CHAPTER XX

RULE OF LAW IN BANGLADESH

The term 'rule of law' is used as opposed to the concept of 'rule of man'. The primary meaning of rule of law is that the ruler and the ruled must be bound by the same law. No separate law or system can be provided for the ruler.

History of Rule of Law

The history of rule of law is the history of emergence of political liberalism from the bondage of political despotism. The study of history of every major legal system, e.g. USA, UK, France etc. will necessarily reveal the idea that all of them had once bitter experience of despotism. All the despotic Kings claimed themselves to be the representatives of God and as representatives of God they claimed themselves to be above the law and under the cover of this design they did all the injustices and arbitrary actions over the subjects. But gradually protests against this despotism began to grow. In thirteenth century Bracton, a judge in the reign of Henry III wrote—

> "The King himself ought to be subject to God and the law, because law makes him King."

This universal law (or natural law as it is sometimes called) was attributable to God. In the seventeenth century, L.C.J Coke identified natural law with the common law of England which he described as 'the perfection of reason'. Since human reason was given by God, the principles of natural law were deducible by man by the use of his reason. He, therefore, emphatically claimed that the common law must be above the King and the Executive (i.e. the king's ministers). Thus the idea of rule of law as of human rights, to a great extent, evolved as a result of political absolutism since rights and freedoms of man became a slogan against the injustices and indignities committed by tyrannical or despotic government. As a necessary outcome of arbitrary actions by King John there arose conflict between the King and the wealthy landowners or barons in arms. At the climax point of this conflict they ultimately compelled the King to accept their terms embodied in Magna Carta. This Magna Carta was the first foundation of rule of law. Because this was the document in the world history where for the first time we find a strong

protest against arbitrary punishment. It ensured the prohibition of imposition of taxation by the King without the assent of the Great Council and arbitrary seizure of property by Royal officials, freedom of movement for merchants within the realm, trial by jury etc. Though this charter was in no sense a peoples' charter, its subsequent tradition transformed it into a charter of English liberties, and at present it is considered as one of the most important landmarks in the history of human rights and free government. The famous article 39 of it says—"No freeman might be arrested, imprisoned, dispossessed, outlawed or exiled or harassed in any other way save by lawful judgment of his peers or of the law of the land."

Thus the charter made a principle absolute that the authority of the King was not unlimited and arbitrary and the abuse of power might be resisted. Later on during the long struggle for power between the king and parliament in the seventeenth century, the parliamentary forces lastly won through the Glorious Revolution in 1688 and the supremacy of the parliament over the King and all other bodies was assured by the Bill of Rights, 1689. It was now made certain that the King might be under the law and parliament. Thus the rule of law[1] (law made by parliament) in place of rule by man (King) with its divine right came to be established. In words of Sir Ivor Jennings—

> "The rise of liberalism and the burden of despotic rule created popular leaders prepared to rebel. As the liberal tradition developed on the English principles and by French methods, many monarchs shared the fate of Louis XVI or were urged unceremoniously into retirement. It was considered necessary to extend the notion and ambit of Rule of Law. It ceased to be only a rule among citizens and became also a rule among rulers."[2]

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1 The doctrine of Rule of Law (as understood by Coke) had now to be reconciled with the other important doctrine of the supremacy of parliament. Either the law was supreme or parliament was supreme. The outcome of this contention was the adoption of the theory or principle that the common law was subject to such changes as the King-in-parliament must make from time to time. Henceforward the law now regarded as supreme law was the common law and statute law i.e. the whole of English law. Ref. Padfield, Colin, F. *British Constitution Made Simple.*

2 Jennings, Ivor. *The Law and the Constitution,* 5th ed, Ibid, P. 45

Professor Dicey and his Theory of Rule of Law

The general conception of the rule of law or rule of law as a principle of constitutional government has become identified and crystallized with professor Dicey's usage of that phrase in his work 'the Law of the Constitution' first published in 1885 though the phrase has been in use since at last as early as the time of Aristotle in fourth century B.C. Professor Dicey first stated that the rule of law was one of the essential features of the constitution of UK. He gave three meanings of the concept of rule of law.

1.Absence of Arbitrary Power

"Rule of law means, in the first place, the absolute supremacy or predominance of regular law as opposed to the influence of arbitrary power, and excludes the existence of arbitrariness, of prerogative or even of wide discretionary authority on the part of the government ..... a man may be punished for a breach of law, but he can be punished for nothing else."[1] ... No man is punishable or can be lawfully made to suffer in body or goods except for a distinct breach of law established in the ordinary courts of the land. In this sense the rule of law is contrasted with every system of government based on the exercise by person in authority of wide, arbitrary or discretionary powers of constraint."[2]

2.Equality Before Law

Rule of law, in the second sense, means the equality of law or equal subjection of all classes to the ordinary law of the land administered by the ordinary law courts. In this sense rule of law conveys that no man is above the law; that officials like private citizens are under a duty to obey the same law, and there can be no special court or administrative tribunal for the state officials.[3]

3.Constitution is the Result of the Ordinary Law of the Land

The rule of law lastly means that 'with us, the law of the constitution, the rules which in foreign countries naturally form part of a constitutional

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1 Dicey, A.V. *Law of the Constitution, Ibid.* P 202
2 *Ibid.* P. 188
3 Dicey, A.V. *Ibid.* PP. 202-3 and 193

code, are not the source, but the consequence of the rights of individuals as defined and enforced by the courts'.[4]

Dicey means by this that the general principles of the constitution i.e. the rights of the citizens e.g., freedom of movement, speech etc. are secured not by guaranteed rights proclaimed in a formal constitution like that of USA, rather they are the result of judicial decisions determining the rights of private persons in particular cases brought before the courts. Hence the constitution is the result of the ordinary law of the land, for its general principles have evolved from the rights of individuals as upheld by the courts in specific cases. This is in marked contrast with many a written constitution in which the rights of the individual are declared.

Though Dicey's theory has been criticsed from different angles, the three important things—absence of arbitrary power, guarantee of citizens right and the equality before law—over which he made emphasis are universally recognised as the core of traditional[1] theory of rule of law.

Criticism of Dicey's Exposition

Several attacks have been mounted against Dicey's exposition of rule of law. As to his first principle he says that there would be no arbitrary or discretionary power. But even in Dicey's lifetime there were both arbitrary and discretionary power in Britain and they still exist in all governmental systems and also it is important to mention that without arbitrary power in exceptional cases the governmental machinery would remain unworkable. Preventive detention, emergency situation, compulsory acquisition of goods and properties, direct enforcement of administrative decisions etc. measures are common and essential for development purposes in exceptional cases and these measures are the best examples of exercise of arbitrary power. Again, there is a distinction between arbitrary power and discretionary power which Dicey failed to trace. Of course, it may be contended that 'it is still an essential principle of constitutional government in UK that there should be no arbitrary

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4 Dicey, A. V. *Ibid*, P. 203

1 The Theory of rule of law as propounded by Dicey is traditional in the sense that the concept of rule of law has undergone a tremendous change in recent time which has been discussed in this chapter.

power to arrest or punish.[2] But discretionary power is sometimes a must for governmental function. For example, judges are given wide discretionary power in granting bail, defining some crimes, explaining laws etc. Ministers and other executive bodies are sometimes given wide discretionary powers by the statute. Thus a minister may be empowered by law 'to act as he thinks fit' or 'if he is satisfied.' In many countries with written constitution discretionary powers are expressly given to the executive e.g. in promulgating ordinances, determination of emergencies etc.

As regards the second postulate Dicey says that there should be equality before law and all are amenable to ordinary courts of the land. But this principle has many exceptions because equality before law is not possible in every case. The king or the head of the state in other countries are immune from both criminal and civil action, judges are immune from personal responsibility for their official acts even if they might have acted beyond their jurisdiction but not knowingly. There are also diplomatic immunities and members of embassies are exempted from process in English courts though not from legal liability. Members of parliament have certain immunities from legal proceeding in respect of some of their activities. Again, special courts are common features in all countries. Rights and obligations of individuals are now largely decided in many cases not by ordinary courts but by special courts like labour tribunal, administrative tribunal, juvenile court, court martial, military court etc. Not only that various Acts like Factories Act, Education Act etc. have vested the executive with certain judicial powers. All these have certainly curtailed the jurisdiction of the ordinary courts of law and refuted the substance of Dicey that there is only one kind of law and one kind of courts that exist in England.

Again, Dicey says that there should be no separate administrative courts as in French '*Droit Administratif*'. He believed that the *Droit Administratif* in France favoured the officials. But 'rule of law has no effective contrast with *droit administratif* for the purpose of *droit administratif*' .... is not to exclude public officers from liability for

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2 Wade. E.C.S and Bradley. A.W. *Constitutional Law*. Ibid. P.66

wrongful acts, but to determine the powers and duties of publice authorities and to prevent them from exceeding or abusing their powers.'[1]

As regards his third postulate Dicey says that fundamental rights and liberties emanate form judicial decisions. But this is one-sided view. Because in England people have got many rights through the law of parliament and the charters issued by the monarchs. The supremacy of parliament is the Constitution. It is recognised as fundamental law just as a written constitution is regarded as a fundamental law. Various public authorities, the Crown, the House of Parliament, the court, the administrative authorities have powers and duties and most of these are determined by statute not by the courts.

So it has been clear from the above discussion that the abolition of discretionary power is not possible fully and also the equality before law is not possible in every case. So the concept of rule of law as propounded by Dicey needs modification.

Rule of Law in True and Modern Sense

The concept of rule of law may be used in two senses – narrower sense and wider sense. In narrower sense it means that people will abide by law and they will be governed by law only. In wider sense it means that the government will be administered by law and under the authority of law only; it will not do anything beyond the authority of law. Thus what in essence means that rule of law is a government by law and not by man. But such a definition of rule of law still remains a traditional one as explained by Dicey. If rule of law means government by law or according to law, then rule of law exists in every country whether it is ruled by a king, or a military dictator or a president. Because they rule or ruled the country according to law only whatever be the nature of that law. And in this sense the government of Hitler, Mussolini, Louis XIV, Ershad of Bangladesh (a military dictator) etc. all come under the category of rule of law. But no man with a minimum conscience will call these governments as rule of law. This is why sir Jennings says—

> "The rule of law in the liberal sense requires that the powers of the crown and of its servants shall be derived from and limited by either legislation enacted by parliament, or judicial decisions taken by independent courts. It is

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[1] Jennings, Ivor, *The Law and the Constitution*, 5th ed, Ibid, PP. 312–313

not enough to say with Dicey that English men are ruled by the law and by the law alone, or, in other words that the powers of the crown and its servants are derived from the law; for that is true even of the most despotic state. The powers of Louis XIV, of Napoleon I, of Hitler and of Mussolini were derived from the law, even if that law be only 'the Leader may do and order what he pleases."[1]

It may therefore, correctly be said that rule of law does no mean any government under any law. It means the rule by a democratic law—a law which is passed in a democratically elected parliament after adequate debate and discussion. Likewise, Sir Ivor Jennings says—

"in proper sense rule of law implies a democratic system, a constitutional government where criticism of the government is not only permissible but also a positive merit and where parties based on competing politics or interests are not only allowed but encouraged. Where this exist the other consequences of rule of law must follow."[2]

He says further—

"Since fundamentally it (rule of law) requires a limitation of powers, most states have sought to attain it by written constitutions, for such a constitution is fundamental law which limits by express rules the powers of the various governing bodies and thus substitutes constitutional government (in large part a synonym for the rule of law) for absolutism. It implies also a separation of powers, since the confusion of powers in one authority is dictatorship or absolutism which according to liberal ideas, is potential tyranny."[3]

The statement of Bhagwati J. in *Bachan Singh* V. *State of Punjab*[4] in respect of rule of law is worth noting here:

"Law in the context of rule of law does not mean any law enacted by legislative authority, howsoever arbitrary or despotic it may be, otherwise even in dictatorship it would be possible to say that there is rule of law because every law made by the dictator howsoever arbitrary and

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1 Jennings, Ivor, *The Law and the Constitution*, Ibid, PP. 47–48
2 Jennings, Ivor, *Ibid*, PP. 60–61
3 Ibid, PP. 48–49
4 AIR 1982 SC 1325

unreasonable has to be obeyed and every action has to be taken in conformity with such law. In such a case too even where the political set up is dictatorial it is law that governs the relationship between men and state, but still it is not rule of law as understood in modern jurisprudence, because in jurisprudential terms, the law itself in such a case being an emanation from the absolute will of the dictator, it is in effect and substance the rule of man and not of law which prevails in such a situation. What is necessary element of rule of law is that the law must not be arbitrary or irrational and must satisfy the test of reason and the democratic form of policy seeks to ensure this element by making the framers of the law accountable to the people."

Since the end of Second World War the principle of rule of law has been a matter of universal discussion and endeavour bas been launched to formulate the basic elements of rule of law. In the context of modern development in the matters of human rights the scope of rule of law has much widened. After the adoption of the Universal Declaration of Human Rights, 1948, the International Bill of Human Rights, 1976, other international covenants on human rights and also after the congress of the International Commission of Jurists and some conferences the concept of rule of law has come to be identified with the concept of rights of man. Rule of law now, therefore, does not mean merely the rule by democratic law but it essentially includes the security of life particularly the establishment of the social, economic and educational conditions without which democratic law, liberty, civil and political rights remain a shadow to the people rather than substance. Because the blood-shot eye of law can make hungry people obey the law but it cannot make them respect the law. With this end in view the International Commission of Jurists, an international organisation with consultative status under the United Nations, has undertaken a series of studies which have been discussed at successive congresses in various parts of the world. A congress was held in New Delhi in 1959, where representatives of no fewer than 53 country's judges, lawyers and teachers of law affirmed in a formal declaration their recognition that rule of law is a dynamic concept which should be employed not only to safeguard and advance the civil and political rights of the individual in a free society but also to establish certain social, economic, educational and cultural conditions under which his legitimate aspirations and dignity may be realized.[1] The Congress

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1 Wade, E.C.S and Bradley, A.W, *Constitutional Law*, 8th ed., P. 75

through four committees, reported on the practical safeguards required for the maintenance of the rule of law. Committee IV reports the following:

> a) The function of the legislature in a free society under the rule of law is to create and maintain the conditions which will uphold the dignity of man as an individual. The dignity requires not only recognition of his civil and political right but also establishment of the social, economic, educational and cultural conditions which are essential to the development of his personality.
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> b) The rule of law depends not only on the provisions of adequate safeguard against abuse of power by the executive, but also on the existence of effective government capable of maintaining law and order and ensuring adequate social and economic condition of life for the society.
>
> c) An independent judiciary and a free legal profession are indispensable for a free society under the rule of law.[1]

To mention more specifically the above Congress in New Delhi adopted a Declaration – Delhi Declaration, 1959. In answers to a questionnaire distributed to those attending, 'Respect for the supreme value of human personality' was stated to be the basis of all law. Clearly this is a statement in general terms about what the content of law should or must be. Taking this as a starting point, the Declaration stated that the rule of law involved:

i) the right to representative and responsible government (viz. the right to be governed by a representative body answerable to the people);

ii) that the citizen who is wronged by the government should have a remedy;

iii) certain minimum standards or principles for the law, (those contained in the Universal Declaration of Human Rights, 1948 and the European Convention of Human Rights, 1950) including freedom of religion, freedom of assembly and association, the absence of retroactive penal laws.

iv) the right to fair trial, which involves :

- certainity of the criminal law.
- the presumption of innocence.
- reasonable rules relating to arrest, accusation and detention pending trial.

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1 Quoted by, Bari, Dr. Ershadul, *Rule of Law and Human Rights*, (a booklet in Bengali). P. 14–15

- right to legal advice.
- public trial
- the right of appeal
- the absence of cruel and unusual punishments.

v) the independence of the judiciary including proper grounds and procedure for the removal of judges.[1]

The influence of Dicey's first and second conceptions can be seen in above. His third conception was abandoned since most other countries in the world have a 'bill of rights' on some description.

Provisions for Ensuring Rule of Law in Bangladesh Constitution.

It has been pledged in the preamble to the Constitution of Bangladesh that—

> "it shall be a fundamental aim of the state to realise through the democratic process a socialist society, free from exploitation — a society in which the rule of law, fundamental human rights and freedom, equality and justice, political economic and social, will be secured for all citizens."

In accordance with this pledge the following positive provisions for rule of law have been incorporated in the Constitution:

1. Article 27 guarantees that all citizens are equal before law and are entitled to equal protection of law.

2. Article 31 guarantees that to enjoy protection of the law, and to be treated in accordance with law, is the inalienable right of every citizen, wherever he may be, and of every other person for the time being within Bangladesh, and in particular no action detrimental to the life, liberty, body, reputation or property of any person shall be taken except in accordance with law.

3. 18 fundamental rights have been guaranteed in the Constitution and Constitutional arrangement for their effective enforcement has been ensured in Articles 44 and 102.

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[1] Quoted by, Blessly, Jain, *Constitutional Law*, (London : HLT Publication, 1990), PP. 12–13

4. Articles 7 and 26 impose limitation on the legislature that no law which is inconsistent with any provision of the Constitution can be passed.

5. In accordance with Articles 7, 26 and 102(2) of the Constitution the Supreme Court exercises the power of judicial review whereby it can examine the extent and legality of the actions of both the executive and legislative and can declare any of their actions void if they do anything beyond their constitutional limits.

6. Right to be governed by a representative body answerable to the people has been ensured under Articles 7(1), 11, 55, 56, 57 and 65(2) of the Constitution.

Provisions of the Constitution which are Contrary to the Concept of Rule of Law in Bangladesh

1. Independence of Judiciary

The most important condition for ensuring rule of law in a country is the independence of judiciary. How far an independent judiciary is essential for ensuring rule of law and how far the independence of judiciary in Bangladesh has been ensured have been discussed earlier. Except the mode of appointment the independence of our higher judiciary is ensured. But the independence of lower judiciary particularly of the Magistrate's courts is not ensured. It was not ensured even in the original Constitution of 1972 particularly for the term 'Magistrates exercising judicial function' in Article 115. Though provisions of Articles 115 and 116 of the Constitution of 1972 seem to ensure the independence of lower judiciary, there is a practical problem of ensuring the independence of Magistrates' courts. As these Magistrates' courts are run by the executive officials and these Magistrates are promoted in executive line they cannot take an independent view of the case before them when he knows that his posting, promotion and prospects generally depend on his pleasing the Executive hand. This dependence of Magistrates' courts on the Executive has been a bar to the ensuring equality before law as guaranteed in Article 27. (For details, see, Chapter 19).

2. Provisions for Preventive Detention[1]

Preventive detention measures can be supported only in time of emergency. But Article 33 of Constitution allows the government to use this measure in peace time. And in practice every government has used Special Powers Act, 1974 as a permanent law. Since a huge number of persons are detained every year without trial purely for political purpose, the right to protection of law, protection of right to life and personal liberty and safeguards as to arrest and detention as guaranteed in Articles 31, 32 and 33 cannot be ensured. So the provisions allowing preventive detention in peace time as provided for in Article 33 is against the concept of rule of law. Also preventive detention in peace time is an arbitrary power which has no place in the institution of rule of law.

3. The Provisions of Article 70[1]

Article 70 is frustrating all positive devices in the Constitution for ensuring rule of law.

Firstly, it is Article 70 for which the right to be governed by a representative body answerable to the people cannot be ensured. Because though Article 55 states, "The cabinet shall be collectively responsible to parliament," this provision of collective responsibility has been a soundless vessel because of Article 70 as the cabinet is always sure that it is not going to be defeated by motion of no-confidence, for no member of the majority party has right to vote against the party.

Secondly, rule of law as distinguished from rule of man or party means rule of that law which is passed in a democratically elected parliament after adequate debate and deliberation. But because of Article 70 neither strong dissenting opinion can be made nor can vote against party line be given by the members of the ruling party. As a result, every bill howsoever undemocratic it may be gets quickly passed. So passing of democratic laws is being hampered by Article 70.

Thirdly, the government always with a view to avoiding debates makes laws by ordinances and later gets them approved under the sweeping power of Article 70.

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1 For details, see. Chapter XVI

1 For details. see. Chapter VIII

4. Provisions for Ordinance-making.[2]

Ordinance making power can be supported only in emergency situations like national crisis, national calamity, severe economic deflation etc. demanding for immediate legislative actions. But Article 93 of the Constitution allows the President to promulgate ordinances anytime during the recesses of parliament sessions. And in practice a huge number of ordinances are promulgated by-passing the parliament. Ordinance-made laws are fully undemocratic since they are made by the executive almost in an unrestricted way. These laws are, therefore, contrary to the concept of rule of law.

5. Emergency Provisions

Except in war time situations declaration of emergency cannot be supported. But Article 141A empowers the President to declare emergency whenever he wishes. By declaring emergency in peace time the government can suspend fundamental rights and suppress the opposition movement. This amounts to avowed arbitrary exercise of power on the part of the government which is contradictory to the concept of rule of law. (For details, see, chapter XV).

6. Administrative Tribunal

In order to provide quick relief and avoid lengthy proceedings of litigation providing for the creation of Administrative Tribunal particularly for service matters which needs special treatment and experience is nothing undemocratic. But though Article 117 provides for the establishment of Administrative Tribunal, it does not mention who will chair this tribunal, what will be their qualification, what would be the conditions of their security of tenure. Again, this tribunal has been kept outside the writ jurisdiction of the High Court Division under Article 102(5). Also it has been kept out of the supervisory jurisdiction of the HCD. This provision has, therefore, been contradictory to the concept of integrated judicial system and of independence of judiciary.

The above discussion makes it clear that though there are some positive provisions for ensuring rule of law in Bangladesh Constitution, they are being outweighed by the negative provisions. Moreover, the latest development in the concept of rule of law dictates that the poor

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2 For details, see, chapter XIV

people should have easy access to justice; providing for fundamental rights is not enough but their enforcement is all that matters. Though our Constitution provides for 18 fundamental rights for citizens, these remain meaningless version to the masses because due to poverty and absence of proper legal aid the poor people cannot realise them. (For details, see, chapter II).

CHAPTER XXI

THE EIGHTH AMENDMENT CASE AND THE DOCTRINE OF BASIC STRUCTURE OF THE CONSTITUTION

The case of *Anwar Hussain Chowdhury* V. *Bangladesh* [1989 BLD(SPL)1] popularly known as the 8th Amendment case is a historic judgment in the constitutional history of independent Bangladesh.

Background of the Case

After martial law was imposed on 24th March, 1982, on 8th May the CMLA by amending the Schedule to the Proclamation of the 24th March, 1982 had set up six permanent Benches of the High Court Division at Chittagong, Commilla, Jessore, Barishal, Sylhet and Rangpur. By a further amendment of the proclamation by Proclamation Order no III of 1986 these permanent Benches were designated as 'Circuit Benches' and it was provided that when Article 100 of the Constitution would be revived, the Circuit Benches should be deemed to be sessions of the HCD at Dhaka under that Article[1] Martial law was withdrawn on 10th November, 1986 and the Constitution was fully revived on the same date. As the Constitution was revived the Proclamation Order III of 1986 was no longer operative and the Chief Justice under the revived Article 100 in consultation with the President, proceeded to implement the provisions of six sessions benches in the same places where Circuit Benches were functioning during the martial law period. The Chief Justice issued six other notifications specifying the jurisdiction to be exercised by each session and the areas covered by them.

To be mentioned here that the Dhaka Bar Association led by the Supreme Court Bar Association began to protest the mode of

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1 The original Article 1000 was following :
100. The permanent seat of the Supreme Court, shall be in the capital, but sessions of the High Court Division may be held at such other place or places as the Chief Justice may with the approval of the President, from time to time appoint.

decentralization of the HCD from the very day the Martial law Proclamation was made to this effect. The Supreme Court Bar Association construed the bifurcation plan of the HCD as totally unjustified and a design to destroy the institution of the judiciary. In protest they boycotted the courts for months, passed resolutions and staged demonstrations, openly accusing the Chief Justice of violating the provisions of the Constitution by constituting the benches and session outside Dhaka. The Court of Chief Justice was boycotted for years and the Chief Justice did not sit in any court for nearly three years. The judiciary was paralysed which diminished the image and prestige of the judiciary as a whole.[1]

However, when the Chief Justice issued under the revived Article 100 six other notifications specifying the jurisdiction to be exercised by each session and the area covered by them, it added fuel to the fire and the lawyers became more agitated. Perhaps with a view to stopping this agitation and movement the government passed the Constitution (Eighth Amendment) Act, 1988 which substituted Article 100 by a new article creating permanent Benches of the High Court Division in the six aforesaid places.[2]

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1 For details, see, Ahmed, Moudud, *Democracy and the Challenge of Development*, Ibid. P. 276

2 Article 100 as amended by the 8th Amendment Act runs the following :

100. Seat of the Supreme Court

(1) Subject to this Article, the permanent seat of the Supreme Court shall be in the capital.

(2) The High Court Division and the judges thereof shall sit at the permanent seat of the Supreme Court and at the seats of its permanent Benches.

(3) The High Court Division shall have a permanent Bench each at Barishal, Chittagong, Comilla, Jessore, Rangpur and Sylhet, and each permanent Bench shall have such Benches as the Chief Justice may determine from time to time.

(4) A permanent Bench shall consist of such number of judges of the High Court Division as the Chief Justice may deem it necessary to nominate to that Bench from time to time and on such nomination the judges shall be deemed to have been transferred to that Bench.

(5) The President shall, in consultation with the Chief Justice, assign the area in relation to which each permanent Bench shall have jurisdictions, powers and functions conferred on the HCD by this constitution or any other law; and the area not so assigned shall be the area in relation to which the HCD sitting at the permanent seat of the Supreme Court shall have such jurisdictions, powers and functions.

(6) The Chief Justice shall make rules to provide for all incidental, supplemental or consequential matters relating to the permanent Benches.

The Constitution (8th Amendment) Case

By two writ petitions the amended Article 100 and the notification of the Chief Justice were challenged as *ultra vires*. A Division Bench of the HCD dismissed the petitions summarily. Leave was granted by the Appellate Division to consider the Constitutionality of the Amendment. After a sound hearing the Appellate Division by a majority of 3 to 1 struck down the 8th Amendment as far as it related to the creation of permanent Benches outside Dhaka by substitution of Article 100. The ground shown by the court was that the impugned amended Article 100 changed the character and nature of the function and jurisdiction of the HCD as envisaged in the Constitution. Such an amendment changing the basic structure of the Constitution was *ultra vires* and therefore not tenable in law.

This was a historic judgment in the sense that it was the first time since the birth of the nation that the Supreme Court of Bangladesh was striking down on amendment to the Constitution made by the parliament, the supreme and sovereign law making body under the Constitution. The judgment aroused serious controversies on the issue of parliaments' authority to amend the Constitution and whether the Supreme Court could restrict the amending power of the parliament. And whether four or five judges sitting on a Bench could be more wise or have more authority than the 330 members of parliament elected by the people.[1]

Principal Arguments on Behalf of the Appellants

The unitary character of the Republic is a basic feature of our Constitution and the plenary judicial power of an integrated Supreme Court completely in line with the unitary character of the Republic is also a basic feature of our Constitution which cannot be altered or damaged. The power of amendment of the Constitution under Article 142 is a power under the Constitution and not beyond it and it is not an unlimited power. The concept that parliament has unlimited power of amendment is inconsistent with the concept of the supremacy of the Constitution embodied in the preamble and

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[1] Ahmed, Moudud, *Democracy and the Challenge of Development*, Ibid. P. 277

Article 7 of the Constitution. The impugned Amendment being contrary to the concept of integrated judicial system and unitary character of the Republic has destroyed these basic features.[1]

Argument by the State

Article 142 of the Constitution provides that any provision of the Constitution can be amended by way of addition, alteration, substitution or repeal by an Act of Parliament. This amendment proceeding is a special one since such an Act can be passed only by two-thirds of the total number of MPs. So the parliament has unfettered power to amend any provision of the Constitution; there cannot be any implied limitation of parliament's power of amendment of the Constitution. The power of amendment under Article 142 is a constituent power; not an ordinary legislative power.

