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# ASIAN COMPARATIVE CONSTITUTIONAL LAW

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VOLUME I  
**Constitution-Making**

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Edited by Ngoc Son Bui  
and Mara Malagodi

ASIAN COMPARATIVE CONSTITUTIONAL LAW



# Asian Comparative Constitutional Law

*Volume 1: Constitution-Making*

Edited by  
Ngoc Son Bui  
and  
Mara Malagodi

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## Making and Unmaking the Constitution of Bangladesh

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M JASHIM ALI CHOWDHURY

### I. Introduction

Bangladesh's Constitution of 1972 was largely modelled on a UK-styled parliamentary system with a 'half-hearted'<sup>1</sup> combination of a US-styled judiciary. The framers choose a Westminster-like arrangement between the executive and legislative branches. The judicial branch was given a semblance of independence (through the judges' appointment, removal, and discipline processes) and the power of judicial review. The choice of parliamentary system was influenced, among others, by the post-colonial political elites' general appreciation of it as a convenient institutional model for the former British colonies (Sri Lanka (1948), India (1950), Pakistan (1956), and Malaysia (1957) for example).<sup>2</sup> In the newly independent Bangladesh, a desire to avoid the painful tragedy of Pakistan's authoritarian presidentialism also provided strong motivation.<sup>3</sup> The independence of the judiciary and its judicial review powers were necessary for enforcing the country's constitutional supremacy (as opposed to the UK's parliamentary sovereignty) and fundamental rights. Ideologically, the sponsors of the 1972 Constitution showed a strong commitment to a social democratic republic based on four foundational principles – democracy, socialism, nationalism, and secularism.<sup>4</sup>

Now, 50 years into its constitutional beginning, Bangladesh seems to have mishandled the original design and forgotten the original ideals. Since 1972, the country has undergone different political experiments involving one-party

<sup>1</sup>Nizam Ahmed, 'In Search of Institutionalization: Parliament in Bangladesh' (1998) 4(4) *The Journal of Legislative Studies* 34, 40.

<sup>2</sup>Harshan Kumarasingham, 'Eastminster – Decolonisation and State-Building in British Asia' in Harshan Kumarasingham (ed), *Constitution-Making in Asia – Decolonisation and State-Building in the Aftermath of the British Empire* (Routledge, 2016) 1–35.

<sup>3</sup>Ahmed (n 1) 35.

<sup>4</sup>The Constitution of the Peoples Republic of Bangladesh 1972, Preamble, arts 8 (1).

presidentialism, several direct or indirect military regimes, several election-time caretaker governments, competitive bi-partisan authoritarian governments, and the ongoing round of one-party authoritarianism. During this tortuous constitutional journey, Bangladesh's parliamentary system has transformed into a crude version of the prime minister's 'elective dictatorship'.<sup>5</sup> The judiciary has been marginalised, and its check-and-balance potential is mostly gone.<sup>6</sup> On the ideological front, the country has either walked away from some of its foundational principles (socialism, for example) or substantially tempered with the others (democracy, nationalism and secularism, for example).

Some pundits have blamed the framers' lack of institutional imagination for this constitutional debacle.<sup>7</sup> While the lack of institutional imagination may be a valid argument in several areas of constitutional design (executive-legislature relations and the electoral system, for example), this chapter argues that Bangladesh's constitution-making process carried with it some other inherent and inevitable dilemmas on political participation, leadership style, and civil-military relations. Total exclusion of the religious-conservative political elements from the constitution-making process (how logical it appeared then) had partially weakened (if not dislodged) the 1972 Constitution's political foundation. Second, a socially resonant tendency to personalise public power<sup>8</sup> inhibited the Constitution-drafters' ability to prioritise institutional considerations over their leader's personal preferences. Resultantly, a seismic constitutional change in 1975 led to direct military intervention into politics and the revival of the ultra-religious conservatives. Bangladesh's constitutional unmaking has been rapid and consistent since then.

## II. The Background

In 1947, when the federal state of Pakistan emerged, it faced a unique and difficult dilemma. More than 1000 miles of Indian territory separated its two wings – East and West Pakistan. Peoples in the two wings were more different than similar. Several linguistic, cultural, ethnic, social and political differences kept the two wings irreconcilably divided.

First, the Eastern wing was ethnically and linguistically more homogenous than the West. While the *Bangalees* in the East valued their distinctive ethnic,

<sup>5</sup> Lord Halisham, 'Elective Dictatorship' (The Richard Dimbleby Lecture, 14 October 1976, BBC, London).

<sup>6</sup> Rafiqul Islam, 'Parliamentary Impeachment of Senior Judges amid Powerful Executive: A Paradox?' *The Daily Star* (Dhaka, 26 August 2014).

<sup>7</sup> Mohammed Moniruzzaman, 'Electoral Legitimacy, Preventive Representation, and Regularization of Authoritarian Democracy in Bangladesh' in Ryan Merlin Yonl (ed), *Elections: A Global Perspective (IntechOpen, 2019)* 1–15.

<sup>8</sup> Harshan Kumarasingham, 'Eastminster: The Westminster Model in British Asia' (*The Constitution Unit*, Department of Political Science, University College London, 22 September 2016).

linguistic and cultural identity over their religious divisions (Hindu and Muslims), the *Punjabis*, *Sindhis*, *Baluch*, *Pushtuns*, and *Muhajirs* (migrated Muslims from India) in the West prioritised their Islamic brotherhood over all other considerations. Understandably, the need for prioritising linguistic and cultural homogeneity over religious division was more acute in the East than in the West. In the Eastern wing, the non-Muslim population was 23 per cent, while in the West, it was only three per cent.<sup>9</sup> The West Pakistani ruling elites' unmindfulness of this reality prompted them to try building a national identity based on an artificial Islamic brotherhood between such diversified groups of people with diverse languages, cultures, and value systems. While political constitutionalism based on respect for diversity, provincial autonomy, and decentralisation could have provided a workable framework of constitutional relations between the two wings, the West Pakistani political elites expressed their desire to suppress the Bengalees and make them 'pure Muslims'<sup>10</sup> instead.

Second, months into the independence, in September 1947, the central government of Pakistan issued currency notes, coins, money orders and postcards in English and Urdu and ignored Bangla – the mother tongue of the East, which comprised 56 per cent of Pakistan's total population. In 1947, a Pakistan Public Service Commission circular made provisions for Urdu, English, Hindi, Sanskrit, Latin and other languages except for Bengali. In a desperate attempt to 'purify' the Bengali culture from 'Hindu influences', the Pakistan Government tried to change the script of Bengali and set up centres for teaching Bengali in Arabic.<sup>11</sup> In 1952, the Bengalees' protest started on this language issue. By 1971, the gulf between the two wings further widened over the issues of power-sharing and other political differences.

Third, while the agricultural peasants constituted the domineering political mass in the East, the landlords of large feudal estates emerged as the most powerful political actors in the West.<sup>12</sup> Prominent political leaders in the East hailed mostly from the working class with leftist indoctrination and a substantial number of college-educated middle-class progressives.<sup>13</sup> On the other hand, the West Pakistani political leadership comprised the landed elites and powerful bureaucrats from the civil-military establishment. Merely three years into the independence from Britain, the East Pakistani Provincial legislature passed a landmark Bill called the East Bengal State Land Acquisition and Tenancy Act of 1950. It sought to abolish the British colonial Government's permanent land settlement system for the landed aristocrats (*Zamindars*), put a ceiling on the maximum amount of land an individual could privately own (at around 33 acres per head), and nationalise the

<sup>9</sup> Jashim Ali Chowdhury, *An Introduction to the Constitutional Law of Bangladesh* (Book Zone, 2020) 55.

<sup>10</sup> Lt Gen Amir Abdullah Khan Niazi, *The Betrayal of East Pakistan* (Oxford University Press, 1999).

<sup>11</sup> Hassan Zaheer, *The Separation of East Pakistan* (Oxford University Press, 1994) 24.

<sup>12</sup> Ian Talbot, *Pakistan: A Short History* (St Martin's Press, 1998) 24–25.

