

BANGLADESH
CONSTITUTION :
TRENDS AND ISSUES



JUSTICE MUSTAFA KAMAL

Kamini Kumar Dutta Memorial Law Lectures, 1994

BANGLADESH CONSTITUTION : TRENDS AND ISSUES

JUSTICE MUSTAFA KAMAL



UNIVERSITY OF DHAKA

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Preface

It is our pleasure that the prestigious Kamini Kumar Dutta Memorial Law Lecture 1994 has been delivered by Justice Mustafa Kamal. A reputed student of Dhaka University of the early 1950s, Justice Kamal has chosen a topic – **Bangladesh Constitution : Trends and Issues** – which is timely and appropriate. In this fascinating area what the students of Law, Jurisprudence and Social Sciences need most is indepth analyses of the provisions of the Constitution, a detailed article by article commentary with special reference to case laws since its inception. This lecture is not intended to make adequate provisions for all that, but I am confident, Justice Kamal's treatment of the Trends and Issues of Bangladesh Constitution will not only be highly interesting but also greatly instructive to the practising community and the academics.

The constitution has always been dynamic in nature; it grows and grows steadily over time in response to the demands of socio-political life of the society. The highest judicial organ of the country on such occasions acts as the catalytic agent, because almost everywhere constitutional development is but an evolution of the constitution through judicial decisions. The Supreme Court in Bangladesh is no exception; in fact, the Supreme Court in Bangladesh has through a number of authoritative interpretations helped develop the Supreme Law of Bangladesh to its desired direction and height. Focussing attention of the readers to such interpretative role of the Supreme Court, this study will certainly provoke both the academic and legal communities to undertake further inquiries and researches.

Justice Mustafa Kamal, already known for his searching comments on legal issues and lively commentaries on constitutional trends, deserves congratulation for this intensely incisive study.

I wish this work a wider readership.

Dhaka
July, 1994

Emajuddin Ahmad
Vice-Chancellor
University of Dhaka

Introduction

Bismillah-ar-Rahman-ar-Rahim

I have, with pleasure and gratitude, accepted the invitation of the University of Dhaka to deliver the Kamini Kumar Dutta Memorial Law Lecture, 1994. This University is my *alma mater*. I owe a debt to it for whatever good has happened to me. My acceptance is a partial repayment of that irredeemable debt. I find, however, that this debt has increased by this assignment, for it is also an honour bestowed on me, making me feel that to repay its debt upon debt is a hopeless task. I also felt honoured to be able to associate my name with Kamini Kumar Dutta, a giant among lawyers of his time (1879-1959) in whose revered memory this Law Lecture has been introduced. At the end of these Lectures, I have appended a short biography of this legendary legal luminary for the benefit of those whose knowledge and memory of him may have faded or dimmed by lapse of time.

The University has given me the freedom to choose my own subject for these Lectures. Why of all subjects my choice has fallen on the Constitution of Bangladesh needs an explanation.

The Constitution is the Supreme Law of the Republic. The entire legislative, executive and judicial activities of the State are guided and regulated by the Constitution. In all countries where constitutionalism prevails, ordinary men and women are more or less knowledgeable about their country's constitution and are vigilant and vocal to a man to assert and preserve the Constitution and the constitutional rights. They do not leave their Constitution in the hands of constitutional lawyers, Judges and academicians. Each citizen is a defender of the Constitution, so that it becomes almost impossible to make an open breach of it

One cannot expect a vigilante citizenry in a predominantly illiterate population, although Article 21 of the Constitution says that "it is the duty of every citizen to observe the Constitution and the laws, to maintain discipline, to perform public duties and to protect public property". That makes the responsibility of the educated citizenry even greater in knowing, understanding and

observing the Constitution. The level of awareness, consciousness and understanding of the Constitution and the commitment to defend it among our educated few is painfully dismal. They are ruefully apathetic to constitutional matters. Not to speak of the enlightened population, even the legal community has consigned the Constitution into the hands of a few, pathetically few, constitutional lawyers. Apart from a few text books of some sorts, there does not seem to exist a detailed article by article commentary on the Constitution of Bangladesh specifically with reference to decided cases after 1972. Writers on legal subjects seldom write on constitutional subjects and case-laws. The work of the Supreme Court on the Constitution from 1972-93 has largely remain ignored.

