

## **Bangladeshi Courts: Reaffirmation of Democratic and Secular Norms**

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### **Abstract**

Bangladesh, a predominantly Muslim country of 160 million people was born in 1971. Immediately after independence, it was confronted with a host of developmental and political challenges. Over time it managed to respond to the development issues with a modicum of success. Initially this was done by an effective utilisation of external support as well as domestic resource mobilisation, and then through home-grown concepts like microcredit and non-formal education, which helped in alleviating poverty, mainstream gender and marginalise extremist thoughts and action. The political problems were more daunting. The principles of ‘democracy’ and ‘secularism’, among others, were soon eroded by military interventions, with such actions given legislative sanction through the Fifth (1979) and Seventh (1986) amendments to the constitution. Recently the higher judicial courts delivered two historic judgements nullifying the amendments and setting the country again on the path of democracy and secularism. This paper discusses the judgements and Bangladesh’s efforts to maintain religious harmony with democratic and secular values.

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## Introduction

A series of interesting judgements by the higher courts in Bangladesh are poised to mark an indelible imprint upon the social and political fabric of Bangladesh. They tend to reaffirm the norms of democracy and secularism, two of the nation's original state principles. Bangladesh is a country with a 'complicated and spectacular tale'.<sup>2</sup> Already, Bangladesh appears well set on a democratic path, which is chaotic, but calm, at least more than Pakistan, the other main Muslim majority country in South Asia. It has an example of how 'education can actually transform a nation'.<sup>3</sup> Add to it women's empowerment through microcredit and non-formal schooling, a steady and equitable growth-rate over years, and commendable international behavior denoting a responsible global actor.<sup>4</sup> A vibrant civil society enhanced the nation's recent international reputation.<sup>5</sup> The work of Nobel laureate Mohammad Yunus helped spread the nation's fame globally.<sup>6</sup> Taunted by Henry Kissinger as a 'basket-case' at its inception in 1971, the country has slowly transformed itself from a 'paradox', as the World Bank described its successes against numerous odds<sup>7</sup>, to a 'paradigm'. Two things tended to cast a shadow on its evolution; military interventions, though less frequent than Pakistan's, from which it seceded in 1971 and the potentials of burgeoning religious extremism, though also far less threatening than the other country's. The recent court rulings addressed these two issues.

Following the establishment of the sovereign state, having broken away from Pakistan in December 1971, the Constitution of Bangladesh, adopted the following year, clearly identified nationalism, socialism, democracy and secularism as fundamental state principles. However as politics evolved most of these underwent considerable erosion. In August 1975, a bloody coup led by some junior military officers assassinated Sheikh Mujibur Rahman, the President, who had championed those values and installed Khandker Mushtaque Ahmed, who did not share his commitment to these norms.<sup>8</sup> The new leaders were also overthrown by counter-coups soon enough, but the leaders of the August 1975 coup were given indemnity in by General Ziaur

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<sup>2</sup> William Van Schendel, *A History of Bangladesh* (Cambridge: Cambridge University Press, 2009) p.XXV.

<sup>3</sup> Nicholas D. Kristof, 'One Soldier or 20 Schools?', *New York Times* (30 July 2010).

<sup>4</sup> Bangladesh has been consistently one of UN's largest peace-keeping contributors, helping stabilise post conflict regions, particularly in Africa. See, Nurul Islam, 'The Army, UN Peacekeeping Mission, and Democracy in Bangladesh', *Economic and Political Weekly*, Vol.XLV, No.29 (17 July 2010), pp.77-85.

<sup>5</sup> For a story on one of Bangladesh's and the world's largest and successful NGOs, BRAC, see, Ian Smillie, *Freedom from Want* ( Dhaka: The University Press Limited, 2009).

<sup>6</sup> See, 'Nobel Winner Yunus: Microcredit Missionary', *Bloomberg Businessweek* (26 December, 2005), [www.businessweek.com/magazine/content/05\\_52/b39665024.htm](http://www.businessweek.com/magazine/content/05_52/b39665024.htm). Accessed on 28 August 2010.

<sup>7</sup> Despite heavy odds, this was due to the considerable progress Bangladesh achieved in a number of fronts. See, Naureen Chowdhury Fink, *Bombs and Ballots: Terrorism, Political Violence and Governance in Bangladesh* (New York: International Peace Institute, 2010), p.12 .

<sup>8</sup> Talukdar Muniruzzaman, 'Bangladesh in 1975: The Fall of the Mujib Regime and its Aftermath', *Asian Survey*, Vol.16, No.2, (February 1976), pp.119-129.