<sup>13</sup> Allen McGrath, *The Destruction of Democracy in Pakistan* (Oxford University Press, 1996) 4–5.

excess lands in the state's favour. Some argue that this single piece of legislation would ring alarm bells among the West Pakistani ruling elites and determine the future course of (non)relation between the two political wings.<sup>14</sup>

Fourth, after around 18 years of misgovernance, the capture of state institutions by the civil-military bureaucracies and denial of rightful political representation for the East, Pakistan fell into direct military rule in 1958.<sup>15</sup> Since then, it could not recover from the clutch of the military's unconstitutional interferences into politics until a bloody war for Bangladesh's independence broke out in 1971.<sup>16</sup> The war seemed an inevitable materialisation of a forecast made by a mid-level intelligence officer of the Pakistan Intelligence Bureau (IB) in 1961:

The people in this province (the East) will not be satisfied unless the constitution ensures them, in reality, equal and effective participation in the management of the affairs of the country, an equal share of development resources and, in particular, full control over the administration of this province. The intelligentsia would also like a directive principle in the constitution to speedily increase East Pakistan's share in the defence services and equal representation of East Pakistanis in the central services.<sup>17</sup>

After a nine-month-long bloody war for independence, East Pakistan became Bangladesh on 16 December 1971.<sup>18</sup> Constitution-making for the new state started as early as January 1972.

### III. The Making

Bangladesh made a constitutional start with the Proclamation of Independence adopted on 10 April 1971. The Proclamation drew its validity from the People of East Pakistan, who elected the members of the East Pakistan provincial legislature and Pakistan's central legislature in the 1970 general election.<sup>19</sup> Once the war broke out in 1971, the elected members constituted themselves into a Constituent Assembly for Bangladesh.<sup>20</sup> The Proclamation devised a presidential form of

<sup>14</sup> Craig Baxter, *Bangladesh: From Nation to a State* (Westview Press, 1997) 72.

<sup>15</sup> Gauhar Altaf, *Ayub Khan: Pakistan's First Military Ruler* (University Press Ltd, 1996) 100–101.

<sup>16</sup> Karl Von Vorys, *Political Development in Pakistan* (Princeton University Press, 1965) 218.

<sup>17</sup> Altaf (n 15) 98–99.

<sup>18</sup> Siddique Salik, *Witness to Surrender* (Oxford University Press, 1977) 107; Iqbal Akhund, *Memoirs of a Bystander* (Oxford University Press, 1997) 211; Anthony Mascarenhas, *The Rape of Bangladesh* (Vikas Publications, 1971) 117.

<sup>19</sup> Ridwanul Hoque, 'The Founding and Making of Bangladesh's Constitution' in Kevin YL Tan and Ridwanul Hoque (eds), *Constitutional Foundations in South Asia* (Hart Publishing, 2021) 91–119, 101.

<sup>20</sup> According to the Provisional Constitution Order, the number of seats in the Constituent Assembly was 469 (169 members elected to the National Assembly plus 300 members elected to the Provincial Assembly in the 1970 election). By that time ten members died (five killed by the Pakistan Army), 23 members lost their seat by being expelled from their party Awami League, two were disqualified for paying allegiance to Pakistan and four others were imprisoned for collaboration with the Pakistan Army during the liberation struggle.

government and designated the nation's founding father, Bangabandhu Sheikh Mujibur Rahman, as the President. The President had all executive and legislative powers of the Republic, including the supreme command of the Armed Forces and the power of taxation. Importantly, the President was allowed to 'do all other things that may be necessary to give the people of Bangladesh an orderly and just Government'. The Proclamation held the field till 10 January 1972.

At the end of the war, on 11 January 1972, Sheikh Mujib exercised his power to 'give an orderly government for Bangladesh' and issued the Provisional Constitution of Bangladesh Order 1972. It changed the presidential system into a parliamentary one. A citizen challenged the President's power to fundamentally change the nature of the Government in the Supreme Court.<sup>21</sup> The Court, however, upheld the presidential authority under the 1971 Proclamation.<sup>22</sup>

The Constituent Assembly would exist for government accountability and the adoption of a new constitution.<sup>23</sup> The law-making powers were reserved for the Government. Understandably, there were questions about the democratic quality of the laws passed during those days and the rationality of denying the Constituent Assembly the power to legislate. The Government responded by arguing that the Pakistani Constituent Assembly's failure to adopt a constitution until 1956 (nine years after its independence) damaged its constitutional order and facilitated military intervention into politics. Therefore, it was important for Bangladesh to achieve a new constitution and put the country in an established constitutional order quickly.<sup>24</sup>

Within the constituent assembly, a 34-member Drafting Committee was set up in April 1972 with Dr Kamal Hossain, the Minister of Law and Parliamentary Affairs as its Chairman. It also included four other top-ranking Ministers. Interestingly, all the members (including one woman) of the committee belonged to the ruling party Awami League (AL), except Sri Suranjit Sen Gupta, a lone opposition member from the National Awami Party (NAP). AL's Pakistan-era opponent – the Muslim League (ML), and other Pakistan-sympathising Islamist parties like Jamat-e-Islami (JI) were banned and hence excluded from the constitution-making process. The China-sympathising leftist political groups that either opposed or played the bystanders in the liberation war (China opposed Bangladesh's independence) were also excluded from the process. Excluded, though not banned, they questioned the validity of forming the Constituent Assembly based on the 1970 election. One of Sheikh Mujib's political secretaries dismissed the critique, claiming that the AL was morally and legally competent to frame the Constitution based on 'an unqualified mandate' it received in the 1970 election.<sup>25</sup> As I argue later in this chapter, this

<sup>21</sup> *AKM Fazlul Hoque v State* 26 DLR (SC) 1.

<sup>22</sup> Justice Mustafa Kamal, *Bangladesh Constitution: Trends and Issues* (University of Dhaka, 1994) 9.

<sup>23</sup> Chowdhury (n 9) 56.

<sup>24</sup> Md Abdul Halim, *Constitution, Constitutional Law and Politics: Bangladesh Perspective* (CCB Foundation, 2017).

<sup>25</sup> Abul Fazl Huq, 'Constitution-Making in Bangladesh' (1973) 46(1) *Pacific Affairs* 59, 66.

exclusionary approach – though understandable in 1972 – would cause a significant strain on the political viability of the Constitution, particularly during the mid-1970s’ military intervention and revival of Pakistan-sympathising political parties.

The Drafting Committee held 74 meetings and took nearly 300 hours to complete its work. It invited ‘any institution or person interested’ to send their constitutional proposals. The invitation was publicised through the press, radio, and television, but only 98 memoranda were received. Some attribute the poor response to the fact that the fundamentals of the soon-to-be adopted constitution were already set out in the Provisional Constitution Order, and the ruling party and its allied groups had differences only on matters of texts.<sup>26</sup> Though there was no open attempt to invite international expertise or consultation during the constitution-drafting process, the Chair of the Drafting Committee, Dr Kamal Hossain, personally drew from leading Indian lawyer Subrata Roy Chowdhury. The Committee also engaged Robert Guthrie, a UK drafting expert, in confirming the linguistic standard of the text.<sup>27</sup> The most important contribution from outside the Drafting Committee was that of Professor Anisuzzaman (University of Dhaka) and his team. They worked on the official Bangla translation of the Constitution’s English text.<sup>28</sup>

The Drafting Committee approved the final Constitution Bill on 11 October 1972. Conclusions were reached over most clauses by unanimous decisions and, in other cases, by a majority of the members present. On several matters, six committee members noted their dissents separately. Of those six dissenters, five belonged to the ruling party and one to the sole opposition party, NAP). Dr Kamal Hossain introduced the Constitution Bill in the Constituent Assembly on 12 October 1972. The Bill was then published in national dailies inviting public input into the draft. Other political parties and student organisations expressed their views through press briefings. Apart from the general debate on political principles, the process did not generate any concrete textual input. Parties largely talked along ideological lines – some questioning the legitimacy of the Constituent Assembly and others critiquing the foundational pillars of the Constitution. A ceremonial session of the Constituent Assembly was held on 14–15 December 1972 when Members of the Constituent Assembly (MCA) formally signed a decorated handwritten copy of the Constitution. *Sri Suranjit Sen Gupta*, the sole opposition member of the Drafting Committee, declined to sign the Constitution’s final draft on the ground that his demand for mandatory free primary education up to class eight was not accommodated. Yet he acknowledged, ‘The chance (of deliberations) I was given

<sup>26</sup> *ibid.*

<sup>27</sup> Hoque (n 19) 114.