The amending power of the parliament is in no way limited or otherwise controlled by some vague doctrine of repugnancy to the preamble and Article 7 declaring the supremacy of the Constitution.

The independence of judiciary and separation of powers are basic features of our Constitution but the impugned amendment has not affected either of the two.[2]

The main issues to be decided by the court were, therefore, the implied limitation of power of amendment of the Constitution, difference between legislative power and constituent power, the meaning of the term 'amendment' and the 'basic structure' doctrine.

The Principal Arguments of the Judgment

1. The Constitution stands on certain fundamental principles which are its structural pillars which the parliament cannot amend by its amending power for, if these pillars are demolished or damaged, then the whole constitutional edifice will fall down. Some of the basic structures are:

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1 Submission of Dr. Kamal Hosssain, Ishtiaq Ahmed, Amir-Ul Islam. See BLD(SPI)1, 1989, PP.23-36

2 Submission of Attorney General. See. *Ibid*,. PP. 37–40

(i) Sovereignty belongs to the people.
(ii) Supremacy of the Constitution.
(iii) Democracy.
(iv) Republican government.
(v) Independence of judiciary.
(vi) Unitary state.
(vii) Separation of powers.
(viii) Fundamental rights.

These structural pillars of the Constitution stands beyond any change by amendatory process. If by exercising the amending power these principles are curtailed it is the court's duty to restrain it. The amended Article 100 has created more than one permanent seat of the Supreme Court thus destroying the unitary character of the judiciary; the transferability of judges has a likely effect of jeopardising the independence of the judiciary, a basic feature of the Constitution. And the amendment has resulted in irreconcilable repugnancies to all other existing provisions of the Constitution rendering the High Court Division virtually unworkable in its original form.[1]

2. The amended Article 100 is *ultra vires* because it has destroyed the essential limb of the judiciary namely, of the Supreme Court of Bangladesh by setting up rival courts to the High Court Division in the name of permanent Benches conferring full jurisdictions, powers and functions of the High Court Division. Besides this, this amended Article is inconsistent with Articles 44,94, 101 and 102 of the Constitution. The Amendment has reduced Articles 108, 109, 110 and 111 nugatory. It has directly violated Article 114. The Amendment is illegal because there is no provision of transfer of cases from one permanent Bench to another Bench which is essential requisite for dispensation of justice.[2]

3. If any provision can be called the 'pole star' of the Constitution, then it is the preamble. The impugned Amendment is to be examined on the touchstone of the preamble with or without

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1 1989 BLD (SPI)1 Per Sahabuddin Ahmed, J.Para. 376, 377, 378

2 Per Badrul Haider Chowdhury, J. Para. 259

resorting to the doctrine of basic structure. The preamble is not only a part of the Constitution, it now stands as an entrenched provision that cannot be amended by the parliament alone. When parliament cannot by itself amend the preamble, it cannot indirectly by amending a provision of the Constitution impair or destroy the fundamental aim of our society. One of the fundamental aims of our society is to secure the rule of law for all citizens and in furtherance of that aim part VI and other provisions were incorporated in the Constitution. By the impugned Amendment that structure of the rule of law has been badly impaired and as a result the High Court Division has fallen into sixes and sevens—six at the seats of the permanent Benches and the seven at the permanent seat of the Supreme Court.[1]

The above quotations from the judgment make it clear that the centre-point on which the majority judges relied to declare the impugned amendment illegal was the doctrine of the basic structure of the Constitution.

The Doctrine of Basic Structure

Now what is meant by the doctrine of basic structure of the Constitution? This doctrine is not a well-settled principle of constitutional law; it is rather a recent trend in and a growing principle of constitutional jurisprudence. As M. H. Rahman. J. says in the 8th Amendment case that the doctrine has developed in a climate where the executive, commanding an overwhelming majority in the legislature, gets snap amendments of the Constitution passed without a Green Paper or White Paper, without eliciting any public opinion, without sending the Bill to any select committee and without giving sufficient time to the members of the parliament for deliberation on the Bill for amendment.[2]

The initial trace or origin of the concept of basic structure of the Constitution can be found in the Sub-Continent, as Dr. Kamal Hossain submitted in the 8th Amendment case, in a decision of the Dhaka High Court (*Abdul Haque* V *Fazlul Quder Chowdhury* PLD 1963 Dac. 669). This decision was upheld by the Pakistan Supreme Court in *Fazlul quder Chowdhury* V. *Abdul Haque* (PLD 1963 SC 486) where the court held—

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1 Per M.H. Rahman. J. Paras. 388. 443. 456

2 Para. 435

"... franchise and form of government are fundamental features of a Constitution and the power conferred upon the Presidency by the constitution of Pakistan to remove difficulties does not extend to making an alteration in a fundamental feature of the Constitution."

But in its development or nourishing stage in Indian jurisdiction the first formal judicial formulation of this doctrine came out in *Kesavananda's* case. Before *Kesavananda's* case the issue of basic structure came to be applied indirectly in *Golak Nath's* case[1] where it was decided that parliament had no power to amend fundamental rights so as to take away or abridge any of them. Subba Rao, C.J. said that fundamental rights are assigned transcendental place under our Constitution and, therefore, they are kept beyond the reach of parliament. This judgment gave rise to acute controversy. It was apprehended that the fundamental rights in the Constitution would become static creating hindrances in the way of enactment of socio-economic legislation required to meet the needs of a developing society.

To get over this problem created by *Golak Naths* case the Indian Parliament passed the Constitution (24th Amendment) Act, 1971 which laid down that parliament might in the exercise of its constituent power amend any provision of the Constitution be it of fundamental rights or of any other one.

The validity of the Constitution (24th Amendment) Act, 1971 and the 25th Amendment Act which curtailed the power of judicial review was challenged in *Kesavananda Bharati* V. *State of Kerala*[2] popularly known as the Fundamental Rights case. The court by majority overruling the *Golak Nath's* case held that the parliament had the power to amend any or all the provisions of the Constitution including those relating to fundamental rights but this power of amendment was subject to certain implied and inherent limitations and that parliament could not amend those provisions of the Constitution which affect the basic structure or framework of the Constitution.

The next case in which the Indian Supreme Court had occasion to apply the *Kesavananda* princile as regards the non-amendability of the basic features of the Constitution was *Indira Nehru Gandhi* V. *Raj Narayan*[3] popularly known as Election case. Here was involved the

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1 *Golak Nath* V. *State of Punjab* AIR 1967 SC 1643

2 AIR 1973 SC 1461

3 AIR 1975 SC 2299

question of the validity of the Constitution (39th Amendment) Act, 1975 which took away the power of any court and also of the Supreme Court to decide any doubts and disputes arising in connection with the election of four high officials of the State viz, the President, Vice President, Prime Minister and Speaker.[1] Following *Kesavananda's* principle the court held that the impugned Amendment affected and destroyed certain basic structures of the Constitution e.g. democracy which implies the principle of free and fair election: rule of law and judicial review. It was also held that parliament in the exercise of constituent power was not competent to validate an election declared void by the High Court. In this case Chandrachud, C.J. said that the fundamental rights, being a part of the essential of the Constitution could not, therefore, be abrogated or emasculated in the exercise of the power conferred by Article 368, though a reasonable abridgment of those rights could be affected in the public interest.[2]

The Indian government became furious with the Supreme Courts judgment in *Indira Gandhi's case* declaring clause 4 of 39th Amendment invalid and it came forward to ensure that never in future the courts should have the power to pronounce a constitutional amendment invalid. Accordingly, the 42nd Amendment of the Constitution was enacted providing for that, "no constitutional amendment (including the provision of part III i.e. the fundamental rights) ... shall be called in question in any court on any ground", and also that "there shall be no limitation whatsoever on the constituent power of parliament to amend by way of addition, alteration, variation or repeal of the provisions of the Constitution". The Amendment, therefore, made it clear that even

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1 In 1971 Smt. Indira Gandhi's election was declared invalid by the Election Tribunal on the ground that she had adopted corrupt practices in the election. During the pendency of her appeal in the Allahabad High Court the parliament by 39th Amendment inserted Article 329A(4) and (5) in the Constitution. It was provided by the amendment that henceforth the parliament would decide any dispute as to the election of above four persons; that the existing law in this regard would not apply to the election of them; and that the disputed election of Indira Gandhi was valid and the election petition against her abated. This Amendment was ratified in three days during a period of emergency when freedom of speech was suspended and there was hardly any time for the debate in the constitutional implications of that Amendment. (H.M. Seervai, *Constitutional Law of India*, 3rd ed. Vol. I. PP. 2659–2660)

2 AIR 1975 SC 2299 P. 2461

the 'basic feature' of the Constitution could be amended by parliament. As a commentator puts 'it purported to kill the child 'basic structure'.[1]

However the validity of this 42nd Amendment was challenged in *Minerva Mills Ltd* V. *Union of India.*[2] The scope and extent of the application of the doctrine of basic structure again came up for discussion before the Supreme Court in this case. The Supreme Court unanimously held the Amendment as unconstitutional transgressing the limits of the amending power and damaging or destroying the basic structure of the Constitution. The court said that the parliament had only a limited power which itself is a basic feature of the Constitution and the donee of a limited power cannot by the exercise of that power convert the limited power into an unlimited one. In other words, the parliament cannot expand its amending power so as to acquire for itself the right to repeal or abrogate the Constitution or to destroy its basic and essential features; power to destroy is not a power to amend. Mr. N. A Palkivala has remarked that this decision has rekindled the light of the Constitution of India.

This proposition that parliament cannot amend the Constitution so as to destroy its basic features was again reiterated and applied by the Supreme Court in *Waman Rao* V. *Union of India.*[3]

Thus the doctrine of 'basic feature' has successfully passed the acid-test in almost 5 cases in India and has already attained its firm footing in Indian Constitutional jurisprudence though there still remains controversy as to the substance of this doctrine. And the Bangladesh Supreme Court in the 8th Amendment case has followed the Indian decisions as regards the doctrine of basic structure.

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1 Paras Diwan and Ram Rajput. *Constitution of India*, 1977. P. 302
2 AIR 1980 SC 1789
3 AIR 1980 SC 1789

Problems of the Doctrine of Basic Structure

As has been mentioned just now that there still remains a considerable controversy and differences of opinion as to the substance of the doctrine of 'basic structure'. Because what actually is meant by the doctrine?, What subject-matters will come under the category of 'basic feature'?, Which particular features of a Constitution are basic and which are not ? These are the questions which are still haunting both the judges and researchers. In *Kesavananda's* case Sikri C.J. says that the basic structure of the Constitution consists of the following features—

i) Supremacy of the Constitution.
ii) Republican and democratic form of government.
iii) Secular characteristic of the Constitution.
iv) Separation of powers between the executive, legislative and judiciary.
v) Federal character of the Constitution.

According to Shelat and Grover J.J. the following are the examples of the basic structure of the Constitution:

i) Supremacy of the Constitution.
ii) Republican and democratic form of government and sovereignty of the country.
iii) Secular and federal character of the Constitution.
iv) Demarcation of power between the legislative, executive and Judiciary.
v) Dignity of individual security by various freedoms and basic rights in part III and the mandate to build a welfare state contained in part V.
vi) Unity and integrity of the nation.

In *Indira Gandhi's* case the following features were termed as basic :

i) Rule of law.
ii) Judicial review.
iii) The principle of free and fair election as a principle of democracy.
iv) Jurisdiction of the Supreme Court under Article 32.

In *Minerva Mills* case the Supreme Court held that the following are the basic features of the Constitution:

i) Limited power of parliament to amend the Constitution.
ii) Harmony and balance between fundamental rights and directive principles.
iii) Fundamental rights in certain cases.
iv) Power of judicial review in certain cases.

Likewise in 8th Amendment case of Bangladesh the judges could not come into an unanimity as to what constitute 'basic feature' of the Constitution. According to B. H. Chowdhury J. 21 features are basic features of our Constitution.[1] Justice Sahabuddin Ahmed has mentioned six features as basic which have been mentioned earlier.

Of course, like the concept of 'basic feature' there are many concepts which are not capable of precise definition, nevertheless they exist and play important part in law. Negligence, reasonableness, natural justice are some of these concepts which are very much understood but cannot be precisely defined.

Again, the Constitution of some countries specifies 'basic features' of the Constitution categorically. For example, the Constitution of Germany mentions in Article 79(3) that the amendments of the basic law (Constitution) affecting the following matters shall be prohibited meaning that these are basic features:

i) the division of the Federation into Laender (states).
ii) the participation on principle of the Laender in legislation.
iii) the basic principles as laid down in Articles 1 and 20[1]

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1 Para, 254

1 Article 1 deals with the following things as to the protection of human dignity :

i. The dignity of man is inviolable. To respect and protect it shall be the duty of all public authority.
ii. The German people therefore uphold human rights as inviolable and inalienable and as the basis of every community of peace and justice in the world.

Article 20 deals with the following things as to the political and social structure, defense of the constitution :

i. The Federal Republic of Germany shall be a democratic and social federal state.

Likewise Article 89 of the French Constitution says that ' the republican form of government shall not be an object of amendment'.

If there is such categorical specification in the Constitution as to its basic features the court is not to fall into any precarious situation but since most of the written Constitutions are silent about their basic features, the courts in these cases have to assume basic features under the umbrella of the doctrine of 'basic feature' of the constitution. Though the doctrine is still a moot question, it has already been a basis of some important constitutional judgments in India and Bangladesh and in an unhappy fight between the executive and judiciary the latter has been able by using this doctrine to establish constitutional supremacy. In this sense this doctrine may be comparable to the doctrine of judicial review as expounded by Marshall C. J. Someone says that this doctrine of basic feature appears to be an extension of the doctrine of judicial review.[1] Marshall held in *Marbury* V. *Madison*[2] that the court, in exercise of its judicial functions, had the power to say what the law was, and if it found an Act of Congress conflicted with the Constitution, it had the duty to say that the Act was no law. Though the decision of Marshall C.J. is still being debated, the principle of judicial review has received a wide acceptance not only from the superior courts to the countries that are under the influence of common law but in civil law countries as well.

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ii. All public authority emanates from the people. It shall be exercised by the people through elections and referendums and by specific legislative, executive and judicial bodies.

iii. The legislature shall be bound by the constitutional order, the executive and judiciary by law and justice.

iv. All Germans have the right to resist anybody attempting to do away with this constitutional order, should no other remedy be possible.

1 M. H. Rahman J. in 8th Amendment Case. Para. 438

2 (1803)1 cranch 137

Philosophy Underlying the Doctrine of Basic Structure

One might argue that this doctrine is vague and should be rejected. But S. Ahmed. J. in 8th Amendment case says that the doctrine of basic structure cannot be rejected if consequences of its rejection is taken into consideration. Seervai in his *Constitutional Law of India,* Vol.II, Page 1568 rightly observed that the consequence of rejecting the doctrine of basic structure would be so grave and so opposed to the objectives of the Constitution that the consequence of uncertainty would be insignificant by comparison. Actually there are some sound philosophical rationales which work behind this doctrine.

1. A Constitution like a sacred document is made written with a formal declaration by a democratic assembly especially constituted on behalf of the people for this purpose necessarily with a view to keeping its supremacy as a lofty idealism for a nation. Every written constitution, therefore, has certain fundamental principles and objectives which are its structural pillars and on which the whole edifice of the constitution is erected and if these principles are taken away or destroyed, the Constitution will lose its original and inherent identity and character.

2. The parliament being a creature of the Constitution must exercise its powers within the constitutional bounds and limits. It, therefore, cannot enlarge its limited power into an absolute power to destroy its basic elements. If parliament had the power to destroy the basic feature of the Constitution, it would cease to be a creature of the Constitution and become its master. Moreover, a Constitution which is formally declared as a sacred document and as the guide for the nation can, in no way, be considered as an object of rapine and plunder at the hand of the parliament. As S. Ahmed, J says in 8th Amendment case, 'the doctrine of bar to change the basic structure is an effective guarantee against frequent amendments of the Constitution in secretarial or party interest in countries where democracy is not given any chance to develop.'

3. The declaration of constitutional supremacy as opposed to the parliamentary supremacy in the Constitution implicitly presupposes

the existence of an independent court or authority to examine the constitutionality of actions done by the executive and legislative. Though the judiciary like parliament is also the creature of the Constitution, it is the Constitution which at the same time gives, somewhere directly and somewhere indirectly, this judiciary the power to play the role of an umpire – to see that the executive and legislative are not transgressing their constitutional limits. This is why the judiciary under a written Constitution is called the guardian of the Constitution.

Types of Doctrine of Basic Structure

On the basis of treatment given by judges over 'basic structure' principle both in Bangladesh and India, it would, for the convenience of research and study, be appropriate to use this doctrine in two senses :

1. Basic structure principle in general sense or numerable sense; and

2. Basic structure principle in real or substantive sense.

Most of the judges so far have treated this doctrine from numerative point of view. Some judges say that there are 21 basic structures; some say for 6; again some says that there are 3 and so on. This is why no unanimity can be found among the judges as to the substance of this doctrine. If this doctrine is meant from this general or numerable sense then there are some dangers:

Firstly, any provision of the Constitution may come, if judges so interprets, under the umbrella of this doctrine giving rise to vagaries of clashing principles.

Secondly, this will give rise to differences of opinion among the judges which has been seen in every case upholding 'basic structure' doctrine.

Thirdly, the judiciary may, by applying any provision under the umbrella of 'basic feature' principle, reduce or narrow down the justifiable scope of amending power of the parliament. And the absolute judicial dictation, in other words, the whim of judiciary

may take the place of constitutional limit in respect of amending power of the Constitution.

Fourthly, in some cases the judgment of the court will be reduced into nullity reducing ultimately the dignity and institutional value of the Judiciary as has been the case of the judgment of Badrul Haider Chowdhury in 8th Amendment case. In his judgment he mentioned the then Articles 48 and 58 of the Constitution to be the basic features of the Constitution. These articles then provided for direct election of the President in presidential form of government and the selection by the President of a member of parliament as Prime Minister who commands the support of the majority. These Articles, he said, are protected. However, within two years from this judgment, after the general election in February, 1991 the then Articles 48 and 58 amplified as a 'basic feature' by B.H. Chowdhury J. were substituted by the Constitution (Twelfth Amendment) Act, 1991 replacing the presidential system of government with parliamentary one. Had he, therefore, mentioned 'democracy' instead of these two 'specific articles as 'basic feature', his judgment would have been more authentic, logical and meaningful. This is because democracy is a philosophy as well as a goal of our nation as embodied in the preamble of the constitution. So 'democracy' should be a basic feature which has, in reality, no contradiction with the presidential or parliamentary form of government.

Thus with a view to avoiding the above mentioned dangers and also allowing it to grow as a sound principle of Constitutional law both the judges and researchers should take the 'basic structure' principle in a special sense rather than in general or numerable sense. In special sense or in real or substantive sense the doctrine of 'basic structure' means those fundamental principles and objectives of the Constitution which are its structural pillars and on which the whole edifice of the Constitution is erected and if these principles are taken away or destroyed, the Constitution will lose its original and inherent identity and character. So if it is found that a Constitutional amendment made by parliament has affected or is likely to destroy any of the basic features of the Constitution, then the amendment should be declared unconstitutional and void. And in this substantive sense the doctrine necessarily indicates and

means the 'preamble' of the Constitution. This is because it is the preamble which, in the way of embodying philosophy of the Constitution, contains the fundamental principles and objectives as fundamental aims or goal of the notion. Taking the preamble as a guiding star, or touchstone or centre point judges should explain and nourish the doctrine. It is pertinent to mention here that Justice Muhammad Habibur Rahman in 8th Amendment case specifically and with emphasis meant 'preamble' of the Constitution as the pole star in relation to the doctrine of 'basic structure'.

CHAPTER XXII

MARTIAL LAW AND MILITARY INTERVENTION: A POLITICO–LEGAL ANALYSIS

Origin and Development of the Concept of Martial Law

From historical point of view the origin of the modern concept of martial law traces back to the court of the Constable and Marshal which was a part of Curia Regis or the Supreme Court established in England in the middle age by William, the conqueror. The King's Marshal or the Constable or to use the modern designation, the Master of the Horse, was the commander-in-chief of the King's army. Law administered by the King's Marshal through its court of Constable and Marshal was known invariably 'Marshal law' and this term gradually came to be spelled 'martial law' what we say today. This Marshal law was something apart from common law of England. The King on the advice of his Marshal used to issue orders and regulations for suppressing riot, or rebellion and also for governing the conduct and discipline of officers and soldiers. These orders and regulations came to be known as martial law. This martial law administered by the Constable and Marshal's court was applied in the following cases :

1. Administering army and governing the conduct of and discipline within the soldiers and their officers and also for imposing penalties over them in appropriate cases. It is to be mentioned here that till 18th century this law relating to soldiers was known as martial law. But henceforth it came to be known as military law and at present this is what we call military law.

2. In case of insurrection, riot or rebellion or breaches of peace within the realm the King used to command his Marshal to suppress those by applying martial law. The Marshal, therefore, applied martial law in such cases and martial law being so imposed the ordinary common law along with ordinary court became suspended; under martial law the solders might do anything to suppress riot, kill, execute or slaughter as in battle. But as soon as the disturbance was over the common law along with ordinary courts were revived. This was actually a royal prerogative or, in other words, the common law right of the Crown to repel force by

force in the case of invasion, insurrection, riot etc. But gradually it became evident that the Crown began to abuse this prerogative. It was found that even in cases of persons who were merely guilty of ordinary felonies and who, therefore, were to be tried under common law in ordinary courts, were ordered to be tried by martial law. Again, instead of maintaining discipline and order in the army martial law was applied to punish any crimes committed either by soldiers or civilians associated with them which ought to have been done legally under common law in ordinary courts. It was also evident that even after the disturbances or riot for which martial law and Marshal Court were applied, had been over, the Marshal Court (Military Tribunal in modern sense) was retained and were applied to punish citizens for subsequent offences.[1] Thus as Cockburn C.J. says, 'the prerogatives of the Crown was often attempted to be stretched beyond its proper limits'.[2] This frequent abuse of martial law in time of peace was lastly prohibited by the British Parliament by the celebrated Petition of Rights, 1628.

Since 1628 martial law has never been attempted to be exercised in the realm of England by virtue of the prerogative either in time of peace or of war. So now, after 1628 the right to declare martial law in peace time came under the parliament's authority. And under the authority of parliament only three times martial law was imposed in England to suppress riot and insurrection. This was done on three different occasions during the rebellions of 1715, 1745 and 1780. And henceforth till today no martial law was declared in England even under the authority of parliament.

It is noteworthy that during the first and the second World War the British Parliament passed enactments like the Defence of the Realm Act 1914–15 and the Emergency Power (Defence) Acts 1939–1940 giving the executive wide discretionary and military powers to meet the emergency. There may be controversies as to whether this enforcement virtually amounted to an application of martial law. But these were not martial law as such, because, firstly, the Defence of the Realm Act did not authorise to declare 'martial law' and secondly, though initially the law gave his

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1 Cod, *Military Forces of the Crown* Vol. 1, P. 18 (1889)
Quoted by, Munim F.K.M.A, *Legal Aspects of Martial Law*, (Dhaka : Bangladesh Institute of law and International Affairs, 1989), P. 12

2 Rex V. Nelson & Brand. Quoted, *Ibid*, P. 13

Majesty-in-council the power to make regulations and provided that offenders should be tried and punished by court martial for breaches of such regulation, the law was later on amended which authorised civil courts instead of courts martial to try breaches of the aforesaid regulations. So the jurisdiction and functioning of the ordinary courts were not suspended. Likewise, the power under the Emergency Power (Defence) Act did not amount to martial law because, ordinary courts were not suspended; persons violating regulations were to be tried not by any court martial but by special courts which were essentially civil courts.[1]

Actually these measures were national emergency measures and it is established beyond any doubt that the Armed Forces may be legally empowered under any grave emergency by an Act of parliament to render such assistance as may be deemed essential to ensure the restoration of order.

Different Meanings of Martial Law

The above discussion makes it clear that the concept of martial law had its origin and development in British system but in true sense of the term there is no martial law in Britain for last three centuries. Then in which sense does martial law exist in Britain? Before answering this question first we should see in what different senses the term 'martial law' is used. The term 'martial law' may be used in the following four senses.

Firstly, in earlier times 'martial law' was used to mean what we now call military law, the law for the discipline and government of the armed forces. It had this connotation up to the latter part of the eighteenth century. Prior to that period, no distinction was made between the military law and the martial law of the present day as they had a common historical origin in the law, that had been administered in medieval England in the court of the Constable and the Marshal.

Secondly, the term 'martial law'[2] is commonly used in the sense of 'military government in occupied foreign territory in time of war. Martial

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1 Munim, F.K.M.A. *Ibid*, P. 44–45

2 **Distinction Between Martial Law And Military Law**
(i) Military law is a body of special laws and regulations governing the Army, the Navy and the Air Force. So military law is composed of three types of positive laws— Army law Navy law, and Air Force law. This law is applicable to members of the

law in this sense of military government is quite outside the ambit of municipal or constitutional law; it is rather a subject matter of international law.

Thirdly, martial law is used to mean the deployment of troops in aid of and under the discretion of the civil authorities to suppress riot, insurrection or other disorders, in the realm without the proclamation of martial law. It is to be noted that the right to enlist the support of the military forces by the civil authority in its effort to restore order is common to the law of every civilised country. This right of the executive cannot be properly called 'martial law'. It seems that, for the lack of an alternative name the expression 'martial law' is used to mean the use of military forces in the aid of the civil authorities in suppression riots or other public disorders.[1] If it is to call a kind of martial law, then the author thinks it more convenient for the purpose of research and study to describe it martial law in universal sense. In Britain martial law exists only in this sense.

Fourthly, martial law means that kind of law which is generally promulgated and administered by and through military authorities in an effort to maintain public order in times of insurrection, riot or war when the civil government is unable to function or is inadequate to the

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aforesaid forces in peace as well as in war. For example, in Bangladesh the Army Act, 1952 the Naval Discipline Ordinance, 1961 and Air Force Act, 1953 are military laws. On the other hand, martial law is not any positive law as such; it is basically a condition of affairs in which absolute power for the purposes of suppression of insurrection or resistance or invasion, is assumed by the military authorities who are temporarily placed above the ordinary law and are not amenable to the jurisdiction of the civil courts. Of course, it may be said that martial law is a body of regulations and proclamations issued by the Martial Law Administrators.

(ii) The object of military law is to regulate discipline and administration within the soldiers whereas the object of martial law is to suppress rebellion, insurrection or riot by using force.

(iii) Military law is executed through court-martial a kind of tribunal in which those who violate the military law are commonly tried. But martial law is executed by Martial law courts, Military Tribunal, Special or Summary Court etc. Courts which are set up to administer martial law are not, properly speaking, courts at all. Such courts were described by Sir James Stephen as "mere committees formed for the purpose of carrying into execution the discretionary power assumed by the martial law government."

(iv) Military law is a kind of defined law and is permanent in nature. But martial law is not built on any settled or defined principles and it is temporary in nature.

