as temptation and temper with his independence during the concluding period of his service". (Quoted by Badrul Haider Chowdhury, *Evolution of the Supreme Court of Bangladesh* (1990), Pg-168) The ultimate consequences of Articles 95, 98 and 99 is that only those lawyers would be appointed as who are the members of the ruling party or who are likely to favour the government. This has the likelihood of resulting in low degree in judicial decisions even though the judges are completely free after their appointment.

B) **Lower Judiciary:** The larger portion of our population is directly connected with the litigation in the courts of the subordinate judiciary. However, unfortunately since our independence the subordinate judiciary lacked independence and hazardous problems beset with it where the mass of litigants come with a hope to get justice. In view of the land mark judicial decision by the Appellate Division in Masder Hossain case back in 1999, the Caretaker Government headed by Dr. Fakhruddin Ahmed amended the Criminal Procedure Code 1898 on 1st November, 2007 and along with these changes the lower judiciary was separated from the clutches of the executive. (Md. Abdul Halim, *Constitution, Constitutional Law and Politics: Bangladesh Perspective*, 5th Ed, CCB Foundation, Pg-361) Though there is provision for consultation with the Supreme Court under Article 116 of the Constitution, the reality differs as it is frequently heard that in many cases all acts of posting, promotion, grant of leave etc. are done by the Ministry of Law, Justice and Parliamentary Affairs and sometimes it is done without any prior approval of the Supreme Court which is mandatory but the Ministry obtains it later on and in between some particular judges or a judge is harassed whom the Ministry intends to harass. Such type of harassment is a great hindrance for the judges to discharge impartial justice. Sometimes the Ministry illegally detains the file of promotion or grant of leave. It is also heard that frequently judges are threatened over the telephone. So, what is needed urgently is to submit all powers of controlling judges including their salaries to the unfettered hand of the Supreme Court to ensure the collective as well as individual independence of the judges.

Constitutionalism in Bangladesh Perspective

The period under Sheikh Mujibur Rahman

The first bold initiative taken by Sheikh Mujib in the independent Bangladesh was to change the system of government from presidential to a parliamentary one. But this change was not more than a mere expression of sentiment of Mujib since it was a change in the form only which enabled Mujib to redesignate his position as the Prime Minister. Though the change provided for a parliamentary system, the Constituent Assembly which was to act as parliament was neither given the power to make law nor to exercise control over the cabinet. The cabinet was not, therefore, accountable to anybody. Both the executive and legislative powers remained concentrated in the hand of the Prime Minister. Thus at the very start of its journey constitutionalism received a setback in Bangladesh. (Moudud Ahmed, Bangladesh: Era of Sheikh Mujibur Rahman, Pg-9)

An essential institution of a parliamentary democracy is the President or King or Queen who is a titular head of the state. Although he is a titular head, he has three rights in respect of the governance of the country – right to be informed, right to encourage and right to warn. It is a constitutional duty of the Prime Minister to inform the President about the day to day administration and decisions of the cabinet and to seek advice from him. But in the first phase of Bangladesh politics (1972-75) Mujib, the Prime Minister had clear-cut and absolute supremacy over the two ceremonial heads of the state, Abu Sayeed Chowdhury and Mahmudullah.

In parliamentary system the Prime Minister is regarded as ‘one among equals’ meaning that every minister of the cabinet has a role to play in decision-making and it is the duty of the Prime Minister to create an environment where every cabinet minister can participate equally in decision-making. But relations between Mujib and his cabinet colleagues were those of subordination rather than ‘one among equals’. Mujib was so proud of his charisma and he used it with such gravity that no cabinet minister could raise voice against Mujib’s decision. It has been commented that the first political order of Bangladesh during the Mujib era was more in the nature of a ‘prime minister’s dictatorship’ than a genuine parliamentary one. (Dilara Choudhury, Pg-36)

To maintain democracy within the party as well as within the governmental level the posts of party president and the leader of the parliamentary party or the head of the government should not be held by the same person. Parliamentary form of government is a party government. As a party government the party from outside should retain a sort of control over the government or the parliamentary party so that the government or parliamentary party cannot transgress the policies and programmes of the party on the basis of which the party has elected them. In other words, this principle prevents the government from being dictatorial disregarding the policies and manifestos of the party. On the other hand, when the same person holds the posts of both the party president, and the head of the government, it tends the party to be more powerful than the government which may quickly destroy the democratic institutions in the country. In the first phase of Bangladesh politics Sheikh Mujib was the head of the government (as the Prime Minister); he

was also the president of the Awami League. This combination of dual power is contradictory to the norms of constitutionalism.