<sup>28</sup> Emraan Azad, ‘Language and the Constitution of Bangladesh – In Memory of Professor Anisuzzaman’ (*International Journal of Constitutional Law Blog*, 28 June 2020), available at [www.iconnectblog.com/2020/06/language-and-the-constitution-of-bangladesh-in-memory-of-professor-anisuzzaman](http://www.iconnectblog.com/2020/06/language-and-the-constitution-of-bangladesh-in-memory-of-professor-anisuzzaman).

shall be a milestone in the history of democracy'.<sup>29</sup> The Constituent Assembly was dissolved on 16 December 1972. The Constitution came into force on that date.

Election to Bangladesh's First Parliament was scheduled on 7 March 1973. The ruling party AL declared that it would treat the election as a 'referendum on the constitution' and appealed to the people 'to give their mandate in favour of [its] four pillars' – Bangalee nationalism, socialism, democracy, and secularism. The pro-China leftist parties reiterated their earlier views about the legality of the Constituent Assembly and promised to adopt a new constitution when they got a chance. AL's newly emerged political rival, the Jatyo Sanajtantrik Dal (JSD), criticised the monopolising tendency of AL and the lack of enough socialist guarantees in the Constitution. None of the operative political groups seriously questioned the four structural pillars mentioned above. However, as mentioned earlier, the military's intervention and the revival of Pakistan-leaning and Islamist political groups like the Bangladesh Nationalist Party (BNP) and Jamaat-e-Islami (JI) would pose an existential challenge to those principals from the mid-1970s and onwards.

#### IV. The Design

One of the framers' four foundational pillars was democracy. To the framers, it meant 'governance, at all levels, through the mandate of the people'.<sup>30</sup> Accordingly, various provisions of the Constitution enumerated the republican nature of the state,<sup>31</sup> parliamentary system,<sup>32</sup> and elected local governance.<sup>33</sup> Preference for the parliamentary system over the presidential one was particularly important. Bangladesh's revolutionary leader Sheikh Mujib and his party AL weighed political strife against the presidential dictatorships of the Pakistani military regimes. AL abhorred the presidential system and preferred a cabinet government answerable to the Parliament. The Constitution made the President a ceremonial head of state bound by the Prime Minister's advice.<sup>34</sup> The Prime Minister must be a member of the legislature and command the support of the majority of MPs.<sup>35</sup> The Prime Minister and other ministers collectively answer the Parliament.<sup>36</sup> The Government must resign if it loses its confidence.<sup>37</sup> However, a paradoxical

<sup>29</sup> Belal Husain Joy, *Constitutional History of Bangladesh Comments on Contemporary Political Crisis and Leading Case Laws* (Bangladesh Law Book Company, 2008) 140; Md Abdur Rashid, 'Shongbidhan Proshonge Kicho Kota' (in Bangla) (1998) 50 *DLR Journal* 85.

<sup>30</sup> Syed Istiaq Ahmed, 'Constitution and Democracy in Bangladesh since 1972' (1992) 44 *DLR Journal* 52.

<sup>31</sup> Constitution (n 4), art 7.

<sup>32</sup> *ibid* arts 56, 57 and 58.

<sup>33</sup> *ibid* arts 9, 59 and 60.

<sup>34</sup> *ibid* art 48(3).

<sup>35</sup> *ibid* art 56.

<sup>36</sup> *ibid* art 55(3).

<sup>37</sup> *ibid* art 57.



provision was article 70 (anti-defection clause). It required the MPs to vote strictly on the party line or lose their parliamentary seats otherwise. It was a restraint upon the Parliament's accountability power, and the clause has been the subject of constant constitutional debate since 1972.<sup>38</sup> The framers, however, referred to the MPs' abusive voting history during the Pakistani period and frequent fall of cabinet governments at the behest of Pakistan's various interventionist presidents.<sup>39</sup>

Framers touted 'socialism' as the core constitutional principle of economic management. It was believed that a liberal democratic model of government could be applied towards achieving a 'socialist society, free from exploitation'.<sup>40</sup> The framers wanted to realise, 'through the democratic process', 'a socialist economic system (...) ensuring the attainment of a just and egalitarian society, free from the exploitation of man by man'.<sup>41</sup> A part of the Constitution (Part II – fundamental principles of state policies) was dedicated to various socio-economic rights including guarantee of food, clothing, shelter, health care and education, equality, just compensation for labour, state acquisition of private property, etc.<sup>42</sup> However, the fundamental principles were conceived as political aspirations rather than judicially enforceable rights.<sup>43</sup> The socialist motivation of the framers was primarily guided by an eagerness to avoid the Pakistani military's capitalist policies that saw a widening of the gap between the haves and have-nots and disproportionate channelling of public resources towards the benefits of civil-military bureaucracies and business elites.<sup>44</sup> Accordingly, Article 42(2) provided for the acquisition, nationalisation or requisition of private property with or without compensation. Sheikh Mujib's Government nationalised the important service industries and permitted private ownership in the industrial sector subject to the possibility of an article 42 acquisition.

The 1972 Constitution's third and fourth principles – *Bangalee* nationalism and secularism – were deeply interlinked. *Bangalee* nationalism was touted as the new nation's ethnocultural and language-based national identity. It was a clear rejection of Pakistan's religion-based nationality. Article 6 of the Constitution read:

The unity and solidarity of the *Bangalee* nation, which, deriving its identity from its language and culture, attained sovereign and independent Bangladesh through united and determined struggle the war of independence, shall be the basis of *Banglaee* Nationalism.

<sup>38</sup> Zahed Iqbal, 'Article 70 of the Constitution: A Critical Analysis (In Bangla)' Presented at the Eighth Monthly General Meeting of The Asiatic Society of Bangladesh (Dhaka, 8 April 2021) 15.

<sup>39</sup> Sabbir Ahmed, 'Article 70 of the Constitution of Bangladesh: Implications for the Process of Democratisation' (2010) 31 (1) *BISS Journal* 1, 3–7.

<sup>40</sup> Constitution (n 4), Preamble.

<sup>41</sup> *ibid* art 10.

<sup>42</sup> *ibid* arts 15–20.

<sup>43</sup> M Jashim Ali Chowdhury, 'Claiming a "Fundamental Right to Basic Necessities of Life" Problems and Prospects of Adjudication in Bangladesh' (2011–12) 5 *Indian Journal of Constitutional Law* 184.

<sup>44</sup> Rehman Sobhan, *Bangladesh Problems of Governance* (University Press Ltd, 1995).

Secularism was a natural upshot of language-based nationalism. It was presented as a mix of state neutrality and intervention in religion. Article 12 prohibited the establishment of any dominant religion in the state, guaranteed religious freedom and equality for the people of all faiths, undertook a responsibility to eliminate communalism in all forms, and banned the use of religion as a tool of politics.<sup>45</sup> Article 38 of the Constitution expressly outlawed the formation of religion-based political parties.<sup>46</sup>

Constitutional principles apart, the framers paid substantial attention to institutions like the Election Commission and the Judiciary. The Election Commission was the constitutional guarantee of regular and orderly transfer of power. Article 118(4) guaranteed the Commission functional and institutional independence from the Government. The Election Commissioners have assured a fixed five-year tenure<sup>47</sup> and job security equal to the Supreme Court judges.<sup>48</sup> They were also barred from accepting post-retirement benefits.<sup>49</sup> The Commission was assured of necessary logistic and administrative support, and the Government was constitutionally bound to 'assist' the Commission in discharging its duties.<sup>50</sup> Article 119(2) gave the Commission the plenary power of conducting the election 'honestly, justly and fairly'.<sup>51</sup> The Supreme Court has interpreted this power as wide enough to permit the Commission to act even in areas where the law is silent as to what is to be done or not to be done.<sup>52</sup>

On the other hand, the judiciary was seen as the institutional guarantee of Bangladesh's constitutional supremacy (as opposed to parliamentary sovereignty).<sup>53</sup> The Supreme Court was given the power to judicially review the parliamentary laws and enforce the citizens' fundamental rights against state and non-state actors.<sup>54</sup> The higher judiciary was given an express guarantee of independence.<sup>55</sup> Judges were given security of tenure until they reached a certain age. They could be removed only upon an impeachment resolution passed by a two-thirds majority in Parliament, which was equal to the threshold required for constitutional amendments.<sup>56</sup> Regarding the subordinate courts, there was a constitutional commitment to separate them from the executive branch.<sup>57</sup>

<sup>45</sup> Constitution (n 4), art 12.