1 Bari, Dr. M. Ershadul, *The Imposition of Martial Law in Bangladesh, 1975 : A Legal Study*, The Dhaka University Studies Part-F, Vol. 1(1), (1990), P.1 (Footnote).

preservation of peace, tranquility and enforcement of law and by which the civil authority is either partially or wholly suspended or subjected to the military power. And as soon as peace is restored, the military authority goes back to its barrack handing over power to the civil government. This type of martial law is called martial law in proper sense. About this type of martial law professor Hood Phillips says that martial law in the strict sense means the suspension of the ordinary law and the establishment therefore of discretionary government by the executive exercised through military.[1] Martial law in this sense is unknown to the law of England.[2] The French institution of 'State of Siege' provides the glaring example of martial law in proper sense. Under article 36 of the French Constitution the Council of Minister may declare martial law (State of Siege) but only the parliament may authorise its extension beyond 12 days. This martial law in proper sense has two types of essential elements — Ante-elements and Post-elements.

Ante-Elements

(i) There must be necessity i.e. the situation of the whole country or any part of it is such that the ordinary courts and civil government are unable to function.[3]

(ii) Declaration of martial law must come from or the deployment of forces must be ordered by the authority who is legally competent to do so.[4]

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1 Phillips, O'Hood, *Constitutional and Administrative law*, Seventh edition, (London: Sweet and Maxwell, 1987), PP. 357–358.

2 Dicey, A.V, *Law of the Constitution*, Ibid, P. 287

3 The traditional rule under the doctrine of 'necessity' is that if the civil courts are sitting, it is a conclusive proof that a state of peace and not of war existed. But the Privy Council in *Exparte D.F. Marais* (1902 AC 109), a case from South Africa, held that the continued sitting of the civil courts was not a conclusive proof that a state of martial law did not exist. It is then a question of fact to be determined by the ordinary courts of the land if a state or condition exists in any given area or district so as to justify the coming into force of martial law.

4 **Who can declare martial law ?**
There are differences of opinion as to the answer to this question. The general democratic rule is that martial law may be declared by the head of the executive under the authority of parliament. In Britain declaration of martial law was a prerogative of the crown. But after 1628 declaration of martial law came to be the power of parliament. Now King could declare martial law only on the authorisation of parliament. In France martial law can be declared by the Council of Minister but to extend it beyond 12 days parliament's approval is a must. In British India and also in other British colonies the Governor-General had the power to declare martial law and the basis of that power was a law made by the British parliament. Article 196 and

Post-Elements

(i) The civil government must either act in concert with or in subordination to the military authority; or, it will be suspended and the military authority will substitute for it.

(ii) Civil laws and courts would be suspended and the people would be made subservient to the military authority i.e. the ordinary courts would be superseded by the military tribunals.

(iii) As soon as peace is restored, martial law and martial law courts or tribunals would be dissolved; civil law and courts would be revived; the civil government would sit on power and the military authority would go back to its barrack.

(iv) The civil government would pass an indemnity Act indemnifying any person or officials in respect of their acts done in connection with the maintenance or restoration of order in a martial law area and validating any penalty inflicted under martial law.

(v) Once peace is restored and civil government revived, the courts have the right to review acts committed by the military during the period of martial law.[1]

Besides the above mentioned senses of martial law, there is, of course, another type of martial law which should be a class apart, and it is military take over or military intervention into politics under the garb of martial law in proper sense. Though this type of martial law has nothing to do with constitutional martial law and most of the constitutional experts and jurists are not at all prepared to treat it as a martial law but the fact is that this military take over is done under the garb of martial law; formal declaration by issuing a proclamation is made that martial law is declared throughout the country; the largest number of the world population is acquainted with this kind of martial law only; the largest number of developing countries have been or still are under clasp

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Article 223–A of the Pakistan Constitution of 1962 contained provisions of martial law. Also Article 34 of the Indian constitution provides for martial law. But nowhere of these constitutions it was /is mentioned – who could / can declare martial law. So it is not clear if the executive without an Act or authority of parliament can declare martial law. In undivided Pakistan martial law was declared two times; neither there was an Act authorising it; nor the declaring authority (the President) took approval or authorisation from parliament. Since the executive may abuse this power of martial law it should be specifically laid down in an Act by parliament as to who and under what circumstances may declare martial law as envisaged by the Constitution.

1 *Higgins* V. *Wills* (1921) IR 386

of this kind of martial law for a considerable period of the second half of this century. This kind of martial law should, therefore, be given a specification particularly for research purpose. In my view the best suited name of this kind of martial law should be like 'So-called', 'Extra-constitutional' or 'Whimsical martial law.' Why is it being termed as extra-constitutional or whimsical martial law would be discussed subsequently and this so-called martial law would be centre-point of discussion in this chapter.

From the light of the above discussion it may be said that under constitutional jurisprudence martial law may be of following 3 types:

1. Martial Law in Universal Sense.
2. Martial Law in Proper Sense.
3. So-Called, Whimsical or Extra-Constitutional Martial Law.

Martial Law in Universal Sense

As mentioned earlier martial law in universal sense exists in every civilized country of the world. Because in this sense martial law means the deployment of troops in aid of and under the direction of the civil government to suppress riot, insurrection or other disorders in the realm. In this case the military authority does not supersede the civil government; it is merely called upon to aid the civil government in execution of its emergency functions.

Martial Law in Proper Sense

As mentioned earlier martial law in proper sense means the suspension of ordinary law and the temporary government of a country or part of it by military tribunals. This is equivalent to the circumstances which in France is known as the declaration of 'State of Siege'. Details of this kind of martial law have been discussed earlier.

So-Called Martial Law

As mentioned earlier this type of martial law is commonly known in political science military intervention into politics. The displacement of civil governments by the military has been a common feature in most countries which have gained independence from colonial rule in the second half of the twentieth century. Wherever the social and political condition deteriorates and an ambitious general is at hand, the country goes through a period of military rule. This military rule suddenly comes with the declaration of martial law and such declaration is not generally a willful declaration of the executive who has constitutional authority to do so; rather it is declared either by the military coup leader himself ousting or killing the existing governing leaders or by the head of the state under

gun-point. Again, many countries' Constitutions do not provide any provision for martial law but the military comes to power declaring martial law fully in an extra-constitutional way. From legal point of view this type of martial law is void *ab initio*. This type of martial law does have the post-elements of martial law in proper sense but none of the ante-elements. Because firstly, with the declaration of this type of martial law the civil government is suspended and the military authority takes over to power; secondly, all civil courts and laws are declared suspended and people comes under the jurisdiction of martial law and martial law courts or tribunals. But none of the ante-elements is possessed by this martial law. Because, firstly, it is not declared by the authority which has constitutional and legal power to do so; secondly, it is not declared on the basis of doctrine of necessity; rather such type of martial law is declared for political purpose, for seizure of power ousting the civil government. This is why it may be termed as so-called martial law. 'This kind of revolution or imposition of martial law constitutes a class apart and has nothing to do with constitutional martial law."[1]

Martial Law and the Doctrine of Necessity

In constitutional law martial law finds its justification in the common law doctrine of necessity for its promulgation and continuance; all measures taken in exercise of the power of martial law must be justified by requirements of necessity alone, the necessity to restore law and order. Thus martial law can be declared as a last resort in times of grave emergency when society is disordered by civil war, insurrection or invasion by a foreign enemy, for speedy restoration of peace and tranquillity, public order and safety in which the civil authority may function. Sir James Mackintosh conceded that "while the laws are silenced by the noise of arms, the rulers of the Armed Forces must punish, as equitably as they can, those crimes which threaten their own safety and that of society but every moment beyond usurpation"[2]

The same opinion was expressed by lord Brougham :

> "On the pressure of great emergency, such as invasion or rebellion, when there is no time for the slow and cumbrous proceedings of the civil law, a proclamation may justifiably issue for excluding the ordinary tribunals and directing that offence should be tried by Military Court; such proceeding

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1 Justice Murshed in *Lt. Colf. G.L. Bhattcharya* V. *The State*, Quoted. Bari, *Ibid.*

2 Quoted by, Munim, F.K.M.A, *Ibid*, P.52

might be justified by necessity ... It is created by necessity and necessity must limit its continuance".[1]

Likewise Hamudur Rahman. J in *Asma Jilani* V. *Government of Punjab and others* says :

> "Martial law is a machinery for the enforcement of internal order .... is normally brought in by a proclamation issued under the authority of the civil government and it can replace the civil government only where a situation has arisen in which it has become impossible for the civil courts and other civil authorities to function ... it is an equally established principle that where the civil courts are sitting and civil authorities are functioning, the establishment of martial law cannot be justified."[2]

Since martial law is declared on the basis of state of necessity "mere subjective apprehensions as to the existence of such necessity would not, however, justify the declaration as well as the exercise of arbitrary powers. It will subsequently be judged with reference to an objective standard, for 'necessity' is an objective standard by which executive action can be measured".[3] Taney C.J. of the US Supreme Court in *Luther* V. *Borden*[4] says that the court cannot restrain the executive from declaring martial law earlier at hand, for the question whether the 'public safety' requires a declaration of martial law is a question of political nature. That the right to recourse to the military forces arises from necessity has been admitted on all hands but what kind of necessity invests the military authority with such unregulated discretion has often been the subject of inquiry before the courts. The necessity should be that "the danger must be present or impending and the necessity such as does not admit of delay."[5] To determine its presence the court will take into consideration the state of facts as they were at the time of taking the action. There must be a reasonable relation between the steps taken and the emergency.[6] If such relationship does not exist, the action will be wholly arbitrary.[6]

It is recognised that during the continuance of martial law the armed forces have the power to inflict any punishment including the death penalty. But it is also recognised that any use of force is limited as well

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1 Quoted by, Munim. F.K.M.A. *Ibid.* P. 53
2 PLD 1972 139
3 Bernard Schwartz - Quoted by, Munim. Ibid.. P. 117
4 5 How 1(1849)
5 Mitchell V. Harmony 13 (wall) (U.S) 115 p. 134 (1851)
6 Bernard Schwartz. Quoted by Munim. *Ibid*
6 Starling V. Constantine 287 US 378 (1932)

as justified by the nature of the emergency. Accordingly, the armed forces whose duty is merely to restore order and repel an enemy cannot act wantonly. The exercise of powers when martial law has been proclaimed does not enable members of the armed forces to commit excesses under colour and pretence of authority. Though martial law allows every act necessary for maintenance and restoration of order, at the same time it requires that it must be honest and bonafide. On his failure to prove executive good faith in administering martial law, Governor Wall was not only prosecuted but was hanged for the crime of committing murder.[1]

The legislature, however, usually passes an Act of Indemnity which provides a good defence to those responsible for acts done in good faith. But this kind of legislation does not cover any act motivated by malice or ill will. "Excess and wantonness, cruelty and unscrupulous contempt of human life, meet with no sanction from martial law any more than from ordinary law."[2] So once martial law is withdrawn and peace restored, any injured person may use his right of action in the court and if he can establish that the powers were not used *bonafide* and for recognised purposes, he will be entitled to damages and other remedies. If this is not or if it is argued that every act, however unnecessary or malicious it may be, is justified by a proclamation of martial law, one may easily see the institution of martial law degenerate into an engine of tyranny, private malice and revenge.

So-Called Martial Law, Courts, Doctrine of Efficacy and Doctrine of Necessity

Now we shall proceed to see how the courts treat the so-called martial law in developing countries where military take over has been a common feature since the second half of the 20th century. In this respect courts in developing countries have resorted to two different doctrines — Doctrine of Efficacy and the Doctrine of State Necessity.

Doctrine of Efficacy

This doctrine is also called the doctrine of revolutionary legality which is based on the positivist theory of the efficacy of the change or revolution (coup d' etat) expounded by Hans Kelsen. In his book *"General Theory of Law and State"* Kelsen, under the heading of "the

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1 Munim, F.K.M.A. *Ibid,* P.118

2 Per Colonial Judge in a case arising after Jamaica Insurrection in 1865. Quoted by, Munim. *Ibid,* P.118

Principles of Legitimacy", has given a logical explanation on the elements and effects of a revolution. According to Kelsen, a revolution means a successful revolution and a successful revolution must have the following two elements :

(i) The overthrow of existing order and its replacement by a new order.

(ii) The new order begins to be efficacious because the individuals whose behaviour the new order regulates actually behave, by and large in conformity with the new order.

If these two facts are associated with the new order, then the order is considered as valid order and a law creating factor. So the success of a revolution or, in other words, the efficacy of the change would establish its legality.[1]

This Kelsen's theory of efficacy was first applied in *State* V. *Dosso*[2] case by the Pakistan Supreme Court. Pakistan after nine years of its independence, had been able to adopt and implement its first republican constitution in 1956. Then the Governor-General Iskander Mirza was elected as the first President under the constitution. After the constitution was adopted, there was naturally a sense of relief in the political circle who expected full implementation of the constitution after the first general election to be held in 1959. But such expectations proved unreal as governments after governments came and went resulting in an extreme political chaos and instability both at the centre and in the provinces. President Iskander Mirza did not play the democratic role of an impartial balance under the constitution; rather being directly involved in party politics, he became the master-architect of these chaos and instability. For his power-expectation and undemocratic and conspiratorial activities it was decided by the politicians that Iskander Mirza would not be elected as the president in the next election. When the country was preparing for the general election to be held in February, 1959, Mirza finding himself unable to rally support among the politicians for his re-election, by a proclamation on the night of 7th October, 1958 abrogated the constitution of 1956, dismissed the Central and Provincial governments; dissolved the central and provincial legislatures and declared martial law throughout the country. In doing this Mirza was supported by the Commander-in-Chief of the Pakistan Army, general Mohammad Ayub Khan who was

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1 Kelsen, Hans, *General Theory of Law and State*, (New York : Russell and Russell, 1961), PP. 117–119, emphasis supplied by the author.

2 PLD 1958 (SC) 533

also appointed as the Chief Martial Law Administrator. Following the proclamation of martial law the Law (Continuance in Force) Order was promulgated.

The legality of Mirza's Proclamation of martial law and the military government came up for consideration in *State* V. *Dosso* case. As mentioned by a commentator,

> "the Pakistan Judiciary had to face unique situation when it was required to pronounce on the legality of a new regime which usurped power through an unprecedented means hitherto unknown in the constitutional history of the commonwealth. The martial law imposed by Mirza was not 'martial law' as understood by the ordinary connotation of the term. The pre-existing legal order had been overthrown establishing a new one by an extra-ordinary means not contemplated by the constitution and the question of legitimacy of the new order had come for examination before a court established under the system which had now been replaced.[1]

The court took resort to the positivist theory of Hans Kelsen and declared the martial law and military Goverentment of Pakistan valid on the basis of the doctrine of efficacy as explained by Kelsen. The substance of the judgment was that since the constitution was abrogated and its government came to power by imposing martial law and since there was no protest among the people, the *coup* was a successful one and martial law and military government were legally valid. Munir C.J. maintained :

> "Victorious revolution or successful *coup d' etat* was an internationally recognised legal method of changing a constitution, and the revolution having become successful in Pakistan it satisfied the efficacy of the change and became a basic law-creating fact .... It sometimes happens that a constitution and the national legal order under it is disrupted by an abrupt political change not within the contemplation of the constitution. Any such change is called a revolution, and its legal effect is not only the destruction of the existing constitution but also the validity of the national legal order ... from a juristic point of view the method by which and the persons by whom a revolution is brought about is wholly immaterial .... Equally irrelevant is the motive for a revolution ... . If the revolution is victorious in the sense that persons assuming power under the change can successfully require inhabitants of the country to conform to the new regime, the revolution itself becomes a law-creating fact ... . "

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1 Patwari, A.B.M. Mafizul Islam, *Protection of the Constitution and Fundamental Rights under the Martial Law in Pakistan*, P.3

The judgment delivered in Dosso's case had to face a severe criticisms on the one had and on the other hand, it had a great impact, for it gave recognition to an unconstitutional government which became a pattern of 'change' in the commonwealth countries and later on, this decision has been refereed to with approval in courts of many countries like Nigeria, Rhodesia, Ghana, Uganda etc.

In *Uganda* V. *Commissioner of Prisoners Exparte Matuvo* the Ugandan High Court following the decision of Dosso's case held that the constitution of 1966 of Uganda which was made by military government was a product of a revolution and it would be regarded as valid and the supreme law of Uganda. Similar verdict was given in *R* V. *Ndholvu* by the Rhodesian High Court and also in *Awoornor Williams* V. *Gbedmah* by the Supreme Court of Ghana.

The Overruling of the Doctrine of Efficacy

In *Asma Jilani* V *The Government of Punjab*[1] the same Supreme Court of Pakistan overruled the decision of Dosso's case and held that the martial law proclaimed by Yahya Khan was illegal and that his assumption of power on 25th March, 1969 was wholly unconstitutional and could not be recognised as valid. As to the doctrine of efficacy the court said :

> "The principle laid down in Dosso's case is wholly unsustainable and cannot be treated as good law either on the principle of stare decisis or even otherwise."

Likewise in the case of *E.K. Sallah* V. *Attorney General* the Supreme Court of Ghana, after the constitution of 1969 came into effect, was called upon to determine the legal implications of the military *coup d' etat* on the pre-existing legal system. The court held that the suspension of the constitution of 1960 by military *coup* had no effect of destroying the legal order.

Doctrine of Necessity

This doctrine has already been discussed. Now we will see how the court has accepted the doctrine to meet revolutionary situations. The present Pakistan constitution was adopted in 1973 when Zulfiker Ali Bhutto was the Chief Martial Law Administrator and president. But in 1973 General Ziaul Haque, the Chief of Army led a military coup; ousted

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1 PLD 1972 SC 139

Bhutto and his government; dissolved parliament; suspended the constitution and declared martial law. The legality of this martial law came up for consideration in *Begum Nusrat Bhutto* V *The Chief of Army Staff and Federation of Pakistan.* The Supreme Court declared martial law and military coup by Ziaul Haque valid; it overruled the decision of *Asma Jilani.* But this time the court did not rely on the doctrine of efficacy; rather it resorted to the doctrine of state necessity. The court said:

> ".... It was in this circumstances that the Armed Forces of Pakistan ... intervened to save the country form further chaos and bloodshed to disaster. It was undoubtedly an extra-constitutional step, but obviously dictated by the highest consideration of state necessity and welfare of the people.
>
> .... The imposition of martial law was impelled by high considerations of state necessity and welfare of the people, the extra-constitutional step taken by the Chief of Army staff to overthrow the government of Mr. Bhutto, as well as the provincial government and to dissolve the Federal and Provincial legislature stand validated in accordance with the doctrine of necessity."

The So-called Martial Law and the Role of the Judges

It has already been mentioned that declaration of martial law can be justified only on the common law doctrine of necessity. But when martial law is declared just to hold on to power or to capture power through military *coup* or to oust the existing government for any other purpose, this martial law does not have any legal validity. But due to pressure of realities and facts or under a threat the judges have tried to legalise this so-called martial law sometimes on the basis of the doctrine of efficacy and sometimes, on necessity. Again, when there has been no threat or any pressure, the court has emphatically declared this martial law illegal. For example, when the Pakistan Supreme Court delivered its judgment on *Asma Jilani's* case Yahya and his regime had been dicredited and removed from office and martial law was not in force. Likewise, the decision of *E.K. Sallah's* case also came after the military government had ceased to exist. If such judgments are pronounced during the continuance of military rule and martial law, there is danger for the judges and the courts so pronouncing; they will either be suspended or their jurisdiction will be restricted or the judges concerned will be removed from office by the new regime. Again, it is improbable that the judgment of the court would have made the slightest difference to the continuance of martial law, because the military authority does not

hesitate to fraustrate such judgments by issuing decrees or proclamation. For example, when the Lahore High Court of Pakistan in *Malik Mir Hassan* V. *State* declared the proclamation of martial law declared 25th March ,1969 illegal, the military authority issued the President's Jurisdiction of Courts (Removal of Doubts) Order, 1969 by which the courts were barred from questioning the exercise of powers by the Martial Law Authority and the decision in contravention of this would be deemed to be of no effect. Likewise when the Supreme Court of Nigeria in *Lakanmi* V. *Attorney General* declared the military *coup* and martial law illegal, the decision of the court was made eneffective by the military government by issuing the Federal Military Government (Supremacy and Enforcement of Powers) Decree, 1970. The situation has best been explained by Justice Fieldsend in *Madzimbamuto* V. *LardnerBurke N.O. and another* [1] :

> "It may be a vain hope that the judgment of court will deter a usurper, or have the effect of resorting legality, but for a court to be deterred by fear of failure is merely to acquiesce in illegality."

Thus the legality of so-called martial law which is followed by a military *coup* or revolution does not depend on the courts justification or judgment; rather it conversely controls the courts and judges. This is why this type of martial law may be termed as whimsical martial law. Certainly this type of martial law poses a dilemma for the judges. Sometimes they become helpless when the constitution is either abrogated or suspended and made subservient to the will of an extra-constitutional force. Though a judge is oath-bound to preserve, protect and defend the constitution, during this extra-constitutional situation 'he is' as expressed by Sir Hugh Beadle, 'simply forced into a position of accepting the facts and the laws as they are, whether he likes or not. He has been taken over by events."[2] An Argentinan Judge (Oyhanarte. J.) has aptly described the dilemma of judges :

> "The Supreme Court cannot modify the course of history. It lacks the power necessary to do this. When it is faced with the overthrow of constitutional authorities and the installation of a government of force by what have come to be called 'revolutionary' means, the judges of the court can do three things :
>
> (i) resigns, thus transferring the responsibility of the decision to others ;

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1 (1968) 2 SALR 284 Quoted by, Ershadul Bari, *Ibid*, P. 68

2 Sir Hugh Breadle C.J, in R V. Ndhlove. Quoted by, Kamal, Mustafa, J, *Bangladesh Constitution : Trends and Issues*, Ibid. P. 60.

(ii) simply accepts the fact ;
(iii) try to save those institutional values which can still be saved."[1]

But the judges should make choice for the third alternatives because, as mentioned by Mastafa Kamal. J. 'resignation of judges in revolutionary situations has not been uncommon, but except for the ripple that it causes in the body politic neither the judges by resignation *en masse* or in ones or twos have been able to deflect the revolutionary regime from following the course of action it chose to persue nor have the people at large carried the mantle from the judges to overthrow the extra-constitutional force. On the other hand when judges resigned in protest against an unconstitutional take-over or when judges were removed because of their obstruction to the wishes of the new authority, their successors on the Bench merely conformed to the wishes of the new regime and often they were also of so low a calibre that justice was no longer administered properly.[2]

So-Called Martial Law in Bangladesh

The Constitution of Bangladesh does not envisage the imposition of martial law. Throughout the text of the Constitution, no reference has been made to Matial Law. Although the term 'Martial Law' had duly occurred in Article 196 of the 1956 Constitution of Pakistan and Article 223-A of the 1962 Constitution of Pakistan, the Articles which enacted provisions for passing an Act of Indemnity in relation to acts done in connection with Martial Law Administration, it has significantly been omitted form corresponding Article 46[3] of the Constitution of Bangladesh that empowered parliament to pass an Act of Indemnity in respect of any act done in connection with the national liberation struggle or the maintenance or restoration of order in any area in Bangladesh. This shows that although in Pakistan Articles 196 and 223–A of the 1956 and 1962 Constitutions respectively, recognised the possibility that Martial

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1 Quoted by, Kamal, Mustafa, J, *Ibid*, P. 60
2 Kamal, Mustafa, J, *Ibid*, P. 61
3 Article 46 of the Constitution of Bangladesh says—"Notwithstanding anything contained in the forgoing provisions of this part (i.e. Part III which guarantees some important fundamental rights to citizens) Parliament may law make provisions for indemnifying any person in the service of the Republic or any other person in respect of any act done by him in connection with the national liberation in Bangladesh or validate any sentence passed, punishment inflicted, forfeiture ordered, or other act done in any such arca."

law might be imposed under the common law doctrine of necessity for the purpose of 'the maintenance or restoration of order in any area in Pakistan', no such recognition was given in Bangladesh where the phrase 'Martial Law' was omitted from the analogus Article 46 of the Constitution of Bangladesh. Therefore, it appears that in the Constitution of Bangladesh there is no provision whatsoever for the imposition of martial law under any circumstances even for the sake of restoring law and order.[1]

But like some other commonwealth countries martial law was imposed unconstitutionally in Bangladesh twice— first, on the 15th August, 1975 and second, on the 24th March, 1982.

On 15th August, 1975 Sheikh Mujibur Rahman, the then President of Bangladesh was brutally killed with his family members by a military coup. Following this assassination martial law was declared throughout the country. Khandaker Mostaque Ahmed assumed the office of the President. Though martial law was imposed, the Constitution was not suspended; it was to remain in force subject to martial law proclamation, regulations, orders etc. This martial law continued for 3 years and 7 months. On the 5th April, 1979 the Chief Martial Law Administrator and President Ziaur Rahman got his extra-constitutional regime legalised through the parliament which was elected during the continuance of martial law and on 6th April martial law was withdrawn.

For the second time martial law was imposed by the then Chief of Army Lieutenant General Hussain Muhammad Ershad ousting the civil government of Justice Abdus Sattar on 24th March, 1982. This time the Constitution was suspended. This martial was kept in force for 4 years and 7 months. On 10th November, 1986 General Ershad legalised his regime through a parliament which was elected during the continuance of martial law and on the next day martial law was withdrawn.

It is pertinent to note here that unlike the case of *Dosso* and *Asma Jilani* (the cases in which legality of imposition of martial law in Pakistan was examined) in Bangladesh the legality of the declaration of martial law was not discussed by the Supreme Court in any case either during the continuance of or even after the withdrawal of martial law. But some fringe questions relating to martial law came up for

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1 Bari, Dr. M. Ershadul, *Ibid*, P. 67

consideration before the courts[1] and the courts declared that martial law proclamation regulation etc. were supreme law and the Constitution lost its character as the supreme law. In this respect, the observations of Fazle Munim. J. in the case of *Halima Khatun* V. *Bangladesh* is worth quoting:

> "What it appears from the Proclamation of August 20, 1975 is that, with the declaration of Martial Law .... the constitution of Bangladesh ... (has been made) subordinate to the Proclamation and any regulation or order as may be made by the president in persuance thereof .... Under the Proclamation ... the constitution has lost its character as the supreme law of the country. There is no doubt, an express declaration in Article 7(2) of the constitution to the following effect," This constitution is, as the solemn expression of the will of the people, the supreme law of the Republic, and if any other law is inconsistent with this constitution that other law to the extent of such inconsistency be void." Ironically enough, this Article, though it still exists must be taken to have lost some of its importance and efficacy. In view of .... the Proclamation the supremacy of the constitution .... is no lager unqualified."

For the third time in Bangladesh military intervention into politics was made on 11th January, 2006 in the wake of political unrest before the 9th Parliamentary election. This intervention did not follow any declaration of martial law; nor was the constitution suspended; it was class part intervention and the consequence and aftermath of this intervention is yet to ripen into politics. For details, see chapter 23 and 243 of this Book.

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1 Halima Khatun V. Bangladesh 30 DLR (SC) 207
Sultan Ahmed V. Chief Election Commissioner 30 DLR (HCD) 291.
Haji Jaynal Abedin V. State 30 DLR (HCD) 371
Jamil Haque V. Bangladesh 34 DLR (AD) 125
Nasiruddin V. Bangladesh 32 DLR (AD) 216
Khandakar Mostaque Ahmed V. Bangladesh 34 DLR (AD) 222
Khandker Ehtesamuddin Ahmed V. Bangladesh, 30 DLR (AD) 154
Bangladesh V. Mahbubur Rashid 1981 BLD (AD) 300
Monoranjan Mukherjee V. Election Commission 41 DLR (HCK) 484
Principal Secretary, Presidents Secretariat V. K. Mahtabuddin Ahmed 42 DLR (AD) 214
Nasir Kader Siddiqui V. Bangladesh 44 DLR (AD) 16
For more of academic treatment, See, Kamal, Mustafa, J. Ibid.

