

ROAD TO BANGLADESH SERIES

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BANGLADESH

Quest for Freedom and Justice



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Front: Demonstration in Dhaka on 1st March 1971, protesting Yahya's announcement of an indefinite postponement of the National Assembly Session scheduled for 3rd March.

Back: Facsimiles of the preamble of the Constitution of Bangladesh. Bangabandhu's signature is on the top of the first column and that of the author is third on the second column.

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Chapter 9

The Making of the Constitution

Elections, to elect 313 members to the National Assembly and 300 members to the Provincial Assembly, had been held in December 1970. The National Assembly was to function as a Constituent Assembly. This Constituent Assembly never met. The postponement, *sine die*, of its first meeting scheduled for 3 March had provoked the launch of the Non-Cooperation Movement. The deployment of military force to suppress it had led to the struggle for a sovereign, independent Bangladesh.

Many of the Bangali members elected to the National and Provincial Assemblies had sought refuge across the border from the onslaught of the Pakistan Army. Tajuddin Ahmad and Amirul Islam, who had managed to cross into India, started to contact the Awami League leadership who, by that time, had crossed over. One of the earliest acts of the Awami League leadership had been to draw up a formal proclamation of independence by the 'elected representatives of the people'. The proclamation of 10 April 1971 announced the formation of the provisional government, and referred to the declaration of independence by Bangabandhu Sheikh Mujibur Rahman on 26 March 1971. The proclamation was published on 17 April 1971, on the same day as a provisional government was sworn in at Mujibnagar, a border town in the district of Kushtia. The proclamation had constituted the Bangali members elected to the National and Provincial Assemblies to be members of the Constituent Assembly of Bangladesh. Bangabandhu Sheikh Mujibur Rahman was declared the president of Bangladesh, Syed Nazrul Islam the acting president, and Tajuddin Ahmad prime minister.

After the surrender of the Pakistan Army on 16 December 1971, and the return of Bangabandhu to Bangladesh on 10 January 1972, a

constitutional framework for the new state demanded immediate attention.

During the course of our plane journey, as Bangabandhu and I returned from captivity in Pakistan, Bangabandhu spoke about the possible form of government to be established. He was returning as president of Bangladesh: yet the Awami League had always been committed to a parliamentary form of government in which the prime minister would be the chief executive. Since I had been dealing with constitutional matters in the party, he asked me for my views. My opinion was clearly for a parliamentary form of government, headed by a prime minister. This had been part of the Six Points Programme. It would also be in the long term interest of the country, to provide for executive authority to be exercised by a Cabinet, led by a prime minister, who would be accountable to Parliament. It would help to develop the concept of collective responsibility, as well as the capabilities of a team which would, in the future, be able to provide leadership.

Bangabandhu agreed, and then raised the question of whether he should remain as the president, and let Tajuddin continue as the prime minister. I suggested that, if he were to remain president, this would repeat the problem faced by Pakistan in 1947 when Jinnah, having held the post of Governor General, had, in effect, exercised the role of chief executive and diminished the office of prime minister. If a parliamentary form were to function effectively, then such a situation should be avoided.

On 11 January, I received a message to go to the house on Hare Road, which had become the prime minister's residence, and was then occupied by Tajuddin Ahmad. I promptly responded to the summons and went with Amirul Islam, who had also been sent for. On arrival, we found that Justice Abu Sayeed Chowdhury had also been asked to come. A Cabinet meeting was in progress. Bangabandhu came out and told us that it had been decided that, pending the framing of a constitution, a parliamentary form of government should be introduced. He asked if a provisional constitutional instrument could be prepared immediately, to enable a Cabinet to be sworn in the following day? Could a draft be placed before the Cabinet within the next hour? This was to be the pace at which work moved in those early days. A draft was hurriedly prepared by us and submitted to the Cabinet. It was approved and sent to the Government Press for

publication in the Gazette. Bangabandhu then turned around and told Justice Chowdhury that as he (Bangabandhu) was to become prime minister, there was need to appoint a president as the constitutional head of state, and so he requested Justice Chowdhury to assume that office. Although this came as a surprise to Justice Chowdhury, he accepted this call to the high office of presidency.

Who was to administer the oaths of office? Since the old provincial High Court had become defunct, a provisional High Court had to be constituted and a chief justice appointed. An instrument constituting the new court was drawn up, and the search for a chief justice began. The first choice was Kamruddin Ahmad, a senior lawyer, who had moved from active politics in the fifties to diplomatic assignments and had, through the sixties, been engaged in legal practice. His book *The Socio-Political History of Bengal*, first published in 1967, had made a considerable impact because it reflected the emerging nationalist struggle. It had been proscribed more than once by the Government of Pakistan. He had kept out of active politics, but was always available for wise counsel. I recall, in April 1970 when elections to a Constituent Assembly, on a one-person one-vote basis but subject to the Legal Framework Order, were announced, Bangabandhu and his senior colleagues had met at Kamruddin Ahmed's house. I was present during the meeting at which, after extended discussions, the position of the Awami League was formulated. A draft statement had been prepared to the effect that an election to a Constituent Assembly on a one-person one-vote basis was welcomed, but that the Awami League would not countenance any restraints upon what would be a sovereign body, made up of elected representatives of the people.

When the decision to appoint him as chief justice was transmitted to Kamruddin Ahmed on the telephone, he was overwhelmed with emotion. He had lived with tragedy in his personal life; his son, a brilliant university student, who had joined the liberation war as a freedom-fighter, had been killed in action. So, he replied that he could not see himself accepting any office given his physical and mental state. The choice ultimately fell on Justice Sayem, a judge of the High Court.

The president and chief justice were sworn in the next morning. As Bangabandhu was leaving the ceremony, he asked me to come to the swearing-in ceremony of the new Cabinet that afternoon. To my surprise, he announced that he was going to include me in the

Cabinet. I was to be entrusted with the Law portfolio, with specific responsibility to steer the process of constitution-making, to which the highest priority had to be accorded.

