CHAPTER VI

FUNDAMENTAL RIGHTS

Before understanding fundamental rights one should have idea about rights and human rights. Right means a claim of some interests adversed by an individual or a group of individuals which has either moral or legal basis and which is essential for his development in the society. In a sense right is not created by law; it originates itself as an obvious result of mutual interaction between man and society. Rights are primarily divided into two categories- moral rights and legal rights. Moral rights are those rights which have their basis on the rule of natural justice and the violation of which results in moral wrong. Legal rights, on the other hand, are those rights which are recognised by the positive law of the country and can be claimed on legal basis and the violation of which results in legal wrong. As mentioned earlier right originates in the society and remains as a moral right so long it is not recognised by law. Whenever a law recognises it and secures its protection, it transforms into a legal right. All legal rights in this sense are moral rights and the distinction between the two is one of degree rather than of form.

Human Right

The term "human right" which does not mean any right is used in a special sense. Human rights are those of legal and moral rights which can be claimed by any person for the very reason that he is a human being. These rights come with birth and are applicable to all people throughout the world irrespective of their race, colour, sex, language or political or other opinion. These are, therefore, those rights that are inherent in human person and without which they cannot live as human beings.[1] Jaques Maritain says, "The human person possesses rights because of the very fact that it is a person, a whole, a master of itself and its acts and which consequently is not merely a means to an end but an end which must be treated as such ... ... these are things which are owed to man because of the very fact that he is man."[2] It is also pertinent here to mention the comment of Sridath Ramphal as to human rights - "They have their

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1 Bari, Dr. M. Ershadul, *Ibid*, P. 19

2 Quoted by Hamid, Dr. Kaji Akter, *Human Rights, Self-determination and the Right to Resistence*, (Dhaka : Bhuiyan Academy, 1994), P.25

origin in the fact of the human condition, and because the have, they are fundamental and inalienable. More specifically, they were born not of man but with man."[1]

Human rights, therefore, have two inherent characteristics-universal inherence and inalienability. These two characteristics distinguish the concept of human right from other right. Universal inherence means that these rights are universally inherent in all human beings and anyone can claim these rights after his birth. Inalienability as an essential feature of human rights means that these rights cannot be taken away; they cannot be the object of sale or purchase or any kind of transfer. In this sense human rights are different from citizens' rights[2] which are protected by the positive law of the state and the state can any time take away or abolish any citizen's right. But human rights are rights that existed before the state came into being and for this they are natural and inalienable rights.

It is noteworthy that if 'inalienability' is considered as an essential element of human rights, there is a danger and confusion. Because a perusal of all human rights will give the idea that this element does not apply to all human rights. For example, right to property which is recognised in Article 17 of both the French Declaration on Rights of Man and Citizen, 1789 and the Universal Declaration of Human Rights, 1948. But this right is undoubtedly an alienable right. Only one common characteristic, can, therefore, be found for human rights and that is 'universal inherence'. It is rather better to divide all human rights into two categories-fundamental or basic human rights like right to life, food, shelter, basic necessaries of life, speech etc. and other human rights.[3]

It is also important to indicate here that what has been told here so far about human rights is the only theoretical side of human right

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1 Quoted by Hamid, Dr. Kaji Akter, *Ibid*, P. 28

2 Citizens' rights means those rights which are not included in human rights. For example, right to conduct business,to form a company, to insure etc. are citizens' right but not human rights.

3 See for details, see, Vasak, Karel, *The International Demension on Human Rights*., Vol.–I, P.43-59

while the real picture is quite different. Because everywhere human rights are being violated; there are some human rights which can be taken away by the state, e.g, right to nationality, right to property etc. The truth is that the concept of human right is not at all a legal concept; it is purely a matter of international law. If a particular human right is recognised by a positive law of a state and is maintained through enforcement machinery only then it becomes legal and enforceable right. It is, therefore, better to describe human rights as universal moral rights.

The concept of human rights has got its formal and categorical shape from the Universal Declaration on Human Rights adopted by the UNO in 1948 where 25 human rights have got their place. These 25 rights are mostly referred to as human rights. Of these 25 rights 19 are civil and political rights and 6 are economic, social and cultural rights.

Fundamental Right

The term fundamental right is a technical one, for when certain human rights are written down in a Constitution and are protected by constitutional gurantees they are called fundamental rights. They are called fundamental rights in the sense that they are placed in the supreme or fundamental law of the land which has a supreme sanctity over all other law of the land.

Following the footsteps of the French Declaration of Rights of Man and Citizen, 1789 and the American Declaration of Independence, 1776 and then the incorporation of a Bill of Right in the US Constitution in 1791 most of the democratic countries with written constitution are including a chapter for Bill of Rights or Fundamental Rights with special sanctity. Why is such a trend being followed invariably in written constitutions?

The object of enumeration of fundamental rights in a constitution is not to make them unalterable in any way but main object is that they can not be taken away by ordinary process of law making. They are placed beyond the reach of the executive and the legislative to act in violation of them. The object of the

incorporation of fundamental rights in the US Constitution was pointed out by Justice Jackson-

> "The very purpose of a Bill of Rights is to withdraw certain subjects from the vicissitudes of political controversy; to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's ..... fundamental rights may not be submitted to vote, they depend on the outcome of no elections."[1]

In *Jibendra Kishor* V. *The Province of East Pakistan* the Supreme Court of Pakistan held-

> 'The very conception of a fundamental right is that it being a right guaranteed by the Constitution cannot be taken away by the law, and it is not only technically inartistic but a fraud on the citizens for the makers of a Constitution to say that a right is fundamental but that it may be taken away by the law.'[2]

The same view was reaffirmed by the Pakistan Supreme court in *State* V. *Dosso*.[3] The Indian Supreme Court in *Golak Nath* V. *State of Punjab* [4] held-

> "The declaration of the fundamental rights of the citizens are inalienable rights of the people ... ... The Constitution enables an individual to oppose successfully the whole community and the state to claim his right."

Rights and freedoms form the bedrock of democracy. No democracy can function successfully in the absence of some basic freedoms. Again, modern democratic government is a party government. The party winning majority in the election form the government. But coming into power the government may turn itself into a dictatorial one violating the basic rights of people and oppressing the opposition. The aim of having a declaration of fundamental rights in the Constitution is to prevent such a possible danger. In other words, they provide a restraint on the power of the government so that it cannot interfere with the peoples' basic rights

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1 in *West Virginia State Board of Education* V. *Barnette* 319 US 638 Quoted from: Pirjada, Sharifuddin, *Ibid*, P.4

2 PLD 1957 SC (PAK) 9.

3 PLD 1958 SC (PAK) 533

4 AIR 1967 SC 1643

according to its whims. When rights and freedoms are placed in the Constitution they become the part of the supreme law and the government cannot take them away except by constitution amending process which is always a rigid one. This is why insertion of a Bill of Rights in a written Constitution is considered to be one of the safeguards of democracy.

It is important to mention here that in Britain there is no Bill of Rights; no formal declaration of any fundamental right has ever been made. It does not, of course, mean that the rights of the people are less guaranteed in Britain. What are fundamental rights under written constitution are all ordinary rights in Britain. There the protection of rights and freedoms rests not on constitutional guarantees but on supremacy of law, i.e. the rule of law, public opinion and strong common law traditions. Though the British parliament, under the doctrine of parliamentary supremacy, can any time abridge, modify or abolish any right of the people, it is the deep-rooted democratic traditions and vigilant public opinion which act as a constant check on the parliament to do that and the power of the executive is limited in the sense that it cannot interfere with the rights of the people without the sanction of law and it is, under the doctrine of rule of law, answerable to the courts for any action which is contrary to the law of the land. But these conditions do not prevail in other countries which are composed of diverse elements, having no deep-rooted traditions of individual liberty. Secondly, almost all the modern countries emerging from the bondage of colonialism had a painful experience of denial of people's right. They, therefore, felt that mere custom or tradition alone cannot provide to some basic rights the same protection as their importance deserves. "The unique English tradition", as Bowic says, "is not simply exportable and other nations have generally felt that their governments need the constant reminder which a bill of rights provides, while their people need the reassurance which it can supply".[1]

Instances of written constitution having no fundamental right can be cited. For example, Australian Constitution is silent about the fundamental rights. The reason may be a historical one. Because the earliest settlers in Australia carried their law with them from England and there the system is fully controlled by

[1] Quoted by Jain, M.P. *Ibid*, P. 459

British tradition. "The framers," as Kerr says, "of the Constitution preferred to rely on the unwritten traditional bulwark of liberty"[2] *Likewise, the Canadian Constitution initially did not contain a Bill of Rights. Then the Canadian parliament enacted a law in 1960 laying down some basic rights. But being only a law made by parliament, it did not constitute any restriction on parliament itself. Lastly a Charter of Rights was formally incorporated in the Constitution by an amendment in 1982.*[3]

Distinction between Human Rights and Fundamental Rights

Firstly, all fundamental rights are human rights but all human rights are not fundamental rights. Fundamental rights are those of human rights which are placed in a written constitution. Human rights, therefore, are the whole of which fundamental rights are a part.