CHAPTER XXIII

CARETAKER GOVERNMENT AND THE 13TH AMENDMENT OF THE CONSTITUTION

Caretaker Government

The concept of 'Caretaker Government' as it has been and is being used in politics and constitutions of various countries, may be used in three senses : Presumed Caretaker Government ; Caretaker Government in Special sense; and Caretaker Government in proper sense or Non-Party Caretaker Government.

Presumed Caretaker Government

When parliament stands dissolved because its duration has expired or is dissolved because the government has been defeated in the floor and it has advised for its dissolution or because of any other reason, the existing government continues in office till the new government is formed after election. This sitting government after dissolution of parliament and before its reconstitution transforms automatically into a caretaker government in the sense that this government though a sitting one undertakes to take care of the affairs of the government for pre-election interim period during which it does not initiate any important policies or commitments of a broad and sweeping nature. Invariably, the Prime Minister in office at the time of the dissolution of the legislature or the termination of its constitutional life, carries on the administration of the country as head of the caretaker government. This transformation is recognised in all democratic countries. In Britain, Canada, New Zealand it is a conventional practice and in countries with written constitutions it is specifically mentioned that when parliament is dissolved the sitting government continues in office till its successor has entered upon office.

To be noted that this transformed nature of the sitting government during the election period is not universally recognised as caretaker government as such and it cannot be said to be 'caretaker government' in true sense of the term, for this government taking care of the administration itself contests in the election while it is in power. But as it does not initiate any important policies or make a commitment of broad and sweeping nature and it holds office just to take care of the day to day administration, only in this sense it may be presumed to be a kind of

caretaker government. This type of caretaker government is automatic and natural in countries where constitutionalism is practised.

Caretaker Government in Special Sense

In some cases to a particular special situation a caretaker government is formed on the basis of national consensus. Again, in some written constitutions specific provisions are kept for caretaker government to conduct general election.

For example, in Britain in 1945 the cabinet formed by Churchill following the Second World War has been termed by Sir Ivor Jennings as Caretaker Government.[1] As this government was formed particularly for conducting post-war election in Britain and this 16 member cabinet was participated by Conservative Party, National Liberation Party and also some non-party members. This government was different from a presumed caretaker government as I have mentioned above. Sir Ivor Jennings categorically says that 'it should be explained that it is not British practice to appoint a 'caretaker government' for the duration of general election. It was done in 1945 because the wartime coalition had broken up. The electors had to decide whether they wanted a Conservative Government or a Labour Government, and meanwhile the King's service had to be carried on. This was quite exceptional. The government which advises the dissolution remains in office throughout the election and continues to do so after the election, unless it is defeated'[2]

Again, Article 48(5) of the Pakistan Constitution specifically provides for 'caretaker government'. It stipulates that—

> "Where the President dissolves the National Assembly, he shall, in his discretion
>
> (a) appoint a date not later than 90 days from the date of the dissolution, for holding of a general election to the Assembly; and
>
> (b) appoint a 'Caretaker Government".

But there is no provision for appointing a non-party caretaker government; neither is there any mandatory provision that the caretaker government will not take part in the election. As a result, the provision

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1 *Cabinet Government*, 3rd ed, P. 86 (Footnote)
2 *Cabinet government*, Ibid, P. 86

for 'caretaker government' as provided in the Pakistan Constitution cannot be said to be a caretaker government in true sense of the term.[1]

Caretaker Government in True Sense

In true sense the term 'caretaker government' means an interim government which is a non-party government and abstains itself from contesting the election and is appointed particularly for conducting a free and fair election. For example, the provision for 'caretaker government' as provided by the 13th Amendment of the Constitution of Bangladesh ensures a caretaker government in true sense, for none of the government has the right to contest general election. Caretaker government of Pakistan of 1993 and of 1997 were caretaker governments in proper sense. The interim government to conduct election in South Africa in 1994 was also a caretaker government in true sense. The interim government of Justice Sahabuddin Ahmed which was formed after the fall of military dictator Ershad regime in 1990 in Bangladesh was not, from constitutional point of view, any caretaker government because there was no provision for caretaker government as such in the Constitution of Bangladesh. Under the provisions of the Constitution Justice Sahabuddin Ahmed was appointed as the Vice-President and when Ershad resigned Sahabuddin Ahmed acted as the Acting President and until he came out of his office he acted as the Acting President. But if we examine his government from factual, political and philosophical point view, we find that his government was essentially though not constitutionally a caretaker government in true sense. Because all of his government were non-political persons and none of them took part in the election.[2]

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1 After the death of President Ziaul Haque Pakistan had its first caretaker government under the constitutional provisions to conduct election. But all ministers under caretaker government took part in election and there was strong allegation of rigging and malpractices in the election. The second caretaker government was in 1990 and this time it was also party government and all the ministers of caretaker government took part in the election and there was extensive allegation of rigging and maplractices. The third caretaker government was in 1993. This time it was a non-party caretaker government and none of the members of it took part in election. The last caretaker government was in 1997. This time also it was impartial and non-party caretaker government and none of the members of it took part in the election.

2 The aforesaid 3 types of caretaker governments may again be classified into two categories (1) So-called or Party-caretaker government; and (2) Non-party caretaker government.

Background of the 13th Amendment

On the way to restoration of liberal democracy from the bondage of military autocracy the historic 5th Parliamentary Election was a milestone which was held under the Acting President Justice Sahabuddin Ahmed in 1991. An unprecedented degree of enthusiasm was shown by all quarters. The election was nationally and internationally recognised as free and fair. Winning majority seats in parliament the BNP formed government. But from the beginning of the BNP government the opposition parties in the parliament began to create pressure on the government so that it include provision for caretaker government in the Constitution. In 1993 first Jamat-i-Islam and the AL and JP submitted their respective Bills concerning caretaker government. Every Bill contained the same object—"to make general elections free and fair and to make the whole process of election free from the government influence provision for caretaker government should be introduced in the Constitution". But this demand of the opposition parties was treated by the government as unconstitutional and illegal. The Magura by-election was the turning point for the movement of caretaker government. It was this Magura by-election in which the government party BNP took resort to an unprecedented malpractice and rigging. This election manipulation of BNP government, as reported by most important dailies, defeated even the Ershad's election manipulation in 1988 and it has earned a title of 'Election Magura' in the election politics of Bangladesh. Before this Magura incident all the opposition parties made walkout from parliament in protest of a statement made by Information Minister Nazmul Huda concerning Hebron Killing issue of Israel. And they made commitment that they would not return to parliament if the Information Minister did not expunge his statement. To this boycotting of parliament Magura election malpractices provided an extra strength and now the opposition parties got their direct way of demanding that they would not go back to parliament till a 'caretaker government' Bill was introduced in the House. The government did not pay a heed to this demand. On 28th December, 1994 about 147 MPs resigned in protest. When the government proceeded to hold by-election in 142 vacant seats the political impass took more outrageous condition leading to continuous country-wide strike. On 24th November, 1995 the government dissolved the 5th parliament and the 6th Parliamentary Election was scheduled on 15th February, 1996. But since the government did not pay any heed to the demand of caretaker government by the opposition, all the opposition parties boycotted election. The ruling party BNP proceeded to contest the

election with sudden hand-picked parties as the military director Ershad did. The announcement of the result of the election added fuel to the fire-like opposition movement. All the opposition parties launched their country-wide non-cooperation movement and demanded the fall of the government as well as the dissolution of 6th parliament. The whole politico-economic condition of the country was leading to a complete civil war. Lastly finding no other the way out BNP government introduced the Caretaker Government Bill (the 13th Amendment of the Constitution) on 21st March at the first session of the 6th parliament. The Bill was passed on 26th March. Then the 6th parliament after 7 days of its life was dissolved on 30th March and Justice Habibur Rahman was appointed as the Chief Adviser of the Caretaker Government as envisaged in the 13th Amendment of the Constitution.

The 13th Amendment of the Constitution

This Amendment was passed with 268-0 votes on 26th March, 1996 and it became law on 28th March. The Amendment added a new Chapter (Chapter IIA : Non-Party Caretaker Government) in part IV of the Constitution with 5 new Articles (58A, 58B, 58C, 58D and 58E). It also amendment Articles 61, 99, 123, 147, 152 and the Third Schedule of the Constitution.

The Non-Party Caretaker Government

Formation of Caretaker Government when arise?

According to provisions of the 13th Amendment the question of formation of caretaker government will arise in the following two situations:

(i) If parliament is dissolved for any reason a caretaker government shall be appointed within 15 days after such dissolution.

(ii) If parliament stands dissolved, a caretaker government shall be appointed within 15 days after such dissolution. [(Article 58C(2)]

Composition of Caretaker Government

According to Article 58C the caretaker government shall consist of not more than 11 members of whom one shall be a Chief Adviser and other 10 shall be Advisers.

Qualification of the Advisers

Under Article 58C(7) the President shall appoint Advisers from among the persons who are –

(a) qualified for election as members of parliament;

(b) not members of any political party or any organisation associated with or affiliated to any political party.

(c) not, and have agreed in writing not to be, candidates for ensuring election of members of parliament;

(d) not over seventy-two years of age.

Who can be appointed as the Chief Adviser

Following persons having qualification of an Adviser may be appointed as Chief Adviser by the President:

(i) The person who among the retired Chief Justices of Bangladesh retired last.

(ii) If such retired Chief Justice is not available or is not willing to hold the office of Chief Adviser, the President shall appoint as Chief Adviser the person who among the retired Chief Justices of Bangladesh retired next before the last retired Chief Justice.

(iii) If no retired Chief Justice is available or willing to hold the office of Chief Adviser, the President shall appoint as Chief Adviser the person who among the retired judges of the Appellate Division retired last.

(iv) If such retired judge is not available or is not willing to hold the office of Chief Adviser the person who among the retired judges of the Appellate Division retired next before the last such retired judge.

(v) If no retired judge of the Appellate Division is available or willing to hold the office of Chief Adviser, the President shall, after consultation, as far as practicable, with the major political parties, appoint the Chief Adviser from among citizens of Bangladesh.

(vi) If none of the above-mentioned persons can be found to be appointed as the Chief Adviser, the President shall assume the function of the Chief Adviser (Article 58C).

Status of the Members of the Caretaker Government

The Chief Adviser shall have the status, and shall be entitled to the remuneration and privileges, of a Prime Minister and an Adviser shall

have the status, and shall be entitled to the remuneration and privileges of a Minister.

Functions:

(i) The non-party caretaker government shall discharge its function as an interim government and shall carry on the routine function of such government with the aid and assistance of persons in the services of the Republic; and, except in the case of necessity for the discharge of such functions it shall not make any policy decisions.

(ii) The non-party caretaker government shall give to the Election Commission all possible aid and assistance that may be required for holding the general election of members of parliament peacefully, fairly and impartially (Article 58D).

Evaluation of the 13th Amendment

In the constitutional development of Bangladesh the 13th Amendment of the constitution may be said to be a positive step for some reasons.

Firstly, the fundamental basis of formation of government in democracy is election. If this election is not free and fair, the formation of government cannot be said to fulfill the norms of democracy; and in this case the most celebrated maxim of democracy "all power belongs to the people" becomes a mere farce. More the election process will be free and fair, more the people will see their voting right, in other words, right to elect representatives meaningful. The most important positive merit of the 13th Amendment is that it has paved the way for making the general elections free and fair, particularly free from government influence.

Secondly, it has been a common trend in the politics of almost all developing countries that during the election period the party in power makes the worst abuse of public purse and properties to get the victory in their favour. This manipulation in the election process virtually creates an insurmountable stumbling block to the development of some important democratic institutions like the Election Commission, voting right, press, media and political party etc. Since the 13th Amendment provides interim separate caretaker government and no party government can continue in power during the general election, there remains no scope of manipulation of public purse and properties by the party in power.

Thirdly, coming to power every government from now on will have to think that once parliament is dissolved or its term is ended, it will automatically find itself out of the power and then the public will have the fullest opportunity and atmosphere to exercise their right to elect representatives and of the government. On the other hand, no government will be in a position to think for manipulating in the election process. There is therefore, possibility that the government will now be more responsive than in the past.

Demerits of the 13th Amendment

Firstly, though the Chief Adviser of the caretaker government has been given the status of a Prime Minister, from legal point of view, he has been made subservient to the President and he has not been given the full power as a Prime Minister in ordinary situation can exercise. According to article 58E the President is not bound to act in accordance with the advice of the Chief Adviser. Again, article 58B(2) stipulates that the non-party caretaker government shall be collectively responsible to the President. Thus President retains the power to cancel any decision of the caretaker government and even the caretaker government itself. Since the Chief Adviser along with all advisers of the caretaker government is non-political and non-partisan person and since he will exercise his powers only for three months to conduct a general election, no power-expectation will work within him, he should have been, for the sake of independent exercise of his function, given the same constitutional power as the Prime Minister does have.

Secondly, while the caretaker government is in power the unfettered power over the defence has been vested upon the President. During ordinary situations though the supreme command of the defence is vested in the President, he exercises this function only in accordance with the advice of the Prime Minister. But the 13th Amendment is silent about this matter. Thus the most powerful way to act in an arbitrary manner is retained with the President.

Thirdly, this interim caretaker government will be in power for 3 months only; they will not have any policy formulating functions and they will be in power without any prior experience of governing the country. So it is likely that this government may create obstacle in the smooth functioning and developments of policies initiated by the previous government.

This is, of course, the most strong argument against the concept of separate caretaker government. It is also true that very few instances can be found where after every 5 years or after every dissolution of parliament a separate politically inexpert government sits in power for conducting a general election. But the fact of the Bangladesh politics as far as it concerns its election politics is that a free and fair election has been a far cry in the history of Bangladesh since its independence and the interim government of Justice Sahabuddin Ahmed after the fall of Ershad regime has made a historic success in holding a free and fair election and this success had turned the concept of caretaker government into a political reality which has, through the 13th Amendment, been a constitutional reality.

But analysing the Amendment from true viewpoint of constitutionalism we would say that 13th Amendment is against the principle of institutionalisation of democracy. Because as a result of this Amendment a wrong conception will always work in the minds of the people and young learners that the government in power cannot be above the corruption and manipulation of election process; secondly, the Election Commission as a constitutional institution of democracy for controlling, conducting and superintending the whole election process is inherently weak and cannot be made in a position to be institutionalised; thirdly, the whole governing process particularly the bureaucracy will get a swing on a regular interval which may hamper the smooth functioning of the administration. For institutionalisation of democracy not a separate interim caretaker government but an independent Election Commission is essential which I shall discuss later on in this chapter.

Why Caretaker Government where there is Election Commission?

The Election Commission which is the fourth organ of the state as invisaged in the Constitution is a constitutionally independent body to control and conduct election process. Administering election process through an independent Election Commission is recognised in many democratic countries. As to the independence of the Election Commission the following provisions have been provided for in the Constitution:

(i) The Election Commission shall be independent in the exercise of its functions and subject only to this Constitution and any other law [Article 118(4)].

(ii) An Election Commissioner shall not be removed from his office except in like manner and on the like grounds as a judge of the Supreme Court [Article 118(5)].

(iii) The President shall, when so requested by the Election Commission, make available to it such staff as may be necessary for the discharge of its functions (Article 120).

(iv) The superintendence, direction and control of the preparation of the electoral rolls for elections to the office of President and to parliament and the conduct of such elections shall vest in the Election Commission (Article 119).

(v) It shall be the duty of all executive authorities to assist the Election Commission in the discharge of its functions (Article 126).

Thus the Constitutional independence of the Election Commission has been ensured but the problem lies with the statutory independence; various laws, which regulate the Election Commission and electoral process are vitiating this constitutional independence.

Firstly, according to the Rules of Business the Election Commission Secretariat is attached to the Prime Minister's Secretariat. As a result, the Chief Election Commission cannot exercise his effective control over the Secretariat of the Election Commission.

Secondly, it is a conventional and somewhere Constitutional rule that members of the Election Commission are appointed in consultation with the Chief Election Commissioner. But that condition of appointment has neither been inserted in the Constitution nor does it exist in convention in Bangladesh politics.

Thirdly, though the security of tenure of the Commissioners of the Commission is as like as that of the judges of the Supreme Court and although article 119 of the Constitution has invested the Election Commission all control and superintendence over election process, the Commission has little statutory independence to control election process independently and effectively. As expressed by an ex-Chief Election Commissioner the scheme under the Representation of the People Order, 1972 is that the Election Commission shall simply arrange the election; and the real control will remain at the hand of the Returning Officers. [1] Under section 39 of the Representation of the People Order, 1972 the principal function of pronouncing election results of parliamentary

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[1] See Summary of Proceedings of workshop on Electoral Process in Bangladesh, published by CAC in 1994.

election is done by the Returning Officers who are the Deputy Commissioners of different districts. These Returning Officers are easily dictated by the government and if he declares a candidate who has not secured the highest votes elected, the Election Commission has no independent and absolute power to punish him.

Fourthly, in every district there is an Election Officer known as District Election Officer (DEO) who is under the direct control of the Election Commission. But by law this DEO has been made subordinate to executive officers. Most of the logistics required to be used in the polls—general elections or elections of the local bodies—are controlled by the Deputy Commissioners (DC). Besides, the DCs enjoy the power of magistracy which is every important for conducting polls. On the other hand, the status of the District Election Officer is lower than that of Thana Nirbahi Officer (TNO) and the former controls no logistics in the district.

Fifthly, to get redress of violation of election laws and irregularities there is provision for Election Tribunal as envisaged in the Representation of the People Order, 1972. In this tribunal a candidate through an election petition can call an election in question. But the procrastination of the proceedings of the tribunal vitiates all its pious purposes. In most cases petitions are not decided till the parliament is dissolved or ends its term thus frustrating all the rights of the petitioner. In this connection it is important to mention that till 24th November, 1995, 194 election petitions were filed out of which only 26 petitions were decided and that too very lately. The following table will make the position clear:

Parliament	No. of Election Petitions	Petitions Decided
First March 3, 1973 to August 15, 1975	4	Nill
Second February 18, 1979 to March 24, 1982	40	3
Third May 7, 1986 to December 6, 1987	106	3
Fourth March 3, 1988 to December 6, 1990	13	1
Fifth February 27, 1991 to November 21, 1995	31	19
Sixth 19 March, 1996 to 25 March, 1996	unavailable	unavailable

Seventh 14 July, 1996 to 13 July, 2001	unavailable	unavailable
Eighth 28 October, 2001-	31	13

Sixthly, the workload of the Election Commission has been another threat to its discharging functions effectively. Though under the Constitution the primary function of the Election Commission is to control the parliamentary elections and to arrange for electoral rolls and demarcation of constituencies etc. a gigantic burden of holding local bodies election has been put on the shoulder of Election Commission. The Commission is engaged with abnormal load of 50 thousands elective offices of the local bodies. No Election Commission in South Asian countries like India and Sri Lanka has been vested with this sort of burden for running local bodies elections.

These are the legal and institutional short comings which have made the whole institution of Election Commission weak in administering and controlling the electoral process. And these shortcomings have lastly paved the way for the caretaker government.

The Caretaker Government and the Independence of the Election Commission.

The caretaker government as provided for by the 13th Amendment has paved the way of making only general elections free and fair. But the question of ensuring free and fair atmosphere for other elections like parliamentary by-election, city corporation election, local bodies election etc are still unsettled.

Secondly, though provisions for caretaker government has been introduced with a view to ensuring free and fair general election, still there are some drawbacks which will hamper free and fair election. The unchecked power given to the Returning Officers under the Representation of the People Order, 1972 will still be abused by them sometimes for their personal interest and sometimes for their allegiance to any political party. Question was raised even during the first caretaker government as to the impartiality of the Returning Officers. Returning Officers have been given wide and unchecked powers in selecting and accepting nomination papers, counting votes, controlling polling stations and announcing results and in case of irregularities or partialities by them the Election Commission has not been given any independent power to

inflict immediate punishment or other appropriate measures against them. Till such power will not be given to the Election Commission there will be no assurance of free and fair election.

Analysis from broader perspective will give the idea that there is no alternative of making the Election Commission fully independent; the flaws and defects of the election laws should be corrected and the Election Commission should be invested with full authority to announce and conduct the elections. The post of District Election Officers should immediately be upgraded so that they can gradually take the lead at the district level in conducting polls. We will see later in this chapter that the present caretaker government backed by military has taken up steps to fulfill these lacunae in law.

Reform Proposals with Caretaker Government

In the political field of Bangladesh the most significant development was the initiation of constitutional reform of CTG and electoral reform in 2005. The AL-led opposition alliance unveiled the reform proposal on July 16 towards an influence free general election. There were 31 point reform proposals: 5 were with regard to changes in the formation and jurisdiction of CTG; 15 were with regard to reforms in the Election Commission to make it truly independent and 11 were with regard to amendment to electoral laws and regulations. The main proposals were as follows:

Reforms with regard to CTG:

(i) The President would appoint the Chief Adviser and advisers to the CTG such persons who enjoy confidence of and are acceptable to all in consultation with all political parties.

(ii) During the tenure of the CTG, the President would act in all matters of state on the advice of the Chief Adviser, keeping parliamentary democracy in consideration.

(iii) During its term, the CTG, in place of the President, would run the defence ministry to avoid any conflicts.

(iv) The jurisdiction of the caretaker government would be confined to conduction day-to-day work and assisting the Election Commission in holding the general elections.

Reforms with regard to Election Commission:

With regard to reforms of the Election Commission the opposition parties proposed the following recommendations:

(i) Chief Election Commissioner and election commissioners are to be appointed after consultation with political parties.

(ii) The independence of the Election Commission must be ensured.

(iii) Election Commission must have its own secretariat free from the influence of the executive.

(iv) Election Commission must be given its full budgetary freedom and the Finance Ministry would have no control over the release of funds.

(v) The EC must have full authority to appoint returning officers, presiding officers and law-enforcing agencies to ensure security during the elections, and the government would be obliged to take necessary action in line with the Commission's demands.

(vi) The persons involved in conducting the elections would be under the Commission for a certain period before and after the polls.

(vii) During the period, the Commission would have the authority to take immediate disciplinary action against them for any offence and neglect of duty, and the government would have to act out the Commission decisions.

(viii) The Commission would be able to postpone or cancel elections in case if the violation of election laws and rules and to issue orders of arrest and to punish the violators. During the election period, it would have judicial powers too.

(ix) The electoral roll would be prepared maintaining full transparency. The roll preparation and issuance of voters, identity cards would have to be computerised and electronic voting would have to be introduced.

(x) The returning officer would send the consolidated statement of the election results to the Commission secretariat and only the Election Commission would announce the results.

(xi) The election tribunals would dispose of any cases involving election results within two months and any appeal would have to be disposed of by the Appellate Division of the Supreme Court within three months.

Reforms with regard to Electoral Laws:

(i) Candidates must make public declaration of their assets and dependants. All candidates must submit statements of their election expenses within one month of the polls. Personal information, including their academic qualifications, source of income, and account of assets and liabilities are to be disclosed.

(ii) Black money holders, loan defaulters and relatives of loan defaulters, and persons who opposed the war of independence and war criminals would be ineligible to contest the elections.

(iii) A ban would have to be imposed on religion- based politics and on the use of religion in seeking votes.

(iv) Ban on religion-based election campaigns.

However, the BNP Government did not accept these proposals and as the time passed for 8th parliament the voices of demands for reforms became more stronger and this eventually led to the crisis with the Election Commission and postponement of 9th parliamentary election.

Election Commission under Political Storm

Justice MA Aziz, a sitting judge of the Appellate Division was appointed as the Chief Election Commissioner on 23rd May, 2005 amid a raging political controversy. The announcement of his name as CEC by the Government was readily rejected by the main opposition party AL. And in his first test of capability and intention to hold any free and fair election in the Narsingdi by-election, he failed miserably. The hooliganism exhibited by the thugs of the ruling alliance were visible in the pages of news media all over, which however, failed to perturb him. In response to the complaints he commented that "I do not have miracle power to redress the situation" which only reflected that it was not the CEC but somebody else who was holding the 'miracle power' to redress any visible wrongdoing in the election process. Most of the opposition parties also took no time to label him as 'partisan' CEC. He took a series of decisions with regard to reforms in electoral roll which were mostly unheard of previously. 53 political parties the Commission had invited turned up for the dialogue from July 26 to 28. The BNP-led ruling alliance voiced their support for fresh voter list while the opposition 15 parties favoured updating the existing voter list. The Commission eventually decided, on August 6, 2005 to prepare a fresh voter list. However, it was alleged that the CEC had unilaterally made the decision, ignoring the opposing views of other election commissioners. The decision also led to constant bickering over the interpretation of law on the preparation of a fresh voter list. In fact the law (Electoral Rolls Ordinance, 1982 and Electoral Rules, 1982) did not allow for the preparation of fresh voter list while the CEC claimed that it did. This difference of opinion turned into a court case by way of writ petition. The writ petition challenged the preparation of fresh voter list under a "unilateral

decision" of CEC MA Aziz. After hearing the petition filed by Asaduzzaman Noor and Rahmat Ali, the High Court Division asked EC authorities to submit the files regarding the voter lists of 1990, 1995 and 2000. Disposing of two writ petitions, the High Court Division on January 4 asked the EC to revise the existing electoral roll and hold immediately a meeting. However, the EC had delayed the implementation of the High Court directives on the voter list for several weeks on the grounds that it did not receive the copy of the order. However, bypassing the High Court orders, the EC Secretariat started the work of preparing the fresh list on 1st January, 2006 while the two election commissioners have repeatedly been calling for a meeting. However, the CEC did not call the meeting mainly because the two election commissioners were united on revising the existing list. In the wake of an impasse over preparing a fresh voter list, the government in a hasty move appointed two more election commissioners on 17th January, 2006 apparently to win the Chief Election Commissioner (CEC) the majority in the commission. They were Justice Mahfuzur Rahman, former judge of High Court Division and the immediate past secretary to the EC Secretariat SM Zakaria. With them, the number of members in the EC rose to five, the highest in the history of the commission. Rejecting the appointments of two new election commissioners, the Awami League (AL) led 14 - party opposition coalition announced a dawn- to - dusk hartal (general strike) across the country on January 22 .Mr. Aziz's regime had been mired in controversy regarding preparation of voter list over 18 months and he had been criticised for his partisan role even by foreign diplomats. The Council of Advisers to the Caretaker Government from its first meeting on November 1, 2006 started searching for ways to make the EC credible but they faced enormous difficulties as MA Aziz refused to resign forcing the political parties to hold dialogue for reform of EC. Mr. Aziz was the man who could spare the nation of the trouble going through political violence for an indefinite period of time simply by resigning. However, he was holding on to his post even after the President's request to do so. On 25th November, 2006 MA Aziz said that he would go on 90 days leave but did not say when. President decided to appoint another two more

commissioners under articles 118(1) of the Constitution. President and Chief Adviser to CTG Iajuddin Ahmed announced that MA Aziz agreed to go on 90 days leave. The way Mr. Aziz conducted himself as the CEC, proved one of two things: either he is naive or he was playing some one else's role. In the wake of violent political unrest Aziz went on three moth's leave. To this effect President and Chief Adviser made an announcement in his address to the nation on 22nd November, 2006. After Aziz went on leave, the President appointed two election commissioners- Modabbir and Saiful Alom without consulting his council of advisers and on the subsequent day it was reported in most of the dailies the past political affiliation of these newly appointed two election commissioner; 14 party rejected the new appointments. After MA Aziz left, Justice Mahfuzr Rahman, a commissioner proclaimed himself as the acting CEC although there is no provision in the Constitution with regard to acting CEC. Justice Mahfuz declared that election was to be held within 90 days time and the last date of submission of nomination paper was fixed 21st December, 2006 while the opposition parties declared boycotting of election. Although both the Caretaker Government and EC were strong in holding election within stipulated 90 days, the situation was so complex that a fair election with participation of all parties was impossible. Voter list correction ended on 18th December, 2006 with huge controversy that no proper update was made in the existing voter list. Initiatives were taken four times to update voter list but every step had been mired with allegations of irregularities. In a surreptitious and hasty move threatening to pitch the country into further political chaos on 27th November, 2006 the EC announced the schedule of election for 9th parliamentary election to be held on 21st January, 2007; December 10 was to be the last date of submission of nomination papers; December 19 to be the last date for candidacy withdrawal; December 11 to be the last date to scrutinise nomination papers. Eminent citizens were surprised as the critical issues surrouding the CTG and Election Commission were not addressed before declaring the poll schedule; most of the advisers were kept in dark about this declaration. The opposition parties rejected the polls schedule and demanded EC reconstruction, voter list correction

before polls schedule and they called for a countrywide blockade until demands were fulfilled. The question was raised as to why was the election schedule declared without informing the council of advisers? Why was it hastily declared before the printing of voter list was completed? In all previous elections printing of voter list was complete before the declaration of election schedule. In 1996 the election was held on June 12 and the election schedule was announced on 27th April, 46 days before the polls. In 2001 election was held on 1st October and the schedule was announced on 19th August, a 43 days before. However, in the case of 9th parliamentary election the schedule was declared on 27th November and election was to be held on 21st January, 2007, a 55 days before. Thus some more days could have been waited for easing the controversy which the government, however, the EC did not. According to 90 days limit all election activities would have to be completed by January 25, 2007, it left only 4 days for all re-polling activities. This was another proof that the schedule was announced hurriedly. On 3rd December, 2006 a survey report was published by NDI (National Democratic Institution for International Affairs that a total of 1.22 crore names registered in the updated voter list are either excess or duplicates.