All that existed in Dhaka were the remnants of a provincial law department. A Law Ministry had to be formed without delay. I was able to persuade a sitting judge, Dr. Munim, to accept the post of Law secretary. I had known him since our student days in London, where he did his doctorate in constitutional law; he had shared, with me, the teaching of constitutional law at the University of Dhaka through the sixties. He accepted on the specific understanding that he would return to the bench as soon as the work of constitution-making was completed.

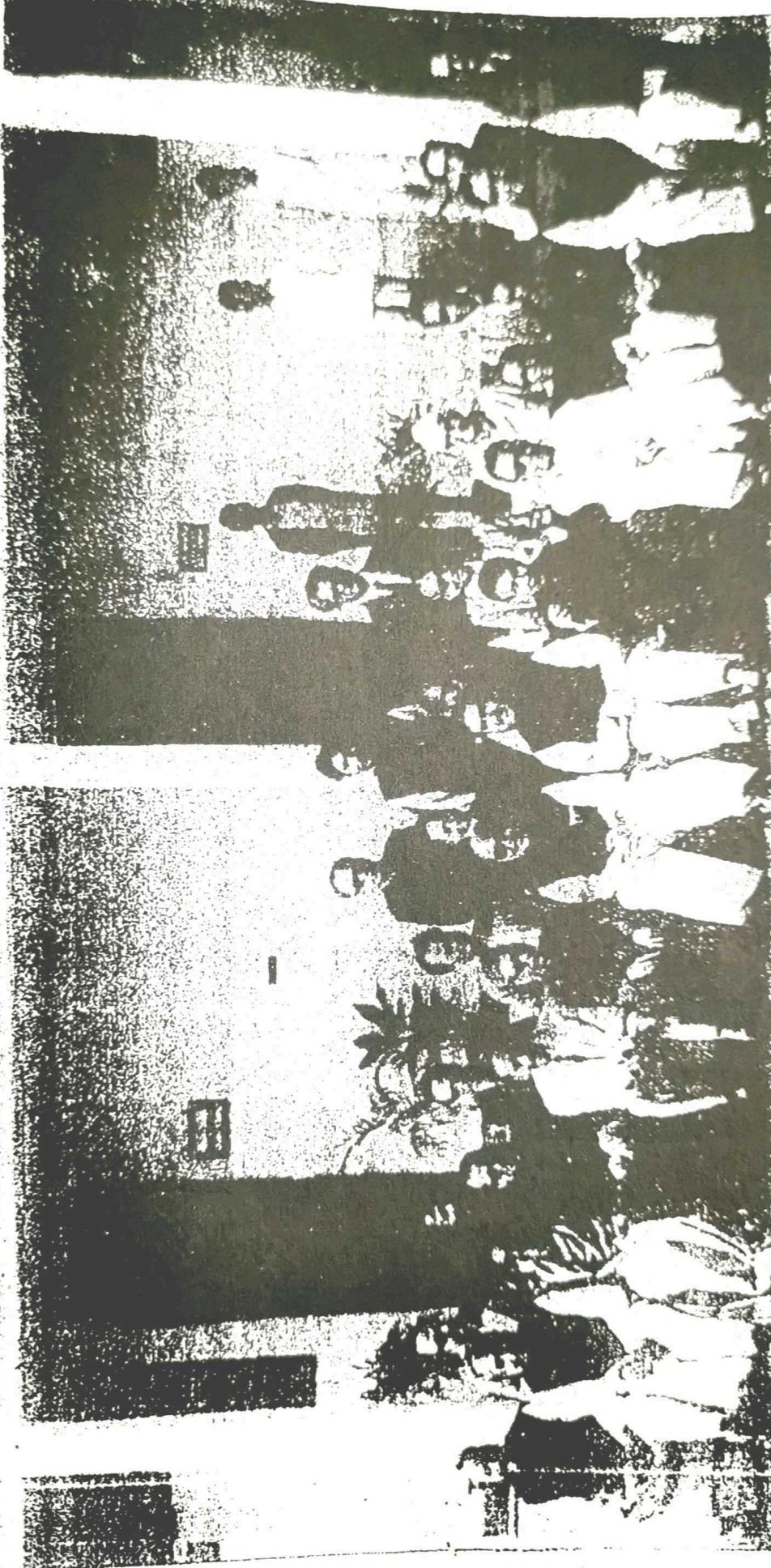
The text of the Constitution was to be in Bangla. This was to present a challenge, because this would be the first constitution to be drafted in Bangla. Dr. Anisuzzaman of the Bangla Department of the University of Chittagong, who had also been a member of the Planning Cell in Mujibnagar, was persuaded to join the small team that was formed to start preparatory work on the Constitution. The Constituent Assembly of Bangladesh Order was promulgated, and steps were taken to convene the first meeting of the Assembly on 10 April 1972, exactly a year after the elected representatives of the people had, by a revolutionary act, constituted themselves into a Constituent Assembly.

The first meeting of the Constituent Assembly was charged with deep emotion. It was a moment of communion with the souls of the martyrs who had paid with their lives to vindicate the rights of the people to make a constitution for a sovereign and independent People's Republic of Bangladesh. The wounds of the liberation struggle were still fresh, and the agonies suffered by the entire nation were keenly felt. Nearly a dozen elected members were among the many martyrs, to whom the nation was beholden. Speaking at the inaugural session, Bangabandhu expressed these feelings:

Our people have paid with their blood for our independence and for our right to meet today as the sovereign Constituent Assembly for Bangladesh. It is for us to ensure that the sacrifices of our martyrs will not have been in vain.