Rahman, the strongman-turned-President, through the Fifth Amendment (of the Constitution).<sup>9</sup> It legitimised all constitutional changes between 15 August 1975 and 9 April 1979.<sup>10</sup> Similarly, General Hussain Mohammed Ershad, who assumed power following Ziaur Rahman's assassination in 1981, had the Seventh Amendment enacted on 11 November 1986, validating all his constitutional (or extra-constitutional) actions.<sup>11</sup> It was only after Ershad's overthrow through a mass upsurge in 1991 that an acceptable democratic system took root, with two parties, the Awami League, and Bangladesh Nationalist Party (BNP), and two leaders, Sheikh Hasina and Khaleda Zia, alternately leading the government every five years, with caretaker governments holding elections, as neither Party trusted the other enough to do so.<sup>12</sup>

During this period, the principle of 'secularism' also took a battering. 'Secularism' was deleted as a state principle from the constitution in 1977, Islam was declared the state religion in 1988, the use of Islamic idiom burgeoned in political discourse and close liaisons were formed between secularist and Islamist political parties.<sup>13</sup> Grave concerns were raised by some foreign observers. One was Liza Griswold, who writing in 2005, expressed fears about the rise of the Taliban in Bangladesh.<sup>14</sup> Another was Bertil Lintner, whose apprehensions were that if countermeasures were not adopted a hitherto moderate state could go down the 'Islamist' path.<sup>15</sup> Happily, though, the misgivings did not come to pass. The Islamist movement spluttered and was dealt a heavy blow when the courts awarded capital punishment to a number of leading terrorists which were carried out during the period of the caretaker government (2007-2009). At this time, the current government is organising trials for war crimes committed in 1971, mostly by Jamaat-i-Islami leaders who had also opposed the independence of Bangladesh, and there does not appear to be any palpable opposition to the decision by the mainstream public.

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<sup>9</sup> For an interesting account and analyses of the turbulent Bangladesh politics in mid and late 1970s, see Lawrence Lifschultz, *Bangladesh: The Unfinished Revolution* (London: zed Press, 1979).

<sup>10</sup> See Rasel Pervez, 'Repeal of the Fifth Amendment: Musings', e-Bangladesh (18 February 2010). [www.e-bangladesh.org/2010/02/18/the-repeal-of-the-fifth-amendment-musings/](http://www.e-bangladesh.org/2010/02/18/the-repeal-of-the-fifth-amendment-musings/) Accessed on 29 August 2010.

<sup>11</sup> Banglapedia: National Encyclopedia of Bangladesh, [www.banglapedia.org/httpdocs/HT/C\\_0336.HTM](http://www.banglapedia.org/httpdocs/HT/C_0336.HTM). Accessed on 29 August 2010.

<sup>12</sup> For a concise and succinct account of the complexities, see Kazi Anwarul Masud, *Bangladesh Crisis* (Dhaka: Sudipta Printers, 2007).

<sup>13</sup> Ali Reaz, 'God Willing: The Politics and Ideology of Islamism in Bangladesh', *Comparative Studies of South Asia, Africa and the Middle East*, 23:1&2 (2003), pp.301-302.

<sup>14</sup> 'The Next Islamist Revolution?', *New York Times* (23 January 2003), [www.mukto-mona.com/news/bangla\\_bhai/Islamic\\_rev\\_NYTimes.htm](http://www.mukto-mona.com/news/bangla_bhai/Islamic_rev_NYTimes.htm). Accessed on 29 August 2010.

<sup>15</sup> 'Bangladesh: Extremist Islamist Consolidation', [www.satp.org/satporgtp/publication/faultlines/volume14/Article!.htm](http://www.satp.org/satporgtp/publication/faultlines/volume14/Article!.htm). Accessed on 29 August 2010.

## The Courts and the Fifth Amendment

Following a writ petition, on 29 August 2005 the High Court in Bangladesh gave a historic ruling that declared the Fifth Amendment to the constitution illegal. The then BNP government was actually favourably disposed towards the amendment and it was obvious that it would do little about it until the Supreme Court, pronounced itself on the issue. This came five years down the line, in February 2010. The political milieu had altered by then and an Awami League-led government was now in office. Five months later, in July, the six member bench headed by then-Chief Justice Mohammed Tafazzal Islam released the full text of the judgment, comprising 184 pages. In strong terms it denounced extra-constitutional methods of acquiring state power and restored the secular spirit of the original constitution.

These were reflected in the following two pronouncements of the court - first it said, 'We are putting on record our total disapproval of martial law and suspension of the constitution or any part thereof in any form...The perpetrators of such illegalities should also be suitably punished and condemned so that in future no adventurist, no usurper would dare to defy the people, their constitution, their government, established by them with their consent'. Second, on secularism, the court observed that martial law proclamations by omitting secularism, one of the state policies from the constitution, destroyed one of the basis of our struggle for freedom and also changed the basic character of the Republic as enshrined in the preamble as well as in Article 8(1) of the Constitution'.<sup>16</sup>

The editorial of a mainstream newspaper seemed to reflect public sentiment, when it wrote, '...the judgment of the Supreme Court nullifying the fifth amendment to the constitution must be considered one significant means by which history can be restored to its natural course or must be made to move in a direction that will uphold the interest of the nation... Apart from a return to unfettered democracy, we also have the opportunity today, thanks to the landmark Supreme Court verdict to have our secular spirit as a nation restored in the constitution...Secularism has never been and can never be a negation or abandonment of religion. It is a much higher principle, the one that promotes and ensures the equality of all faiths and the right of all citizens to practice their religion in their individual ways'.<sup>17</sup> Perhaps as a pragmatic compromise, the judgment made no mention of the eighth amendment, which had declared Islam as the state religion, thereby retaining it.