Secondly, the source of a fundamental right is the Constitution whereas the source of human rights is the international law.

Thirdly, fundamental rights have territorial limitations i.e. they have no application as fundamental rights outside the territory of a particular state. But human rights have no territorial limitations; they have universal application.

Fourthly, fundamental rights are protected by constitutional guarantees and can be enforced through the state courts. But there is no effective enforcement machinery for human rights.

Fifthly, fundamental rights are largely applicable to the citizens while human rights are universally applicable to all human being.

Enforcement of Fundamental Rights

The insertion of fundamental rights in a constitution becomes meaningless if it is not provided by the Constitution for easy and effective procedure for their enforcement. And this easy and effective enforcement should be available not only against the executive but also against the legislative. If the executive does anything in violation of fundamental rights, the citizens must have a

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2 Keer, Donald. M.M. *The Law of the Australian Constitution,* (The Law Book Company of Australia Ltd. 1925). P.218

3 Jain. M. P: *Ibid,* P. 459

remedy. Similarly if the legislature enacts any law which is inconsistent with any of the fundamental rights, there must be procedure to declare that law unconstitutional. The idea of protection of fundamental rights can be best understood from the American Declaration of Independence, 1776 where it is stated-

> "That all men are created equal, that they are endowed by their creator with certain inalienable rights; that among these are life, liberty and pursuit of happiness;
>
> that to secure these rights governments are instituted among men deriving their just powers from the consent of the governed;
>
> that whenever any form of government becomes destructive of these ends, it is the right of the people to alter or abolish it and to institute a new one."

The Declaration, therefore, has laid the utmost emphasis on the enforcement of rights that if the peoples' rights for the protection of which the government is formed, cannot be enforced then the government would be useless. The importance of remedies to enforce fundamental rights has also got recognition in article 8 of the Universal Declaration of Human Rights, 1948 which states-

> "Everyone has the right to an effective remedy by the competent national tribunal for acts violating the fundamental rights granted him by the constitution or by law."

To this respect the Pakistan Supreme Court in *Moudoodi* V. *Government* held-

> "The basic principle underlying a declaration of Fundamental Rights in a Constitution is that it must be capable of being enforced not only against the executive but also against the legislature by judicial process."[1]

Constitutional Guarantees or Remedies

Though it is a claim of a written constitution embodying fundamental rights that effective constitutional remedies for the enforcement of fundamental rights should be provided for by the

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1 PLD 1964 SC 673 Quoted by. Pirzada. *Ibid.* P. 58

Constitution itself, practical experience teaches us that some of the written constitutions do not specifically provide for the remedies in the Constitution. The US and the French Constitutions are two of them. But most of the written constitutions provide for the right to constitutional remedies in case of violation of fundamental rights. This right to constitutional remedy has two dimensions- judicial review and judicial enforcement.[1] Judicial review in relation to fundamental rights is provided for with a view to enforcing fundamental rights against the legislature. In other words, if the legislature passes any law which is inconsistent with the fundamental rights, the highest seat of the judiciary must have the jurisdiction to declare that law unconstitutional. The Supreme Court of Bangladesh can exercise this jurisdiction under Articles 26 and 102 of the Constitution.[2] Judicial enforcement, on the other hand, is provided for with a view to enforcing fundamental rights against the executive. In other words, if any public authority violates any of the fundamental rights enumerated in the Constitution, the right to move the highest court of the land for enforcing that right must be specifically guaranteed in the Constitution and it should be guaranteed as of an independent fundamental right. This right is guaranteed in article 44 and the High court Division of the Supreme Court is empowered to enforce fundamental rights under Article 102 of the Bangladesh constitution.

As mentioned earlier, the US Constitution incorporating a Bill of Rights does not specifically provide for constitutional remedies for the enforcement of fundamental rights. In other words, no right has been created, as has been in the Constitution of Bangladesh, India, Pakistan etc., in the US Constitution in favour of citizens to move the Supreme Court for the enforcement of any of the Bill of Rights. The direct enforcement procedure of fundamental rights in USA is dealt with the Judiciary Act of 1789 and the US Supreme Court hears the fundamental rights cases only in its appellate jurisdiction.[3] In France the position is also a narrower one. The French Constitution provides neither any right to constitutional

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1 See, also PP. 61-72
2 See also PP. 72-73
3 See Abraham, Henry J, *The Judiciary*, (Allyn & Bacon, Inc.) 5th ed, P. 258

remedies nor is any court in France empowered to declare a law which is inconsistent with fundamental rights unconstitutional.[1]

Fundamental Rights in the Constitution of Bangladesh

18 fundamental rights have been enumerated in the Constitution commencing from Article 27 to 44. All of these rights are civil and political rights. These 18 fundamental rights may be firstly divided into two groups:

a. Rights granted to all persons- citizens and non-citizens alike. These are six rights enumerated in Articles 32, 33, 34, 35, 41 and 44 of the Constitution.

b. Rights granted to citizens of Bangladesh only. These are 12 rights enumerated in Articles 27, 28, 29, 30, 31, 36, 37, 38, 39, 40, 42 and 43.

Imposition of Restriction over Fundamental Rights

The enjoyment of rights can nowhere be seen in an absolute position, for the enjoyment of one's right in the society is subject to the enjoyment of others' right. Moreover, modern states are welfare states where collective interests are given priority over individual's rights or interests. Unrestricted individual liberty becomes a licence and jeopardises the liberty of others. "Civil liberties as guaranteed by the Constitution imply the existence of an organised society maintaining public order without which liberty itsell would be lost in the excess of unrestrained abuses".[2] If individuals are allowed to have absolute freedom of speech and action, the result would be chaos, ruin and anarchy. On the other hand, if state has absolute power to determine the extent of personal liberty, the result would be tyranny. So restrictions may be imposed on the enjoyment of fundamental rights for the greater purpose of public welfare. This idea has got recognition in article 29(2) of the Universal Declaration of Human Rights, 1948 -

> "In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and

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1 See also P. 65.

2 *Fox* V. *New Hampshire*, (1941) 321 US 569 at P. 574

freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society".

It is also worthy here to mention the judgment of Justice Mukharjee in *Gopalan* V. *State of Madras*[1] -

> "There cannot be any such thing as absolute or uncontrolled liberty wholly free from restraint; for that would lead to anarchy and disorder. The possession and enjoyment of all rights ... ... are subject to such reasonable conditions as may be deemed by the governing authority of the country essential to the safety, health, peace, general order and morals of the community."

Keeping in line with this idea restriction has been imposed on some fundamental rights under the Bangladesh constitution. On the basis of this restriction all fundamental rights enumerated in the Bangladesh Constitution may be classified into following three groups:[2]

A. Absolute Rights:

Some rights have been kept in an unfettered form in the sense that parliament cannot, except as provided in the Constitution, impose any restriction over them. They are following:

1. Equality before law (Art. 27)
2. Discrimination on grounds of religion etc. (Art. 28)
3. Equality of opportunity in public employment (Art. 29)
4. Prohibition of foreign titles etc. (Art. 30)
5. Safeguards as to arrest and detention (Art. 33)
6. Prohibition of forced labour (Art. 34)
7. Protection in respect of trial and punishment (Art. 35)
8. Enforcement of fundamental rights (Art. 44).