A Constitution Drafting Committee was formed by the Assembly, and I was entrusted to chair it. The 34 member committee included

The Musical Club of the University



THE MUSICAL CLUB OF THE UNIVERSITY

senior party leaders, Syed Nazrul Islam, Tajuddin Ahmad, Mansur Ali, Kamaruzzaman, and Khandaker Mushtaque Ahmed.¹ A member of the opposition, Suranjit Sengupta, was also included in the committee. Most of the senior lawyers who were members of the Assembly served on this committee. Razia Banu was included as a woman member. The committee was directed to produce a draft Constitution as early as possible. Guidance on general principles provided by the resolution of the Assembly, declared that the high ideals of nationalism, socialism, democracy, and secularism, which had inspired the brave martyrs to lay down their lives in the national liberation struggle, would be the fundamental principles of the Constitution. This was to be the starting point of the committee's work. These principles had been articulated through popular historic movements in the period between 1947 and 1971.

A constitution has been described as the autobiography of a nation which reflects its historical experience. To adopt the language of Justice Albie Sachs, one of the architects of the Constitution of the new South Africa, 'If a constitution is the autobiography of a nation, then we are the privileged generation that will do the writing. It is something that involves us all ... no one gives us rights, we gain them in struggle. They exist in our hearts before they exist in paper. Yet the intellectual struggle is one of the most important areas of the battle for rights. It is through concepts that we link our dreams to the acts of daily life'.² It was through a historic liberation struggle that we won our right to write a Constitution.

A new constitutional order was expected to empower people. With the end of British colonial rule in 1947, the people of the eastern wing, who constituted the majority in erstwhile Pakistan, expected to become masters of their own destiny within a democratic state.

¹ Other members of the Constitution Drafting Committee were: M. Abdur Rahim, Abdur Rouf, Md. Lutfar Rahman, Abdul Momin Talukdar, Prof. Abu Sayed, Mohammad Baitullah, Amirul Islam, Badal Rashid, Khondakar Abdul Hafeez, Mohammed Nurul Islam Monzoor, Shaukat Ali Khan, Md. Humayun Khalid, Asaduzzaman Khan, A. K. Musharraf Hossain Akhond, Abdul Momin, Shamsuddin Mollah, Sh. Abdur Rahman, Faqueer Shahabuddin Ahmed, Abdul Montaqim Chowdhury, Prof. Khorshed Alam, Serajul Haq, Dewan Abul Abbas, Hafiz Habibur Rahman, Md. Abdur Rashid, Suranjit Sengupta, Nurul Islam Chowdhury, Mohammad Khaled, Razia Banu, Dr. Kshitish Chandra Mondal.

² A. Sachs, *Protecting Human Rights in a New South Africa*, Cape Town, Oxford University Press, 1990, p. vi.

Political power would be used to achieve economic emancipation. The overwhelming majority of the population comprised of peasants and working people who, during the colonial period, had suffered economic deprivation as *projas* under an exploitative *zamindari* system introduced by the Permanent Settlement. Landlessness, indebtedness, and pervasive poverty had characterised the lives of ordinary men and women.

The dreams which were woven into the constitutional provisions, were those of a democratic political order in which power would truly belong to the people, to be exercised through a sovereign parliament composed of representatives elected on the basis of universal adult franchise. This parliament would bring about social and economic transformation. It was clearly expected that the representatives of the people would be committed to end exploitation through the implementation of programmes for fundamental economic and social change.

Nationalism represented an assertion by the people of their identity, which evolved during the course of its historical struggle into the right to their language, culture, traditions and history. In declaring independence, the people of Bangladesh had emphasised that they were exercising their right to self-determination to create a nation state. In Pakistan, the ruling elite had denied that there could be such a nationalism based on a distinct language and cultural heritage. Such insensitivity had been accentuated when Bangalis were confronted with the question: Are you a Bangali or a Muslim? Now that Bangladesh had been established as a nation state, and was recognised as such by the world, their national identity could no longer be questioned. This sense of fulfillment, however, led to smaller ethnic communities, in particular those living in the Chittagong Hill Tracts, feeling excluded. Manabendra Narayan Larma, an elected member, expressed these concerns in Parliament. Bangabandhu's response was that they would enjoy equality in all respects, and that special provisions would be made through affirmative action to ensure such equality. Specific constitutional provisions were included in Articles 28 and 29. His assurance, that members of all ethnic communities would enjoy equal rights, did not specifically address the question of ethnic identity and language.

Democracy expressed the long-suppressed desire of the people to govern themselves, to guide their own destiny. They looked ahead to

a new dawn after the long night of terror and oppression that they had suffered under colonial rule and the military dictatorships that had been imposed on them. The struggle to establish democracy still continues. Subsequent events were to undermine democracy and subject the people, once again, to the oppression of a military dictatorship.

Secularism stands for the rejection of communalism in all its forms, and of the abuse of religion for political purposes. The cynical exploitation of religion for bolstering the interests of the ruling elite was part of our experience. We had seen the worst crimes committed in the name of Islam. Pakistan had called itself an Islamic state but the adoption of that label had not kept it from functioning as an unjust and authoritarian state which, in the end, resorted to murder and rape and ultimately destroyed itself. The principle of secularism that was embodied in the Constitution was very carefully worded so as to make clear that it did not stand for hostility to religion. The constitution-makers were fully conscious that the majority of the Bangali people were practising Muslims. The principle of secularism, as spelt out in the Constitution, was to maintain a separation between the state and religion and to create an environment in which all religious communities could coexist in harmony, free from discrimination and religious intolerance, specifically that:

The principle of secularism shall be realised by the elimination of-

- (a) communalism in all its forms;
- (b) granting by the State of political status in favour of any religion;
- (c) abuse of religion for political purposes;
- (d) discrimination against, or persecution, of persons practising a particular religion.