The political unrest was increasing day by day with the uncertainty of election, partisan role of the EC and the President and these eventually led to interference by the military and declaration of emergency on 11th January, 2007.

On 1st February, 2007 the acting CEC Mahfuzur Rahman and other four commissioner resigned as per the request of the President. On 4th February, 2008 the Election Commission was formed afresh. ATM Shamsul Huda was appointed as the Chief Election Commissioner and Muhammad Sohul Hossain and Brig Gen (retd) M Shakhawat Hossain as commissioners. Since its formation the present EC led by ATM Shamsul Huda started chalking out a massive plan for electoral and structural reforms before going into holding the stalled 9th parliamentary election. On 15th July 2007 the EC announced its plan of next general election. The announcement was as follows:

- Voter list with photograph is to be completed by October, 2008
- Parties to be registered by June, 2008
- Reform dialogue to be completed by September-November, 2008.
- Election is to be held in December, 2008.

Apart from the above the EC has also voiced its commitment to complete its internal reforms like ensuring and separating the EC secretariat from the control of the Prime Ministers office. To this end a new ordinance named the Election Commission Secretariat Ordinance, 2007 has been passed by the government with a view to separating the control of the EC from the Prime Minister's office.

Caretaker Government under Professor Dr. Iajuddin Ahmed

On 27th October, 2006 the 4 Party Alliance government handed over power as it completed its five years rule. As soon as past Prime Minister ended her speech to the nation, violence erupted among supporters of two rival political parties in capital and also throughout the country. It was almost settled that BNP loyalist retired Chief Justice KM Hasan would be Chief Adviser, and the President Iajuddin has already been partisan; secretariat and other government agencies have already been politicised; Election Commission along with electoral roll has in such way been manipulated that there was certainty of the BNP-alliance getting elected in the 9th parliamentary election to be held on 22nd January, 2006. There was a very tense political atmosphere throughout the country. Amid such situation Justice KM Hasan declared that he was not willing to become the Chief of Caretaker Government. After refusal by Justice KM Hasan without resorting to other available options in the Constitution for appointing a Chief Adviser, the President himself took over as Chief Adviser. When he (President-cum-Chief Adviser) addressed the nation and told that he was not ready at all to assume the office of the Chief Adviser, but he had to do so to preserve constitutional

continuity, which was under serious threat due to the critical situation arising out of confrontational politics and worsening law and order situation. However, this did not clearly explain why the President offered himself as the Chief Adviser before exploring all the constitutional options available for appointment of the Chief Adviser. Writ petition filed against this decision by the President mentioned that the President without exhausting the mandatory provisions of Article 58C(3), (4) and (5) of the Constitution, has assumed the office of the Chief Adviser, violating the oath of office which he took to protect and defend the Constitution.

The President and Bangabhavan did not follow the mandatory provisions of the Constitution with regard to the appointment of the Chief Adviser to the Caretaker Government. When Justice KM Hasan did not accept the post, the President should have followed the other available options given in Article 58C of the Constitution; or could have continued discussion with political parties to reach a consensus before becoming the CA himself; or he should have referred the matter to the Appellate Division for its opinion before becoming the CA himself.

As per constitutional provisions in Article 58C the next person who could take oath was former CJ Mahmudul Amin Chowdhury. BNP raised objection that Mahmudul Amin Chowdhury did not qualify to head caretaker government as per the Constitution because the immediate past former CJ before KM Hasan, Mainur Reza Chowdhury died and the Constitution provides no provision for third Chief Justice. However, as per rule of the Constitution Justice Mahmudul Amin Chowdhury was qualified and he should have been formally offered the post of CA. However, he was not offered the post. Instead a Bangabhavan official called up him over phone and asked him if he would feel embarrassed in case an offer was made to him[1]. Justice Amin told that he would not feel embarrassed and was

[1] Daily Star. 30th October. 2006.

rather prepared for the responsibility. However, Justice Amin was not eventually offered the post.

If no other Chief Justice is available for the post, the third option of the Constitution provides for the immediate past retired Justice of the Appellate Division. Under this option the first person to offer was Justice MA Aziz who was already holding a constitutional post as CEC.

The fourth option was retired Justice of Appellate Division Hamidul Haque who was then serving as Director General of the Judicial Administration Training Institute. The BNP had reservation about him and he was not also offered the post.

Thus the President in fact ignored these options of the Constitution before coming to the conclusion that the President must himself head the caretaker government, which is not even the fifth option but the sixth and the last.

Most people in the country never anticipated that the President could not find a non-party citizen in the country eligible to assume the post of the Chief Adviser under Article 58C(5) of the Constitution while 11 non-party persons are easily found to constitute the Council of Advisers[2].

The Question of Constitutionality of the appointment of Iajuddin as Chief of Caretaker Government

Following his assumption to the office of the Chief of Caretaker Government three writ petitions were filed in the High Court Division in November, 2006 which were as follows:

(i) the first challenging the assumption of the office of Chief Adviser by the President;

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[2] Barrister Harun ur Rashid. *Non-Party caretaker government: is it working?*, Daily Star, December 20, 2006.

(ii) the second challenging the Chief Adviser's powers to take decisions unilaterally without consultation with the Council of Advisers: and

(iii) the third challenging the declaration of the election schedule prior to the correction of the electoral rolls.

On 30th November the petitioners argued that an unconstitutional act does not become constitutional by lapse of time; that the President is not above the law or the Constitution; that the interpretation of Article 58C(1)(6) by which the President assumed the office of the Chief Adviser was self- serving and wrong.

When the matter was being heard, the Attorney General submitted that he wished to file an application for a larger bench to hear the matter, given its constitutional importance, and the court should therefore not continue to hear the matter. The Bench of judges however commented that there appeared to be no precedent for this, and they were minded to issue a Rule and would reconvene at 2 pm. However, the AG then submitted that the judges should reject the petition outright. It must, however, be emphasised that whatever order the court would have passed would not have been a final judgment with any binding consequences.

A Rule Nisi is just the first stage of a motion matter, which in the present case would have involved the court asking the Chief Adviser to show cause why his assumption of office should not be held to be without lawful authority. So the AG would have had ample opportunity, even if a Rule were issued, to make a full reply, and if this was found cogent by the court, even perhaps to obtain a judgment in its favour. Bizarrely, the AG was insisting that even this preliminary order not be issued and the matter be rejected summarily.

This difficulty was further exacerbated when the AG, accompanied by Mr. Moudud Ahmed and others rushed to the Chief Justice's office to obtain an stay order. Sadly, the Chief Justice of the Supreme Court, in an unusual display of constitutional power, sopped

the proceeding of the Bench. The Chief Justice's stay order came minutes before the High Court bench was to issue a rule. Shocked by the order, lawyers and others present in the court burst into anger and vandalised different sections of the Supreme Court, and set fire to the vehicle of the state minister for law, justice and parliamentary affairs. This step by the Chief Justice was seen by many as unprecedented in the judicial history[3]. It is unprecedented that a Chief Justice stayed a preliminary order of Rule Nisi to be issued for show cause purpose only. Although the immediate past BNP led 4 party alliance found this as an acknowledgment of 'victory', it have pulled off an unprecedented and gross manipulation of judicial process[4]. The lofty image of impartiality and neutrality of the apex court as the defender and guardian of our Constitution has seriously been hampered by the unnecessary interference of the Chief Justice.

Iajuddin as Chief Adviser and affairs of the CTG

Notwithstanding the constitutional validity of his assumption of power as the Chief Adviser to the Caretaker Government, Dr. Iajuddin Ahmed made the first serious mistake by monopolizing the major ministries thus showing little trust in his council of advisers.

He deployed army on 9th December, 2006 ignoring strong opposition from his advisory council and most of the advisers thought that the current situation in the country did not call for any army deployment. Since the calling out of army is a decision of the Chief Adviser, not of the President, can the Chief Adviser do it alone, disregarding the opinion of his advisers? In terms of the Constitution, the non-party caretaker government is collectively responsible to the President (Article 58B(2)). The efforts to end the then prevailing political crisis reached a stalemate due to the President's objection to the sending of Election Commissioner Jakaria on leave.

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[3] Commented by former Chief Justice Mustafa Kamal.

[4] Sara Hossain, Bar-at-Law, *Beyond Contempt*, Daily Star, 4th December, 2006

It was alleged that the Chief Adviser was not acting in accordance with the advice of the council of advisers. Many of the advisers publicly admitted in the media that either they did not know of the decisions made by Chief Adviser or knew them only from newspapers. Such communication gap between the Chief Adviser and advisers of the non-party CTG is not within the contemplation of the constitutional arrangement. According to the provisions of Article 58B(3) "the executive power of the Republic shall be exercised in accordance with the Constitution by or on the authority of the Chief Adviser and shall be exercised by him in accordance with the advice of the Non-Party Care-Taker Government". Thus, the word 'shall' indicates that seeking advice from advisers are mandatory for the Chief Adviser and he cannot act or take any decision on his own[5].

Notwithstanding the massive protest against his failure to be neutral, and the writ petitions in the High Court Division, the President-cum-Chief Adviser of the CTG appeared to have succumbed to the pressure of his benefactors by granting tacit consent to announcement of the election schedule. Pitiably enough the ten advisers had not been taken into confidence on the issue.

After the CEC Aziz went on leave the President appointed two election commissioners- Madabbir and Saiful Alom without consulting his advisers.

He also made the EC announce an election schedule hurriedly on November, 27 keeping the Advisory Council in the dark.

Besides, the Chief Adviser on November, 22 addressed the nation without discussing the advisers who described the speech as the President's very own. Being upset by the CA's unilateral action, some advisers even refrained from attending office the following day.

Unlike before the caretaker government under President Iajuddin Ahmed has been commented as one man show caretaker government.

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[5] Barrister Haru ur Rashi. *Advice for the Chief Adviser*. Daily Star, December. 3, 2006.

The way Iajuddin Ahmed conducted the affairs of the caretaker government that it had left advisers very much neglected and merginalised. The important decisions were taken unilaterally sidelining the advisers and making them feel ignored and irrelevant. Four advisers (Dr. Akber Ali Khan, Hasan Mashhud Chowdhury and CM Shafi Sami) resigned in protest on 11th December, 2006. Although the President appointed another four advisers on 13th December, he did not initiate any move to improve the prevailing situation within the council of advisers where other advisers have also expressed their discontent with the President's method. Mr. Iajuddin failed miserably to distinguish the two constitutional posts he had been holding. He could not rise above a party preference. He was openly acting in favour of the interest of the BNP and its alliance partners disregarding the views of other advisers; or even he did not bother taking advice from his advisers. He was pushing the country into a grave crisis; a threshold of political chaos. He was titled by people and media as 'yesuddin' for partisan role as a Chief Adviser of caretaker government. As a result of his partisan role the AL including other opposition parties declared that they would not accept any polls under Iajuddin and MA Aziz. They claimed that Iajuddin as the Chief Adviser was the main obstacle in creating a congenial atmosphere for a free and fair election.

9th National Parliament election was scheduled to be held on 22nd January, 2008. However, the political crisis started to deteriorate from January 3 after the AL led grand alliance declared to boycott and resist the January 22 election.

There have so far been three elections under three successive caretaker governments in the post-democratic era. All three caretaker governments commanded almost universal respect at the time of their tenure. The chief advisers have all along been committed to consult all his advisers before taking any decision; although controversy over the role of the caretaker government may have been generated in 2001 election, no such challenge to the legitimacy of the caretaker government prevailed as it predominated this time under the

President and Chief Adviser Dr. Iajuddin Ahmed. The credibility of the present Election Commission has come under challenge to an extent not seen during the course of last three elections.

The President is not a part of the CTG and therefore cannot legitimately exercise powers over the council of advisers. The President has to act on the advice of the Chief Adviser like he acts on the advice of the Prime Minister. Therefore any action of the President as regards the EC not based on, or contrary to the advice of the council of advisers is liable to be illegitimate. Only in two respects has the President been given powers independent of the CTG: (i) promulgation of emergency; and (ii) administration by himself of the laws related to the defence services qua Supreme Commander. On all other matter the President is as titular as under an elected government. Dr. Iajuddin is both the Chief Adviser and the President. It is difficult, if not impossible, for one person to exercise powers and to enforce accountability for exercise those powers[6].

Problems with Caretaker Government:

(i) The executive power of the Republic rests with the Chief Adviser and his Advisory Council. It is desirable that the administration of the defence services should come within the purview of the caretaker government and not on the President alone.

(ii) The President of Bangladesh is not elected on a bipartisan or consensus basis among political parties represented in the parliament. The ruling party nominates the President, who is elected by members of parliament. It is entirely at the discretion of the majority party to propose the name of the President, either non-party person or member of the party. Against this background, the provision of the eligibility of the President as a last resort to hold

[6] Mashiur Rahman, *Crisis at the EC*, Daily Star, 04.12.2006

concurrently the post of the Chief Adviser of the non-party caretaker government arguably defeats the whole purpose of the caretaker government.

(iii) In 2001 the Chief Adviser, after approval of the council of advisers, wanted to amend the Penal Code (Amendment) Ordinance but the President did not agree. Since same person occupies both the high offices, there appears to be no second opinion on any proposed action[7].

(iv) It is also suggested that it has not been prudent to involve retired chief justices to be eligible for holding the post of the Chief Adviser which is an executive post. It is counter to the spirit of the doctrine of separation of powers on which the Bangladesh Constitution was founded.

(v) There have not been any criteria enumerated the provision for the President to appoint a citizen to hold the position of the Chief Adviser, if he failed to appoint any retired chief justice or judge if the Appellate Division of the Supreme Court.

(vi) The phrase "no retired chief justice is available" employed in Article 58C(4) lacks clarity and is confusing. The phrase is open-ended and therefore has been interpreted differently. For example, does it refer to a pool of retired chief justices or only two retired chief justices (last retired and the next before the last) as mentioned in Article 58C(3), ruling out other retired chief justices.

(vii) The powers of the chief adviser have not been spelt out clearly in relation to what the chief adviser can do, or cannot do, without the advice of the advisers. The absence

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[7] Barrister Harun ur Rashid, *Army on the Street: Will it serve the intended purpose?* Daily Star, 12th December, 2006.

of such provision has led to confusion as to what "collective responsibility" means under Article 58B(2) of the Constitution.

90 Days embargo in the Constitution

The BNP led 4 party alliance was committed that 9th parliamentary election was to be held within stipulated 90 days as specified in the constitution and there could not be any violation of this mandatory rule. On the other hand, the opposition led 14 party demanded reforms in election laws, election commission and caretaker government and until those reforms were done no election would be participated by the opposition parties. Out of this 'no-move' stage by two parties there emerged the issue of extension of the constitutional time of 90 days. Constitutionally the CTG has to hold the election within 90 days after dissolution of the previous parliament (Article 123(4)). Can this time be extended any how? It is suggested that the Supreme Court may condone the extension of time to hold election of 2007. After all, the Constitution is for the people and for their rightful cause, the court can exercise that power even if there is slight deviation from the strict constitutional provisions and this is permissible under the doctrine of state necessity[8]. However, President Ijauddin Ahmed did not adhere to this suggestion.

Caretaker Government backed by Military and led by Dr. Fakhruddin Ahmed

As the country was heading towards a complete civil war because of political clash between two main political parties killing at least 30 people and leaving injured thousands, the President, with the intervention of the military declared emergency in the country on 11th January, 2007 suspending most of the fundamental rights. Nine advisers to the Iajuddin Caretaker Government resigned and senior most adviser Justice Fazlul Haque took the charge of acting Chief Adviser. The President admitted in an address to the nation that there was flaws in the process of updating ongoing voter list. He also stated that it was not possible to hold free and fair election with such voter list within 90 days and as such the election schedule to be held on 22 January, 2007 was declared postponed. On 12th January Dr.

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[8] Barrister Rafique-ul-Hoque, *Doctrine of State Necessity*, Daily Star, 04.12.2006

Fakhruddin Ahamed former governor of Bangladesh Bank was appointed as the Chief Adviser to caretaker government. On 13th January five advisers were appointed and on 16th January another five advisers were appointed to the present caretaker government.

Having taken the charge the CTG cracked down on corruption and pledged to hold credible election in 2008. By February 10 the CTG arrested bigwigs of both the political parties who were hitherto untouchable corrupt bigwigs of BNP and AL. Ministers and MPs 20 in number were arrested and sent to jail in charge of anti-state activities, sabotage and corruption. subsequently another 170 key political leaders, businessmen and public servants on charge of graft and abuse of power were arrested. With the promulgation of emergency and military backed caretaker government a new order emerged in the political arena of the country.

For more details of the activities of this government please see chapter 24.

CHAPTER XXIV

CONSTITUTIONALISM IN BANGLADESH: ITS START AND PROBLEMS

Constitution and Constitutionalism

Constitution and constitutionalism are not synonymous. Constitutionalism is used to mean limited government or rule of law or constitutional government. The existence of a constitution in a country does not necessarily indicate the existence of a constitutional government there. Again, a country without a constitution, may still have a constitutional government. So constitutional government does not mean a government according to the constitution; it means a democratic government according to laws as opposed to arbitrary or despotic government. According to professor de Smith —

> Constitutionalism is practised in a country where—
>
> i) the government is genuinely accountable to an entity or organ distinct from itself;
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> ii) elections are freely held on a wide franchise at frequent intervals ;
>
> iii) where political groups are free to organise in opposition to the government ; and
>
> iv) where there are effective legal guarantees of fundamental civil liberties enforced by an independent judiciary.[1]

Professor K.C. Wheare says that constitutional government means something more than government according to the terms of a constitution. It means government according to rule as opposed to arbitrary gvoernment; it means government limited by the terms of a constituion; not government limited by the desires and capacities of those who exercise power.[2]

From technical point of view, there is no constitution in Britain; the governmental powers in the British constitutional system have nowhere been delimited like a written constitution; nowhere is it specifically laid down as to which particular acts the government is unable to carry out; neither is there any authority in Britain to punish the government if it carries out any arbitrary act through parliament. However,

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1 de Smith, S.A., *The New Commonwealth & its Constitution*, (Londan: Stevens & Sons, 1964), P. 106

2 Wheare, K.C, *Modern Constitutions*, (London: Oxford University Press, 1975), P. 137

constitutionalism has existed in the British constitutional system for a long period; British people are enjoying their basic human rights in a more guaranteed way than they are guaranteed in a written constitution. The reason behind such a development is that though the powers and functions of the British Government have not been delimited by a written constitution, the constitutional conventions regulating the exercise of governmental power have developed through ages and they have, through repeated political practice, become constituional norms[1] i.e. as binding as laws. This is why the British Government, violating the conventions, dares not carry out any arbitrary action. Besides this, the educated public opinion in Britain acts as a strong vigilance to safeguard the constitutional government. So Britain has no constitution but it has a strong constitutional government. On the other hand, Mayanmar, for example, has a written constitution but it does not have a constitutional government. In a real sense there is no distinction between rule of law

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1 Constitutional Norm: constitutional norm, in other words, means constitutional rules which imposes political and sometimes legal obligation upon the persons who are associated with the functioning of the governmental powers. Constitutional norms of a country may be of two types - Legal norms and Non-legal norms. Constitutional legal norm means those written constitutional provisions which impose obligation over the persons associated with the governmental powers and which are enforceable by courts of law. For example, rules concerning royal prerogatives in Britain have originated from common law and the British courts can determine their limits and can enforce them as well. Likewise in Bangladesh Constitution provisions relating to fundamental rights, executive, legistative, judiciary etc. are all constitutional legal norms. Because almost all of these provisions are enforceable by the Supreme Court. On the other hand, there are some rules which impose obligation over the persons associated with the governmental powers but they are not enforceable by the courts. These rules may be called constitutional non-legal norms. In other words, these are called conventions. For example, most of the British constitutional rules are conventional i.e. they are non-legal norms. In Bangladesh the rule as to the appointment of the Chief Justice has been a convention i.e. a non-legal norm. Because there is no constitutional obligation on the part of the president to appoint the senior-most judge of the Appellate Division of the Supreme Court as the Chief Justice: he can appoint any judge of the Supreme Court to this post. But it has been, through a long time uninterrupted practice, like a convention to appoint the judge as Chief Justice who is senior-most among the judges of the Appellate Division. It is pertinent to mention here that in Britain legal norms can be of two types — statutory norms and common law norms. See, Turpin, Colin, *British Government & Constitution.*, (London: Weidenfield & Nicolson, 1990), P.4
What is norm ? —to get answer to this question please see Hans Kelsen's *General Theory of Law and State* (New York : Russel & Russel, 1961) PP. 30–64. Kelsen says that 'a command or rule is a norm only if it is binding upon the individual to whom it is directed, only if this individual ought to do what the command or rule requires." (Ibid. P. 31)

and a constitutional government. Because the term "rule of law" is not now limited to the three principles as propounded by A.V. Dicey. In real sense rule of law does not mean rule by the government under democratic laws only; it is more than that. Rule of law means rule by the government under such democratic laws in which a government's responsibility can be ensured and the fundamental rights of the citizens are guaranteed i.e. they have an easy and effective way of enforcing their rights.

The Weary Way to Constitutionalism from the Sub-Continent to Pakistan

The 200 year history of the British rule in the Sub-Continent bears testimony to the fact that in the British period there was both law and government and subsequently three constitutions were also given. But till 1947 when the Indian Independence Act was passed, constitutionalism remained to the people of this Sub-Continent a beckoning on the horizon. The end of the East India Company's rule in 1857 followed the direct rule of the British Government. The British Government kept the 'colonial democracy' alive here; political democracy could not be established till 1947[1], because full rights in the formation and in the control of the government were not given to the people of this land. From 1861 the British Government began the policy of democracy 'by instalments or doses'. The Indian Council Act of 1861 first made an attempt to establish contact beween the government and the governed by way of creating opportunity for Indian people to take part in the making of laws for India. Afterwords through the Indian Council Act, 1892 and the Morley-Minto Reforms of 1909 the number of Indians was increased both in the Legislative Council and Executive Council. Then came the two Constitutions of British India - the Government of India Act, 1919 and then the Government of India Act, 1935. Though both the Constitutions provided for a parliamentary form of government and Indian elected representatives could participate there, they were not given full rights in the formation and in the control of the government. It was the Indian Independence Act, 1947 which created for the first time a congenial atmosphere to practise and develop constitutionalism in both Pakistan

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1 See. details, Choudhury, G. W , *Democracy in Pakistan*, (Dhaka: Green Book House, 1963)

and India. It provided in essence a big transition – a transition from colonial democracy to political democracy in India and Pakistan. The Constituent Assembly for Pakistan created under this Act was a sovereign body composed of elected representatives of Pakistan. The Assembly was given the duty to frame a constitution and absolute power to act as a central legislature for Pakistan. Thus the Assembly had the power to exercise control over the cabinet; the cabinet was responsible to the Assembly; the Governor General's previous discretionary powers were abolished and he was turned into a titular head. However, due to the absence of a strong political party system and especially the abuse of power by the Governor General the Constituent Assembly could not work properly and as a result the first Constituent Assembly had to face a dramatic collapse[1]. Likewise when Pakistan took its first Constitution in 1956, it had all the trappings of a responsible government; almost all favourable conditions were laid down in the Constitution so that a constitutional government could flourish in Pakistan. However, due to the lack of a well organised and disciplined party system and undue interference by the Heads of the state with the ministries and political parties i.e. the lack of sense and respect towards the spirit and culture of parliamentary democracy, the start of constitutionalism in Pakistan faced a serious setback and lastly that start ended in failure when the military government took over in 1958.

The Start of Constitutionalism in Bangladesh and its Problems

The same fate of constitutionalism as Pakistan had to experience came to be the realities in the start of constitutionalism in Bangladesh. It was a long cherished aim of the people and the leading party Awami League's commitment on its way to movement for autonomy in the then East Pakistan to establish a parliamentary government which would be directly responsible to the elected representatives. To that end in view, the first bold initiative taken by Sheikh Mujib in the independent Bangladesh was to change the system of government from presidential which was working during war time to parliamentary one. But this

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1 For details, Sayeed, Khalid B, *The Political System in Pakistan,* (Karachi: Oxford Unitersity Press, 1967), and Choudhury, G.W , *Democracy in Pakistan,* Ibid.

change was not more than a mere expression of sentiment of Mujib since it was a change in the form only which enabled Mujib to redesignate his position as the Prime Minister in place of the President[1]. Because as mentioned earlier[2] though the change provided for a parliamentary system, the Constituent Assembly which was to act as parliament was neither given the power to make law nor to exercise control over the cabinet.[3] The cabinet was not, therefore, accountable to anybody. Both the executive and legislative powers remained concentrated in the hand of the President. Thus at the very start of its journey constitutionalism received a setback in Bangladesh.

Then on 16th December, 1972 the Constitution of Bangladesh came into force. Except some minor weaknesses[4] it was a healthy Constitution which provided almost all favourable conditions of a responsible government. Taking a bitter lesson from the abuse of power and destructive role of the President in the Pakistan politics the framers of the 1972's Constitution of Bangladesh limited the powers of the President in strict terms. However, a good Constitution does not necessarily produce a constitutional government and democracy is always more than a mere form of government. The success of a constitutional government depends necessarily upon the democratic spirit of toleration, devoted sense of respect and relentless response towards the institutionalisation of democracy. In a new country with fresh start of democracy the ruling party or the leading leader should have a genuine interest to develop constitutionalism; it should respect the public opinion and the opinion of the opposition; it should resolve all political disputes in a democratic way without resorting to any repressive measure; it should encourage and help grow and develop a strong opposition; to build up honest and devoted future leaders and above all, the leading leader should, howsoever powerful his charisma be, institutionalise his charisma rather than personalise so that this may act as an inspiring instance to be followed by the incoming leading persons. Unfortunately for the success of constitutionalism in Bangladesh under the 1972's Constitution what role was played by the undisputed charismatic leader of the nation Sheikh Mujib have been found to be very fraustrating both as the Prime Minister and the leader of the AL.