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1 AIR 1950 SC 27

2 This grouping has been done according to the judgment of the Supreme Court of Pakistan in *Abu A'la Maudoodi* V. *Government of West Pakistan*, quoted by Pirzada, Shairfuddin, *Ibid*, P. 101

B. Rights on which reasonable restriction can be imposed:

They are following:

1. Freedom of movement (Art. 36)
2. Freedom of Assembly (Art. 37)
3. Freedom of Association (Art. 38)
4. Freedom of thought and conscience and of speech (Art. 39)
5. Freedom of religion (Art. 40)
6. Protection of home and correspondence (Art. 43)

The grounds for imposing restriction on these rights have been laid down by the respective sections-

1. in the public interest (Art. 36)
2. in the interest of public order or public health (Art. 37)
3. in the interest of public order or morality (Art. 38)
4. in the interest of the security of the state, friendly relation with foreign state, public order, decency or morality or in relation to contempt of court, defamation or incitement to an offence (Art. 39)
5. in the interest of the public order and morality (Art. 41)
6. in the interest of the security of the state, public order, public morality or public health. (Art. 43).

In the case of above mentioned fundamental rights parliament can by law impose only reasonable restriction as mentioned in the respective articles. The reasonability of the law can be examined by the Supreme Court and if the restriction seems to be unreasonable the court can declare the law illegal. It was held in *Chintamoni Rao* V. *State of Madhya Pradesh*[1] -

> "Legislation which arbitrarily invades the right cannot be said to contain the quality of reasonableness ... ... The determination by the legislature of what constitute a reasonable restriction is not final or conclusive; it is subject to supervision of courts."

A perusal of the nature of restriction over the above mentioned fundamental rights also reveals the idea that the Constitution of Bangladesh has struck a balance between the guarantee of

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[1] AIR 1951 SC 118

individual's rights and the collective interests of the community. Because as mentioned above, the concept of public interest, morality, public order, security of the state, public health etc. all are collective interests. The maintenance of social order and peace depends principally on safe enjoyment of these collective interests which would remain unprotected leading to a realm of anarchy had there been no provision to impose reasonable restriction on individual's liberty.

C. Fundamental rights which have been practically left to the legislature:

There are some rights on which parliament can by law impose any restriction it pleases. They are following:

1. Right to protection of law (Art 31)
2. Protection of right to life and personal liberty (Art. 32)
3. Right to lawful profession, occupation or business (Art. 40)
4. Protection of property right (Art.42)

It has been detailed in the Constitution that the enjoyment of these rights shall be 'in accordance with law', 'except in accordance with law', 'subject to any restriction imposed by law', etc. Therefore the parliament can impose any restriction over these four rights. And the court cannot examine the reasonability of the restriction; it can see only the following two things:

i) if the law imposing restriction is a valid one;

ii) if the right has been infringed or abridged in accordance with the law.

For example, it was the law that a person could not possess more than 300 bighas of land. Then a change was made in the law that one could not possess more than 100 bighas of land and the present law provides that one cannot possess more than 60 bighas of land. Even in near future parliament may make law that one will possess not more than 30 bighas. If the penalty for a particular offence is life imprisonment, the parliament can, by law, substitute it for death sentence, and the court cannot declare the law illegal howsoever unreasonable it is.

Suspension of Fundamental Rights during Emergency

For this topic please see chapter XV

CHAPTER VII

AMENDMENTS OF THE CONSTITUTION OF BANGLADESH

So far there has been 14 amendments to the Constitution of Bangladesh. Detail discussion will follow here a summery of all the amendments.

Summery of 14 Amendments

Amendments	*Date*	*Summery of Substance*
1st Amendment	15th July, 1973	To make way for prosecution of genocide, crime against humanity and war crimes committed in the liberation war of 1971
2nd Amendment	22nd September, 1973	Inclusion of emergency provision, suspension of fundamental rights and preventive detention.
3rd Amendment	28th November 1974	To give effect to the boundary–line treaty between Bangladesh and India.
4th Amendment	25th January, 1975	One party dictatorial system was substituted for a responsible parliamentary system.
5th Amendment	6th April, 1979	Legalising all acts done by the first Military Authority

6th Amendment	10th July, 1981	To make way for the Vice-President to be a candidate in president election.
7th Amendment	10th November, 1986	Legalising all acts done by the 2nd Military Authority.
8th Amendment	9th June, 1988	Setting up six permanent Benches of the High Court Division and making 'Islam' the state religion.
9th Amendment	11th July, 1989	Direct election of the President and the Vice- President simultaneously.
10th Amendment	23rd June, 1990	Period for reservation of 30 women members seats in the parliament was extended for 10 years.
11th Amendment	10th August, 1991	Legalising the appointment of Shahabuddin Ahmed, Chief Justice of Bangladesh, as Vice President of Bangladesh and his all activities as the Acting President and then the return to his previous position of the Chief Justice of Bangladesh.
12th Amendment	18th September, 1991	Reintroducing the parliamentary system.
13th Amendment	28th March, 1996	Provision for Caretaker Government.
14th Amendment	16th May, 2004	Re-introducing reserved seats for women in Parliament

FIRST AMENDMENT

This amendment was made to face a special situation. There was no special law in the country to prosecute those who committed war crimes, crime against humanity, genocide and other crimes under international law, during the liberation war in 1971. Again, the provisions of fundamental rights in the Constitution did not allow their separate trial. By this amendment a new clause in Article 47 was inserted (clause 3) which allowed the parliament to make any law for the trial of war criminals. By inserting a new Article 47A in the Constitution certain fundamental rights were made inapplicable to those who would be tried under that law. The rights which were made inapplicable to them were following.

1. Right to protection of law (Art. 31)
2. Protection against trial under *expost facto*[1] law [Art. 35(1)]
3. Right to a speedy and public trial by an independent and impartial tribunal [Art. 35(3)]
4. Right to enforce fundamental rights (Art. 44)

It is worthy to mention here that under the authority of this amendment the parliament passed within a week the International Criminal (Tribunal) Act for the trial of 195 prisoners of wars. But all initiative of the government to try them ended in a failure due to tricks played by Bhutto.[2]

SECOND AMENDMENT

Background

The original Constitution of Bangladesh had two most significant negative features—first, the absence of provisions for preventive detention and second, absence of provisions for emergency and suspension of fundamental rights. During the British colonial rule and

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1 *Expost facto* Law: The latin expression *expost facto* means 'after the fact'. *Expost facto* law means a law that provides punishment for an act that was not illegal when the act was committed. Every *expost facto* law is necessarily retrospective. Blacks Law Dictionary defines *expost facto* law as a law passed after the concurrence of a fact or commission of an act which retrospectively changes the legal consequences or relations of such fact or deed.

2 See. Ahmed. Moudud. *Bangladesh : Era of Sheikh Mujibur Rahman*. Ibid. P. 206

then 23 years constitutional history of Pakistan the arbitrary application of preventive detention law and emergency was so bitter that it left a good teaching to the AL that such provisions which are contradictory to the concept of nourishing living democracy, would never allow to build normal democratic system. To maintain the colonial state the British government used these laws under the Government of India Act, 1935 as necessary weapons to crash the opposition and perpetuate their rule. And hundreds and thousands of Indians and their leaders had to suffer imprisonment without trial for an indefinite period. After partition the two Governor-Generals of Pakistan Golam Mohammad and Iskander Mirza used the power of emergency to perpetuate their rule and thereby destroyed all the political institutions. The emergency imposed by Ayub Khan in 1965 was not lifted till 1969 when he was forced to leave power. During this continued emergency opposition was suppressed and hundreds of citizens were put into prison for years together without trial. This bitter experience led the AL to make an avowed commitment since the formation of United Front in 1954 to repeal not only these black laws but also to remove any scope or prerogative enabling an individual to retard the process of democracy.[1] With this experience and commitment in mind, the AL government in Bangladesh did not want to leave any scope for such exercise of power by the president. As a result, in the original Constitution of Bangladesh neither provision of emergency nor any of for preventive detention was inserted. The decision was praiseworthy and conducive to the nourishment of living democracy. But sooner than 9 months had passed provisions for emergency and preventive detention were inserted in the Constitution by the 2nd Amendment to the Constitution.