<sup>46</sup> *ibid* art 38 (proviso).

<sup>47</sup> *ibid* art 118(3).

<sup>48</sup> *ibid* art 118(5) (proviso).

<sup>49</sup> *ibid*, art 118(3)(a) and (b).

<sup>50</sup> Section 5 of the Representation of the People's Order 1972.

<sup>51</sup> Constitution (n 4), art 119(3).

<sup>52</sup> *Abdul Quader Farazi v CEC and Ors* 4 MLR (HC) 67; *Altaf Hussain v Abul Kashem* 45 DLR (AD) 1993.

<sup>53</sup> Constitution (n 4), arts 7(2) (Constitution is the supreme law of the Republic), 26(2) (Law inconsistent with fundamental rights to be void), 65(1) (laws must be subject to the provisions of this Constitution), 102(1) (judicial power to review legislations), and 142 (procedural limits on the constitutional amendment power); *Anwar Hossain v Bangladesh* 1989 BLD (Spl) 1 (basic structure limit on the amendment power).

<sup>54</sup> Constitution (n 4), arts 102(2)(a)(i), 102(2)(b)(i), 26–47.

<sup>55</sup> *ibid* art 94(4).

<sup>56</sup> *ibid* arts 96 and 147.

<sup>57</sup> *ibid* arts 22 and 114–16.

## V. The Unmaking

The Constitution of 1972 was hailed by its sponsors as the ‘most progressive constitution’ of its time.<sup>58</sup> The initial years under the new Constitution, however, were chaotic. By 1975, the country fell into an emergency proclamation, radical political opposition, deteriorated law and order situation and practical death of the parliamentary system.<sup>59</sup>

### A. Assault on the Parliamentary System

While the 1972 Constitution’s foundational basis was laid through a mass mobilised liberation war, the political will of a chosen few – especially that of the country’s founder *Bangabandhu* Sheikh Mujibur Rahman – shaped the priorities of the Constitution-makers. Personalising tendency was apparent at almost every step – minor or major – of the post-war state-building process. The Provisional Constitution Order 1972, drafted at the personal behest of Sheikh Mujib, constituted an inviolable structural and philosophical prescription for a 34-member Constitution Drafting Committee. The Committee worked mainly on the details of the texts. The Constituent Assembly’s capacity to assist the process through its regular legislative works was also absent. As mentioned earlier, under the Provisional Constitution, Sheikh Mujib’s Government exercised legislative power during the constitution-drafting period. By the time the Constitution came into force in December 1972, the edifice of Bangladesh’s administrative and public laws was built at the sole discretion of one leader – Sheikh Mujib.<sup>60</sup> During that period, the Government promulgated 202 Orders which were ‘varied and all-embracing in scope and content and may be said to have laid the foundation of the new legal order in Bangladesh.’<sup>61</sup>

Though AL emerged as a mass-based political party during the Pakistani regime, the party did not evolve through a process of the intra-party democratic process. By 1970, it became Mujib’s party by all means and purposes. As mentioned earlier, the floor-crossing bar or anti-defection clause – article 70 was incorporated as a regime-stabilising tool. However, the evolving rule of loyalty, rather than intra-party accountability, aggravated its impact beyond the framers’ contemplation.<sup>62</sup> The clause would later take the system of partisan-whipping to an extreme level,

<sup>58</sup> Huq (n 25); Hoque (n 19).

<sup>59</sup> Moudud Ahmed, *Bangladesh: Era of Sheikh Mujibur Rahman* (University Press Ltd, 1983).

<sup>60</sup> Kamal (n 22) 6.

<sup>61</sup> *ibid* 11.

<sup>62</sup> M Jashim Ali Chowdhury and Nirmal Kumar Saha, ‘Advocate Asaduzzaman Siddiqui v. Bangladesh: Judiciary’s Dilemma with Impeachment’ (2017) 3(3) *Constitutional and Administrative Law Quarterly* 7, 16.

leading a commentator to label it a ‘Damocles’ sword’<sup>63</sup> over parliamentary backbenchers paving the Prime Minister’s dictatorship.<sup>64</sup>

In January 1975, Prime Minister Sheikh Mujibur Rahman brought the Fourth Amendment Bill to switch the parliamentary system into a presidential one.<sup>65</sup> Mujib dissolved AL and all other political parties and introduced a one-party (BAKSAL) state.<sup>66</sup> Admittedly, Sheikh Mujib attempted the drastic change without mobilising enough intra-party consultation and consensus.<sup>67</sup> The dissenters were silenced, and the Fourth Amendment was passed in the Parliament without any backbench input and literally within minutes of tabling it on the floor. The pro-Pakistani elements of the army, AL’s disgruntled faction, and the pro-China leftists seized the opportunity of Sheikh Mujib’s deteriorating public appeal.<sup>68</sup> He was brutally killed along with almost all his family members on 15 August 1975. For the next 15 years, Bangladesh was governed by direct military authoritarians who amended, abolished, or substituted the Constitution at their sweet will.

## B. Tearing Up the Four Foundational Principles

In 1972, an important requirement of the parliamentary system – conservative-liberal bipartisanship was conspicuously missing in the newly independent Bangladesh. The conservative political forces of undivided Pakistan coalesced around the ML and Jamaat Islami (JI), both of which actively opposed the liberation of Bangladesh. They lost their right to exist in the newly independent country. However, the suddenly created political vacuum could not be filled by the Pro-Soviet leftist parties with an insignificant mass base in Bangladeshi society. Excluded from the constitution-making process, the religious nationalists would actively sabotage Sheikh Mujib’s four fundamental constitutional principles once

<sup>63</sup> Justice Badrul Haider Chowdhury, Former Chief Justice of Bangladesh quoted in AKM Shamsul Huda, *Constitution of Bangladesh, Vol 2* (Rita Court, 1997) 560.

<sup>64</sup> Ziaur Rahman, ‘Democracy: Freedom of Speech and Floor-Crossing Interface’ (2010) 1 *The Northern University Journal of Law* 24.

<sup>65</sup> Zillur R Khan, ‘Bangladesh’s Experiments with Parliamentary Democracy’ (1997) 37(6) *Asian Survey* 575, 580; Syed Badrul Ahsan, ‘Lifting the Long Silence on Baksal’ *Dhaka Tribune* (Dhaka, 29 January 2020); Shakhawat Liton, ‘Fourth Amendment: It “Impairs Freedom of Lower Judiciary”’ *The Daily Star* (Dhaka, 2 August 2017).

<sup>66</sup> Md. Morshedul Islam, ‘The Politics behind the Passage of Fourth Amendment to the Constitution of the People’s Republic of Bangladesh and Its Provisions: A Modest Analysis’ (2014) 4(9) *Public Policy and Administration Research* 55.

<sup>67</sup> Ahmed (n 59).

<sup>68</sup> Emajuddin Ahmed, ‘The Military and Democracy in Bangladesh’ in Ronald May, Viberto Selochan (eds), *The Military and Democracy in Asia and the Pacific* (ANU Press, 2004) 105–15; Amin Al Zaman, ‘Party Factionalism in Bangladesh: A Case Study of the Awami League (1971–97)’ (PhD Thesis, Aligarh Muslim University, 2004) 131–48; Abdul Mannan, ‘The Conspiracy behind the Assassination of Bangabandhu’ *The Daily Star* (Dhaka, 15 August 2016).

they were revived by the military regimes.<sup>69</sup> In 1976, BNP emerged as a prototype of the banned ML. Jamaat-e-Islami (JI) was revived in its name.