A talented and constructive political leader always tries, with a sacrificing sentiment, to settle all political problems in a democratic and compromising way. However, instead of adopting democratic methods and techniques Sheikh Mujib began to deal with the opposition forces in a dictatorial way. This led him to resort to measures such as preventive detention and emergency power in order to deal with the growing political unrest, thereby undermining and weakening the democratic process and constitutionalism which he himself founded in 1972.

And lastly when Mujib introduced one party dictatorial system in place of multi-party democratic system, he actually gave his finishing blow to the candle of constitutionalism which was till then flickering for full shine. The new dictatorial system adopted by him was fully devoid of any sign of further development of constitutionalism. In the new system there remained no freedom of speech, thought and conscience, for no free press was allowed; no right to form or join a party; no fundamental right to be enforced through an independent court. Thus the system was a total negation of constitutionalism. These are the reasons which are responsible for the failure of constitutionalism at its first phase in Bangladesh politics

The period under Ziaur Rahman

Mujib's constitutional dictatorship was overthrown by a bloody military coup in which Mujib and his entire family (with the exception of two of his daughters who were abroad) were assassinated. Martial Law was declared ousting Mujib's civil government; the army emerged as a powerful political force; and the body polity of Bangladesh faced a new and unexpected era of military rule. The nature of military rule is that it comes to power ousting a civil government completely in an illegal way. The first military ruler Major General Ziaur Rahman began to civilianize his regime gradually which came to an end in 1979 when the 5th Amendment of Constitution was passed legalizing all military activities. Martial law was withdrawn and the Constitution was allowed to continue as the supreme law. But the governmental system was fundamentally retained as an authoritarian as was introduced by the 4th Amendment; of course, some undemocratic provisions introduced by the 4th Amendment were removed and some relations among the institutions of the government were liberalized. The governmental system was neither a true presidential as is practiced in the USA nor a parliamentary one as is practised in the UK. Neither was it the same presidential as is practiced in France where the Prime Minister and his cabinet are collectively responsible to parliament. The presidency as modified by the 5th Amendment was much more powerful than the presidency under the French Constitution. The system lacked the principle of checks and balances. The system was, therefore, a class apart; an all powerful executive ridden presidential system which armed the President with all devices to administer his dictatorial rule. This model bore more similar to that of Ayub Khan of Pakistan.

The executive authority was vested with the President who was directly elected by the people for a period of five years although without a limit to the number of terms in office. Once elected it

was quite impossible to remove him from the office, for the impeachment procedure as introduced by the 4th Amendment was unprecedentedly a difficult one. All extra-ordinary constitutional devices like emergency, ordinance-making powers, preventive detentions etc. were retained which armed the President to act almost in a dictatorial way. The President was also the chief legislative initiator through his power to address and to dissolve the parliament. Also the power of the parliament was kept restricted like that of a rubber-stamp body. Zia's system was, therefore, neither a fully democratic government nor even hated dictatorial one as introduced by Mujib. It was a multi-party presidential system blended of democratic and autocratic features. Though most observers believe in Zia's sincerity concerning the country's development programmes and his faith in Bangladesh's destiny, his leadership was flawed due to his inability to build political institutions. While in power, he depended more on civil-military patronized bureaucratic institutions than on political ones. His encouragement of factionalism in the opposition parties and his use of the legislature as a 'rubber stamp' created serious complications for the sound growth of constitutionalism.

The period under H. M. Ershad

The trend of civilianization by Zia was smashed by the imposition of second time martial law by Ershad in 1982. Parliament was dissolved; the Constitution was suspended and all political activities were banned. Following the path of Zia, Ershad began to civilianize his regime and martial law was withdrawn after four and half years when the 7th Amendment of Constitution was passed legalizing all military activities. Throughout his autocratic rule – 8 years and 9 months – the longest period in the Constitutional history of Bangladesh, the issue which haunted Ershad was the question of his legitimacy to govern the country. There were continuous movements against Ershad regime and on his way to suppress this movement; he amputated almost all institutions of democracy. Through unprecedented electoral malpractice, Ershad destroyed the electoral process in the country. Ershad amended the Constitution as many as four times and every time he did it for his own political end. He retained the presidential-parliamentary mixed system introduced by Zia; he retained the parliament as a secondary rubber-stamp body; all autocratic measures like preventive detention, emergency, ordinance-making powers were willfully used by him; the press was repressed; radio, T.V. etc. mass-media were used as the sole mouth piece of Ershad. There are many instances that not only democracy but good autocracy or military dictatorship which at least believes in real nation-building can usher in economic development in a country. South Korea, Indonesia, Myanmar etc. bear the testimony of such example. Unfortunately Bangladesh did not deserve even any such type of autocracy.