Subject matter of the Amendment

Four types of fundamental changes were introduced in the constitution by this amendment. They are following:

1. A new part IXA was added to incorporate emergency provisions. (please see chapter XV)

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1 Ahmed. Moudud. *Bangladesh: Era of Sheikh Mujibur Rahman,* Ibid. P. 102

2. Article 33 was substituted so as to empower the parliament to pass law relating to preventive detention (see, details, chapter XVI)

3. Provision for enacting laws inconsistent with fundamental rights were incorporated by adding two new clauses—clause 3 of Article 26 and clause 3 of Article 142. This was not any illogical or undemocratic something, for the government was not given any power, without amending the constitution itself, to enact any law inconsistent with fundamental rights. Article 26(2) of the original constitution reads:

> "The state shall not make any law inconsistent with any provisions of this part (i.e. "Fundamental Rights' part) and any law so made shall, to the extent of such inconsistency, be void".

Though the usual interpretation of the term 'law' used in this Article means a positive law passed by the parliament in its ordinary legislative process and not necessarily an amendment Act in its constituent amending power, an apprehension arose that the court might declare even an amendment Act purporting to amend the provisions of fundamental rights illegal. The reason behind such an advance apprehension was the controversial judgment of the Indian Supreme Court in *Golaknath's* case.[1] It was decided in this case that the term 'law' in Article 13(2) of Indian Constitution corresponding to Article 26(2) of the Bangladesh Constitution includes amendments to the Constitution and consequently, if an amendment Act abridges or takes away a fundamental right the amending Act itself would be void. This amendment gave rise to an 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 *Golaknath* 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. To avoid such a possible situation the Constitution of Bangladesh was amended in advance. A new clause (clause 2) was added in Article 26 which reads:

> "Nothing in this article shall apply to any amendment of this Constitution made under article 142."

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

To remove all doubts a double check was provided by inserting another clause (clause 2) in article 142 which reads:

> "Nothing in Article 26 shall apply to any amendment made under this Article."

4. The interval between two sessions of the parliament was extended from 60 days to 120 days. This change virtually weakened the spirit of responsible government. Because to extend the period between two sessions of parliament is to keep the parliament in abeyance for a longer period, in other words, to get the government out of its responsibility in the parliament. Secondly, so long the parliament will not be in session the government will get an easy hand to promulgate ordinances by-passing the parliament.[1] Thus what was done by extending the period between two sessions was to give government an easy way to be dictatorial.

This second amendment was the first destructive blow on a democratic constitution. It was an irony of fate for Bangladesh that the party which led an indomitable movement for 23 years against all black laws and oppression there under has now, only to consolidate their power, proceeded for more harsh laws and political repression sacrificing the lofty idealism embodied in the Constitution by this very party. As a commentator says-

"in order to consolidate their political position further the high degree of idealism embodied in the 1972 Constitution was at last sacrificed. ..... With such a meagre number of members in opposition the Amendment Bill was passed within a short time without much debate. The opposition's proposal including that of Mr. Ataur Rahman Khan to refer the Bill to elecit public opinion was rejected. The new law Minister Monoranjan Dhar, however, attempted to make out a case arguing that these provisions for preventive detention and proclamation of emergency were in the constitutions of all democratic countries of the world and they were being kept to meet the emergency situation of the country. He argued that these provisions were not incorporated in the Constitution when it was framed and that now this amendment was introduced to fill up that 'omission'."[2]

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1 See further at P. 115

2 Ahmed. Moudud. *Bangladesh: Era of Sheikh Mujibur Rahman*, Ibid. P. 149

"When preventive detention and emergency provisions were inserted," as Badrul Haider Chowdhury, C.J. says, "in the constitution, to put it simply what was given by one hand was taken away by the other."[1]

THIRD AMENDMENT

Like the first one the third amendment was made to face a practical situation. It made changes in Article 2 of the Constitution and gave effect to an agreement between Bangladesh and India relating to some changes in boundary lines between these two countries.

FOURTH AMENDMENT

Of all the amendments made so far the 4th Amendment has been the most debatable one. This amendment has played the most devastating role in the development of Constitutionalism in Bangladesh. It altered and virtually destroyed the basic and essential features of the Constitution.

Background

After the national independence the people of Bangladesh were presented a well-written and much improved constitution over all the existing constitutions of the sub-continent. The Constitution, to a large extent, reflected the aspirations of the people nurtured for nearly two decades. But only after 3 years of its life the same AL government which had adopted it transformed it, by the 4th Amendment, beyond any resemblance with the original. It virtually turned the Constitution, a best one, into the worst one in the world.

On 28th December, 1974 emergency was declared throughout the country suspending fundamental rights guaranteed in the Constitution. While justifying such an action it was mentioned in the government handout that a group of people who were opposed to the independence and emergence of Bangladesh as a sovereign state were active in various subversive activities and they were joined by others who failed to attain power through constitutional means. It also disclosed that some collaborators were subverting the state and were engaged in activities

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1 Chowdhury, Badrul Haider. *Evolution of the Supreme Court of Bangladesh*, (Dhaka University : 1990). P. 79

which were creating impossible conditions in the country for attaining normal political stability and orderly economic progress. Though the emergency was proclaimed with a view to bringing the deteriorated economic situation under control by arresting and punishing the hoarders, black marketers, smugglers, armed bandits etc., it was not the real reason behind. The main aspect of it was to create conditions which would be congenial for a smooth ushering of a stem which Mujib by that time had already decided to introduce one party dictatorial system in the Constitution. Accordingly, on 25th January, 1975 only 27 days after the emergency was proclaimed the country went through the most significant and radical changes in the Constitution.[1] The infamous Fourth Amendment Bill to the Constitution was introduced in the parliament and the parliament passed the Bill into an Act at a speed unprecedented in the history of law making. Within half-an hour the crucial Bill which was of the greatest importance, was passed through and no discussion or debate was allowed.[2] "The way the Bill was adopted demonstrated the omnipotence of Sheikh Mujib's leadership. A constitutional dictatorship was established which formally buried parliamentary democracy and the growth of constitutionalism in Bangladesh".[3]

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1 Ahmed, Moudud, *Bangladesh : Era of Sheikh Mujibur Rahman,* Ibid, P. 233

2 Soon after the Bill was passed through, Mujib took the oath of office in the parliament administered by the Speaker ousting the quiet and placid Mahmudullah from the office of the President even without giving him an opportunity to resign. It had been the tradition in the sub-continent that the oath of office of President was to be administered by the Chief Justice of the country. In the Fourth Amendment this was changed and was substituted to be done by the Speaker. It was alleged that this was done for sheer convenience. Arrangement was made in such a way so that the fundamental change that was brought through by the 4th Amendment could be given effect to almost on the spot and there was no scope for raising any legal dispute over the whole change. Mujib, therefore, introduced the Bill on Saturday, the day the Supreme Court does not sit. The unusual way of passing the law without any debate or discussion also suggested that Mujib did not want to leave any scope to block the change. The Chief Justice was perhaps not trusted anymore to administer the oath. Otherwise, there could be hardly any reason to change this provision. The Speaker, a party member was readily available to administer the oath of office to the President in the premises of the parliament soon after the law was passed. (Ahmed, Moudud, *Ibid,* pp. 235, 241 & 260)

3 Choudhury, Dilara. *Ibid.* P. 45

Subject matter of the Amendment

The major changes introduced by the Amendment have been discussed below along with their effects and consequences over constitutionalism in Bangladesh-

1. In place of parliamentary system the so-called presidential system was introduced.

The parliamentary form of government has grown and developed in Britain and new countries of the world are taking this system as a model of direct responsible government. The presidential system of government, on the other hand, has grown and developed in USA. Both the systems are ideal democratic systems. So a change from parliamentary to presidential system does not necessarily mean that there can be no democracy. But to make the presidential system truly a democratic one some intrinsic features of it must be adopted which the 4th Amendment lacked.