Soon, the Constitution's ethnolinguistic 'Bangalee Nationalism' was discarded for a territorial and citizenship-based identity called 'Bangladeshi nationalism'.<sup>70</sup> Bangladeshi nationalism was a thinly veiled attempt to distinguish Bangladesh's majority Muslims from West Bengal (India)'s majority Hindus (both are Bangalees). The Islamist parties enthusiastically embraced the newly coined identity. To their further satisfaction, the military regime deleted secularism and added a principle of 'Absolute trust and faith in the Almighty Allah'<sup>71,72</sup> instead. 'Bismillah-Ar-Rahman-Ar-Rahim (In the name of Allah, the Beneficent, the Merciful)' was added at the beginning of the Constitution. A separate constitutional provision was inserted to prioritise Bangladesh's closer relationship with the Islamic states worldwide.<sup>73</sup> In 1988, the second military regime further amended the Constitution to declare Islam as the 'State Religion' of Bangladesh.<sup>74</sup>

In the 2000s, after the return of AL to power, the Supreme Court of Bangladesh invalidated all those constitutional amendments in different cases.<sup>75</sup> Following the judgments, the AL Government tried, with limited success, to restore the original versions of the nationalism and secularism clauses.<sup>76</sup> AL had to accept the ground reality created by decades of religious polarisation this time. It decided to revive the original texts partially and retain the Bismillah and State Religion clauses.<sup>77</sup> In 2016, a division bench of the High Court Division of the Supreme Court refused to hear a challenge to the State Religion clause.<sup>78</sup> Presumably, the Court was influenced by the same political development that forced the AL Government to compromise.<sup>79</sup>

The post-1975 military regimes also favoured a capitalist economy over the original Constitution's socialist ideal. Socialism was redefined as meaning mere

<sup>69</sup> Robert S Anderson, 'Impressions of Bangladesh: The Rule of Arms and the Politics of Exhortation' (1976) 49(3) *Pacific Affairs* 443, 445.

<sup>70</sup> Constitution (n 4), art 6(2) (as amended in 1976); *Bangladesh Italian Marble Works Ltd v Bangladesh* [2006] BLT (Special) (HCD) 1, 226–29.

<sup>71</sup> Constitution (n 4), Preamble and art 8(2) (as amended in 1976).

<sup>72</sup> The Second Proclamation (Sixth Amendment) Order 1976.

<sup>73</sup> Constitution (n 4), art 25(2) (as amended in 1976).

<sup>74</sup> Shah Alam, 'The State-Religion Amendment to the Constitution of Bangladesh: A Critique' (1991) 24(2) *Verfassung und Recht in Übersee / Law and Politics in Africa, Asia and Latin America* 209.

<sup>75</sup> *Bangladesh Italian Marble Works* (n 70); *Khondhker Delwar Hossain v Bangladesh Italian Marble Works Ltd and Others* [2010] 62 DLR (A.D.) 298; and *Siddique Ahmed v Bangladesh* [2011] 33 BLD (HCD) 84.

<sup>76</sup> The Constitution (Fifteenth) Amendment Act 2011.

<sup>77</sup> M Jashim Ali Chowdhury, 'The Dilemma of Constitution Reprint' *The Daily New Age* (Dhaka, 15 April 2011).

<sup>78</sup> Maher Sattar and Ellen Barry, 'In 2 Minutes, Bangladesh Rejects 28-year-old Challenge to Islam's Role' *The New York Times* (New York, 28 March 2016), available at [www.nytimes.com/2016/03/29/world/asia/bangladesh-court-islam-state-religion.html](http://www.nytimes.com/2016/03/29/world/asia/bangladesh-court-islam-state-religion.html).

<sup>79</sup> Eusef Robin Huq, 'The Legality of a State Religion in a Secular Nation' (2018) 17(1) *Washington University Global Studies Law Review* 245, 259–64.

‘economic and social justice’<sup>80</sup> Most of Mujib’s nationalised industries were de-nationalised. State-owned banks, financial institutions, and trading concerns have fallen to private hands. The shares until recently held by the Government in many enterprises were sold to private individuals or companies.<sup>81</sup> The discard of ‘socialism’ permanently shaped Bangladesh’s economic policies and priorities. Even the AL coming back to power in 1996, continued the privatisation process and quietly gave up on its socialist commitment. The original Constitution’s vision for a socialist state was essentially forgotten, and Bangladesh moved permanently towards a market-based capitalist economy.<sup>82</sup>

### C. The Era of Competitive Bi-Partisan Authoritarianism

Bangladesh restored the 1972 scheme of the parliamentary system in 1991.<sup>83</sup> A joint manifesto of the political alliances staging street agitation against the military regime agreed that rubber stamp parliaments working under the military’s presidential regimes (1975–1990) must be replaced with a Parliament having institutional power to hold the Government accountable.<sup>84</sup> However, the second life of Bangladesh’s parliamentary system would soon fall into a new round of illiberal, bipartisan and competitive authoritarianism.<sup>85</sup> It was because, at that juncture of Bangladesh’s political history, the survival of parliamentary democracy depended on other issues directly impinging upon the system.<sup>86</sup>

First, prolonged military intervention in politics substantially weakened the prospect for civilian leadership and parliamentary oversight of the civil-military bureaucracy.<sup>87</sup> Second, by the 1990s, Bangladesh’s party system got firmly dynastic

<sup>80</sup> Constitution (n 4), Preamble (as amended in 1976).

<sup>81</sup> Sobhan (n 44) 36.

<sup>82</sup> M Jashim Ali Chowdhury, ‘Elections in “Democratic” Bangladesh’ in Mark Tushnet and Madhav Khosla (eds), *Unstable Constitutionalism: Law and Politics in South Asia* (Cambridge University Press, 2015) 194.

<sup>83</sup> Md. Masum Sikdar and Md. Mehedi Hasan Shohag, ‘Democracy and Authoritarianism: Understanding Three Decades of Bangladesh Politics’ (2016) 6(24) *Research on Humanities and Social Sciences* 6, 15; Craig Baxter, ‘Bangladesh in 1991: A Parliamentary System’ (1992) 32(2) *Asian Survey* 162.

<sup>84</sup> Talukder Maniruzzaman, ‘The Fall of the Military Dictator: 1991 Elections and the Prospect of Civilian Rule in Bangladesh’ (1992) 65(2) *Pacific Affairs* 203, 223.

<sup>85</sup> Shafi MD Mostofa and DB Subedi, ‘Rise of Competitive Authoritarianism in Bangladesh’ (2021) 14(3) *Politics and Religion* 431.

<sup>86</sup> Craig Baxter, ‘Bangladesh a Parliamentary Democracy, if They Can Keep It’ (1992) 91(563) *Current History* 132.

<sup>87</sup> Maniruzzaman (n 84) 203–206; Syed Imtiaz Ahmed, ‘Civilian Supremacy in Democracies with “Fault Lines”: The Role of the Parliamentary Standing Committee on Defence in Bangladesh’ (2006) 13(2) *Democratization* 283; Muhammad A Hakim, ‘Bangladesh: The Beginning of the end of Militarised Politics?’ (1998) 7(3) *Contemporary South Asia* 283; Siegfried O Wolf, ‘Civil-Military Relations and Democracy in Bangladesh’ (2013) *Spotlight South Asia Special Issue* 1, 14–30; Aurel Croissant, David Kuehn, Philip Lorenz and Paul W Chambers, *Democratization and Civilian Control in Asia* (Palgrave Macmillan, 2013) 118–135; Quamrul Alam and Julian Teicher, ‘The State of Governance in Bangladesh: The Capture of State Institutions’ (2012) 35(4) *South Asia: Journal of South Asian Studies* 858, 864.

and patriarchal roots. Sheikh Mujib's daughter Sheikh Hasina was now placed at the helm of AL. The first military ruler, Ziaur Rahman's widow Begum Khaleda Zia got a similar hold over BNP. The second military ruler Hussain Mohammad Ershad established a strong personal grip over his Jaty Party (JP). Consolidation of the personalistic leadership style would damage the prospect of intra-party democracy and a democratic and merit-based political recruitment and promotion within the parties.<sup>88</sup> Third, the revival and entrenchment of pro-Pakistani political parties (JI, for example) and their natural cohabitation with BNP led to extreme polarisation and distrust among AL and BNP, the arch-rivals of post-1990 Bangladesh. The competing dynasties of Sheikh and Zia would harbour mutual distrust and promote opposition-thrashing, violent street hostility, election-rigging and back door conspiracies for ascending to, or clinging on to, the power.<sup>89</sup>

This period of competitive authoritarianism led to a purposeful deconstruction of the country's electoral institutions. As mentioned earlier, the Constitution-framers paid remarkable attention to the functional independence of the Election Commission. However, the biggest threat to its institutional independence lurked within the Government's unrestricted appointment power.<sup>90</sup> As per the Constitution, the chief election commissioner (CEC) and other election commissioners are appointed by the President, acting on the Prime Minister's advice.<sup>91</sup> Successive political governments had captured the Commission by using its appointment power. Though there had been a recent practice of convening a search committee for finding and recommending the CEC and other election commissioners,<sup>92</sup> the process proved broadly farcical.<sup>93</sup> The search committee found its legal footing through the Chief Election Commissioner and other Election Commissioners Appointment Act 2022.<sup>94</sup> The committee's mandate and powers, however, remained in the shadows. Though the 2022 Act requires the committee to work in a 'transparent and neutral way',<sup>95</sup> there are substantial doubts about its capability to ensure transparency.<sup>96</sup> With the President's constitutional obligation to act upon the Prime Minister's advice intact, the 2022 Act cannot offer a binding force to the search committee's recommendations.