The period after the fall of H. M. Ershad

In 1990 the country was freed from the clutches of military rule and the peoples' sustained struggle for democracy at last triumphed with resignation of autocratic Ershad and the time came to lead the nation on a new journey in search of constitutionalism. The second start of constitutionalism had its peaceful transit through the historic 5th parliamentary election under the Acting President Justice Sahabuddin Ahmed. In 1991, by the 12th Amendment of the Constitution government was reverted again to parliamentary form after 16 years. The starting of the second parliamentary democracy seemed fine and enthusiastic however, the celebrated 5th parliament like

many of its predecessors could not complete its constitutional duration. The ruling party BNP has, in many ways, failed to make a positive turn towards the development of constitutionalism.

Another great impediment to the growth of democracy is the hereditary or dynastic element in the party leadership. Khaleda Zia became leader because she is the wife of late President Zia who founded BNP and Sheikh Hasina because of her father who founded Bangladesh. The leaders of these two political parties are permanently settled in their respective positions cancelling all the possibilities of emergence of any new leadership in their respective parties. This anti-democratic dynastic feature in the party leadership has been the greatest impediment to the development of constitutionalism in Bangladesh. Because both Khaleda Zia and Sheikh Hasina have created a permanent block to the democratic growth of leadership in the party leaving no scope for the emergence of a promising and dedicated leadership to lead the party and nation; both having no sufficient institutional educational background or proper knowledge over the working of various institutions of democracy are doing the worst to destroy democracy; they are greeting moneyed people, extortionists and criminals to their parties; they are expressly instigating and provoking the destructive politics of students and other organizations like CBA, trade union, civil servants etc.; they are encouraging retired as well as acting bureaucrats both civil and military to come into politics; they are blatantly using government servants for their narrow political goal.

Despite the existence of all ample possibilities for both political and economic development we are still struggling because we could not get an honest and far-sighted leader who can guide the nation with devoted spirit into a proper direction. Bangladesh parliament has become a constant victim of disturbing trend of politics of boycott for the last 20 years since the beginning of a democratic process. After the first democratically held elections, when the BNP formed the government, opposition Awami League lawmakers staged a prolonged boycott of Parliament. In other words, in the 5th parliament, the lawmakers of the main opposition Awami League started boycotting Jatiya Sangsad from the 13th session and did not turn up till the dissolution of the parliament in 1996. The seats of the AL lawmakers were vacated at the 20th session on June 19, 1995 after they remained absent from parliament for 90 consecutive working days.

In the wake of the second general elections for 7th parliament, when the Awami League formed the government, opposition BNP lawmakers did the same thing. The BNP as the opposition joined parliament at the maiden session and started boycotting the house from the 13th session. Between the 13th and the 23rd session, the last session of the seventh parliament, the BNP joined parliament only to save their membership because if an MP stays out of the parliament for consecutively 90 days, he loses his membership in the parliament.

Leading Cases

There are many case laws available in Bangladesh like the Majdar Hossain's Case (1999) stated above which is also known as the Judicial Separation Case, which has relevance and implications with constitutionalism in Bangladesh. However a few of such cases are discussed here.

Anwar Hossain Choudhury vs. Bangladesh

Popularly known as 8th Amendment case this case is one of the most important cases decided in Bangladesh where the apex court of the country as guardian of the Constitution is found to interfere with the function of the legislature by declaring a portion of the law amending the constitution as invalid. In this case the Supreme Court of Bangladesh applied the doctrine of basic structure of the constitution to decide the constitutionality of the 8th amendment of the Constitution. The highest court of the country in this case elaborately discussed what is meant by amendment of the constitution and limitations of the article relating to the amendment.

5th Amendment Case (2005)

In this case the Supreme Court held that some basic structures of the Constitution were destroyed through the 5th Amendment to the Constitution. The Court declared all martial Law Proclamations, order, regulations, rules issued and executed under the first martial law regime ratified by the 5th Amendment of the Constitution as unconstitutional. The Court further held “The Proclamations etc., destroyed the basic character of the Constitution, such as, change of the secular character, negation of Bangalee nationalism, negation of Rule of law, ouster of the jurisdiction of Court, denial of those that constitute seditious offence.”

7th Amendment Case (2011)

The Supreme Court, in this case, found that some basic structures of the constitution were destroyed through the 7th Amendment to the Constitution. It declared all Martial Law Proclamations, Orders, regulations, rules issued and executed under the second martial law regime ratified by the 7th Amendment of the Constitution as unconstitutional. The Court also held: “This would vindicate the finding that General Ershad was guilty in the same degree as he was a party to keep some ‘basic features’ of the Constitution in a destroyed state, destruction having previously been commissioned by General Ziaur Rahman.”