Firstly, an essential element of the presidential system is the principle of separation of powers. And that separation of powers must be a balanced separation as opposed to absolute separation of powers. To maintain the separation of power as a balanced one there must be the principle of checks and balances which prevent any organ of the government form becoming arbitrary and dictatorial. But the presidential system as introduced by the 4th Amendment was adopted without any of these two important principles. In true presidential system, as there is the doctrine of separation of power, no minister can be a member of parliament. But in the 4th Amendment it was provided that the President could appoint Ministers from among the members of the parliament or from outside [Art. 58(3)]. There was left, therefore, no separation of power.

Secondly, under the Amendment, the President was to be elected by the people in a direct election (Art. 48). So the new President under the amended system was to face and be elected in a direct election. But by inserting a special provision in the 4th Schedule Sheikh Mujib was made President by operation of law. As the provision goes:

> "(b) *Bangabandhu* Sheikh Mujibur Rahman, Father of the Nation, shall become, and enter upon the office of the President of Bangladesh and shall,

as from such commencement *hold office as President of Bangladesh as if elected to that office under the Constitution as amended by this Act".*

Mujib, therefore, became an instrumental President as opposed to peoples' President through election, for it was the 4th Amendment, an instrument, which made him President.

Thirdly, as the whole system was changed it was essential to hold a new general election. But like the life of the President the life of the parliament was also given an auto-extension by operation of law. A special provision was made in the 4th Schedule which read:

> "Notwithstanding anything contained in the Constitution, the parliament functioning immediately before the commencement of this Act shall, unless sooner dissolved by the President, stand dissolved on the expiration of the period of five years from such commencement."

Thus completely in an extra-constitutional way the lives of both the President and parliament were extended. These two incidents may be termed as a silent *coup d' etat*[1] in the constitutional history of Bangladesh.

Fourthly, the earlier provision was that no person could hold the office of the President for more than two terms. Likewise in US presidential system no person can be President for more than two terms. But under the 4th Amendment no such restriction was mentioned

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[1] **Coup d' etat :** It means a sudden change in the government by force or by any illegal or extra-constitutional way brought about by those who are in governmental power or in military power. Distinction between coup and revolution was recognised. But the Pakistan Supreme Court in *State* V. *Dosso* (1958) held that there was no distinction between coup and revolution. Both the terms are, therefore, synonymous. Distinction, of caurse, remains between coup or revolution and mass-upsurge. Mass-upsurge involves the participation of the masses while a coup is effected from above i.e. it is effected by a group of elite in a conspirating way where the masses do not have any participation. Examples of coups are the seizures of power by Napolean III in 1851, by Mussolini in 1925, by a group of army officers in 1975 in Bangladesh killing the then President Sheik Mujib etc. The whole 4th Amendment may be termed as a silent coup, for the government elite uprooted the whole governmental system and introduced completely a new one. All this was done within half-an hour, in a dramatic hasty way without allowing any debate. On the other hand, the fall of Ershad's autocratic regime through the mass-revoloution in Bangladesh in 1990, take over by the labour party in Russia in 1917 – are the examples of mass-upsurge.

meaning that under the new system the president could hold the office of the president for an unlimited number of terms.

2. The 4th Amendment made the impeachment and removal of the President unprecedentedly difficult.

With regard to the impeachment and removal of the President on the ground of physical or mental incapacity the number of votes required in both the cases of initiation of motion and passing the resolution was raised, under the 4th Amendment, to two-thirds and three-fourths respectively which were previously done by a simple majority and two-thirds (Art. 53 & 54). So the President was placed above the supreme law of the land, for the amendment of the constitution needed two-thirds majority whereas the President's impeachment or removal needed three-fourths majority. Actually the provisions were made to leave no scope for impeachment or removal of the President.

To be mentioned here that such a stringent procedure for the impeachment was introduced in Pakistan Constitution of 1962 made by Ayub Khan. There the provision was that to impeach the President a resolution was to be moved by written notice of not less than one-third of total members and to be passed by not less than three-fourths majority. It was also provided that if less than one-half of the total members of the National Assembly voted in support of the resolution all the members giving notice of the resolution should cease to be members of the assembly. Such a stringent provision is made in a dictatorial system so that no one dare raise any voice to remove or impeach the President. Though the impeachment procedure in Ayub Khan's Constitution was a stringent one, there was no one party system; it was a multi-party system. But the interesting point here is that the 4th Amendment introduced one party and the President was to be the leader of that one party. There was no opposition who would try to impeach the President. So it seems that President Sheikh Mujibur Rahman had no confidence even in his own party men. Such a stringent procedure for impeachment particularly in one party system can nowhere in the world be seen.

It is also worth mentioning here that to impeach the President under the US Constitution a resolution thereto must be moved in the House of Representatives by one or more members. If the resolution is supported

by majority members of the House, it then goes to the Senate for trial. When the trial is held it is the Chief Justice of USA and not the regular speaker who presides so that an impartial trial may be held. If the charge is supported by votes of two-thirds of the members present, the president shall vacate his office (Art.1 sec. 3).

Present Position: These provisions concerning the President as introduced by the 4th Amendment is no longer in force. The 12th Amendment has reintroduced the provisions of the original Constitution of 1972.

3. The 4th Amendment turned the Parliament into a powerless secondary rubber-stamp body.

The Amendment turned the parliament into a useless forum. In the original Constitution the legislature was given the status of supreme and sovereign law-making body. It was the source of law and authority and the fountain of power sanctioned by the people. In presidential system though the President and his ministers are not responsible to the parliament, the parliament still retains strong checks and control (under the doctrine of checks and balances) over the cabinet through committee functioning and particularly in law-making the parliament in every system, be it parliamentary or Presidential one, is considered supreme and sovereign. In every system it is a rule of law that a bill passed by parliament cannot transform into an enforceable law unless it is assented by the President or the head of the state. But if the president is armed with the power to use absolute veto then a bill which is opposed by the president cannot come into a law. And in such a situation the law-making power virtually gets itself trapped or strangled at the hand of the president and the parliament as a law-making body becomes meaningless; it turns into a secondary rubber stamp body. It is for this, in democratic countries the veto power of the President is given either in a limited form (e.g. in USA under Art. 1 Sec. 7 of the US Constitution) or is abolished (e.g. in the UK the veto power is abolished by convention).

It was provided in the original Constitution that the President, within 15 days after a Bill was presented to him, should assent to the Bill. Without giving assent he could return the Bill to the parliament for its reconsideration. If he failed to do so the Bill was deemed to have duly

assented by him after the expiration of 15 days. Thus like the US Constitution the original constitution of Bangladesh armed the president with suspensive veto as opposed to absolute veto.

Veto : In constitutional law 'veto' means the power of the head of the state to prevent the enactment of or to reject a bill passed by parliament. Veto can be of three types: (a) Absolute Veto: (b) Suspensive or Qualified Veto; and (c) Pocket Veto.