<sup>88</sup> Samiul Hasan, 'Corruption, Accountability and Political Parties in Bangladesh: Connections and Consequences' in Ronald May and Binayak Ray (eds), *Democratic Ideals, Governance, and Corruption in South Asia* (Freedom Press, 2006) 9–10; Stanley A Kochanek, 'Governance, Patronage Politics, and Democratic Transition in Bangladesh' (2000) 40(3) *Asian Survey* 530, 531–33.

<sup>89</sup> Mostofa and Subedi (n 85).

<sup>90</sup> Sakhawat Hussain, *Electoral Reform in Bangladesh 1972–2008* (Palok Publishers, 2012) 51.

<sup>91</sup> Constitution (n 4), art 118(1).

<sup>92</sup> M Jashim Ali Chowdhury, 'The EC Search Committee: Towards a "Consensual" Constitutional Convention?' *The Daily Star* (Dhaka, 7 February 2017).

<sup>93</sup> Nure Alam Durjoy, 'Akbar Ali Khan: Search Committee was not Successful' *The Dhaka Tribune* (Dhaka, 11 February 2013).

<sup>94</sup> The Chief Election Commissioner and other Election Commissioners Appointment Act 2022 (Act No 1 of 2022), Bangla transcript of the law is available at <http://bdlaws.minlaw.gov.bd/act-details-1397.html>.

<sup>95</sup> *ibid* section 4(1).

<sup>96</sup> Badiul Alam Majumder, 'Search Committee for EC: Transparency Can Counter Confidence Crisis' *The Daily Star* (Dhaka, 23 February 2022).

Once constituted, the Commission must depend on the government bureaucracy, including the law enforcement agencies.<sup>97</sup> The Constitution is silent about a separate Election Commission secretariat. It requires the executive branch (the bureaucracy) to 'assist'<sup>98</sup> the Commission. In 1984, military ruler Ershad brought the secretariat under the President's direct supervision. After 1990, it continued to be attached to the Prime Minister's office. The Commission's principal administrative officer, the Secretary, was appointed on deputation from the Prime Minister's office. Thus, the Election Commissioners led an organisation they could not command.

Later in 2008, following a judicial order,<sup>99</sup> an Ordinance was issued separating the Commission Secretariat from the Prime Minister's office. The Ordinance was made into law in 2009.<sup>100</sup> The law, however, failed to make any difference. The constitutional requirement to 'assist' the Commission<sup>101</sup> could not consolidate its position in practice. The Commission usually places numbers, for example, the returning officers, polling officers, support staff, etc before the President. Those staff, posted on deputation from other Ministries and departments, are practically not expected to perform their responsibilities in ways that might draw the ire of their political bosses.<sup>102</sup>

The Election Commission's inability to effectively command the government administration was exposed in the very first election of the country.<sup>103</sup> It was laid bare by the military regimes' day-light election-rigging<sup>104</sup> and result manipulation.<sup>105</sup> The situation did not change after the democratic revival of 1990 either.<sup>106</sup> Instead of addressing the Election Commission's institutional weaknesses, the post-1990 political parties brought forth the concept of an election-time, caretaker government led by non-political personnel like the Supreme Court judges.

<sup>97</sup> Hussain (n 90).

<sup>98</sup> Constitution (n 4), art 126.

<sup>99</sup> *Kazi Mamunur Rashid v Government of Bangladesh* 28 BLD (2008) (HCD) 87 [24] (per Mamnun Rahman J).

<sup>100</sup> The Election Commission Secretariat Act 2009.

<sup>101</sup> Constitution (n 4), art 120.

<sup>102</sup> Chowdhury (n 9) 545–46.

<sup>103</sup> Huq (n 25) 75.

<sup>104</sup> Samina Ahmed, 'Politics in Bangladesh: The Paradox of Military Intervention' (1991) 9(1) *Regional Studies* 58; Syed Serajul Islam, 'The State in Bangladesh under Zia (1975–81)' (1984) 24(5) *Asian Survey* 556, 568–69; Peter J Bertocci, 'Bangladesh in 1985: Resolute Against the Storms' (1986) 26(2) *Asian Survey* 229; Staff Correspondence, 'Violence Mares Election in Bangladesh 1985' *The New York Times* (5 August 1986), available at <https://www.nytimes.com/1986/05/08/world/violence-mars-bangladesh-election.html>.

<sup>105</sup> Stanley A Kuchnek, 'Corruption and Criminalization of Politics in South Asia' in Paul Brass (ed), *Routledge Handbook of South Asian Politics: India, Pakistan, Bangladesh, Sri Lanka and Nepal* (Routledge, 2010) 377; Ahmed (n 104).

<sup>106</sup> Golam Hossain, 'Bangladesh in 1994: Democracy at Risk' (1995) 35(2) *Asian Survey* 172; Muhammad Rashiduzzaman, 'Political Unrest and Democracy in Bangladesh' (1997) 37(3) *Asian Survey* 260; Nasir Uddin, 'Recent Trends of Local Government Elections in Bangladesh: An Analysis on Profile and Politics' (2016) 4(2) *Public Affairs and Governance* 166, 176; Abu Elias Sarker and Faraha Nawaz, 'Clientelism, Partyarchy and Democratic Backsliding: A Case Study of Local Government Elections in Bangladesh' (2019) 26(1) *South Asian Survey* 70.



The concept of a caretaker government was first aired in 1994 as an oven-ready solution to the country's life-long problems with electioneering. The proponents of the model, mainly the then opposition party AL, looked back to the 1991 parliamentary election held under the then Chief Justice acting as an interim President.<sup>107</sup> AL and its allies were confident that the judges of the Supreme Court could fix the nation's electoral problem.<sup>108</sup> This disregarded Bangladesh's troubling past of the judges' controversial connivance with various extra-constitutional and martial law regimes.<sup>109</sup> Though the caretaker government has been able to oversee two parliamentary elections (1996 and 2001) relatively fairly, the judges' brokerage of an election-time government led to rampant politicisation of the judiciary, scandalisation of the judges and compromise of judicial independence.<sup>110</sup>

On the other side of the coin, the then ruling party BNP – forced to consume the system – framed it as a reluctant concession and tried, in every possible way, to weaken the caretaker Government's non-partisan leader *vis-à-vis* a partisan President.<sup>111</sup> Thereby, the BNP leadership devised a system of dual government that contained a looming threat of destabilising the election-time government.<sup>112</sup> One such incident happened just days before the seventh parliamentary election in 1996. BNP-appointed President Abdur Rahman Biswas exercised his military powers dubiously, almost inviting a third military coup and causing the fall of Justice Habibur Rahman's caretaker government.<sup>113</sup> Also, the heads of the 1996 and 2001 caretaker governments found their constitutional mandate unclear. They had often been forced to perform various balancing acts to fulfil the competing demands from major political parties.<sup>114</sup> The system, therefore, produced a 'hotch-potch' that violated 'the entire scheme of the Constitution'.<sup>115</sup>

Assuming the power again in 2001, the BNP-JI coalition amended the Constitution to ensure that a judge favourable to them would lead the caretaker

<sup>107</sup> Muhammad A Hakim, *Bangladesh Politics: The Shahabuddin Interregnum* (University Press Ltd, 1993).

<sup>108</sup> Md Zakir Hossain and M Jashim Ali Chowdhury, 'The Caretaker Government: A Constitutional Evaluation and Search for Alternatives' (In Bangla) (2014) 19 *The Chittagong University Journal of Law* 228, 243–44.