When President Gaddafi of Libya asked Bangabandhu, at the Non-Aligned Summit in Algiers in 1973, why Bangladesh had embodied secularism in its Constitution, he replied:

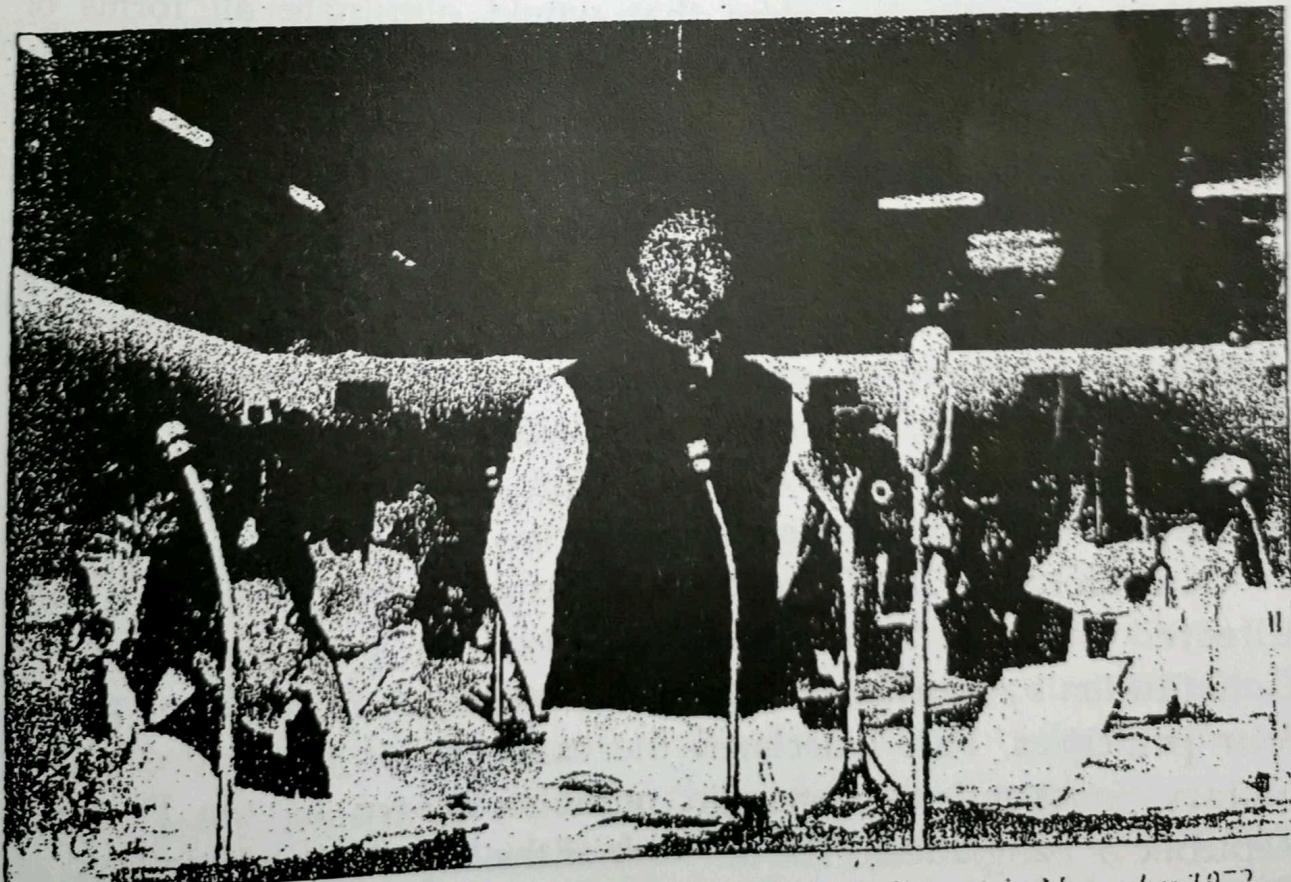
Our secularism is not against religion. Our secularism stands for harmony among members of all religions. Indeed, in the opening of the Koran Allah is described as *Rubb-al-Alimin*, the head of all creation and not of *Rubb-al-Muslimin*, the head only of Muslims. This is the spirit which underlines our secularism.

The creation of an environment in which members of all religious communities would live in harmony was not only seen as a rejection

of the hypocrisy and bigotry of the past twenty-four years, but as a positive step in the struggle against communalism which had inflicted untold human suffering in the countries of South Asia and had to be fought relentlessly. Separation of the state from religion implied that an individual's private faith would not be a matter for the State to judge.

Socialism reflected the commitment to create a just and egalitarian society; a society in which there would be no exploitation, and in which equality of opportunity would be assured. The vision of an independent Bangladesh, which had inspired the freedom-fighters, was of a society which would be free from exploitation. They were quite clear that, having freed themselves from the infamous '22 families' of Pakistan, they were not going to create '22 families' to take their place in Bangladesh.

Within seven months, the task of drafting the Constitution was completed. The Constituent Assembly adopted it on 4 November 1972, and it came into force on 16 December 1972, the first anniversary of the conclusion of the liberation war. The speed with which the task was accomplished received a great deal of appreciation, both at home and abroad, while the critics of the administration charged that



Kamal Hossain presenting the draft Constitution Bill in Parliament in November 1972

sufficient exchange of ideas and criticism of the provisions contained in the Constitution had not taken place.

This was certainly not the case. Not only did the drafting committee represent the various tendencies within the Awami League, but it also included a member from the opposition. Extensive discussions had taken place in the committee, which worked for hours, sitting late into the night every day for several months. Different points of view within the committee, were reflected in the discussions on major issues such as the definition of the fundamental principles, and on the provision that a member, having been elected on a party ticket, would have to resign if s/he voted against his/her party. Often, after prolonged debate and discussion, the issues were resolved by consensus. A large number of amendments were proposed for the draft Constitution Bill, and over fifty of the amendments proposed by the members were incorporated.