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1 Ahmed. Moudud, *Bangladesh: Era of Sheikh Mujibur Rahman*, Ibid. P. 9

2 See. P. 37 of this book.

3 Why was not the Constituent Assembly given legislative power? See. PP. 140–142

4 For weaknesses and flaws, See, PP. 43–48 of this book.

First, an essential institution of a parliamentary democracy is the President or King or Queen who is a titular head of the state. Although he is a titular head, he has three rights in respect of the governance of the country- right to be informed, right to encourage and right to warn. It is a constitutional duty of the Prime Minister to inform the President about the day to day administration and decisions of the cabinet and to seek advice from him. But in the first phase of Bangladesh politics (1972-75) Mujib, the Prime Minister had clear-cut and absolute supremacy over the two ceremonial heads of the state, Abu Sayeed Chowdhury and Mahmudullah. Neither of them had the courage or conviction to stand up against any arbitrary or unconstitutional action of the Prime Minister. Neither could they demand the reverence and courtesy normally accorded to the holder of such an office.[1] This is why Justice Abu Sayeed Chowdhury was not happy being a titular head under the dominating shadow of Sheikh Mujib. He felt himself like being in a case. He wanted to be freer and do something productive for the country.[2]

Second, in parliamentary system the Prime Minister is regarded as 'one among equals' meaning that every minister of the cabinet has a role to play in decision-making and it is the duty of the Prime Minister to create an environment in which every cabinet minister can participate equally in decision-making. But relations between Mujib and his cabinet colleagues were those of subordination rather than 'one among equals'. Mujib used to treat his cabinet colleagues more like a cabinet in a presidential system where the President's decisions are accepted no matter whether they are shared by cabinet majorities or not. Mujib was so proud of his charisma and he used it with such a gravity that no cabinet minister could raise voice against Mujib's decision.[3] It has been commented that the first political order of Bangladesh during the Mujib era was more in the nature of a 'prime minister's dictatorship' than a genuine parliamentary one.[4]

Third, the great wrong of Mujib was that he, instead of institutionalising his charisma, started a process of personalisation and

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1 Choudhury, Dilara. *Ibid.* P.36

2 Ahmed, Moudud, *Bangladesh: Era of Sheikh Mujibur Rahman,* Ibid, P.228 & 230 (Footnote–24)

3 See, Choudhury, Dilara , *Ibid.* P.30
Ahmed, Moudud, *Bangladesh: Era of Sheikh Mujibur Rahman,* Ibid, P.259 (Footnote–9)

4 Choudhury, Dilara, *Ibid.* P.36

this personalisation of governmental process posed a serious threat to the functioning of constitutionalism in Bangladesh. As a result of such a trend all activities and policies of the government came to be the activities and policies of Mujib as a person. Parliamentary government is always a party government and as a party government the cabinet has to feel the pulse of the party before it takes any decision. The cabinet should not take any decision going beyond the policies and objectives supported by the party. Again, the party never advises the cabinet to take any decision which would go against the public opinion or national interest. Thus a check and balance work between the government, the party and the people whereby the government becomes more responsible. However, Mujib used his towering charisma in such a dictatorial way that he himself became the Awami League[3] and infact his activities and party management were so dictatorial and repressive that 'he was not only the Awami League Party, he was also the political order himself.[4] Such a dictatorial attitude of Mujib destroyed the Awami League as a party; everything became synonymous with Mujib as a person. It gave rise to the politics of personality cult towards Mujib; it destroyed cohesion and discipline within the party which eventually resulted in factionalism within the Awami League and also within the Chatra League–a student organisation under the umbrella of Awami League. 'It hampered the orderly succession and recruitment of leadership.'[1]

Fourth, to maintain democracy within the party as well as within the governmental level the posts of party president and the leader of the parliamentary party or the head of the government should not be held by the same person. Parliamentary form of government is a party government. As a party government the party from outside should retain a sort of control over the government or the parliamentary party so that the government or parliamentary party cannot transgress the policies and programmes of the party on the basis of which the party has elected them. In other words, this principle prevents the government from being dictatorial disregarding the policies and manifestoes of the party. On the other hand, when the same person holds the posts of both the party president, and the head of the government, it tends the party to be more powerful than the government and when the party becomes more powerful than the government, it may quickly destroy the democratic

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3 Ahmed, Moudud, *Bangladesh : Era of Sheikh Mujibur Rahman*, Ibid, P.234
4 Choudhury, Dilara, *Ibid*, P.37
1 Choudhury, Dilara, *Ibid*, P.216

institutions in the country. In the first phase of Bangladesh politics Sheikh Mujib was the head of the government (as the Prime Minister); he was also the head of the party (as the president of the Awami League). This combination of dual power in one hand is contradictory to the norms of constitutionalism.

Fifth, one of the methods of enforcing the government responsibility under parliamentary system is the committee system in parliament. The most important committees are the Public Accounts Committee (PAC) and Standing Committees on Ministries. However, in the first parliament during more than 2 years of its life no ministerial committee was formed.[2] As a result, scrutiny over the activities and responsibility of different ministries could not be ensured in the first parliament.

Sixth, the post-budgetary financial responsibility of the government is enforced through two powerful organs – the Comptroller and Auditor-General (CAG)– a constitutional body and the PAC in the parliament. The main function of the CAG is to audit the accounts of the Republic to ensure that the moneys approved by parliament are spent for the purpose intended and in an effective and efficient manner. After such auditing the CAG lays its reports to the parliament directly. In all democratic countries the CAG is an officer of parliament; he is responsible only to the parliament. Since responsibility to audit all the public accounts is vested upon the CAG, he and his whole staff should be fully independent of the executive. The complaints or observations made in the report by the CAG is again scrutinised by the PAC of the parliament and in doing this examination the PAC can question the accounting officers of the concerned ministries; it can take evidence in public; question other witnesses. In all democratic countries PAC is headed by a senior MP of the opposition. However, in Bangladesh though the PAC was formed in the first parliament, it was headed by a Treasury Bench Member. Again, unlike other democratic countries, the CAG has been made responsible to the President and not to the parliament.[1] Moreover, unlike the system of

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2 See details, Chapter XI

1 See section 2(2), 6(1) of the Bangladesh Comptroller and Auditor-General Order (P.O. No. 15 of 1972). The provisions in the Order expressly violated the constitutional provisions. I asked Dr. Kamal Hossain who was then the Law Minister how he could suggest for such an unconstitutional law ? Dr. Hossain by-passed the question saying– "If you think it unconstitutional then go to court and the court will declare it unconstitutional." I made a counter question—"Sir, do you want to say that this Order is constitutional and valid ?" He told that the provisions of the Order may be interpreted in two ways.

other democratic countries there is no provision in Bangladesh for consultation with the PAC in respect of the appointment of the CAG. The whole staff of CAG including his audit section has been kept under the executive control of the Ministry of Finance. Furthermore, unlike in India and Britain the CAG in Bangladesh does not have authority to conduct performence audit; it only prepares annual audit report.

Thus from the very outset this vital organ of constitutionalism has been kept handicapped. And still the CAG is in such a handicapped position. The success of the PAC especially in respect of its financial control over executive depends mostly on the fruitful activities of the CAG and since the CAG is tightly handicapped so has been the role of the PAC. In the first parliament the PAC did not make any report.[1] Thus the first parliament could not fulfill its role to ensure the executive's financial responsibility. It is pertinent to note here that the PAC in Britain submits about 40 reports a year in the House of Commons and a selection of them are debated on one day per session.[2]

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1 The PAC made no report in the 1st parliament. In the 2nd parliament it submitted one report. During the martial law regime of Ershad an adhoc PAC prepared three reports. The 3rd parliament did not form PAC. In the 4th parliament the PAC submitted 2 reports. And in the 5th parliament it submitted 4 reports.

2 In the advanced countries like the USA, UK the PAC is very active and effective in seeing that the money sanctioned has been spent with economy, efficiency and for the purposes. But in Bangladesh such an important institution has not been properly used, for: (a) the legislature itself was not in existence for many years; (b) even when the legislature was in existence, the PAC was not appointed in time; (c) tightly handicapped position of the CAG. Since the audit section of the CAG has been kept under the executive control of the Finance Ministry, the most serius problem in the functioning of the PAC has been caused by the government. Because the government had not regularly submitted the audit reports to the legislature. Thus 17 audit reports on Defence, Railway, Foreign Mission, Postal Department, T & T Board, Semi-Government and Commercial organisations were submitted to the parliament after 14 years on the 11th July, 1990 and the Finance Minister could not put forward satisfectory explanation for such unusual delayed period during which hundreds of pages of the reports were destroyed by worms and insects. (The *Ittefaq*. daily Bengali New paper 12.7.1990)

The PAC in the present 7th parliament is chaired by A.S.M. Akram, a government party MP. I asked him about the progress of the functioning of the PAC. He told that the committee like its predecessor is facing a huge backlog of audit reports and a great portion of their time is being spent in disposing of these old cases. The Committee meets 4 times in a month. Does the Commit.ee has any plan to meet more frequently to settle the pending cases? In response to this question he said that the members seem to reluctant to meet even four times a month, for they are very ill-paid for their committee functions.

Seventh, for the success of a parliamentary government a strong and responsible opposition in the parliament is a *sine qua non.* Unfortunately in the first parliament there was no opposition as such. Out of 315 seats AL had 306 and out of remaining 9 seats Jatiyo Samajtantrik Dal had 2, Jatiyo League 1 and Independent got 1.[3] This negligent opposition was not any organised opposition and hence there was no opposition leader; Ataur Rahman Khan was an unofficial leader. Mujib also emphatically and neglectfully claimed that there was no opposition in Bangladesh. "From the point of view of numerical strength Mujib was correct but he was forgotten that this was the worst that could happen to help the growth of a democratic system in the country".[1] Though it was negligent Mujib should, for the sake of political development in Bangladesh, have treated this feeble opposition as an opposition in the parliament and thereby helped functioning a democratic system[2]. As like as the AL the Congress Party in India after its independence led the journey of parliamentary democracy with its dominating absolute majority. But this Congress-dominated one party system in no way hampered the functioning of the Indian parliamentary system. The success of Indian parliamentary system was possible due to the leadership quality of Nehru, the democratic structure of the internal organisation of the Congress party, clear-cut policy preference, and criticism and suggestions put forward by the parliamentary committees. The Nehru government, inspite of having an absolute majority, treated and behaved with the opposition with the respect a parliamentary opposition deserves. This is why parliamentary democracy in India has, in the mean time, taken an institutional shape on a firm basis.

Eighth, the Election Commission is one of the most important institutions of constitutionlaism. A pre-requisite of democracy is the selection of representatives through a fair and free election system. To conduct a fair election the independence of the Election Commission and the cooperation from the government to that end is equally needed. Though the Election Commission in the first general election in Bangladesh had constitutional independence, it was trodden down by the

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3 Ahmed, Moudud, *Bangladesh: Era of Sheikh Mujibur Rahman,* Ibid, P.146

1 Ahmed, Moudud, *Bangladesh: Era of Sheikh Mujibur Rahman,* Ibid, P.146

2 In one party Singapurian parliament the ruling party assigns the task of opposition to its back-benchers. All ruling party members except ministers perform the role of opposition in debate. They however, can criticise only the details of implementation, not the principles of the policy.

negative attitude and activities of the ruling party. When news started pouring in that some central leaders of AL were losing some important seats, the Central Election Campaign Committee constituted earlier to handle the election affairs was completely by-passed and the responsibility of formulating strategies and actions were taken over by the control room at *Gonobhavan* (Prime Minister's Office).When frantic telephone calls started pouring in from the candidates who were likely to be defeated, the government machinery including Jatio Rakkhi Bahini was alerted and orders were sent to help out those candidates who were in trouble. As the counting started indicating sure victory for some of the opposition candidates, helicopters were flown out to render assistance and at least in half a dozen constituencie's entire ballot boxes were removed and replaced with new ones. It is true that the AL would have won the election with an overwhelming majority in any case. At the most if the central leadership of the AL had not intervened, the opposition would have won an additional 20 seats.[1] But what attitude the AL government adopted in the first election had a far-reaching fraustrating consequences in the development of constitutionalism in Bangaldesh. The chance of development of electoral democracy in Bangladesh was nipped in the bud.[2] As another commentator said—"unnecessarily there was rigging during elections to parliament under the new Constitution, giving the AL an overwhelming majority. No viable democratic opposition was allowed to emerge".[3] "The Awami League followed an electoral strategy of overkilling the opposition. Its policy of putting maximum pressure to win every parliamentary seat virtually wiped out the opposition parties from the parliament."[4]

Ninth, a talented and constructive political leader always tries, with a sacrificing sentiment, to settle all political problems in a democratic and compromising way. However, instead of adopting democratic methods

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1 Ahmed, Moudud , *Bangladesh : Era of Sheikh Mujibur Rahman,* Ibid, P.144
See also Talukder Maniruzzaman. *Ibid,* P. 157

2 See Walter Schwartz, *"How Bangladesh lost its Political Verginity",* Guardian (London), reprinted in the 'Weave' (Dacca), March 31, 1973; See also Serajul Hossain Khan, *"Electoral Democracy Buried"*
Holiday (Dacca) March 18, 1973. (Talukder, Ibid, P. 191)

3 Banerjee, Subrata , *Bangladesh* , (New Delhi : National Book Trust, 1981), P.159

4 Jahan, Raunaq, *Bangladesh Politics : Problems and Issues.* (Dhaka : UPL, 1980), P.82
See also Ahmed, Abul Mansur, *"Amar Dekha Rajnitir Panchash Bachar"* (Fifty Years of Politics as I saw it) (Dhaka: Nowroj Kitabistan, 1975), PP. 610–612

and techniques Sheikh Mujib began to deal with the opposition forces in a dictatorial way. This led him to resort to measures such as preventive detention and emergency power in order to deal with the growing political unrest, thereby undermining and weakening the democratic process and constitutionalism which he himself founded in 1972. If the founding leader Mujib did not incorporate all these undemocratic provisions in the Constitution no subsequent leader or government would have dared to incorporate them in the Constitution.

As a leader of the movement for autonomy to independence of Bangladesh Sheikh Mujib was successful but there is a wide distinction between pre-independence Mujib and post-independence Mujib. In the former he is like an unparallel leader of the history; a man of immortal fame. This is why he was garlanded by people with title like *'Bangabandhu'* (peoples' friend). But in the latter i.e. as the Prime Minister or leader of the nation-building struggle for Bangladesh his role was very disappointing. This is why a commentator goes on to say that 'Mujib was a fine Bangabandhu but a poor Prime Minister.'[1]

Tenth, the first parliament as the most vital instrument of democracy remained throughout its life a cinderella parliament. This parliament could have been, with the spirit and enthusiasm of the national liberation war, turned into the most active instrument on the way to institutionalisation of democracy. However, the ruling elite did not desire so; they kept the parliament as a mere show-room. The overall performance of the first parliament is very pathetic. In it the average number of sitting days a year was 53 only; in India the average number of sitting days is 110; in UK it is 150 and in Canada it is 145. It is a recognised principle of the functioning of parliament in almost all civilised countries that more is national problems more is the functioning of parliament. In time of national emergency or grave national problems the parliament sits without any break. But in Bangladesh parliament the opposite was the case. The new born country was facing repeated problems like law-making, rehabilitation, policy formulation, policy implementation, corruption, smuggling, deteriorated law and order situation, freedom fighters, arms recovery, collaborators, abandoned porperties, nationalisation of industries, production in fields and factories. Unfortunately parliament was not allowed to take any effective role in solving these problems; all were dealt with by the whim of Mujib

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1 Ziring, Lawrence. *Bangaldesh : Form Mujib to Ershad.* (Dhaka : UPL, 1992), P. 85

which virtually undermined the role and institutionalisation of parliament as an institution of democracy. The first parliament made 154 Acts in total out of which 90 originated from ordinances amounting to 58.44% of the total law made by it. In all the House accepted 5413 starred and 27 unstarred written questions. The number of short-notice questions was 30 starred and 11 unstarred. Though a considerable number of questions were answered the Question-Hour in the first parliament generated neither much interest nor any debates on public policies. Interestingly, as the over-all socio-economic problems as well as law and order situation deteriorated, the number of questions declined. During the 8th session there was no Question-Hour at all. In this parliament most of the questions dealt with constituency interests whereas only a few related to national policy. A few questions were asked about a mysterious fire in the jute godowns in various parts of Bangladesh. The issues raised by MPs and answers given by the ministers were not tackled the way they should have been, in order to scrutinising the defects of the administration. During the Question-Hour debates are not supposed to run along the party line but most Treasury Bench MPs were apprehensive and extra-careful not to step out of line.[1] The familiar parliamentary procedure of the adjournment motion, used to call attention to problems of government, was not allowed although there were daily reports in the newspapers about the deteriorating law and order situation especially about the clashes occuring between Rakhi Bahini and the radical forces. By late 1973 and early 1974, the situation had deteriorated to such an extent that the government had to deploy the army to handle it.

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

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1. Choudhury, Dilara , *Ibid*, P. 118

Military Rule and the Myth of Constitutionalism in Bangladesh

'Mujib said his primary role on returning to Bangladesh following the conclusion of the civil war was to rebuild the country's political-administrative institutions. Mujib did not deliver on that promise. Having reached a moment when the only instrument of government lay in the utilization of violence, the question that emerged centered on where the violence would be directed. Mujib must have believed he could punish his enemies i.e. anyone who challenged his supremacy. Indeed, Bhutto shared thought two years later. But Mujib as Bhutto too was to learn, had the violence visited upon himself.[1] Mujib's constitutional dictatorship was overthrown by a bloody military coup in which Mujib and his entire family (with the exception of two of his daughters who were abroad) were assassinated. Martial Law was declared ousting Mujib's civil government; the army emerged as a powerful political force; and the body polity of Bangladesh faced a new and unexpected era of military rule. The nature of military rule is that it comes to power ousting a civil government completely in an illegal way; it never comes to give democracy. The first military ruler Major General Ziaur Rahman began to civilianise his regime gradually. This civilianisation came to an end in 1979 when the Constitution 5th Amendment was passed legalising all military activities. Martial Law was withdrawn and the Constitution was allowed to continue as the supreme law. But the governmental system was fundamentally retained as an authoritarian as was introduced by the 4th Amendment; of courses, some undemocratic provisions introduced by the 4th Amendment were removed and some relations among the institutions of the government were liberalized. The governmental system was neither a true presidential as is practised in the USA nor a parliamentary one as is practised in the UK. Neither was it the same presidential as is practised in France where the Prime Minister and his cabinet are collectively responsible to parliament. The presidency as modified by the 5th Amendment was much more powerful than the presidency under the French Constitution. The system lacked the principle of cheeks and balances. The system was, therefore, a class apart; an all powerful executive ridden presidential system which armed the President with all devices to administer his dictatorial rule. This model bore more similar to that of Ayub Khan of Pakistan. The executive

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1 Ziring, Lawrence, *Ibid*, P. 102

authority was vested with the President who was directly elected by the people for a period of five years although without a limit to the number of terms in office. Once elected it was quite impossible to remove him from the office, for the impeachment procedure as introduced by the 4th Amendment was unprecedentedly a difficult one. All extra-ordinary constitutional devices like emergency, ordinance-making powers, preventive detentions etc. were retained which armed the President to act almost in a dictatorial way. The President was also the chief legislative initiator through his power to address and to dissolve the parliament. Also the power of the parliament was kept restricted like that of a rubber-stamp body. Zia's system was, therefore, neither a fully democratic government nor was it an ever hated dictatorial one as introduced by Mujib. It was a multi-party presidential system blended of democratic and autocratic features. Though most observers believe in Zia's sincerity concerning the country's development programmes and his faith in Bangladesh's destiny, his leadership was flawed due to his inability to build political institutions. While in power, he depended more on civilian-military patronised bureaucratic institutions than on political ones. His encouragement of factionalism in the opposition parties and his use of the legislature as a 'rubber stamp' created serious complications for the sound grouth of constitutionalism'.[1] The trend of civilianisation by Zia was smashed by the imposition of second time martial law by Ershad in 1982. Parliament was dissolved; the Constitution was suspended and all political activities were banned. Following the path of Zia Ershad began to civilianise his regime and martial law was withdrawn after 4 and half years when the 7th Constitution Amendment was passed legalising all military activities. Though Ershad civilianised and legalised his regime he, unlike Zia could not gain support from the people, for he lacked Zia's charisma and liberation war credentials and remained solely depended upon the military for his survival. Throughout his autocratic rule–8 years and 9 months– the longest period in the constitutional history of Bangladesh, the issue which haunted Ershad was the question of his legitimacy to govern the country. There were continuous movements against Ershad regime and on his way to suppress this movement he amputed almost all institutions of democracy. During his regime the election process in Bangladesh became a total farce and mockery. Through unprecedented electoral malpractice Ershad destroyed the electoral process in the country. Ershad amended the Constitution as

1 Choudhury, Dilara, *Ibid*, P.217

many as four times and every time he did it for his own political end. He retained the presidential-parliamentary mixed system introduced by Zia; he retained the parliament as a secondary rubber-stamp body; all autocratic measures like preventive detention, emergency, ordinance-making powers were wilfully used by him; the press was repressed; radio, T.V. etc mass-media were wilfully used as the sole mouth piece of Ershad. Threre are many instances that not only demeocracy but good autocracy or military dictatorship which at least believes in real nation-building can usher in economic development in a country. South Korea, Indonesia, Mayanmar etc. bear the testimony of such example. Unfortunately Bangladesh did not deserve even any of such type of autocracy.

During the long term of military rule the institution which has been mostly damaged but which is considered as the pivotal force for developing constitutionalism is the party system in the country. Since the political activities were banned repeatedly, the strength and cohesion within the most famous parties was destroyed. On the one hand, many experienced political leaders left their original parties and joined new parties created by military ruler; and on the other hand, mashroom growth political parties devoid of any ideology or programme were created by money-power just to give a democratic poster to the election of the military ruler. The Ershad regime was toppled by a popular mass-movement in December 1990 when the military withdrew its support.

Second Start of Constitutionalism and its Problems

In 1990 the country was freed from the clutches of military rule and the peoples' sustained struggle for democracy at last triumphed with autocrate President Ershad and the time came to lead the nation on a new journey in search of constitutionalism. The second start of constitutionlism had its peaceful transit through the historic 5th parliamentary election under the Acting President Justice Sahabuddin Ahmed. In 1991, by the 12th Amendment of the Constitution government was reverted again to parliamentary form after 16 years. The starting of the second parliamentary democracy seemed fine and enthusiastic however, the celebrated 5th parliament like many of its predecessors could not complete its constitutional duration; it was to dissolve under the pressure of the opposition movement. The ruling party BNP has, in many ways, failed to make a positive turn towards the development of constitutionalism.

First, it is the primary responsibility of the government to make parliament work. But the ruling elite miserably failed to transform parliament into a centre forum of all political activities. The major opposition party AL was not given adequate time in parliamentary deliberation and as a result they boycotted the parliament. The ruling elite did not show much tolerance as was necessary for bringing the opposition into parliament and they forcefully run the parliament as long as two years without the opposition i.e. ignoring the opposition. Though both the government and the 5th parliament during this two years without the opposition were valid from legal point of view but they had no political legality. Lastly the BNP government decided to hold the 6th parliamentary election ignoring the opposition and it proceded to contest the election with some sudden hand-picked parties as the military dictator Ershad frequently did. This was a flagrant wrong done by a democratically elected government and this showed the ruling elite's lack of political foresight. This is why the 6th parliament had only 7 days life. This negative trend in parliamentary democracy i.e. the trend of political intolerance by the BNP government has proved once again the crisis of constructive leadership in the development of constitutionalism in Bangladesh.

Second, in a democratic polity the forum for policy formulation and declaration is only the parliament. However, in the 5th parliament the BNP government could not overcome the wrong done by Mujib, Zia and Ershad. Like all other previous government heads Khaleda Zia declared almost all policies in public gatherings and press conferences avoiding the parliament. To be noted that while Lord Weatherill was the Speaker of the House of Commons once he heard Prime Minister Mrs. Thatcher had made a statement to the press on a very important matter and he was not told that she was going to make that statement to the House of Commons. He quickly phoned up to 10 Downing Street to say that Mr. Speaker presumed that the Prime Minister would come to WestMinster at 3:30 that afternoon in order to make a statement to the House of Commons. The Prime Minister replied that it was impossible, for she would be busy to meet the Speaker from Malaysia and for that reason she made the statement to the press. Lord Weatherill said 'But Prime Minister the place to make statement is not to the press, however good they may be, but to members of parliament and you must never seek to sideline the House of Commons". Then the Prime Minister did come and made her statement in the House. Likewise some years ago India Prime Minister

Narasima Rao addressed a seminar at Singapore. During question time a participant asked him when his government would make the Rupee full convertable. He smiled and said, "If I tell you this here, my parliament will take me to task. These decisions must be first told to them. I have to disclose this decision first in the parliament."[1] This trend of parliamentary culture has yet to start in Bangladesh. To start such a culture the only requirement is sincerity and respect towards parliamentary principles.

Third, the Prime Minister is the centre person in the government; at the same time she/he is the leader of the House. She has great responsibility to make parliament work; to inform parliament all activites of his government; to answer questions for a specified period in the House. However, in the 5th parliament Khaleda Zia almost avoided parliament; she did not regularly attend the sessions; she did not answer questions; she did not take part in debates; she did not make policy statement in the House. All these were against the concept of institutionalisation of democracy.

Fourth, the departmental standing committees in parliament work as constant watchdog against the ministries. However, all of these committees in the 5th parliament remained ineffective, for ministers of respective ministry headed the committees. If a minister who himself will be scrutinised by a committee heads that very committee, the scrutinisation becomes a mere farce only.

Fifth, even the military dictator Ershad appointed an opposition MP as the chairman of the PAC but the BNP government appointed a Treasury Bench MP as the chairman of the PAC. Not only that, the whole department of the CAG including its audit department was kept, as was done in previous regimes, dependent on the Finance Ministry making virtually the constitutional body ineffective.

Sixth, the most abuse of the Special Powers Act has been done by the democratically elected BNP government. The largest number of detenus so far in Bangladesh under this law was 6497 in the year of 1992[1] . But the government was not satisfied with the only draconian law of the Special Powers Act; it, therefore, resorted to another draconian law– the Anti-Terrorism Act. Such a trend of use and abuse of black laws in

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1 Choudury, Nazim Kamran, *The Mirage of Parliamentary Democracy*–II the Daily Star, June 3, 1996

1 For details, See, Chapter XVI

peace-time by a democratically elected government substantiates its autocratic character particularly in respect of protecting personal liberty of the citizen.

Thus the public expectation of the 5th parliament at the re-starting of parliamentary democracy which rose significantly with enthusiastic participation in the election lastly faced a bewildered feedback when the BNP government also took the same course as was done by all previous governments.