***(a) Absolute Veto:** When the head of the state or President withholds his assent to a bill and the bill can never come into a law, the President's action is called absolute veto. In other words, if the nature of a veto is such that once it is applied, a bill is rejected forever i.e. it cannot come into an Act of parliament, then the veto is called absolute veto. In the original Constitution of Bangladesh there was no provision for absolute veto; the 4th Amendment introduced in Article 80 provision for absolute veto but in 1978 by the Second Proclamation order No IV this provision was withdrawn. Now there is no provision for absolute veto; there is however, provision for suspensive or qualified veto in Bangladesh Constitution. In Indian Constitution there is provision (Article 111) for absolute veto but it is not used conventionally. The King or Queen in England has the legal right to use absolute veto but that right has not been exercised since 1707 when Queen Anne vetoed the Scottish Militia Bill. There is no provision for absolute veto in the US Constitution; the US President cannot exercise absolute veto, for the use of absolute veto will on the one hand, make the principle of checks and balances ineffective and on the other hand, make the parliament a peoples representative body meaningless.*

***(b) Suspensive Veto:** When the President withholds his assent to a bill adopted by the parliament and returns the same to the parliament for its reconsideration, the action of the President is called suspensive veto. But the parliament can override such a suspensive veto by mustering a simple majority or absolute majority. Almost all democratic countries provide for suspensive veto, for it maintains checks and balances between the President and the parliament. Of course, in USA the Congress can override a suspensive veto by mustering only two-thirds majority votes in both the Senate and the House of Representatives. Under Article 80 of the Bangladesh Constitution our parliament can override a suspensive veto by mustering an absolute majority i.e. majority votes of the total number of members of parliament. Under the Constitution of Bangladesh President justice Shahabuddin Ahmed used this veto power for the first time in 1999 when he returned the Civil Procedure (Amendment) Bill,1999 for reconsideration by the parliament. However, the AL Government did not*

reintroduce the Bill in the parliament to consider the President's message. The reason seems to be its inability to muster majority votes of the total MPs needed to pass it and to resubmit it to the President for consideration.

***(c) Pocket Veto:** When the President does not assent to a bill ; nor does he return the bill to the House for its reconsideration; rather he holds on it; it is called the President's power of pocket veto. The US President has to assent a bill within 10 days after it is presented to him. Through his 'pocket veto' the US President can hold a bill for 10 days. If Congress has passed a bill within last 10 days of a session, and the President dislikes it, he may exercise a 'Pocket Veto' by holding the bill until Congress adjourns without signing or stating his objections and on the adjournment of Congress the bill dies. US Presidents like Roosevelt, Truman, Cleveland etc. used this pocket veto significantly. In Bangladesh Constitution the President has been given 15 days time. The president can, therefore, hold a bill for these 15 days. At the expiry of 15 days the bill automatically comes into a law. But if parliament is dissolved or prorogued within this 15 days and the President does not give his assent, the bill will face death under 'pocket veto'.*

But under the 4th amendment the President could now withhold assent to any Bill passed by the parliament. Thus the President was now armed with absolute veto and once he vetoed a Bill that Bill could never come out as a law. The President was, therefore, given an unfettered legislative power; he was placed above the parliament, and as a result, virtually "the importance of parliament was entirely gone and it was turned into a secondary rubber-stamp body in the new political system."[1]

It is pertinent to mention here that even in Ayub Khan's Constitution of 1962 there was no provision for absolute veto power. The President could use suspensive veto only. It was provided in Article 27 that in case the President withheld his assent from a Bill, the parliament was empowered to reconsider the Bill and if the Bill was again passed by the Assembly by votes of two-thirds majority, it was again presented to the President for his assent and it was deemed to have duly assented after the expiration of 10 days. Thus even in Ayub Khan's Constitution

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1 Ahmed, Moudud, *Bangladesh : Era of Sheikh Mujibur Rahman*, Ibid, P. 237

particularly in the matter of law-making the principle of checks and balances between the President and the parliament was maintained.

It is also noteworthy here that in the US system the President has no power to absolute veto. He has the power to use suspensive veto in the sense that he may, within 10 days return a Bill to the Congress for reconsideration. And when such a Bill is reconsidered and again passed by votes of two-thirds majority in both the Houses, it becomes automatically a law (Art. 1, Sec. 7).

Present Position: Provision relating to veto as was introduced by 4th Amendment is not in force. The provision of absolute veto was deleted in 1978. Now the whole provision is a democratic one as was introduced in the original Constitution of 1972.

Secondly, in the original Constitution, the interval between the two sessions of parliament was 60 days. But the Second Amendment extended this period to 120 days and by 4th Amendment the provision was made that "there shall be at least two sessions of parliament in every year" (Art. 72). Thus the role of the parliament was reduced to a minimum. Of course, there are countries where sessions are held only once or twice a year. In Britain parliament session is held only once a year; usually in November the session starts and it lasts for the whole year except some recesses[1] and two weekly holidays. In India under Article 85 of the Constitution parliament session may be held only twice a year but usually parliament holds 3 sessions per year (Budget session, Monsoon Session and Winter Session) and the average number of sitting days in a session is 35.[2] Thus making provision for at least two sessions a year by the 4th Amendment was nothing undemocratic. However, the intention behind was to keep parliament away from its functioning, for no

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1 There are usually 5 recesses: two weeks in December/January; one week in March / April; one week at the end of May; 10–12 weeks in August–October and a further week or so in mid-November between the close of the old session and the opening of the next. (based on information supplied by the House of Commons

2 Jain, C.K. *The Union & State Legislature in India,* (New Delhi : Allied Publisher Ltd. 1993) P. 34

session in the first parliament in Bangladesh did last for more than 7 days in average.

Present Position: This undemocratic provision is no longer in force. The provision of the original Constitution has been revived.

Thirdly, under Article 70 of the original Constitution, a seat of a member of parliament was to be vacated for two reasons — (i) if he resigned from the party which nominated him as a candidate; or (ii) if he voted in the parliament against that party. But the 4th Amendment inserted an explanation to the meaning of "voting in the parliament against the party" providing that even abstaining from parliament session or abstaining oneself from voting ignoring the direction of the party would be deemed to be voting against the party. Thus the provision was made more rigid to debar members from raising any voice against the party and this provision has become a permanent obstruction for the development of responsible government in Bangladesh. This provision exists still today and by 12th Amendment it has been made more stringent. (See, details, Chapter VIII)

Fourthly, under the original constitution Article 76 provided for the parliament to appoint certain standing committees at the first meeting of each session. By the 4th Amendment this provision of *'at the first meeting of each session'* was deleted. It reduced the importance of parliament even further. Because now the parliament was not bound to appoint committees at its starting; it now had the option to pass away most of its life without framing standing committees. These undemocratic provisions still exist.

The above discussion makes it clear that the 4th amendment made the parliament completely ineffective though it was the House of the representatives of the people.

4. The Amendment took away the power of the High Court Division to enforce fundamental rights.

The original Constitution of Bangladesh provided for 18 fundamental rights and the High Court Division of the Supreme Court was empowered to enforce these rights. Article 44 guaranteed the right to move the High

Court Division of the Supreme Court and this court could enforce these rights under the authority of Article 102. But this power of the court was taken away by the 4th Amendment which provided in Article 44 that "Parliament may by law establish a Constitutional court, tribunal or commission for the enforcement of fundamental rights." Thus unlike earlier now no one had the right to go to the Supreme Court to have his fundamental rights enforced. It was a constitutional court or tribunal which would enforce fundamental rights. But the constitutional trickery done by the makers of the 4th Amendment was a terrible one.

Firstly, all the fundamental rights as enumerated in the Constitution now turned into a mere show-a set of so-called fundamental rights. Though they were still termed as fundamental rights, they were virtually transformed into ordinary rights for their enforcement now depended on the implementation of an ordinary law.

Secondly, another trickery is that it was not mentioned in the amended Constitution as to what would be the nature or constitution of the Constitutional court or tribunal; who would chair that court or tribunal; what would be their qualification etc. Thus the body which was to enforce fundamental rights was not a constitutional body; it was a forum to be made by an ordinary law and like the department of Ombudsman the parliament was not constitutionally bound to make and implement this forum immediately.

Thirdly, Article 102(1) was deleted so that the High Court Division might not make any question or issue any order or direction for fundamental rights. Since the sinister-looking purpose was to take away all fundamental rights from the jurisdiction of the Supreme Court, it is needless to say that the Constitutional court or tribunal as stipulated in Article 44 under the Amendment would never be an impartial body.

Thus the fundamental rights as enumerated in the Constitution lost their all significance and sanctity. In almost all legal systems with constitutional supremacy the Supreme Court is regarded as the guardian, guarantor and protector of fundamental rights. But this traditional jurisdiction of the Supreme Court – the role of a sentinel on the *qui vive*

for fundamental rights was snapped away. It is unprecedented in the history of the sub-continent that the jurisdiction of the Supreme Court to enforce fundamental rights was taken away.