In formulating the detailed provisions of the Constitution, there were two aspects that engaged the greatest amount of attention. The first related to the provisions which were to establish the framework of a parliamentary democracy. The second was to make adequate provision for the attainment, through the democratic process, of a social and economic system that would eliminate all forms of exploitation, ensure equality of opportunity and of the basic conditions for a decent life for our people.

In pursuance of the first aim, a bill of rights was embodied in the Constitution. The fundamental rights guaranteed by the Constitution included: equality before the law; equality of opportunity in public employment; right to life and personal liberty; freedom of movement; freedom of assembly; freedom of association; freedom of thought, conscience, and speech; freedom of profession, occupation, and business; freedom of religion, right to privacy of home, and correspondence; and the right to property.

Our efforts, in the Constitution Drafting Committee, had been directed towards, as faithfully as possible, preparing a draft Constitution by working out specific provisions on the basis of the four principles. Part I declared the existence of Bangladesh as a unitary, independent, sovereign republic known as the People's Republic of Bangladesh. The territory of the Republic was defined as 'those territories which immediately before the proclamation of

independence on the 26th day of March, 1971 constituted East Pakistan'. Bangla was declared to be the state language of the Republic. *Amar Sonar Bangla* ... was adopted as the national anthem. The most important of all the articles was Article 7, which affirmed that all powers in the Republic belong to the people, and that their exercise, on behalf of the people, would be effected only under, and by, the authority of the Constitution.

Part II declared nationalism, socialism, democracy and secularism to be the fundamental principles of state policy, and further enunciated a number of principles derived from these four principles. The fundamental principles of state policy sought to spell out the vision of an exploitation-free society that we believed represented the aspirations of the people of Bangladesh. It provided that national unity and solidarity of the people of Bangladesh were the bases on which the Republic was established. It further provided that a socialist economic society would be established with a view to ensuring the attainment of a just and egalitarian society, free from the exploitation of man by man.'

The Republic would be a democracy in which fundamental human rights, freedom, and the dignity and worth of the human person would be guaranteed, and in which effective participation of the people through their elected representatives would be ensured at all levels. The principle of secularism reflected the collective determination of the people of Bangladesh to exorcise from the soil of Bangladesh those dark forces of communalism and religious bigotry that had wrought such horrors in our land. This, however, in no way precluded the full and free practice of religion by any person of his/her faith. The principles set out in that part defined the principal features of an exploitation-free economy. The principles of ownership were clearly set out, namely that the people would own and control the instruments and means of production, so that the key sectors of the economy would be in public ownership. Subject to this, there would be co-operative and private ownership within such limits as may be prescribed by the law. The fundamental responsibility of the State - to emancipate the toil masses, peasants, workers, and disadvantaged sections of people from all forms of exploitation - was recognised; it was to be attained through a planned economic growth and a constant increase of productive forces and steady improvement

in the material and cultural standard of living of the people, with a view to securing for its citizens:

- a) the provision of the basic necessities of life, including food, clothing, shelter, education, and medical care;
- b) the right to work, that is the right to guaranteed employment at a reasonable wage having regard to the quantity and quality of work;
- c) the right to reasonable rest, recreation, and leisure; and
- d) the right to social security, that is to say to public assistance in cases of undeserved want arising from unemployment, illness, or disablement, or suffered by widows or orphans or in old age, or in other such cases.

Other basic principles, and social and economic objectives, were set out. These included adoption of effective measures to remove disparity in standards of living between the urban and rural areas; the establishment of a uniform, mass-oriented, universal system of education based on the needs of society; the raising of levels of nutrition and the improvement of public health. Further, it was provided that the State should endeavour to ensure equality of opportunity to all citizens and, in particular, to ensure the equitable distribution of opportunities in order to obtain a uniform level of economic development through the Republic. The State was also committed to adopting effective measures to reduce social and economic inequality. Work was recognised as a right, a duty, and a matter of honour for every citizen. The duty of every citizen – to observe the Constitution and the laws, to maintain discipline, to perform public duties and to protect public property – and of every public servant – to strive at all times to serve the people – were affirmed as was the principle of the separation of the judiciary from the executive organs of the state. The basis of Bangladesh's relations with other states was set out, namely, that it would base its international relations on the principles of respect for national sovereignty and equality, non-interference in the internal affairs of other countries, peaceful settlement of international disputes, and respect for international law and the principles enunciated in the United Nations Charter. A commitment was given to support oppressed people throughout the world who were waging a just struggle against imperialism, colonialism, or racialism.

These principles were affirmed to be fundamental to the governance of Bangladesh. It was expressly declared that these principles would

be applied in the making of laws, that they would be a guide to the interpretation of the Constitution and the other laws of Bangladesh, and that they would form the basis of the work of the State and of its citizens. These principles were the ones on the basis of which the fundamental social and economic transformation of the country was envisaged. The attainment of such goals involved the making of necessary laws and the enforcement of appropriate laws and policies by the executive authority. This would involve planning, adequate allocation of resources, and a total effort on the part of all people, both in government and outside.

A number of basic conventions related to the working of a parliamentary democracy, which are often implied in other Constitutions, were spelt out in our Constitution. The brief periods when parliamentary government had been allowed to function in Pakistan had been marked by bitter experiences of excessive interference by those who held the office of 'constitutional head', either as president or as Governor General. Indeed, such interference and manipulation had undermined parliamentary democracy and provided a pretext for the military to usurp power.

Therefore, a conscious departure was made from those constitutions which formally vested executive authority in the president, while providing that there would be a Council of Ministers headed by the prime minister, who collectively responsible to Parliament to aid and advise the president. The question which engaged the attention of the Constitution Drafting Committee was whether the well known conventions of Cabinet government, as practiced in Britain, should be included in the form of written provisions or whether these should remain unwritten. It was finally decided to write the basic conventions of Cabinet government into the Constitution.

The office of the president was defined in Article 48 of the Constitution in the following terms:

(2) The President shall, as Head of State take precedence over all other persons in the State, and shall exercise the powers and perform the duties conferred and imposed on him by this Constitution and by any other law.