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<sup>16</sup> *Daily Star, Dhaka* (29 July 2010).

<sup>17</sup> *Daily Star, Dhaka* (30 July 2010).

## The Courts and the Seventh Amendment

On the heels of this judgment of the Supreme Court, the High Court delivered another ruling that nullified the seventh amendment enacted by Ershad in 1986 legitimising his military take over. Even at the time of its enactment, experts had sensed its ominous implications. A lawyer had written that it ‘has intensified the widespread concern and suspicion about the future of constitutional rule in Bangladesh’.<sup>18</sup> A High Court bench comprising two justices, AHM Shamsuddin Chowdhury and Sheikh Mohammed Zakir Hussain, ruled in August 2010 that the seventh amendment was ‘void and unconstitutional’; it also declared void *ab initio* the proclamation of martial law on 24 March 1982 and all regulations, orders and instructions under it, including verdicts passed by tribunals under it.<sup>19</sup> There is, of course, every possibility that the matter would go to the Supreme Court and little possibility that the Supreme Court would turn it down, which is a logical deduction from its own ruling on the Fifth Amendment.

The two judgements were as well received as the previous one. In a commentary on them, the editor of a major Dhaka English Daily said, ‘The two recent verdicts nullifying the fifth and the seventh amendments to our constitution can definitely be termed as epoch-making. If ever there were moments in our history when the pronouncements from the judiciary elevated us, energised us, emboldened us and above all restored our pride in ourselves...the aforementioned two judgements were such moments.’<sup>20</sup> Another analyst stated, ‘Bangladesh has welcomed the two verdicts. Simply put, the judgements nullifying the fifth and the seventh amendments have established as paramount the peoples’ will and not the will and the whims of military strongmen’.<sup>21</sup>

## Prognosis and Relevance for the Muslim World

As can be imagined, the judgements have great implications for Bangladesh. Much of it is moral, since the courts cannot undo the past and as a matter of fact had to state that apart from what was specifically cited by the rulings, all else would continue as is. In other words, normal decisions with regard to governance would remain valid. That was necessary. By acknowledging that Islam remains the state religion, the courts acted in consonance with what it perceived as a

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<sup>18</sup> M. Rafiqul Islam, ‘The Seventh Amendment to the Constitution of Bangladesh’, *The Political Quarterly*, Vol.58, Issue 3 (July 1987), p.312.

<sup>19</sup> ‘Seventh Amendment of Constitution Illegal and Fate of Ershad’, *Save BD.com*, 27 August 2010. [www.savebd.com/news/seventh-amendment-of-constitution-illegal-and-fate-of-ershad/](http://www.savebd.com/news/seventh-amendment-of-constitution-illegal-and-fate-of-ershad/). Accessed on 14 September 2010.

<sup>20</sup> Mahfuz Anam, ‘Judgements that Restore Our Pride’, *Daily Star* (28 August 2010).

<sup>21</sup> Haroon Habib, ‘Two Epoch-Making Verdicts’, *The Hindu* (9 September 2010).

preponderant public sentiment. Yet by underscoring secular and democratic values, the courts were also in conformity with the public psyche. It is true that an ‘unconstitutional takeover’ by definition would ignore the constitution, the first act of a ‘strongman’ would be to abrogate the constitution, but nonetheless the rulings enshrined democratic and secular norms as national principles. Also the judgements demonstrated that the long arm of law would eventually prevail. The courts were careful to avoid any criticism that they were legislating, by clearly stating that specific laws in this regard would be enacted by the parliament.

Apart for its ramifications for Bangladesh itself, the rulings have great implications for the wider Muslim world. A vast majority of Bangladesh’s 160 million Muslims appear to have accepted the pronouncements, many enthusiastically. At a time when major Muslim nations, even the archetypal Islamic secular state Turkey, were coming increasingly under the influence of religiosity, Bangladesh was moving in a direction that implied the acceptance of religion, along with secular and democratic principles. A Pakistani analyst, Farooq Sulehria, observed, ‘[The judgements] not only bucked an apparent trend in the Muslim world, but also dismissed a stereotype: Islam’s incompatibility with secular democracy... In an age of brewing fundamentalism the Bangladesh Supreme Court’s decision is very important and this example, if allowed to flower, may provide secularism with a chance to root itself in the Muslim world’.<sup>22</sup> In Bangladesh, the courts have shown the way. It remains to be seen whether the nation will follow, and if some other Muslim nations will emulate. Indeed Bangladesh has the potentials to become the drummer that other Muslim nations can march to.

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<sup>22</sup> Farooq Sulehria, ‘Secularism Triumphs? Bangladesh Supreme Court Sets an Example’, *Let Us Build Pakistan*, World Press Copyright 2010. <http://criticalpp.com/archives/6500>. Accessed on 14 September 2010.