Constitutional development is no doubt an evolution of the Constitution through judicial decisions, but judicial decisions on the Constitution are the outcome of dedicated lawyering backed by intensive academic studies. A purposive and articulate academic community and an ever persistent lawyer community magnify the patent and the latent in the Constitution in all its facets and phases and it is they who by their continuous constitutional quests keep the torch of the Constitution burning even when the Constitution sustains an assault. The role of the Judges is no doubt important, but it is the practising lawyer who opens the multiple keys to the Constitution and shows to the Judge the wealth contained in it. A responsive Judge picks up the wealth thus exposed, although there have been and are Judges in all jurisdictions who need no keys. The wealth of the Constitution is stored in their wisdom. The lawyer has to know to pick it up in bits and pieces.

With intermittent interferences, which I have detailed in these Lectures, this Constitution of ours has been in operation since the last 21 years (1972-93) and a number of provisions of this Constitution has received authoritative interpretation from the Supreme Court in both Divisions. A detailed and systematic study of this accumulated interpretative role of our Supreme Court has not received the analytical attention that is its due.

I selected this subject not with an ambition to fill up the void, but with an humble intention to spur future academic ventures into this vast unexplored field. My effort is that of a starter, hence an incomplete effort. Readers of these Lectures will find several constitutional topics like fundamental rights, *habeas corpus*, *mandamus*, *certiorari*, prohibition and *quo warranto* missing from its pages, primarily because it was not possible to incorporate these relatively known subjects within the limited purview of these Lectures and also because the total work done by the Supreme Court in these fields over the last two decades are considerable enough to merit a separate and full-length treatment.

Readers will find in these Lectures quotations from judgments of the Supreme Court to be copious and lengthy, somewhat unusual in studies of this kind. The choice is deliberate. I wanted to highlight the post-1972 decisions of the Supreme Court on the Constitution. Hence the contents of the judgments feature more than anything else. Studies on any Constitution usually contain frequent references to the sayings of well-known authors and jurists, to U.K., U.S. and Indo-Pak judicial decisions and to the wisecracks of Judges. I have avoided the "parade of familiar learning" for which the Readers may turn elsewhere. I wanted the Readers to know how much (or how little) the Supreme Court has done so far.

Before the Constitution came into force on the 16th December, 1972 Bangladesh was governed, *de jure* from the 26th March, 1971, *de facto* from the 16th December, 1971, by three constitutional documents, the Proclamation of Independence, Laws Continuance Enforcement Order, 1971 and the Provisional Constitution Bangladesh Order, 1972. In Chapter I, these documents have been noted and the few cases on them have been dealt with.

In Chapter II, the salient features of our Constitution have been noted and those case-laws since 1972 have been mentioned and analysed which throw light on these basic features.

The period from 1972 to 1975 may be said to be the first phase of our constitutional journey, which saw as many as four constitutional amendments, the last one changing radically the basic features of the Constitution. A Proclamation of Emergency on the 28th December, 1974 kept certain fundamental rights outside of the jurisdiction of the High Court Division and this state of affairs continued upto the 27th November, 1979. The Constitution was almost throttled in its birth and Chapter III describes the unhappy childhood of the Constitution with some decided cases which highlight its teething troubles.

The First Martial Law in Bangladesh (1975-79) *per force* obliged the Supreme Court to steer its course towards Martial Law Jurisprudence, an unprecedented challenge to any new-born higher judiciary. The success and failure of the Supreme Court during this period is for the Readers to judge, but Chapter IV recreates the duel between constitutionalism and extra-constitutional take-over and the position the Supreme Court takes after an initial stupor.

Chapter V describes the interlude of 1979 to 1982 during which the Constitution was again allowed to have its full play and during which there was a spate of constitutional litigations, followed by the Second Martial Law in 1982 which continued upto 1986. The Supreme Court relapsed into Martial Law Jurisprudence once again. The remnants and fallouts of Martial Law became the concern of the Supreme Court.

With the restoration of the Constitution in 1986, constitutional litigation reached its peak in 1988, when certain provision of the Eighth Amendment of the Constitution were challenged. The Constitution 8th Amendment case has been discussed in Chapter VI in its essentials.

Chapter VII describes the constitutional development after 1990 when the Parliamentary system was revived and covers the period upto the end of 1993. All constitutional cases of some importance, dealing with one or more provisions of the Constitution, have been noted.

Judicial Review, the soul of the judiciary in a Constitution, is a lionised subject in constitutional studies. I have avoided the beaten track and written about the limitations of this remedy in Chapter VIII.

Finally, in Chapter IX, I have given my perception of the issues looming large in the Constitutional horizon.

Snatching some time away from my day's (and night's) Court work, I have prepared these Lectures all alone in my study. I myself realise the deficiencies of this one-man effort. Readers will find even more. My apologies.

I thank Almighty Allah for His kindness in allowing me to complete the task.

Mustafa Kamal

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