(3) In the exercise of all his functions, save only that of appointing the Prime Minister pursuant to clause (3) of Article 56, the President shall act in accordance with the advice on the Prime Minister:

Provided that the question whether any, and if so what, advice has been tendered by the Prime Minister to the President shall not be enquired into in any court.

Article 55(2) provided that 'the executive power of the Republic shall be exercised by or on the authority of the prime minister' in accordance with the Constitution, that is, as the head of a Cabinet, collectively responsible to Parliament. Article 56(3) provided that the president would appoint as prime minister, the Member of Parliament who appeared to command the support of the majority of the Members of Parliament.

Article 57(2) provided that if the prime minister ceased to retain the support of a majority of the Members of Parliament, he would either resign his office or advise the president to dissolve Parliament, and if he so advised, the president shall dissolve Parliament accordingly. Having regard for the long interruption in the functioning of parliamentary democracy, it was considered prudent to expressly set out the basic conventions of Cabinet government in the Constitution.

A further consideration which contributed to this decision was the juristic controversy about the precise content of some of the conventions, and the existence of diverse opinions regarding to the application of these conventions to what might be regarded as 'penumbral' cases. Thus, to the question whether the president was bound to accept the advice of a prime minister who had been defeated on the floor of the House, a clear answer was provided by Article 57(2) of the Constitution. This was intended to eliminate uncertainty.

A review of British and Commonwealth constitutional practices had revealed that doubt had been expressed as to whether the constitutional head was in every case bound to accept the prime minister's advice on dissolution. Article 57(2) had adopted the better view that it was obligatory for the constitutional head to grant dissolution since the idea underlying this convention was that, in modern times, a ministry was the direct result of general elections and that its defeat in the House automatically entitled it to appeal, once again, to the people.

The vital role of political parties in the working of parliamentary democracy was recognised while framing the Constitution. Universal adult franchise and the complexity of the problems facing modern government made effective and disciplined parties, seeking popular support on the basis of a distinct programme, essential to the working of a parliamentary democracy. It was, therefore, felt

necessary that a provision should be included to deter the practice of 'floor crossing', which militated against the functioning of a healthy parliamentary democracy. This practice had been a source of concern in other newly independent countries; indeed, Kenya had amended its Constitution to provide that a member who resigned from the party from which he had been elected should vacate his seat. Article 70 of the Bangladesh Constitution provided:

A person elected as a member of Parliament at an election at which he was nominated as a candidate by a political party shall vacate his seat if he:

- (a) resigns from the party; or
- (b) votes in Parliament against that party; but shall not thereby be disqualified for subsequent election as a member of Parliament.

No provision of the Constitution evoked more lively discussion, both in the Committee and in the Assembly, than Article 70. The original form in which it was included in the Constitution Bill had also contemplated that expulsion from a party, on whose ticket a member was elected, would render the seat of that member vacant. This part of the provision was widely regarded as being far too drastic. Many members protested that this condition would seriously restrict their freedom of speech and independent judgment, and thus reduce their effectiveness in Parliament. The strongest argument in favour of this article, was based on the experiences following the 1954 elections to the Provincial Assembly in East Bengal. Regrettable defections resulted in changes in the government and created instability. Bangabandhu recalled his experience of how he had to be vigilant to prevent his party members from defection induced by the promise of ministerial posts. He said that while he was guarding the front door of the MPs hostel, defectors would slip out of the back door. Ultimately, the form in which Article 70 was incorporated limited the grounds for the vacation of a seat to only resignation or to voting against the party.

Judicial review, both of legislation and administrative action, was accorded due importance in the Bangladesh Constitution. The question had arisen whether it would be preferable to vest this jurisdiction by referring to specific prerogative writs, such as *mandamus*, *certiorari*, *quo warranto*, and *habeas corpus*, as had been done in Article 226 of the Indian Constitution, or whether it would be better to spell out the scope and substance of the remedy available under this Article. The most convincing reason for adopting the latter

course was that, thereby, the jurisdiction was amplified. Thus, not only judicial or quasi-judicial, but also purely administrative, acts would be subject to judicial review. Under this formulation, the Court is vested with the power to declare, as being without legal effect, any action of a public functionary or local authority that is found to have been taken without lawful authority.

The Supreme Court is expressly vested with the power to enforce fundamental rights. Article 44 expressly provided:

The right to move the Supreme Court, in accordance with Clause (1) of Article 102, for the enforcement of the rights conferred by this Part, is guaranteed.

The Constitution laid emphasis on the need to establish a participatory democracy; in the language of Article 11, it called for 'effective participation by the people through their elected representatives in administration at all levels'. It was well recognised that any significant social and economic transformation could only be effected through the active participation of people in the making and implementation of plans for social and economic development. This prompted the inclusion of a special chapter, the third chapter of Part IV on 'Local Government'. This chapter contained two clear provisions, Articles 59 and 60, which defined the position of local government in the scheme of the Constitution, in the following terms:

- 59(1) Local government in every administrative unit of the Republic shall be entrusted to bodies, composed of persons elected in accordance with law.
- (2) Everybody such as is referred to in clause (1) shall, subject to this Constitution and any other law, perform within the appropriate administrative unit such functions as shall be prescribed by Act of Parliament, which may include functions relating to:
 - (a) administration and the work of public offices;
 - (b) the maintenance of public order;
 - (c) the preparation and implementation of plans relating to public services and economic development.

To give full effect to the provisions of Article 59, Article 60 provided that Parliament shall, by law, confer powers on the local government bodies referred to in that Article, including power to impose taxes for local purposes, to prepare their budgets, and to maintain funds.