7th Parliament:

However, the toiling masses of Bangladesh again participated in the 7th parliamentary election under the neutral Caretaker Government with same hopes and aspirations and the majority voted for the AL. This parliament completed its full life with the AL in power. Compared to the 5th parliament very few developments would be noticeable in the 7th parliament. Most of major policies had been declared in public gatherings rather than in the parliament. Special Powers Act had been used in a competitive way; the culture of boycothing parliament by the opposition parties was a norm rather than an exception and the Prime Minister Sheik Hasina just provoked this trend; sessions of Parliament had been held for a very shorter period; Departmental Committees were formed after 18 months of the inauguration of the parliament; the PAC was still chaired by a government party MP though it was the AL's pre-election commitment that if they would come to power, the PAC would be headed by an opposition MP; the CAG was still in the amputed position; important mass media like radio, television were being used as government mouth pieces. However, there has been marked improvement in one area and this is the resorting to ordinance making power. The number of ordinances promulgated in between two sessions gradually reduced to almost zero. Second credit which Sheik Hasina may claim is that she introduced PMQT in the House. Third credit lies in the change that unlike before minister will not chair the Ministerial Standing Committeees.

8th Parliament:

8th Parliament completed its tenure without the participation of the opposition and as a result it failed to focus as a forum of national interest and issues. From the very beginning of its life the opposition parties started boycotting parliament and remained outside parliament until

almost the end of it. Compared to the 7th parliament the Prime Minister Khaleda Zia in the 8th Parliament does not deserve any credit in starting or taking any initiative to start any move towards constitutionalism. Parliamentary committees were formed after one and half year of the life of the parliament and that was done without any participation of the opposition; major policies were declared in public gatherings and seminars rather than in the parliament; the Special Powers Act had been used almost in a competitive way; the government seemed to have been champion in the breach of its pledge as to implementation of *Masder Hossain* case as it declared that it would take another six to seven years to complete separation of the lower judiciary; though resorting to ordinance making power is not in the rise still a very important piece of law affecting personal liberties has been done through ordinance. This is the promulgation of Combined Operation Indemnity Ordinance. The most important post related to the parliament is the speaker and this post is also a constitutional post. Speaker is constitutionally committed to maintain independent and impartial balance between treasury bench and the opposition. However, very regrettably the speaker Barrister Jamiruddin Sirkar in the 8th parliament failed to maintain that balance. The main opposition party refrained from attending the sessions, citing the reason that the speaker was openly biased in favour of the treasury bench and the opposition were not given the floor to speak on important issues.

The Speaker in the 8th Parliament

The main opposition party in the 8th parliament refrained from attending the sessions, citing the reason that the speaker was openly biased in favour of the treasury bench and the opposition were not given the floor to speak on important issues. Once elected to the post he has to act in a non-partisan way, treating all parties equally. However, the speaker of the 8th parliament Barrister Zamiruddin Sirkar miserably failed to discharge his function as an impartial speaker.

First in one incident a deputy minister harassed a journalist and the minister was very angry with it and he wanted the parliament to pass a law to curtail freedom of press. The speaker suggested the government to institute laws to curtail freedom of press and the speaker suggested this in the absence of the opposition.

Second, in another occasion the opposition wanted to discuss price hike of essentials in the market and the speaker told the oppostion that the government was taking steps to prevent price hike and that the issue should not be discussed in the parliament.

Third, President Iajuddin Ahmed went to Sigapore on 16th July 2007 but he did not delegate his power to the speaker of the parliament as the requirement of the Constitution. Article 54 of the Constitution specifically states that if a vacancy occurs in the office of the President or if the President is unable to discharge the functions on account of absence, illness or any other cause, the Speaker shall discharge those functions until a President is elected or until the President resumes his office as the case may be.

Fourth, the speaker Zamiruddin Sirker had drawn Tk. 28 lac as his medical bill ignoring official objections. This was reported in dailies in July 2007. According to General Financial Rules no authority should exercise its power for sanctioning expenditure to pass an order that will be directly or indirectly to his own advantage. It was suggested that the Speaker's privileges did not provide for any facilities which he exercised on his own to draw medical bill for which the permission from the Prime Minister would have been a must[1].

The BNP led 4 Party Alliance Rule: (2001-2006)

8th parliament election was held on 1st October, 2001 and the BNP formed its 4 party alliance on 10th October, 2001 headed by Prime Minister Khaleda Zia. On 27th October, 2006 this government handed over power to a constitutional caretaker government after completion of its five year terms. However, the hand over was not at all peaceful as its confronting relationship with the opposition parties and its failure far outweigh its success. The Prime Minister Khaleda Zia claimed the following as her government's success:

Success claimed by the BNP:

(i) Establishment of Anti-corruption Commission
(ii) primary and mass education

[1] Daily Star, 18th July 2007.

(iii) providing increased stipend for students
(iv) tackling unfair means in public examinations
(v) arranging free education for girls up to 12th classes
(vi) welfare measures for teachers and age olds
(vii) taking several steps for child development
(viii) banning polythene shopping bags
(ix) increasing health facilities
(x) conducting drive against food adulteration
(xi) subsidy for agricultural development
(xii) boosting exports
(xiii) appointment of 80,000 young people.

Failure of the BNP:

- The BNP-led qualition government at the very fag end of its tenure gave mass promotion to civil servants entirely on political considerations, apparently for taking them on its side during the election. According to source in the Establishment Ministry, a total number of 2,380 officials were promoted in the different tires of bureaucracy during its tenure, resulting in the record number of officials getting OSD status due to lack of vacancies[2]. State offices have been used for BNP activities (August 16, 2006, Daily Star). Rush for ministerial decision for purchasing government procurements deals which had been rejected earlier by the same body. Cabinet purchase body okayed 17 projects hurriedly despite flaws in many bids.

- Age of Justices in the Supreme Court was increased with political motive, i.e, in view of incoming national election to be run by caretaker government which was to be headed by the Chief Justice retired last.

- Repeated violation of the order of the Supreme Court in *Masder Hossain* case.

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[2] ANM Nurul Haque, *Bueaucracy in disarray*, Daily Star, December, 3, 2006.

- The government formed alliance with Jamat-i-Islami, a religion based party in the country and this party instigated to the incidence of rising militancy in the country. The menace of militancy was another problem for the BNP Government in power. A series of bomb blasts across the country on August 17 was a demonstration of the fire-power and the network Islamist militants had developed over the years. The militants target was the judiciary in the country in 2005. After series of bomb blast on 17th throughout the country on 14th November a suicide attack left two senior assistant judges killed in Jhalakati.

- Allegation of establishing dynastic elements into politics; giving back-up power to Tarek Zia who in behind controlled the cabinet and secretariat and the whole political system of the country. At the same time he raised a group who became famous for corruption throughout the country.

- Although Anti-Corruption Commission was established by this government, arrangements were made in the law in such a way that it remained a paper tiger. It was neither in a position to bring any action against political big-wigs who were corrupted nor could it fix its own organogram.

- The parliament remained ineffective throughout the regime as the opposition boycotted the parliament since its early life and it was the main duty of the Prime Minister to bring the opposition back to parliament.

- As the parliament was ineffective, the committees in parliament which are considered as powerful watchdog of democracy could not play any role to make the government responsible.

- Election Commission as an institution of democracy wa amputed to the sweet will of the 4 party alliance government.

- The post of the President as an institution of democracy was also damaged to such an extent that it went down to designation 'yes! Boss!' or 'Yesuddin'.

- The post of the speaker of the national parliament as an institution of democracy was destroyed.

- Failed to curb corruption as the party allowed dynastic elements to creep into the body polity of the whole system

- On 21st August Khaleda Zia declared that Qawami madrasha degree would get master's degree status which has been termed as playing politics with education by the government at the fag end of its term.

- RAB Rapid Action Battalion was formed under the Armed Police Battalions (Amendment) Act 2003 and it launched its formal operations on June 21, 2004. The members of this elite force were picked up from amongst the competent members already serving in the army, air force, navy, police and BDR. Extra-judicial killing by cross fire by RAB personnel came out in the country as another political flaws of the ruling party. The criticism began to mount as lifeless bodies of listed criminals and terrorists and their sidekicks begun to pile high on a roadside ditches on a daily basis, although there is no provision for extra-judicial killing in the Constitution. Human rights bodies, media and civil society watchdogs refused to allow them the extra-judicial power of killing. From 1st January, 2004- 30th June, 2005 total people killed by cross fire by RAB was 101. This number was 186 in 2006.

- The seed of political controversy was sown on May 16, 2004 when the BNP-Jamat-Alliance government had amended the constitution to extend the retirement age for judges to 67 years from 65. This was viewed by the opposition parties as a conspiracy to appoint retired chief justice as the chief of the caretaker government before the 9th parliamentary election. This Chief Justice was Justice KM Hasan who was quite well known as BNP loyalist. From then on AL kept on voicing that it would not accept retired Chief Justice KM Hasan as the Chief of the caretaker government. Instead of responding to any of the objections of AL, the BNP-led alliance government's unilateral actions in connection with a controversial voter list, appointment of CEC and other election commissioners, deepened the animosity between the rival political parties. When the alliance government handed over power on 27th October, 2006, it was almost settled that BNP loyalist CJ KM Hasan would be CA, and the President Iajuddin has already been partisan; secretariat and other government agencies have already been politicised; election commission along with electoral roll has in such way been manipulated that there was certainty of the BNP getting elected in the 9th parliamentary election to be held on 22nd January, 2006. There was a very tense political atmosphere throughout the country. Amidst such situation KM Hasan declared that he was not willing to become the Chief of Caretaker Government.

The Second Start of Constitutionalism Haulted again Military backed Caretaker Government

On handing over the power by the 4 Party Alliance government on 27th October, 2006, violence erupted among supporters of two rival political parties in the capital and also throughout the country. It was almost settled that BNP loyalist retired Chief Justice KM Hasan would be Chief Adviser, and the President Iajuddin has already been partisan; speaker has played his partisan role throughout the life of 8th

parliament; secretariat and other government agencies have already been politicised; Election Commission along with electoral roll has in such way been manipulated that there was certainty of the BNP-alliance getting elected in the 9th parliamentary election to be held on 22nd January, 2006. There was a very tense political atmosphere throughout the country. Amid such situation Justice KM Hasan declared that he was not willing to become the Chief of Caretaker Government. After refusal by Justice KM Hasan without resorting to other available options in the Constitution for appointing a Chief Adviser, the President himself took over as Chief Adviser. The already tensed political situation became furious resulting in killing almost 30 people and injuring thousands and against this background, the military interfered for the third time into Bangladesh politics and the President Iajuddin was forced to declare emergency suspending all fundamental rights on 11th January, 2007. A new political order emerged in polity of the country- a caretaker government headed by Dr. Fakhruddin Ahmed backed by military.

At the dawn of our independence back in 1971, we thought that dictatorial rule in our country was over once and for all- but we were wrong. When the last military ruler was forced to step down in 1990, we thought we would come under a sound civilian rule- but we were wrong again. After the assumption of power of a democratically elected government a year later, we thought that a proper political process would now begin– but we were wrong once again[3]. Sadly, still today, a full decade and one quarter of a century after our independence, politics in Bangladesh remains decadent, old fashioned and directionless. The babies who were born during our liberation war are all now adult men and women in their mid-30s. Much time has passed and with the passage of time everything has changed but tragically Bangladesh's politics has not changed.

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[3] Syed Badiuzzaman, *We need politics that helps a nation, not hurts it*, New Age, 10th January, 2006

As mentioned above, Bangladesh parliament has become a constant victim of disturbing trend of politics of boycott for the last 15 years since the beginning of a democratic process. Used as a purely temporary strategy by political parties or groups or labor unions to voice their dissent against an action or policy or plan by the authority in the past, boycott has now become a feature of Bangladesh politics. After the first democratically held elections, when the BNP formed the government, opposition Awami League lawmakers staged a prolonged boycott of parliament. In other words, in the 5th parliament, the lawmakers of the main opposition Awami League started boy cotting Jatiya Sangsad from the 13th session and did not turn up till the dissolution of the parliament in 1996. The seats of the AL lawmakers were vacated at the 20th session on June 19, 1995 after they remained absent from parliament for 90 consecutive working days.

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

After the last election in 2001, when BNP returned to power with its qoalition partners, opposition Awami League legislators switched to their old strategy of boycotting parliament once again[4].

At the root of all political problems of Bangladesh lie the animosity and lack of trust, compassion and accommodation between the two arch rivals and the largest political parties of the nation– the ruling BNP and the Awami League. The two parties have been at

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[4] Syed Badiuzzaman, *We need politics that helps a nation, not hurts it*, New Age, 10th January, 2006

loggerheads for many years. After Ershad's exit from power, their animosity continued to increase as they continued to fight for power. The two firebrands heading the two parties prime Minister Khaleda Zia and the Leader of the opposition in parliament Sheikh Hasina have barely maintained even talking terms between them. Although it is not very unusual compared to other countries in South Asia, the leaders of the largest political parties of Bangladesh have tendency to often go as far as to accuse each other of treason[5].

Military backed CTG in 2007 and Aftermath

As mentioned above, on 11th January, 2007 a new order emerged in the politics of Bangladesh and this is the CTG led by Dr. Fakhruddin Ahmed and backed by military. Law adviser of this CTG Barrister Moinul Hossain once declared that this government was a military backed CTG and there has to be an exit route for this government. However, the following day Military Chief Moin U Ahmed stated that the government was not a military backed CTG; it was a constitutional CTG and the military was giving necessary assistance to the civil administration under the normal constitutional arrangements. Reforms and activities of this Government so far have been detailed in brief below:

Constitutional Review Commission

On 10th July, 2007 Army Chief Moin U Ahmed said that the constitution should be reviewed through a 'Constitution Commission' for preparing new laws and mechanisms to ensure accountability and effective governance. He stated the an elected government may undertake the constitutional review after elections are held by the end of 2008 when a constitution commission might be formed. This is not only an important issue but it also goes to the heart of the present political malaise in the country. Many political leaders of major parties have also realised that intra- party political reforms are not enough for genuine democracy, and have also suggested some constitutional

[5] Syed Badiuzzaman, *We need politics that helps a nation, not hurts it*, New Age, 10th January, 2006

reforms with a view to running an accountable government and parliament[6].

It is suggested that the Commission should consider the following list of issues:

- Should the tenure of the Prime Minister be limited to two terms, since the tenure of the President has been limited to two terms under Article 50(2)?
- Should the number of ministers, state ministers, deputy ministers and advisers, or persons having status of minister/ state minister/ deputy minister be limited to only 10% of the elected members of parliament?
- Should the speaker, after being elected, cease to have any affiliation to any political party, for neutrality?
- Should there be certain number of women candidates for MPs be clearly spelt out, including the do's and don'ts? Should they be limited only to law- making functions?
- Should the powers of the president and the Prime Minister operate as checks and balances on each other?
- Should all state institutions, including the Election Commission, Anti-corruption Commission, Ombudsman, Auditor General and Public Service Commission be separated, strengthened and made independent of the government?
- Should retired persons of higher judiciary be involved in any part of the administration? Should former Chief Justices continue to be the Chief Adviser in non- party care- taker governments?
- Should there be a National security council for coordinating security and other national issues?

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[6] Barrister Harun ur Rashid. *Constitutional Review Commission*. Daily Star. July 18. 2007.

- Should any political party not gaining 5% of popular vote in the parliamentary election be denied representation in the parliament, or not recognised as a registered lawful political party?

Emergency and Arrest of People

Around 286,000 people including former ministers, lawmakers, political leaders and business tycoons have been arrested across the country on charges of crime and corruption since the state of emergency was declared on January 11, 2006[7]. Of them police arrested 260,000, Rapid Action Battalion about 9000 and the army-led joint forces over 17000 throughout the country. Among them were about 600 listed criminals. The high profile arrests were made after Chief Adviser Fakhruddin Ahmed's caretaker government declared war on corruption and criminal godfathers.

Minus-Two Formula

This formula suggests that country's two main political parties AL and BNP should be reformed by retiring or removing their present chairpersons. This is because these two parties are responsible for current political conditions and they should accept the blame and step down. Opponents of this formula argue that the minus-two formula is undemocratic as the selection of leadership is a prerogative of the party council. The party councilors can choose anyone as the party leader, and keep him/her as leader as long as they wish. However, people must have choice to elect their leader but if the same leader holds on to the party chairmanship, there will be no choice left to the people. Thus the argument that the party councilors can chose anyone as their party chief and keep him or her leader as long as they want- is not consistent with the theory and principle of democracy. Therefore, the minus-two formula, although referring to two specific persons is, indeed, a general principle of the democratic political system. More specifically, this formula is key to a lasting cure for our ailing political parties[8].

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[7] Daily Star, July 11, 2007.

[8] Khandakar Qudrat-i-Elahi, *Minus-two Formula: A Democratic Interpretation*, Daily Star, July, 19, 2007.

Formation of National Government

It has been suggested that one way out would be the creation of a national government of all the parties. The idea has been around since before the army intervened to install a civilian interim government in January 2007. But, if freed, the former prime ministers are more likely to pursue revenge than co-operation. The same goes for the 200-odd other politicians and businessmen locked up in the anti-corruption drive[9].

The National Security Council:

It has also been suggested that a National Security Council is to be formed to formalise the army's role in politics, as in Pakistan[10]. At present in Bangladesh generals are simly supporting the civilian caretker government, but some Bangladeshies favour setting up a security council to give the military a more formal role in the government. There should be mechanism so that the military can play its role in policy making[11].

Truth Commission:

On 27th March, 2008 the caretaker government has made a draft of Voluntary Disclosure Ordinance, 2008 which contains the provision of establishing the Truth and Accountability Commission. The draft details that the Commission will consist of three members and will continue for six months only. First 30 days will be fixed for those who will come forward for voluntary disclosure. A person willing to make voluntary disclosure will have to apply within 30 days of establishment of the Commission, while anyone referred by NCC, ACC or court will have to apply within 60 days. The ACC (Anti-Corruption Commission) or NCC (National Coordination Committee on Corruption and Serious Crimes) or even a court may refer a person to appear before the Truth Commission. Section 9 of the draft states that those who voluntarily make disclosure to the Commission and are pardoned by the Commission will not be allowed to take part in elections or be members in corporate bodies. Again, that very section 9 stipulates that such a bar may not apply to individuals who, under

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[9] Looking for the Exit, *The Economist*, 7th Feb. 2008.

[10] Looking for the Exit, *The Economist*, 7th Feb. 2008.

[11] Hassan Shahriar, *Power Play*, Daily Star, 27th July, 2007.

certain provisions of section 6, voluntarily come forth to disclose the sources of their illegally acquired wealth. This is a fundamental contradiction in the drat law and this might make the whole purpose of the law meaningless.

Why Truth Commission: The idea of Truth Commission emerged in 2006 as an alternative to dealing with graft cases and graft suspects to give the offenders opportunity to admit their culpability and be penalysed monetarily instantly instead of prolonged legal process and conviction by courts. However, legal experts suggested that this arrangement goes to the counter of Anti-Corruption Commission and its activities and it has many loopholes as a system.

Election Commission Separated

The Caretaker Government passed a new ordinance named the Election Commission Secretariat Ordinance, 2007 with a view to separating the control of the EC from the Prime Minister's office.

Other Reforms undertaken by the CTG:

- Anti-corruption Commission, the Election Commission, and Public Service Commission have been reformed and they have earned the appreciation of the nation. In general, the caretaker government has succeeded in convincing people that an impartial, non-partisan administration is at work.

- Coming into power the CTG started crusade on corruption by political leaders. As many as 240 people, 217 of whom have been in politics, were however, convicted and sentenced to jail in connection with 61 cases. The highest number of cases were brought against Tarique Rahman, the man who had allegedly been at the centre of the rampant corruption that had permeated every sphere of the society in the five years of the immediate past regime of BNP-Jamat led four-party alliance government.

- When the Caretaker Government started campaign against corruption, there was high expectation among people that

those responsible for damaging the universities and educational institutions would be brought to task. Several vice-chancellors appointed on political considerations are alleged to have committed massive corruption. Excepting one or two of the former vice-chancellors who are absconding, the others seem to be enjoying immunity from prosecution and they have been allowed to return to their original posts.

- Abolition of politics by students, teachers and workers. Election Commission made a proposal to the Government for amending the existing regulations to prohibit the political parties

- Registration of political parties.

The Way Forward?

Corruption allegations against the two party leaders seem to have done little to dent their popular appeal. The begums have won at least 70% of the popular vote in every election since the end of the last military regime in 1990. After failing to send them into exile last year, or to convince the parties to ditch them, the army must now trust that judges will convict them both. Under new electoral rules, this would bar them from the next election. But the legal cases seem ill-prepared and credible convictions unlikely. It seems certain that the calls to release the two women will intensify. In the absence of other leaders, this gives the army a choice: democracy and the two begums or no begums and no democracy. Determined not to let them back, the generals, it is feared, may choose the latter course[12].

Other Problems Confronting Constitutionalism

Besides the above mentioned trends and impediments of parliamentary democracy in Bangladesh there are some other institutions

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[12] Looking for the Exit. *The Economist*, 7th Feb. 2008.

of democracy which are beset with hazardous problems hampering the development of constitutionalism in Banladesh.

1. Parliamentary Committee System

Please see chapter XI

2. The Election Commission

As mentioned earlier (chapter XXII) the weakness of the Election Commission and its lack of independence has been so inherent and endemic that Bangladesh Constitution needed the 13th Amendment in order to introduce provisions for a Caretaker Government. Besides the provision for the Caretaker Government during the general elections there is also need for an independent and neutral body having its credibility on its own right beyond any reproach. Because when an election is held for the local government or a by-election is conducted for parliament Election Commission must be able to conduct election with such credibility as is needed for the general election. The Commission must have its own fund and the budget and it should have its own staffs and personnel recruited by the Commission itself. Though it is not provided in the Constitution, it is a part of a convention as practised in other countries that it should submit its report to parliament on the completion of each election and a committee will deal with it. For recent reforms undertaken by the military backed caretaker government with regard to the Election Commission refer to chapter 23 of this book and also pages 515-516 of this book.

3. Public Service Commission and Civil Service

Parliament has been kept out of its arena in respect of services though Constitution has ordained that the parliament should make law regulating the appointment and the condition of services of persons in the service of Republic. In absence of any Act of parliament the terms and conditions of service are governed by the Rules made by President. These Rules are so complex and at times inconsistent and contradictory that there remains bundle of controversies about the seniority, promotion, absorption, lateral entry, preparation of gradation list and with regard to their discipline and enquiry questions regarding equal opportunity are vital for maintaining a reasonably satisfied service cadre. Often such fundamental rights are violated without any effective remedy available to

them. There has also been reduction of power of the Public Service Commission by regulation made by the President under Article 140(2). This is an area from where the parliament has almost abdicated its power though it is the parliament which is empowered to make and to regulate the service condition and to decide on the powers of the Public Service Commission. The Public Service Commissions recommendations are often not complied with by the Ministry of Establishment. These facts are contained in the report which is placed before the parliament but unfortunately the parliament does not provide as to how these reports are to be dealt with and the follow-up measures to be undertaken nor does it identify the committee which should deal with these reports.[1] In almost all democratic countries the reports of the Public Service Commission is dealt with a committee of Parliament.

4. Problems of Bureaucracy and Public Administration

The Bangladesh bureaucracy is well known as hot-bed of corruption. Corruption in the administration of Bangladesh is worse than anywhere in the world. Interestingly the politicians blame the bureaucrats for corruption and inefficiency in the public administration. On the other hand, bureaucrats blame politicians for corruption and inefficiency. Who are then really responsible? It is the politicians who are responsible for the problems in bureaucracy. Bureaucracy is like a cage of pet and trained animals to obey the orders of their masters. To keep these animals always loyal and obedient masters must not forget to apply some controlling devices. Our master-like politicians have not applied and sometimes have applied improperly those controlling devices to keep bureaucrats within their bounds. There are some universally recognised methods of ensuring accountability of bureaucrats. But Bangladesh administrative system lacks those methods from very inception. Of course, it is the fact that the war of independence that created Bangladesh was actively participated by Bangali civil and military personnel and the result was that the new Bangladesh government inherited a politicised administration. Also was the fact that the leaders of the new born country had little administrative experience. During the Pakistan regime the process of creating an effective provincial government was extremely

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[1] Islam, M. Amir-Ul. Bar-at-law. *The Evolution of Parliamentary Democracy and the Constitution of Bangladesh.* (A papaer read in 1997 in CPA seminer).

slow. Almost every senior administrative post in East Pakistan was occupied by a non-Bengali Muslim. East Pakistanies were totally excluded from decision-making and getting share of the development resources.[1] It was also the fact that in undivided Pakistan democracy was practically eclipsed after 1958 and bureaucracy played a highly political role till 1971. And as a result the British tradition of an impartial and non-partisan civil service had been destroyed and this trend had a bearing impact over the Benglali members of the earstwhile East Pakistan Civil Service who later came to paddle the new Bangladeshi administration. Despite all these factors how can it be supported that politicisation would continue even after the start of constitutionalism in Bangladesh? Controlling devices would not at all be set to work?, Law would be made just to vitiate the constitutional independence of and mutilate important organs like CAG, Election Commission, PSC etc? Then During 15 years of military rule the bureaucracy was politicised and militerised just to satisfy the needs of military ruler. During both Zia and Ershad regime top civil and military bureaucrats held important positions and were invol in both critical policy formulation and policy implementation; they had also direct access to the President and could sometimes even override the decisions of their ministers by invoking the President's support. The rules of business as they existed in Bangladesh allowed a matter to be referred to the President in a case of difference of opinion between the minister and his departmental secretary. There were many instances when both Zia and Ershad used to, in such cases, prefered the opinion of the departmental secretaries over those of the ministers. Obviously under such a circumstances the civil servants developed a superiority complex over their ministers. Indeed in Bangladesh from its very inception neither a vigilant parliament nor a responsible executive was in existence to restrain the political ambitions of the civil servants.[2] Thus as an institution of democracy the bureaucracy have lost all its possibilities and when the country was freed from the clutches of military rule in 1990, the bureaucracy was discovered as a problem– a seriously infected institution. Now the bureaucracy is almost an unruly institution; it is in a position that bureaucrats now easily defy their master's (Minister's)

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1 Kochanek, Stanley A. *Patron-Client Politics and Business in Bangladesh*, (Dhaka : UPL, 1993) P. 54

2 Choudhury, Dilara. *Ibid*, P. 220

decisions and orders. Now the public servants dare act like trade unions or CBA. Such behaviour of public servants has been entrenched with the gradual politicisation and patronisation of the government functioneries. All governments of post-independence period both civil and military are guilty of using the civil and military servants for their narrow political ends. It is also a factor that most of the ministers since independence amassed huge wealth by corruption, sometimes they engage themselves in corruption and other misdeeds in collaboration with top-ranking bureaucrats. These are the factors which have played the key-role in turning bureaucracy into a hot-bed of corruption; these have degraded the morale of the bureaucrats; destroyed the cohesion–the administrative chain of functioning within the institution; also destroyed bureaucrats' sense of respect towards ministers which is indespensible to the smooth functioning of state adminstration. Thus over the years the curse of partisanship has gradually eaten away the whole notion of impartiality and objectivity on which our administrative edifice is based. It was observed by the Bangladesh Aid Consultative group in 1994 at Paris that 'Bangladesh Public administration has not been able to deliver on some of the most important turgets the government has set for it. Decesive action is now reguired at the highest level of government to begin to break the bottleneck.'[1] The problem which beset our public administration today are (i) corruption by bureaucrats; (ii) inadequate accountability ; (iii) inefficiency ; (iv) centralisation of decision-making power and bureaucrat's master-like interference in it; (v) politicisation of bureaucracy and administration etc. For a government to be responsible to the people it essentially needs a responsible bureaucracy. To remove the difficulties and to institutionalise this bureaucracy and to make public administration accountable following measures should be taken immediately :

(i) The political will of the government must be demonstrated in a way so that the bureaucrats cannot dare defy Minister's orders.