Present Position: This draconian black provision was repealed and the democratic provision of the original Constitution was restored by President Sayem on 28th may, 1978 by the 2nd Proclamation (Seventh Amendment) Order.

5. The Amendment completely curtailed the Independence of Judiciary

The independence of judiciary depends principally on the following there conditions:

a. Appointment Procedure.

b. Security of Tenure; and

c. Adequate Remuneration and Privileges.

a. Appointment Procedure

As to the appointment procedure it was provided in the original Constitution that the Chief Justice would be appointed by the President and other judges would be appointed after consultation with the Chief Justice (Article 95). But by the 4th Amendment the provision of "consultation with the Chief Justice" was withdrawn. Obviously the purpose was to make appointments on the basis of political consideration and favouritism not of qualification and merit. The appointment now depended completely on the sole wish of the President. Such an unchecked nomination of judges by the executive is not recognized in democratic countries; an objective assessment from the Chief Justice or consultation with the Judiciary is essential so that men of keen intellect, high legal acumen, integrity and independence of judgment from among the lawyers can be taken to ensure independence and impartiality of the judiciary on the one hand and to develop, on the other hand, the standard of judicial review.[1] But the 4th Amendment did away with all these making the higher judiciary completely subservient to the executive.

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[1] See more at Chapter XIX

Present Position: This undemocratic provision still exists.

b. Security of Tenure

Security of tenure is the most important condition for maintaining the independence of judiciary. If the judges do not feel secured in discharging impartial judgment, the independence of judiciary is gone. For better security of tenure judges should be appointed for a definite period and the power of transfer and removal must be a difficult one to obviate the abuse of power and its capricious operation by the executive. It was provided in the original Constitution that a judge could not be removed unless the parliament passed a resolution supported by a majority of not less than two-thirds of the total members of parliament on the ground of proved misbehavior or incapacity [Art. 96(2)]. So the original Constitution provided for full security of tenure and the judges were fully independent in discharging their functions. But the 4th Amendment deleted the provision of impeachment and provided that the President could now remove a judge including the Chief Justice simply by an order on the ground of misbehavior (Art. 96). Now the incapacity or misbehavior need not be proved; President's subjective intention became everything to remove a judge. Thus the President became both the appointing and removing authority of the judges.

Present Position: This undemocratic provision was repealed and the provision of the original Constitution was restored by President Justice Sayem on 28th May, 1976 by issuing a proclamation. Afterwards President Zia on 22nd April, 1977 introduced the provision of Supreme Judicial Council. This provision still exists and it is a healthy provision for the security of tenure of judges (See more P.341)

Subordinate Courts

As to the appointments in subordinate courts it was provided in the original Constitution that-

i) District judges would be appointed by the president on the recommendation of the Supreme Court.

ii) Other judicial officers including Magistrates exercising judicial functions would be appointed by the President after consulting the Public Service Commission and the Supreme Court (Art. 115).

Again, as to the security of tenure of judges in the lower courts it was provided that the control (including the power of posting, promotion and grant of leave) and discipline of judges and magistrates would vest in the Supreme Court (Art. 116). Thus both the appointment procedure and security of tenure in subordinate judiciary were more or less democratic and healthy.

But the 4th Amendment made both the elements executive depended. Article 115 was amended to the effect that "appointments of persons to offices in the judicial service or as Magistrates exercising judicial functions shall be made by the President in accordance with the rules made by him in that behalf." Likewise, Article 116 was amended to the effect that "the control (including the power of posting, promotion and grant of leave) and discipline of persons employed in the judicial service and Magistrates exercising judicial functions shall vest in the President."

From the above discussion it becomes clear that the whole judiciary now came under the absolute grip of the President. He now became the maker and unmaker of the judges. "The whole judiciary which traditionally held a special position in every Constitution of the sub-continent as a basic organ for the functioning of rule of law was now made completely subservient to the executive ..... The Amendment changed the entire institutional context of the judiciary which for a long time played an important role in striking a balance between the excesses of the executive and their victims, between law and its application. ..... The Amendment not only demolished the sanctity of the service but also the institution of the judiciary itself."[1] In words of Justice Abdur Rahman Chowdhury 'if the government can select judges suitable to itself then that would be the end of the judicial system which is the last resort of the people against unconstitutional laws and arbitrary executive action. Experience, however, teaches us that while it is desirable to inject justice into politics, it will be disastrous to inject politics into justice. Once Judiciary becomes subservient to the executive and to the ruling party's philosophy, no amount of enumeration of fundamental rights in the constitution can be of any avail to the citizens because the court of Justice would then be turned into courts of government. It has been

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1 Ahmed Moudud, *Ibid*, P.239

rightly said -'If the salt has lost its savour wherewith shall it be salted?'[1] In the light of all the changes made in respect of the judiciary as a whole one can easily understand how illusory then to say that "all persons employed in the judicial service and all Magistrates shall be independent in the exercise of their judicial functions" (Art. 116A). It was really the greatest Constitutional bluff on the part of the maker of 4th Amendment.

Present Position: The undemocratic provisions introduced by 4th Amendment relating to appointment of judges and Magistrates of the subordinate judiciary still exist. Even the 12th Amendment did not correct it. However, Magistrates courts are now separate under statutory arrangements (see chapter XIX for details).

In relation to control and discipline of the subordinate judges the undemocratic provisions introduced by the 4th Amendment were repealed and the healthy provision "in consultation with the Supreme Court" as was provided by the original Constitution was revived in 1978 by the Second Proclamation.

It is pertinent to mention here that the provisions as to adequate remuneration and privileges as indicated in Article 147(2) was kept untouched.

6. The Amendment introduced one-party political system.

The most significant and far-reaching aspect of the 4th Amendment was the provision for a single national party in the state. A new part VIA with a new article 117A was created for this purpose. According to the new arrangement, the creation of the National Party was left with the subjective satisfaction of the President. It was provided that in order to give full effect to any of the fundamental principles of state policy set out in part II of the Constitution, the President could-

> "direct that there shall be only one political party in the state. Once the President made an order for one party under Article 117A-
>
> i) all political parties of the state would stand dissolved and the president would take all necessary steps for the formation of the National Party.

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1 Chowdhury, Justice Abdur Rahman, *Democracy, Rule of Law & Human Rights,* (Dhaka : Dhaka University, 1993), P. 13

ii) the President by an order would determine all matters relating to the nomenclature, programme, membership organisation, description, finance and function of the National Party.

iii) once the National Party was formed each member of the parliament would have to join the party within a time fixed by the President ; otherwise he would cease to be a member of parliament and his seat would become vacant.

iv) none would be qualified for election as president or as a member of parliament if such was not nominated as candidate by the National Party.

v.) a person in the service of the Republic shall be qualified to be a member of the National Party."

As the arrangement for one party system was incorporated some sinister-looking features are noticeable.

Firstly, the entire scheme of having one National Party in the country was made linked with the fundamental principles of state policy. Though the declaration of one National Party abolishing all existing parties in the state depended solely on the subjective satisfaction of the President it was conditioned that he was to justify his declaration of one party by saying that formation of one party was necessary to give effect to any of the fundamental principles of state policy. This was completely a Constitutional bluff, for in no way the formation of one party keeps any connection with the implementation of fundamental principles of state policy. The implementation of fundamental principles depends on the economic development.

Secondly, all civil and military bureaucrats who should work for the cause of the nation being above politics were now given the right to take part in politics.

Thirdly, members who got directly elected by the people were now liable to lose their membership by operation of law, if they did not join the National Party. So the people's aspiration and mandate came to be trampled and demolished under one man's (President) order.

Fourthly, the National Party was not in a real sense a political party. It was more than a mere political party. Because it became an integral

part of the Constitution; its declaration and organisation were to publish through extra-ordinary gazette notification. It was, therefore, a part of the government.

Formation of One Party

In accordance with the provision of the Article 117A as introduced by the 4th Amendment the President declared the formation of a new National Party for the country under the name and style "Bangladesh Krishak Sramik Awami Leage" (BAKSAL) on February 24, 1975. As a result, all existing political parties instantly stood dissolved. In June the government promulgated the Newspaper (Annulment of Declaration) Ordinance which allowed only 4 newspapers[1] to continue publication and banned the rest. But all these 4 newspapers were to be owned and managed by the state. It brought the whole news media completely under the absolute control of the government. Thus a new system was introduced where no political opposition or press freedom was visualised.