It is noteworthy that these provisions aimed to introduce a decentralised administration, with elected members of local councils entrusted with executive powers and with the power of taxation, to reduce dependence on a centralised and bureaucratically dominated administrative structure. It had been the mark of colonial governments to control its subjects through a top-down and hierarchical administrative system, with bureaucrats carrying out directives.

In a society where urgent economic and social problems cried out for solutions, special provisions were made to enable economic and social reforms, without obstacles being created by sections of the legislature manipulated by vested interests.

The committee was conscious that the constitutional protection of the right to property, and the freedom of trade and business, had created difficulties in the path of implementing social welfare measures through legislation. The fate that the New Deal legislation in the United States had suffered in the thirties, when it was first subjected to judicial review, was a warning to all who aimed at social and economic amelioration of the conditions of the people through legislation. In any system where the validity of legislation stood to be tested by reference to a fundamental law, there would be the continuing risk of such legislation being held to be void on the grounds of inconsistency with some provisions of the fundamental law. The fate of land reforms legislation and nationalisation laws in other systems and, indeed, the history of the different amendments to the Constitution of India, persuaded the committee to take special care in formulating the provisions relating to fundamental rights, in particularly the right to property and to freedom of trade and business, so that legislative efforts aimed at altering property relations and re-ordering the economic structure should not be obstructed by protracted litigation. This is why the original text provided that the right to property and the freedom to carry on trade or business would be enjoyed *subject to any restriction that may be imposed by law*. It also provided that property may be acquired *with or without compensation*, and, further, that the question of adequacy of compensation would not be justiciable.

Pre-constitutional legislation through which nationalisation and other economic measures were effected had been specially protected

by their inclusion in the First Schedule to the Constitution. The wide protection extended to these laws is evident from the terms of Article 47(2) which provided as follows:

47(2) Notwithstanding anything contained in this Constitution the laws specified in the First Schedule (including any amendment of any such law) shall continue to have full force and effect, and no provision of any such law, or anything done or omitted to be done under the authority of such law, shall be deemed void or unlawful on the ground of inconsistency with, or repugnance to, any provision of this Constitution:

Provided that nothing in this article shall prevent the modification or repeal of any such law or provision by Act of Parliament, but no Bill for such an Act, if it contains provision for or has the effect of divesting the State of any property, or of enhancing any compensation payable by the State, shall be presented to the President for assent unless it is passed by the votes of not less than two-thirds of the total number of members of Parliament.

With regard to further legislation relating to economic and social measures, Article 47(1) provided special protection in the following terms:

47(1) No law providing for any of the following matter shall be deemed to be void on the ground that it is inconsistent with, or takes away or abridges, any of the rights guaranteed by this Part:

- (a) the compulsory acquisition, nationalisation or requisition of any property, or the control or management thereof whether temporary or permanent;
- (b) the compulsory amalgamation of bodies carrying on commercial or other undertakings;
- (c) the extinction, modification, restriction or regulation of rights of directors, managers, agents and officers of any such bodies, or of the voting rights of persons owing shares or stock (in whatever form) therein;
- (d) the extinction, modification, restriction or regulation of rights to search for or win minerals or mineral oil;
- (e) the carrying on by the government or by a corporation owned, controlled or managed by the government, of any trade, business, industry or service to the exclusion, complete or partial, of other persons; or
- (f) the extinction, modification, restriction or regulation of any right to property, any right in respect of a profession, occupation, trade or business or the rights of employers or employees in any statutory public authority or in any commercial or industrial undertaking;

(g) if Parliament in such law (including, in the case of existing law, by amendment) expressly declares that such provision is made to give effect to any of the fundamental principles of state policy set out in Part II of this Constitution.

Keeping in view the past experience of delays and difficulties in implementing economic measures and in administering nationalised and statutory enterprises on account of litigation, two further provisions were included in the Constitution. The first provided for the establishment of administrative tribunals to deal with matters relating to, or arising out of, 'the acquisition, administration, management, and disposal of any property vested in or managed by the government... by or under any law, including the operation and management of, and service in, any nationalised enterprise or statutory public authority' (Article 117). It was provided by Article 117(2) that where any administrative tribunal is established under that article, no court would entertain any proceedings or make any order in respect of any matter falling within the jurisdiction of such tribunal.