13th Amendment Case (2012)

A writ petition was filed in the Supreme Court in 2000 challenging the legality of the non-party caretaker government system in the Constitution introduced by the Constitution (13th Amendment) Act, 2006. Four years later, the High Court Division declared that the Constitution (13th Amendment) Act, 2006 has not affected or destroyed any basic structure or feature of the Constitution; rather it promoted the concept of democracy and rule of law in the country. However, in May 2001 the Appellate Division of the Supreme Court reversed the judgment of the High Court Division and declared the provisions of the 13th Amendment Act *ultra vires* of the Constitution.

Proposed Reforms

Executive Reforms

- 1) The political will of the government must be demonstrated in a way so that the Constitution as the fountain of laws in Bangladesh remains as the inspiration and source of legitimacy of executive actions.
- 2) Standing committees on Ministries should be allowed to work independently with full swing and support so that the functions of every ministry come under the direct scrutiny of parliament.
- 3) The constitutional independence and autonomy for GAC must be ensured so that it can independently work in the way to make executive officials of the government accountable in respect of financial matter and to monitor their financial responsibilities.
- 4) A department of Ombudsman should immediately be created which will work as an all-time watchdog against maladministration, red-tapeism and inefficiency in the bureaucracy.
- 5) Directly elected local governments should be established according to articles 59 and 60 of the Constitution with proper powers and independence and the respective local administration with its officials and staff must be vested in the direct control of the local government.
- 6) Unconstitutional laws dealing with the functions and formation of constitutional bodies like CAG, PSC, Local Government, Election Commission etc. must be replaced by democratic laws allowing them to work independently in furtherance of better administrative accountability.

Legislative and Political Reforms

- 1) The exercise of Ordinance-making power should be reduced so that the government cannot get any ample power in law-making avoiding parliament.
- 2) Democracy within the party must be gradually strengthened so that leadership from grassroots level can develop and leaders can gradually gather knowledge over administrative accountability and that they should not depend on bureaucrats.
- 3) In accordance with the provisions of Articles 11, 59 and 60 of the constitution local government institutions should be set up for ensuring people's participation in the development of the country and there should be three tiers of local government at Uapzilla, Union and Zilla levels and all the tiers should be composed of elected representatives of the people by direct election.
- 4) Local government institutions should be made free from government interference except audit and inspection of funds provided by the government. In accordance with the provisions in Article 59(1) of the constitution the local administration and officials must be vested in the direct control of the local government and not under the control of the central government as present legal provision provide, because a centralized administration tends by nature to be more bureaucratic.

- 5) Hereditary nature of leadership should be abolished and the party constitution should be amended to allow change in the leadership after each specified term.
- 6) The party structure and committees should be filled only by election and this will encourage as well as develop leadership from grass-roots level. The party leader should not take any decision without the process of consultation or discussion.

Judicial Reforms

- 1) Standards should be set by specific legislation to appoint judges of the Supreme Court both in the High Court and the Appellate Division to ensure full independence.
- 2) The judgement of the Majdar Hossain's case should be fully implemented.
- 3) The financial independence of the judiciary should be ensured.

Conclusion

Constitutionalism is largely a matter of gradual development and for that development a favourable atmosphere is a must. During 25 years of Pakistan politics AL, the main political party in East Pakistan did not get any atmosphere to learn the devices of and get proper training over democracy; there was no slow and steady growth of political institutions which had occurred in Europe and America. The political ideas of new born country Pakistan freed from the bondage of colonialism were based largely on what they had learnt from their colonial masters. This is why our leaders and representatives are not expert and institutions are very much fragile. No messenger will come from above to teach our leaders. This is the proper time for at least introducing positive parliamentary cultures and traditions towards constitutionalism. Successful democracy depends upon an informed public opinion capable of weighing men and issues and deciding in favour of a policy that can be made to work; it depends on the insistence by public opinion that the holders of power conform to the spirit of the Constitution. But our public opinion is very weak since the electorate here is predominantly illiterate and it will inevitably take time for public opinion to grow and to be rooted in the consciousness of the people. To lead public opinion from this rudimentary stage to its full bloom undoubtedly it is the question of effective leadership which will take all necessary steps. So we should not make any delay at least in introducing various democratic cultures like making parliament a focal point of all political activities; making policy statement first in parliament; institutionalize a parliamentary opposition; starting committee functioning fruitfully, giving autonomy to media etc., so that workers, supporters of parties and lastly the people can get correct ideas over the functioning of institutions of democracy. If these positive traditions are set to work with tolerance and dedication, all other problems can gradually be eroded.

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