(ii) Standing committees on Ministries should be allowed to work independently with full swing and support so that the bureaucrats at every ministry come under the direct scrutiny of parliament. It will only

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[1] Quoted in Summary Proceedings on Workshop on *'Administrative Reforms in Bangladesh.'* P. 9. (Published by CAC in 1994).

be then that members of the civil service will begin to be aware fo parliaments' scrutiny. This will also ensure the communication between political leadership and bureaucracy.

(iii) The constitutional independence and autonomy for the CAG must be ensured so that it can independently work in the way to make bureaucrats accountable in respect of financial matter and to monitor their financial responsibilities.

(iv) A department of Ombudsman should immediately be created which will work as an all-time watchdog against maladministration, red-tapism and inefficiency in the bureaucracy.

(v) Deirctly elected local governments should be established according to Articles 59 and 60 of the Constitution with proper powers and independence and the respcective local administration with its officials and staff must be vested in the direct control of the local governments. This will, on the one hand, decentralise administrative power, functions and responsibilities and as a result, channel-based corruption, conspiracy and red-tapism by the bureaucracy would be reduced and on the other hand, it will relieve MPs much of the burden of local responsibilities and they will, therefore, be able to concentrate more in committee functioning whereby the central bureaucracy will come under the direct control of parliament.

(vi) Unconstitutional laws dealing with the functions and formation of constitutional bodies like CAG, PSC, Local Government, Election Commission etc. must be replaced by democratic laws allowing them to work independently in furtherance of better administrative accountability.

(vii) The larger the government, the wider is its reach. The wider the reach of the executive, more the likelihood of public harassment; more the likelihood of bureaucratic corruption. Government has, therefore, to be shrunk. In the present context where multi-national foreign investment is involved in the exploration of oil and gas, and the generation of power, there cannot be any justification for restricting our own private sector from importing and distributing various products like petroleum etc. Monopolies such as BPC (Bangladesh Petroleum Corporation) which bring no public benefit should be abolished. There are many other instances where 'the state must be rolled back'. Reduction in state intervention should be the prime principle of reform. Wherever possible

government executive should be branched out to agencies and the private sector be allowed to participate in creating a competitive atmosphere.[1]

(viii) The functioning of the PAC must be strengthened and it should be chaired by an expert opposition MP particularly one who had been previously a Finance Minister. Proper functioning of the PAC will ensure the financial responsibility of bureaucrats in every ministry.

(ix) Reports of the PSC must be dealt with a standing committee in parliament and the compliance of the commission's report must be ensured through the scrutiny of the committee system.

(x) To control delegated law making by the bureaucrats a standing committee should be set up and a statutory instrument Act should be made.

(xi) Ordinance-making power should be reduced so that bureaucrats connot get any ample power in law-making avoiding parliament.

(xii) Democracy within the party must be gradually strengthened so that leadership from grassroots level can develop and leaders can gradually gather knowledge over administrative accountability and that they should not depend on bureaucrats.

(xiii) There must be specific rules for promotion, transfer and retirement of officals and promotion must be based on merit and efficiency. This will help bring efficiency and sincerity in the functioning of the administration. A good government means a good civil service. But one cannot have a good civil service without good service conditions, morale and rewards for performance. These factors need to be incorporated into any civil service reform. At the same time there must be provisions for actions to be taken when officials do not attain the standards set for them. To improve professional efficiency government officials should be given proper training particularly intensive and need based training.

(xiv) Lower judiciary should be separated from the executive. This will relieve the bureaucrats of exercising judicial power on the one hand, and on the other people will get rid of the problem of corruption in Magistrate's courts where justice for the poor people is almost captive at the corrupt hand of magistrates. Separation will bring accountability in the judicial sector.

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[1] Help taken from '*Making Parliament Effective*' A report by L.K. Siddiqui and others. (Published by CAC in 1994).

(xv) One of the most fundamental reasons for unruly situation of the bureaucracy and administration is politicisation by governments. Politicisation kills the instinct of a person to work independently; it destroys his courage to stand for justice; it turns him into a tool to serve the party; it leads him to subordinate the interest of the state and people to those of the party and partymen; it gives him opportunity to adopt organsied corruption and conspiracy. So long this politicisation will continue the government will never be able to build up a loyal administraion. If bureucracy and administration is to institutionalise, politicisation must be stopped and to this end PSC and other recruiting agencies should be given full independence in the matters of recruitment of officers.

(xvi) Corruption is the main problem in Bangladesh administration for implementation of any development programme. Corruption has engrained in our society. But this evil cannot be wipped out overnight. No leader, howsoever, powerful or charismatic he may be, will be able to wip corruption out overnight. Only it can be wipped out gradually through the process of institutionalisation of controlling institutions and it needs a dedicated leader for institutionalisation of institutions which controls the administration.

5. Local Government

Local Government is one of the most vital institutions of democracy. Modern state administration is almost unthinkable without devolution of power to the local governments. Due to increase of population as well as to huge expansion of governmental activities certain matters of policy and administration concerning national and international interests are reserved for central administration and the rest wide range of governmental functions are vested in local authorities .In modern state administration the bulk of public services are actually provided by local authorities rather than by central departments. 'It may even be said that at least from day to day, a citizen would seem rather more likely to be dirctly affected by actions of his local authority, than in respect of activities of central government.'[1] Local Governments are elected with a view to ensuring governance from the grass-roots level and participation of the local people in the development and formulation of solution of

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1 Jones, BL., *Garners' Administrative law*, Seventh ed, (London : Butterworths, 1989), P. 23

thier own problems and needs. In developed countries like USA, UK there is an extensive network of local governments the history of which dates back many centuries. Local governments in democratic countries are given the responsibilities for the welfare of their communities in providing for policing, highways and public utilities such as gas, water and electricity. The system of local government helps different ways bring transparency and efficiency within the state administration. First, it helps to solve local problems locally and relieves the central government much of its responsibility to deal with triffle and local matters. It, therefore, allows the central government to employ more methodic and prodigious effort to solve national and international problems. Second, it relieves MPs much of their burden of local responsibilities which people usually expects from MPs. It, therefore, allows them to concentrate more in national legislation, committee functioning and controlling the central government. Third, it decentralises adminstrative functions, responsibilities and powers and as a result, channel-based corruption and red-tapism by the bureaucracy become impossible. Fourth, as it allows MPs to employ more times in committee functioning the central bureaucracy will come under the direct control of parliament. Fifth, it allows the government to reduce its size. Sixth, if local governments are institutionalised, they will help develop leadership from the grassroots level giving gradually a strong base in democracy.

Our constitution-makers have provided for accountability of both the central government and bureaucracy which is to be ensured through the proper functioning of parliament and its committee system. Similarly with regard to local administraion, the express intention of the Constitution makers was also to make them accountable to the elected functioneries. Provisions were made in Articles 59 and 60 of the Constitution to devolve the responsibility for both development activities and administration into the hands of the elected representatives of the local government bodies. The Constitution makers envisaged the newly independent Republic to be a democratic order in which, 'effective participation by the people through their elected representatives in administration at all levels shall be ensured' (Article 11). Accordingly Article 59 provides that local government of every administrative unit 'shall be entrusted to bodies composed of persons elected in accordance with the law' and they will perform functions relating to :

a. administration and work of public officers :

b. the maintenance of public order :

c. the preparation and implementation of plans relating to public services and economic development.

Article 60 also empowers the local government to exercise 'the power to impose taxes for local purposes', to prepare their budgets and to maintain funds. But no government so far has taken proper initiative to fulfil the aspirations expressed in the Constitution with regard to institutionalisation of local government. Elected local government should be autonomous and independent of the executive and the local administration should be under the control of the local government. But in Bangladesh every government has kept colonial mentality in respect of nourishing this institution. Local Government was first introduced in this sub-continent in 1793. 'All reforms in local gevernment since then seem to have taken place mainly for devising an administrative mechanism to keep the centre's control over the peripheries and defuse political agitation and to create support-base for the centre at the grassroots level under a dependency syndrome.[1] Unless there is devolution of power upon the local bodies the people would not be able to become efficient participant in advising their own officers through elected representatives. Many honest, dedicated and efficient people in the locality do not contest local bodies election mainly because of thinking that after being elected they will neither be given autonomy nor proper powers and other financial support to implement local development projects; on the other hand, at the expiration of duration they will have to take blame from the voters for not doing local development activities. As a result, money power gets an ample opportunity to play the real tricks in the local bodis' election; and the government has its political lure to influence election process with a view to creating a support-base from top to bottom. All these have gradually destroyed local government institutions in the country. After a long term of military rule the second democratic government is now running the administration but so far no sign of honest attempt to institutionalise these local bodies is sighted. Following initiatives should be taken to institutionalise local government:

(i) In accordance with the provisions of Articles 11, 59 and 60 of the Constitution local government institutions should be set up for ensuring people's participation in the development of the country and there should be three tiers of local government at Thana, Union and Zilla levels and all the tiers should be composed of elected representatives of the people by direct election.

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1 *Local Government*, a Paper by Dr. Salehuddin Ahmed.

(ii) Every tier of local government should be autonomous and maximum devolution of power to be made to the local government.

(iii) Local government institutions should be made free from government interference except audit and inspection of funds provided by the government.

(iv) In accordance with the provisions in Article 59(1) of the Constitution the local administration and officials must be vested in the direct control of local government and not under the control of the central government as present legal provision provide, because a centralised administration tends by nature to be more bureaucratic.

(v) Remuneration, authority and responsibility of the chairman and members of the local government institutions should be enhanced to give them incentive to work sincerely and with dedication.

(vi) There should be clear demarcation of subjects of the central and local governments to avoid overlapping of functions. Also to avoid conflicts in the relationship between the MPs and chairmen of local bodies the duties and functions of each should be clearly defined.

(vii) The term of office of chairman of local bodies should be reduced to two years instead of five years to make the office of chairman less attractive to monied candidates, but more attractive to dedicated persons.

(viii) Local governments should be so designed that MP can also become the Ex-officio adviser of the Thana and District Council. This will keep the linkage between the local government and the MP and help MP to remain in touch with the development work in his constituency. This will also help develop relation between the parliament and the local governments.

6. Problems of Ordinance-making

Please see chapter XIV

7. Problems of Unconstitutional Laws and the Control over Delegated Laws.

The Comptroller and Auditor-General, Election Commission, Public Service Commission, Local Government etc. are constitutionally created essential institutions of democracy. Institutionalisation of democracy depends on the full independence and proper functioning of these institutions. The Constitution has given these institutions full

independence but statutory laws which deal with their composition and functions are vitiating all aspirations of the constitution. In most cases these laws have been made violating the provisions of the constutiton. Interesting to note that all these unconstitutional laws were made by Mujib Government in the form of Orders[1] particularly when Dr. Kamal Hossain was Law Minister and all successive governments just took and is now taking the benefits from those unconstitutional laws keeping virtually democracy in peril. To give democracy a positive turn these unconstitutional laws should immediately be repealed and democratic laws in accordance with the provisions of the Constitution should be made.

Though no research statistics is available but it is assumed that the largest portion of laws in the country is covered by delegated legislation. As mentioned earlier[2] our country is run almost by S. R. Os and these are often contradictory and they sometimes violate even constitutional provisions. This is the area where the executive is abusing its power almost rampantly. A statutory instrument Act should, therefore, immediately be made and a standing committee should be established to scrutinise these delegated laws before they are applied.

8. Problems of Political Parties

Political parties are backbone of democracy. Without democracy within the party-unit it is quite impossible to expect democracy at the governmental level. However, in Bangladesh as mentioned earlier[1] political parties are mostly fragile and fragmented. The problems of political parties are as follows:

(i) There are more than 100 political parties in Bangladesh but very few of them has definite ideology or programmes to be followed by supporters and future generation. Though one or two parties have

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1 From 10th April, 1971 to 10th January, 1972 (Return of Sheik Mujib) 9 Orders were made by Vice President under the authority of the Proclamation of Independence. From 11th January, 1972 to 16th December, 1972 (enforcement day of the constitution of Bangladesh) 151 Orders were made by the President under the authority of the Proclamation of Independence read with the Provisional Constitution of Bangladesh Order, 1972. From 16th December, 1972 to 7th April, 1973 (First sitting of the first Parliament) 43 Orders were made by the President under the authority of para 3 of the Fourth Shedule to the Constitution.

2 See Chapter XII

1 Chapter VIII

ideologies and programmes, the leaders often defy them for their selfish end.

(ii) Almost all political parties are based around individuals and most of them do not have any grassroots organisation or sufficient support to claim public representation. Mostly political parties are characterised by the politics of conspiracy, self-interest, greed and power-expectation. They are personality-oriented with followers clustering around a party-leaders who in turns becomes dictatorial.

(iii) The nature and composition of major parties reveal a disappointing state of affairs. Each major party is headed by person who is omnipotent in the management of the party-including the formation of central and executive committees. The constitution of the most of the parties are absolutely monolithic in nature.

The party chairman can make and dissolve any committee from the highest to the lowest level. The party structure and committees are filled by nomination not by election. Party is managed in such a dictatorial way that members' free-will does not bear any credit in party-meetings; often members are not given even right to express their opinion in party-meetings; what the party leader says or does becomes the ideology of the party.

(iv) Political parties in Bangladesh are considered as safe abode for criminals, terrorists and extortionists, for these type of people are always given shelter in parties. Moneyd people devoid of any leadership quality or connection with the people are given position in the party. In election time people who amassed wealth through whatever means are given preference to be candidates to these who may not be so wealthy but otherwise dedicated and committed having checkered political career. People having long sacrifices, dedication and commandment with integrity are overtaken by new rich roaders. And this is being done by the party head who have little knowledge about democratic institutions and who have not reached that position through democratic process rather than through back door.

(v) Another great impediment to the growth of democracy is the hereditary or dynastic element in the party leadership. Khaleda Zia became leader because she is the wife of late President Zia who founded the BNP and Sheikh Hasina because of her father who founded Bangladesh. The leaders of these two political parties are permanently settled in their respective positions cancelling all the possibilities of

emergence of any new leadership in their respective parties. This anti-democratic dynastic feature in the party leadership has been the greatest impediment to the development of constitutionalism in Bangladesh. Because both Khaleda Zia and Sheikh Hasina have created a permanent block to the democratic growth of leadership in the party leaving no scope for the emergenc of a promising and dedicated leadership to lead the party and nation; both having no sufficient institutional educational background or proper knowledge over the working of various institutions of democracy are doing the worst to destroy democracy; they are greeting moneyed people, extortionists and criminals to their parties; they are expressly instigating and provoking the destructive politics of students and other organisations like CBA, trade union, civil servants etc.; they are encouraging retired as well as acting bureaucrats both civil and military to come into politics; they are blatantly using government servants for their narrow political goal.

The basic reason behind almost all the above mentioned problems in political parties is the illiterate and politically unconscious people behind the scene who are supplying the real force into the body polity of Bangladesh. They do not have any knowledge over democracy; neither have they any knowledge how to manage a party; they only see a person considering his/her past dynastic history disregarding other criteria's. Khaleda Zia, whatever be her educational or other qualification, is getting support and sympathy from the people only for the reason that she is the widow of an assassinated President, a former military charismatic leader and on the belief that being the widow of Zia she would certainly keep alive Zia's (her husband's) glory and aspirations. Same is the case of Sheikh Hasina. Both Mujib and Zia were charismatic able to create a large and strong support-base in the country and on the basis of this support base people are giving their blind support to these ladies whatever be their experience, education or sincerity in politics. Same has been the case of the Congress party in India which was led by the Nehru-Gandhi family for most of India's 50 years since independence in 1947. But being detached from Gandhi family and for corruption scandal the Congress recently has faced decay. Lastly to stop decay and desertion and particularly to win in the incoming election of 1998 Sonia, the widow of Rajib Gandhi inspite of her repeated refusal to come into politics, was strongly urged to lead the Congress or to at least campaign for them. When Sonia gave up her fiercely guarded privacy to active campaign for the Congress, it was seen that the Congress got vigorated;

workers were particularly rejuvenated because they felt that she may ignite the embers of the dynasty glory once again; huge supporters gathered to greet Sonia at her campaign. But these large numbers of people who are greeting this anti-democratic dynastic element into politics keep hardly any knowledge of its possible dangers. The reason behind such a trend among people is psycho-historical. But illiterate people should not be blamed for this. It is their illiteracy and political unconsciousness which are responsible in this regard. To get rid of this problem what we need is to make our people educated and politically conscious. And to do that here again comes the question of dedicated leadership, for only a far-sighted leader can, with proper guidelines and policy-implementation, make the people gradually educated and politically conscious. But this is not possible overnight; it is a matter of considerable time and progress. But what is urgently needed is to introduce democratic culture in various institutions of democracy in furtherance of political stability which will gradually lead to economic development. It is not true in every sense that if Khaleda Zia or Sheikh Hasina resigns from party leadership while she is in power, the party will face quick decay; it is largely a matter of consensus among party leaders and particularly the sincerity of Hasina or Khaleda and it is also a matter of political tradition; if a tradition is once made by giving people, workers and supporters of the party information and knowledge over both negative and positive aspect of dynastic element in the party through mass-media people will realise and the tradition will gradually develop into a firm institution and democracy will get environment to flourish. And in this respect South African President Nelson Mandela has made the best instance for the sake of democracy by resigning from his party leadership. Our leaders should come forward to follow this example.

To institutionalise politcal parties for the sake of democracy in the country the following steps should be taken by the leaders :

(i) Hereditary nature of leadership should be abolished and the party constitution should be amended to allow change in the leadership after each specified term.

(ii) The party structure and committees should be filled only by election and this will encourage as well as develop leadership from grass-roots level.

(iii) The party leader should not take any decision without the process of consultaion or discussion.

(iv) The post of the party president and the leader of the parliamentary party should not be held by the same person. Ministers must be barred from holding any party office. This will ensure the separate entity of the party as an institution of democracy on the one hand, and on the other hand, the party will be in a position to exercise a sort of control over the government or the parliamentary party so that they do not deviate from their party mandate or manifesto.

(v) Regular elections should be held both at national and local levels. This will, on the one hand, ensure a legal and political process of elimination and recognition of leaders and parties in nation-building activities ; and on the other hand, it will help diminish the unnecessary number of political parties which were created during the long time of political vacuum.

9. Problems of Press and Media

Transperency and openness in government transaction is a necessary part of effective democracy. These two necessary elements of government are fulfiled by press and media. 'A popular government without popular information or means of acquiring it, is but a prologue to a farce or a tragedy or perhaps both'. So there should be unhindered flow of information of government transactions. Though from 1991 the press is more or less free some important laws, rules and regulations which regulate press and media are still very much restrictive. Since independence both radio and TV have been using as mouth-piece of the government. This is why there appears to be a fairly large audience for non-Bangladeshi radio-soures, including All India Radio, BBC and VOA. Both BNP and the ruling AL had avowd commitment to the people that they would give automy to the state-controlled radio and TV. But nothing positive has yet been done. A commission to give report on Radio and TV autonomy was however, set up in September 1996 at the directive of Prime Minister Sheikh Hasina in line with her party's much propagated election pledge and repeated commitment to people to give autonomy to Radio and TV. Report was submitted on August 1997. But the report is being now kept in cold storage. For the transperency within the governmental fabrics Radio and TV should immediatly be given autonomy. Operation of private TV channels should be allowed. All restrictive laws concerning press and media should be replaced by democratic laws and both the press and media should be allowed to be self-regulated by themselves through a code of ethical practice.

10. The Leadership Problem

The problem of democracy in Bangladesh as discussed above are politico-legal in nature. From socio-economic point of view Bangladesh is an underdeveloped country. There is a plethora of problems like over-population and its rapid growth, illeteracy, poverty, disease, malnutrition, unemployment etc. But almost all these problems have been created by our leaders. On the other hand, there are huge possibilities and factors in favour of industrialisation and economic growth in the country. Many third world countries started their journey towards constitutionalism and economic development with fragile institutions as was in the case of Bangladesh. But these countries like Korea, Taiwan, Thailand, Indonesia, Malaysia have been able to make success in a comparatively shorter period. But Bangladesh still lags behind. The basic reason behind such a position is leadership crisis which this nation has been suffering since its independence. Despite the existence of all ample possibilities for both political and economic development we are still struggling because we could not get an honest and far-sighted leader who can guide the nation with devoted spirit into a proper direction. A proper policy guidelines and sincere effort of a patriotic leader can override all the problems like illeteracy, over-population, unemployment etc. as has been done in China, Malaysia, Indonesia etc. The Malaysian Prime Minister Mahathir is a classic example of a prudent and intelligent leader, He transformed his country from rudimentary stage of this 'tiger' status. Malaysia was beset with many problems earlier. South Korea's economy was no better than ours in the 60s. Its per capita income was lower than that of Bangladesh in 1953. But by virtue of solid leadership skill, it has surpassed us long back. South Korea achieved tremendous development in General Chun du Huan's and Rae Tu's regime during 1980–93. Even then, Mr. Chun was not forgiven for his overwhelming corruption which outweighed his achievement of national economic success. He was sentenced to death by the court. This is a good lesson for us in Bangladesh where public leaders work for their own gain and go scot-free even after corruption.[1] Indonesia was economically similar to Bangladesh in the 60s. In 1960 the percentage of people living below the proverty line was 60% in both the countries. At present it is 18% in Indonesia and 50% in Bangladesh. General Suharto got an extremely improvished country but through sincere and unflinching leadership he

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[1] Ahmed , Kazi Asif, *Leadership Crisis in Bangladesh*, 'Obsorver' 14th Sept. 1997

steered its economy towards a better horizon. Now Indonesia's per capita income is $ 950. General Suharto has proved that not only democracy but good autocracy can also usher in economic development in a country.

The much talked-about country Mayanmar which has been under the boot of military junta for a long time and where democracy is still a daydream of the masses, possesses a better economic scenario than ours. At least 1 lakh (10,0000) tourists visit Burma every year whereas even one thousand tourists do not come to Bangladesh in a year. During 1990-95 foreign investment flowing to Mayanmar amounted to 600 million dollars, a figure which is twelve times more than flow into Bangladesh. The age of our independence is 32 years which is a pretty long time. Unfortunately, we still talk about food, cloths, shelter–three basic needs of the people. This 32 year period was enough for any civilised and hard working nation to change its luck and rise to glory. Ironically we failed even to meet our minimum needs over this long period. Our people are no less hard working than those of industrialised nations. They do not know the way to do it. The leaders in our country only 'aggravate the crisis of democracy by trying to shape events to suit their own exigency while disregarding the urgent need for economic growth. Their commitments were limited to speeches and the ritual of annual plans are drawn up and implemented by bureaucracy ... No political effort was made to inspire the people towards sacrifice and growth and no serious national plan was envisaged to deal with these problems. The leaders remained too busy with small, peripheral, petty prersonal politcs and ignored the fundamental issues of development and democracy.'[1]

It is the fact that democracy cannot be established overnight. Those who have firmly established democracy have developed their traditions of social and political justice over the period of many ages. But a necessary noticeable condition in their cases was that tradition once practised was uninterruptedly followed and nourished upto its full institutionalisation. Constitutionalism is lagrely a matter of gradual development and for that development a favourable atmosphere is a must. During 25 years of Pakistan politics AL, the main political party in East Pakistan did not get any atmosphere to learn the devices of and get proper training over democracy; there was no slow and steady growth of political institutions such as had occured in Eurupe and America. The political ideas of new born country Pakistan freed from the bondage of

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1 Ahmed, Moudud, *Democracy and the Challenge of Development*, ibid. P. 369

colonialism was based largely on what they had learnt from their colonial masters. This is why our leaders and representatives are not expert and institutions are very much fragile. But taking this logic as a reason how long we will wait for getting learning? Who will come to give our leaders learning over political game? No messenger will come form above to teach our leaders. This is the proper time for at least introducing positive parliamentary cultures and traditions towards constitutionalism. Successful democracy depends upon an infromed public opinion capable of weighing men and issues and deciding in favour of a policy that can be made to work; it depends on the insistence by public opinion that the holders of power conform to the spirit of the Constitution. 'Representative governments are of little value and may be a mere instrument of tyranny and intrigue if the people are not public spirited, politically conscious and eternally vigilant on the activities of their representatives."[1] But our public opinion is very weak since the electorate here is predominantly illeterate and it will inevitabley take time for public opinion to grow and to be rooted in the consciousness of the people. To lead public opinion from this rudimentary stage to its full bloom undoubtedly it is the question of effective leadership which will take all necessary steps. So we should not make any delay at least in introducing various democratic cultures like making parliament a focul point of all political activities; making policy statement first in parliament; institutionalise a parliamentary opposition; starting committee functioning fruitfully, giving autonomy to media etc. so that workers, supporters of parties and lastly the people can get correct ideas over the functioning of institutions of democracy. If these positive traditions are once set to work with tolerance and dedication all other problems will gradually be eroded.

After 15 years of military rule democratisation started since 1991. However, still politicisation in the administration reigns; both Khaleda Zia and Sheikh Hasina have adopted the policy of creating a support-base within the bureaucracy and administration. Politicisation is being done by Khaleda Zia even in the highest seat of the judiciary i.e. the Supreme Court. While Sheikh Hasina was in oposition she actively instigated bureaucrats' stand against government and her party blatantly used the government servants for ist own political goal towards the fag end of BNP rule. Hasina has later, coming to power, rewarded those who took

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1 Rahman, Mozibor , *Friends not Foes : A Political Survey of Pakistan*, (Dhaka : 14 Hatkhola Road, 1968), P. III

active part in that process. Still situation is being created by instigating staffs of democratice institutions so that the head of that insitution which is a constitutional body resigns willingly making way for the ruling party to set up its politically loyal person to head the institution. Also inroads into administration are being made almost in a competetive way by adopting the policy of politicisation and 'personalisation' in the name of *Bangabandhu* at all possible levels of administration. All these are democracy destroying policy which were adopted by previous military dictator particularly Ershad. When we see that our democratic leaders are adoping the same policy almost in a competetive way, do we see any sign of political development? If such a trend in politics continues, bureaucracy will be more in a position to defy the political will of the government and if the bureaucracy cannot be made loyal and obedient to civil government, it will be impossible for the government to implement development programmes. Khaleda Zia and Sheikh Hasina—these two ladies are struggling, as their activities show, not for the cause of democracy; rather for finding them in power any how. Both are showing their narrow outlook and are adopting the policy of provoking each other. They have also stopped the way to emerge any viable leadership in democratic way. Democracy may be captive at the hand of these two ladies if they do not come out from their narrow outlook for the cause of democracy. The fact is that these two ladies keep hardly any substantive and vigilant knowledge over the importance and functioning of various institutions of democracy; they do not also seem ready with sincerity to get proper learning from party men, press and public opinion. Also is the fact that they cannot be removed from politics; they will try to lead politics of Bangladesh so long they wish. To be borne in mind that more they will be intolerant against each other, more they will see the emergence of a third power; more people will be dismayed and more they will bring possibilities of unnecessary chaos and instability in politics and so long there will be political instability, there will be no scope for economic development. What is urgently needed now is to play effective role by some of our MPs who are really sincere, educated and devoted to the institutionalisation of parliamentary democracy; they should, from their respective parties, whenever and in whatever way possible, consistently create a sort of genuine pressure so that these two ladies cannot take any arbitrary or dictatorial actions to destroy democracy; they should be made to act on democratic line.

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