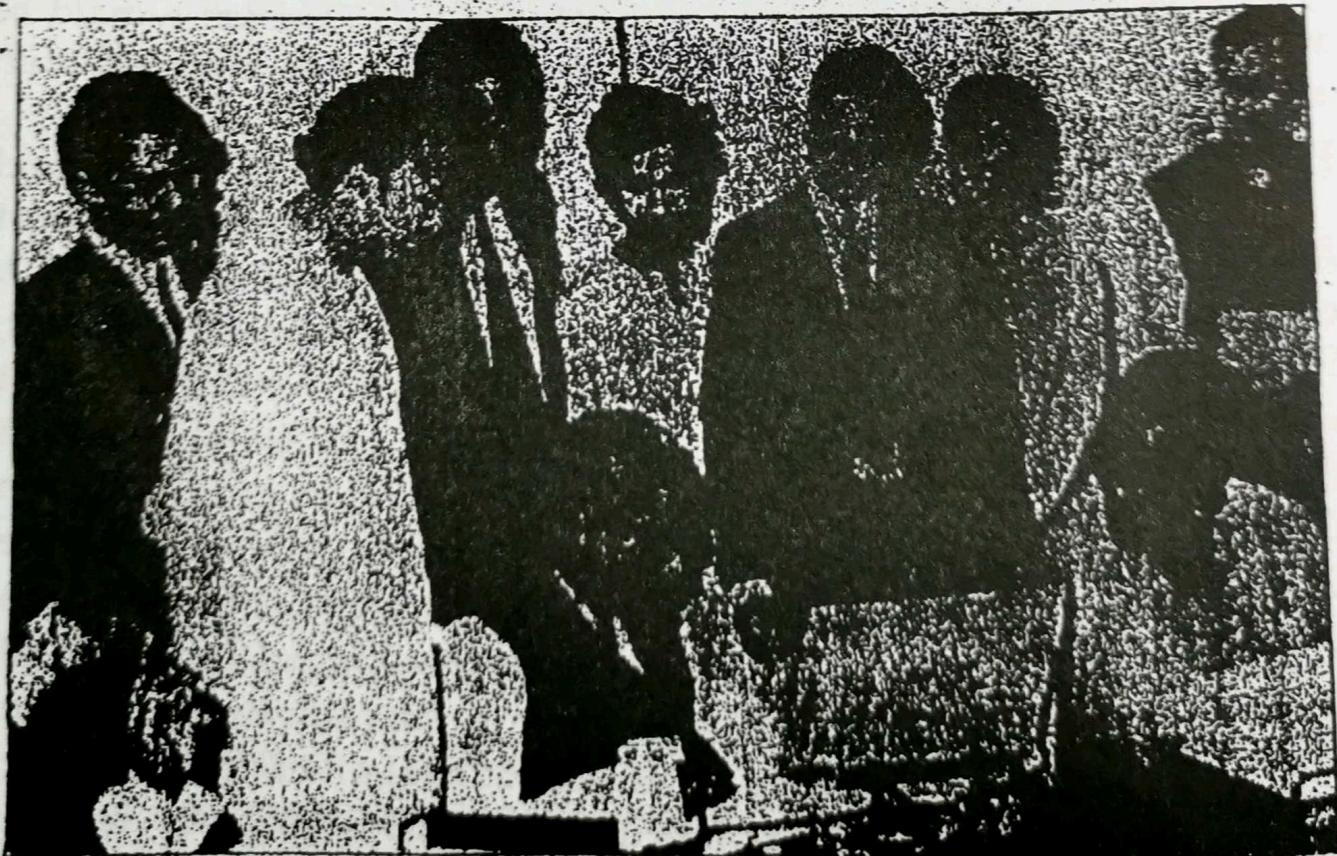
Part VI provided for an independent judiciary. A Supreme Court was to be established, consisting of an Appellate Division, which would be the final appellate forum; a High Court Division would be a court of unlimited original jurisdiction and would be invested with powers which were popularly referred to as the writ jurisdiction.

We thought it necessary to follow the example that had found favour in unitary states and provide for an integrated Supreme Court consisting of the High Court Division and the Appellate Division. A Supreme Court, which was separate and apart from the High Court, would imply that the Supreme Court was the highest court and that the High Court, being a court below it, would then lose its present character. Ultimately it would not be possible to have just one High Court, but to fragment it into four or more, thus totally destroying the character of having a single court of unlimited original jurisdiction invested with writ jurisdiction and the power to enforce fundamental rights. The long-aspired goal of separation of the judiciary from the executive was expressly provided for. All judicial officers, including magistrates exercising judicial functions, would be subject to the control of the High Court in respect of postings, promotions, leaves and discipline. The High Court was also given a controlling role in their appointment.

Another innovation was a provision for specialised administrative tribunals for certain matters, which would provide genuine and rapid redress and at the same time not impose a burden on the Writ Jurisdiction. Such tribunals were provided for in the case of service matters, in the case of property vested in the government under any law, including nationalised enterprises and the laws relating to property, trade and business, and certain other specific laws which were kept out of the purview of the Writ Jurisdiction.

The excessive delays caused by *ex parte* interim orders issued in writ proceedings prompted the inclusion of a provision to the effect that when in such proceedings an interim order was sought, the Court should consider whether such an interim order was likely to have the effect of prejudicing or interfering with any measure designed to implement any development work; if there was such a likelihood, then no interim order should be made until reasonable notice had been given to the Attorney General and, after hearing him, it was determined that the interim order would not have such effect.

In making these special provisions, a conscious attempt was made to eliminate possible sources of obstruction to measures intended to bring about social and economic restructuring for the benefit of the



Shilpacharya Zainul Abedin presenting the first illustrated copy of the Constitution to Bangabandhu for his signature. Artist Hashem Khan on the left and Abdur Rauf (third from right), who transcribed the Bangla text by hand.

people. These provisions alone were not adequate to meet the problems inherent in the effort to restructure the economic order through a democratic process.

The radical economic and social transformation needed to establish a just and egalitarian society, free from exploitation, required fundamental changes to be brought about in attitudes and values, and in the institutional instruments through which plans and policies were to be made and implemented. Both the state apparatus and that of the party needed thorough reorganisation. The new order could only be built through relentless work and large increases in production in the fields and the factories. The achievement of the production targets would require the highest degree of dedication and discipline, of motivation and sacrifice. The people of Bangladesh had demonstrated during the liberation struggle that they were capable of rising to these heights. But to sustain such endeavours, it was necessary that an environment be created in which sacrifices would be equitably shared and in which the privileged elite, old or new, were not seen to be indulging in wealth and luxury at the expense of the toiling masses who were the principal producers of the wealth. The colonial state apparatus which had been inherited was, and remains, both elite-dominated and inefficient. The process of making and implementing policy at the centre, as well as the system of district and local administration, were entirely inadequate and inefficient to carry out the task of bringing about major social and economic change. An elite-dominated bureaucracy by its very nature, is committed to the protection of a *status quo* that favours the elites. Red tape remained the most lasting contribution of the colonial administration. In fact, things had gone from bad to worse since the uncertainty introduced during successive Martial Law regimes had led to the arbitrary dismissal of civil servants. This had created conditions in which the majority of civil servants saw the best course to be that of taking no action, deferring action, or taking only decisions certain to please their superiors. In the second half of the sixties, some civil servants had emerged who, as confidants of the regime then in power, had become 'powerful' and acquired the habit of taking arbitrary decisions, for which they were not accountable to the people. Neither of these tendencies was to make the inherited bureaucracy a suitable instrument for making and implementing programmes for social and economic change.