<sup>109</sup> Kamal (n 22).

<sup>110</sup> Chowdhury (n 82) 220–24; *Abdul Mannan Khan v Bangladesh* 64 DLR (AD) (2012) 107, 313 (per Khairul Hoque CJ).

<sup>111</sup> Hossain and Chowdhury (n 108) 236.

<sup>112</sup> Habib Zafarullah and Muhammad Yeahia Akhter, 'Non-Political Caretaker Administrations and Democratic Elections in Bangladesh: An Assessment' (2003) *Government and Opposition* 345, 362–63.

<sup>113</sup> Hossain and Chowdhury (n 108) 237.

<sup>114</sup> Zafarullah and Akhter (n 112) 365.

<sup>115</sup> *Abdul Mannan Khan* (n 110) 428 (per SK Sinha J); Full text available at [http://ago.portal.gov.bd/sites/default/files/files/ago.portal.gov.bd/page/7f393557\\_475c\\_4317\\_b42a\\_5a850868beae/Constitutional%2013th%20Amendment%20Case.pdf](http://ago.portal.gov.bd/sites/default/files/files/ago.portal.gov.bd/page/7f393557_475c_4317_b42a_5a850868beae/Constitutional%2013th%20Amendment%20Case.pdf). Page numbers referred to here correspond to the full text available in the above web address); Md. Shahjahan Hafez Bhuiyan, 'The Caretaker Government in Bangladesh: An Appraisal of its Formation, (2003) 40 *Politics Administration and Change* 33, 46–47; Md. Morshedul Islam, '1996's Non-Party Caretaker Government Movement and the Role of Opposition in Bangladesh: A Politico-Legal Analysis' (2016) 3(6) *Global Journal of Political Science and Administration* 20.

Government of 2006.<sup>116</sup> AL staged violent street agitation, and in response, the BNP-appointed President Iaj Uddin Ahmed staged a constitutional coup and usurped the leadership of the October 2006 caretaker government.<sup>117</sup> Iaj Uddin's action invited the third round of military intervention in Bangladesh politics. A so-called 'military-backed caretaker government' continued for the next two years (2007–2008)<sup>118</sup> and conducted the ninth parliamentary election (2008).<sup>119</sup>

Later, in 2011, the Appellate Division of the Supreme Court declared the caretaker Government unconstitutional.<sup>120</sup> Still, the Court supported holding at least two further parliamentary elections under the caretaker Government system.<sup>121</sup> This time the AL Government seized on the opportunity and discarded the system altogether.<sup>122</sup> The (fifteenth) constitutional amendment was passed within minutes and without any substantial discussion on the floor.<sup>123</sup> Like Sheikh Mujib's fourth amendment, Sheikh Hasina's fifteenth amendment exposed the internal weaknesses of Bangladeshi political parties and their falling hostages to the whims of the persons in leadership.<sup>124</sup> Thus, the caretaker Government's 'unusual legal structure' was created and abolished as a mere élite preference rather than deliberative and participatory decision-making.<sup>125</sup>

The tenth parliamentary election (2014) was held without any caretaker government in charge, and BNP boycotted it. The majority of the MPs were elected uncontested even before the election day.<sup>126</sup> BNP participated in the eleventh

<sup>116</sup> Nizam Ahmed, 'Party Politics under a Non-party Caretaker Government in Bangladesh: The Fakhruddin Interregnum (2007–09)' (2010) 48(1) *Commonwealth and Comparative Politics* 23.

<sup>117</sup> Shah Alam, 'Article 58C and Assumption of Office of the Chief Adviser by the President' *The Daily Star* (Dhaka, 11 November 2006).

<sup>118</sup> Kazi S M Khasrul Alam Quddusi, 'Criminalisation, Militarization and Democratic Restoration in Bangladesh' (2009) 13(4) *World Affairs: The Journal of International Issues* 136, 138.

<sup>119</sup> Nizam Ahmed, 'Critical Elections and Democratic Consolidation: The 2008 Parliamentary Election in Bangladesh' (2011) 19(2) *Contemporary South Asia* 137.

<sup>120</sup> Abdul Mannan Khan (n 110); Mohammad Omar Faruque, 'Integrity Crisis of the Electoral System in Bangladesh: the 13th Amendment Judgment and Beyond' *Workshop on Constitutional Resilience in South Asia* (University of Melbourne, Australia, 5–7 December 2019); Ridwanul Hoque, 'Constitutionalism and the Judiciary in Bangladesh' in Sunil Khilnani, Vikram Raghavan and Arun K Thiruvengadam (eds), *Comparative Constitutionalism in South Asia* (Oxford University Press, 2013) 317.

<sup>121</sup> Nizam Ahmed, 'Abolition or Reform? Non-party Caretaker System and Government Succession in Bangladesh' (2011) 100 (414) *Round Table: The Commonwealth Journal of International Affairs* 303.

<sup>122</sup> Maimul Ahsan Khan, 'Constitutional Disaster and "Legal" Impunity: Constitutional Amendments in Perspective', Asian Human Rights Commission, available at [www.humanrights.asia/resources/journals-magazines/article2/special-report-inexistent-rule-of-law-in-bangladesh/04-2/](http://www.humanrights.asia/resources/journals-magazines/article2/special-report-inexistent-rule-of-law-in-bangladesh/04-2/).

<sup>123</sup> Sonia Zaman Khan, *The Politics and Law of Democratic Transition: Caretaker Government in Bangladesh* (Routledge, 2017).

<sup>124</sup> Ehteshamul Bari, 'The Incorporation of the System of Non-Party Caretaker Government in the Constitution of Bangladesh in 1996 as a Means of Strengthening Democracy, Its Deletion in 2011 and the Lapse of Bangladesh into Tyranny Following the Non-Participatory General Election of 2014: A Critical Appraisal' (2018) 28(1) *Transnational Law and Contemporary Problems* 27.

<sup>125</sup> Khan (n 123) 2.

<sup>126</sup> Ali Riaz, 'Shifting Tides in South Asia: Bangladesh's Failed Election' (2014) 25(2) *Journal of Democracy* 119; Shelley Feldman, 'Bangladesh in 2014: Illusive Democracy' (2015) 55(1) *Asian Survey* 67; Md Joynal Abedin, 'Legitimacy Crisis in Bangladesh: A Case Study of 10th General Election' (2020) 39(2) *European Journal of Political Science Studies* 1.

parliamentary election (2018). This time, with an AL Government in power,<sup>127</sup> BNP supporters and activists were visibility suppressed by the politicised election commission, bureaucracy, and law enforcement agencies. AL activists captured most polling stations and stuffed the ballot boxes on the night before the election day.<sup>128</sup> This preventive approach of electioneering drives the political opponents and the people agonisingly away from the electoral process. Thus, the Bangladeshi people's widespread withdrawal from the electoral process in recent years appears a logical manifestation of the electoral system's credibility crisis.<sup>129</sup>

#### D. A Marginalised Judiciary under a One-Party Authoritarianism

While Bangladesh's judicial branch has been co-opted and marginalised by the political and military governments alike,<sup>130</sup> the current regime of one-party authoritarianism has taken the marginalisation to an unprecedented height.

The 1972 Constitution provided for the parliamentary removal of judges. In 1977, military ruler Ziaur Rahman substituted it with removal by the Judicial Council system. The Council comprised the Chief Justice and two other senior Supreme Court judges. Once activated by the President, the Council would investigate any allegation and recommend necessary action, including the removal. In 2009, the Supreme Court declared Zia's accession to power and his constitutional amendments (the Fifth Amendment) unconstitutional.<sup>131</sup> It, however, condoned the Judicial Council system. It observed, without any further reasoning, that the council system was more transparent and pro-judiciary than the original one. Absent any other explanation; it appears that the judges were comfortable with the council members' (the judges themselves) exclusive power of investigation and recommendation for the potential removal of any of their colleagues.

In 2014, the AL Government sought to revive the original parliamentary removal system through the sixteenth amendment.<sup>132</sup> While the AL Government preserved the council system in the fifteenth amendment (2011), its new initiative was perceived as a retaliatory move against a supreme court judgment touching upon the

<sup>127</sup> Ali Riaz, 'Bangladesh: From an Electoral Democracy to a Hybrid Regime (1991–2018)' in Ali Riaz (ed), *Voting in a Hybrid Regime Explaining the 2018 Bangladeshi Election, Politics of South Asia* (Palgrave Pivot, 2019) 21–31.

<sup>128</sup> Moniruzzaman (n 7).

<sup>129</sup> Zyma Islam and Partha Pratim Bhattacharjee, 'Dhaka City Polls: Turnout under 20pc in One Third of Centres' *The Daily Star* (Dhaka, 6 February 2020).

<sup>130</sup> Islam (n 6).

<sup>131</sup> *KhandkerDlewar Hossain v Bangladesh Italian Marble Works Ltd* 15 MLR (AD) 1.

<sup>132</sup> Asano Noriyuki and Minato Kazuki, 'Politicisation of the Appointment and Removal of Judges in a Declining Democracy: The Case of Bangladesh' (2019) Institute of Developing Economies, Japan External Trade Organization (IDE-JETRO) Discussion Paper, available at <https://core.ac.uk/download/pdf/288469659.pdf>.

Parliament members' privileges.<sup>133</sup> This time the Supreme Court extra-ordinarily declared the original removal system unconstitutional.<sup>134</sup> The bullish response to the amendment led to a confrontation between the political and legislative branches.<sup>135</sup> In its judgment, the Court passed a scathing rebuke of the Parliament.<sup>136</sup> The High Court Division ruling of 5 May 2016 contained some derogatory remarks on the character and disposition of the MPs. MPs scrambled the House floor and aired heavy criticism of the Court for refusing to submit itself to the Parliament's removal power.<sup>137</sup> The High Court Division judgment was immediately appealed against, and the Appellate Division rejected the Government's appeal on 3 July 2017. Another round of infuriated criticism ensued on the House floor on 9 July 2017. The full text of the judgment of the Appellate Division came out on 1 August 2017. While the High Court Division's comments were already fuelling the fire, Chief Justice SK Sinha's opinion in the appeal verdict was full of attacks on the politicians and the Parliament.<sup>138</sup> It put him in a straight hot seat. He was accused of bias,<sup>139</sup> and a demand for his resignation started to echo on the political spectrum. While the AL Government was preparing for a review petition against the judgment,<sup>140</sup> stubborn Sinha tried to revive the pre-amendment council system within two days of publishing the full-text verdict by calling its meeting.<sup>141</sup>

In reaction, the Parliament unanimously passed a resolution for taking 'proper' legal steps for 'cancelling the verdict' and expunging Justice Sinha's 'unconstitutional, objectionable and irrelevant' observations.<sup>142</sup> Scenes changed swiftly after that, and by 11 November 2017, Chief Justice Sinha was forced to leave the country 'for treatment' and later resigned as the Chief Justice.<sup>143</sup> A review petition against the Appellate Division judgment is still pending. The subsequent Chief Justices also did not call any meeting of the Supreme Judicial Council. Later, three judges of the Supreme Court facing misconduct charges were instructed by the

<sup>133</sup> A. K. M. Shafiuddin v Bangladesh (2012) 41 CLC (HCD).

<sup>134</sup> Advocate Asaduzzaman Siddiqui v Bangladesh 10 ALR (AD) 03.

<sup>135</sup> Rizwanul Islam, 'Impeachment of Judges: A Suggestion' *The Daily Star* (Dhaka, 27 August 2014).

<sup>136</sup> Chowdhury and Saha (n 62).

<sup>137</sup> Ashutosh Sarkar and Shakhawat Liton, 'JS's Authority to Impeach SC Judges: Bangladesh High Court Scraps 16th Amendment to Constitution Govt to Appeal' *The Daily Star* (Dhaka, 11 November 2017), available at [www.thedailystar.net/frontpage/hc-scraps-16th-amendment-1219480](http://www.thedailystar.net/frontpage/hc-scraps-16th-amendment-1219480).

<sup>138</sup> Jashim Ali Chowdhury, 'A Simple Amendment Un-simplified' *The Daily New Age* (Dhaka, 25 August 2017).

<sup>139</sup> Nazrul Khasru, 'Justice Sinha's "Broken Dream": A Death Knell of the 16th Amendment Judgment' (*Bangladesh Law Digest Blog*, 11 December 2018).

<sup>140</sup> Ashutosh Sarkar, 'Chief Justice Steps Down' *The Daily Star* (Dhaka, 12 November 2017).

<sup>141</sup> Tribune Report, 'Supreme Judicial Council reinstated, SC Judges Get their Own Code of Conduct' *The Dhaka Tribune* (Dhaka, 03 August 2017).

<sup>142</sup> New Nation Report, 'JS Will Again Pass 16th Amendment' *The New Nation* (Dhaka, 05 August 2017).

<sup>143</sup> DS Report, 'PM Critical of CJ's Remarks' *The Daily Star* (Dhaka, 22 August 2017); DS Report, 'AL Leaders Now Calling for CJ to Step Down' *The Daily Star* (Dhaka, 23 August 2017); DS Report, 'I Am Completely Well, says Chief Justice SK Sinha as he Leaves Country' *The Daily Star* (Dhaka, 13 October 2017); DS Report, 'Chief Justice Steps Down' *The Daily Star* (Dhaka, 12 November 2017); DS Report, 'Forced to Quit: BNP, No Pressure: AL' *The Daily Star* (Dhaka, 12 November 2017).

then Chief Justice to refrain from their respective benches. Whether the Supreme Judicial Council would investigate them or whether they would be subject to the parliamentary removal process was not clarified.<sup>144</sup> So, the Constitution's current position on judges' removal is unclear. So is the state of judicial independence.

## VI. Conclusion

The historically grounded analysis of Bangladesh's constitutional discourse above suggests that power-personalisation tendency, radicalisation and polarisation of the country's political system have direct consequences on its constitutional consolidation and institutionalisation. Actions of Bangladesh's competing political parties, particularly their patriarchic leaders, since the independence suggest that they never gave up their desire for a perpetual grasp on power and total elimination of their opponents.<sup>145</sup> It encouraged suppressing what Olsen calls a 'Democratic Instrumental Vision'<sup>146</sup> in institution-building. Bangladesh's Constitution-framers were largely successful in setting up a liberal and workable constitutional order. However, the post-independence political leaders, including the framers themselves, and the subsequent reformers made and unmade the Constitution in ways that best served their immediate political conveniences rather than the long-term institutional interest of the country.<sup>147</sup>

As Muzaffar and Seidher put it, democratic and authoritarian actors differ in their attitudes towards uncertainty. While the former seeks to reduce the uncertainty of institutions, the latter works to reduce the uncertainty of outcomes.<sup>148</sup> For the five decades of Bangladesh's existence, political parties and their patriarchal leaders worked to reduce the uncertainty of their retaining power. Different makeshift solutions and proposals inspired by temporal impulses have been suggested and implemented. In contrast, the conversation on the political party system, intra-party democracy, professional civil service, independent Election Commission or other integrity institutions has been consciously avoided. In the process, the country has derailed from its original constitutional ideals, dismantled its key constitutional institutions and reduced the Constitution to 'a fond memory'<sup>149</sup> of the past. Therefore, Bangladesh could qualify as a textbook example of how to make a good constitutional order and then unmake it.

<sup>144</sup> TBS Report, 'A Catch 22 for the Supreme Court' *The Business Standard* (Dhaka, 25 August 2019).

<sup>145</sup> Abul Kalam Azad and Charles Crothers, 'Bangladesh: An Umpired Democracy' (2012) 3(6) *Journal of Social and Development Sciences* 203.

<sup>146</sup> Johan P Olsen, *Governing through Institution Building: Institutional Theory and Recent European Experiments in Democratic Organization* (Oxford University Press, 2010).

<sup>147</sup> Ridwanul Hoque, 'The Politics of Unconstitutional Amendments in Bangladesh' in Rehan Abeyratne and Ngoc Son Bui (eds), *The Law and Politics of Unconstitutional Constitutional Amendments in Asia* (Routledge, 2021) 210–28.

<sup>148</sup> Shaheen Mozaffar and Andreas Schedler, 'The Comparative Study of Electoral Governance: Introduction' (2002) 223(1) *International Political Science Review* 5, 11.

<sup>149</sup> Riaz (n 126) 129.