Present Position: The provision of one party system no longer exists. The whole part VIA of the Constitution was omitted by issuing a proclamation on 8th November, 1975 by President Sayem.

7. The Amendment buried the whole concept of local government

Local government is one of the most important 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 directly affected by actions of his local authority, than in respect of activities of central government.'[2] Local Governments are

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1 i) Dainik Bangla ii) Bangladesh Times ; iii) Ittefaq ; & iv) Bangladesh Observer.

2 Jones, BL, *Garners' Administrative Law.*, (London : Butterworths, 1989), P. 23

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 their 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 in different ways bringing transparency and efficiency within the state administration. First, it helps solve local problems locally and relieves the central government much of its responsibility to deal with trifle 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 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 administrative functions, responsibilities and powers and as a result channel-based corruption and red-tapism by the bureaucracy become impossible; Fourth, as it allows MPs 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 government 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 administration, the express intention of the Constitution-makers was also to make them accountable to the elected functionaries. 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).

But all these aspirations of the Constitution-makers were removed at a stroke of pen by the 4th Amendment. The entire chapter II of Part IV of the Constitution dealing with 'Local Government' was deleted. Also democratic provisions of 'effective participation by the people through their elected representatives in administration at all levels shall be ensured' in Article 11 was deleted. Thus the intention was to uproot the entire democratic base from local levels.

Present Position: The democratic provisions of local government have been re-introduced by the 12th Amendment.

The 4th Amendment undermined the spirit of liberal Democracy in Bangladesh.

The evolution of the concept of liberal democracy or political liberalism can be traced form the declaration of Rights of Man and Citizens in 1789 after the French Revolution and the American Declaration of Independence, 1776 where it was said that the civil and political rights of the people must be guaranteed and the government must be formed by consent. Liberal democracy is, therefore, possible in a system where liberty and rights of citizens are guaranteed and the government is formed with the consent of the governed. A governmental system with liberal democracy must have the following elements.

Firstly, the government must be representative i.e., it must be formed with the consent of the governed. In other words, the government must be elected directly or indirectly by the people. Professor Hood Phillips says that representative government implies that the electors are free to organise themselves into political parties, to express their views and to criticise the policy of the government.

Secondly, the government must be responsible. This responsibility of the government may be direct as in the parliamentary system or indirect as in the presidential system.

Thirdly, people's freedom and civil and political rights must be guaranteed and such a guarantee means principally that—

- People have the right to organise themselves into political parties.
- There is the right to criticise the government.

- There is the right to freedom of thought and press.
- There is a national tribunal or court which exercises the independence to enforce basic rights and freedoms of the people.

This is why sir Ivor Jennings says that "to find out whether there is political liberalism it is necessary to ask if there is an opposition". So liberal democracy is possible both in Presidential and parliamentary form of government. But in one party dictatorial system it cannot be thought of, for the concept of liberal democracy itself emerged as a necessary outcome of struggle against autocratic and dictatorial regime. So what is necessary for the success of liberal democracy is that there must be free political oppositions, freedom of press, guarantee of civil and political rights and above all freedom to criticise the policies of the government so that the government can be kept responsible to the governed.

Let me now proceed to evaluate how the 4th Amendment undermined the spirit of liberal democracy in Bangladesh.

Firstly, the Amendment introduced one party system banning all opposition.

Secondly, freedom of press was taken away when, under the shield of 4th Amendment, all except four newspapers were banned and that four papers were declared as government owned papers. It, therefore, left no scope to criticise the government through press.

Thirdly, the Amendment took away the power of the Supreme Court to enforce fundamental rights and it left no scope for the guarantee of rights and personal liberty.

Fourthly, the Amendment made the parliament a useless forum; its life and death came to the grip of the President. There left, therefore, no scope to make the government responsible.

Fifthly, though the Amendment did not abolish the process of electing members of parliament and the President, it left no scope for electing true representatives of the people. Because under the new system people had no option but to vote in favour of a candidate nominated by the one National Party as envisaged in the Constitution.

Thus the system introduced by the 4th Amendment left no scope for liberal democracy in the country.

REASONS BEHIND THE FOURTH AMENDMENT: MUJIB'S POLITICS AND HIS 'SECOND REVOLUTION'

One of the cogent reasons for the creation of Awami League was "for preservation and restoration of parliamentary democracy". From the very day of its formation preservation of parliamentary system was one of its aims and objects. It fought against the undemocratic system introduced by Ayub Khan in his constitution of 1962. Even in the very first point of its historic 'Six Points' AL was firmly committed to parliamentary system.[1] From historical point of view, Sheikh Mujib, who was a political desciple of Hussain Shahid Suhrawarthy was a strong supporter of, and devoted to, parliamentary democracy. The 23 years struggle led by AL against the Pakistan's ruling elite was, therefore, the struggle for the establishment of a real parliamentary democracy. The AL's manifesto of 1970 election was also to establish a real living democracy[2] on the basis of 'Six Points' programme. Supporting it the people gave triumphant verdict in favour of the AL in the election. Thus the system of parliamentary democracy as introduced in the constitution of Bangladesh was, therefore, the deliberate and conscious decision of the AL and it virtually reflected the aspirations of the people nurtured for two decades. A vital question, therefore, arises- What led the AL to repudiate parliamentary system and to adopt an ever-hated dictatorial rule? We shall see that the answer to this question will necessarily give rise to another counter-question- Was it AL or Mujib himself that repudiated parliamentary democracy?

In quest of the real reason first we should evaluate the reasons given by the makers of the 4th Amendment. In justification of the change by the 4th Amendment Mujib narrated the following arguments.

A. Defects of Colonial Bureaucracy

In support of the change Mujib said-

> 'the system we find today is the British colonial system ..... this is the system of the colonialist to exploit ... to exploit the country ... I want to smash the old moth-eaten administrative system and create a new one ... This new system of mine is the revolution'.

Fisrt, here he referred to the British colonial bureaucracy which, according to him, was an instrument of exploitation. The irony is that

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1 Ahmed, Moudud. *Bangaldesh : Constitutional Quest for Autonomy,* Ibid, P. 87
2 Ahmed, Moudud. *Ibid,* P. 197

Mujib himself got his whole political life developed under this system; he also had been a minister for a short time under this very system during the undivided Pakistan period. During 25 year struggle for democracy in Pakistan regime he never opposed this system; neither was it the manifesto of any of 1964, 1970 or 1973's elections to change this colonial system; neither was it opposed by him or by the AL while the Constitution of Bangladesh was being adopted. Now suddenly he got the system which is recognised and institutionalised throughout the world moth-eaten.

Second, the vital point is that what system Mujib was going to introduce in the place of colonial bureaucracy was unknown to him. He did not get any planned system ready to introduce. Was it possible for him to run his administration without a bureaucracy, whatever be its nature?

Third, bureaucracy must be an impartial and non-partisan institution to provide expertise and knowledge to and to abide by the orders of the ministers in policy formulation and implementation. After independence the bureaucracy which was created by our leaders was not any imposed system over us by any great power. The bureaucracy in the new-born country was not colonial; rather it was shaped as colonial from its inception and Mujib's wrong policy played the key-role in it who had little knowledge about state administration. (i) Mujib reinstated in his new administration both civil and military bureaucrats of defeated Pakistan regime who had little or no commitment to Bangladesh. These expatriates from Pakistan began to infuse schism and factionalism within the whole bureaucracy; (ii) He and his party men blatantly patronised and favouritised the administration wherever possible ; (iii) Corruption by Mujib's ministers, his influential party men and relatives made the door open to the bureaucrats to come into open competition in corruption and conspiracy; (iv) Mujib took certain excessive stern legal measures with a view to curtailing some important rights and status of bureaucrats which not only posed a threat to both civil and military bureaucrats but also a threat to the very foundation of bureaucracy as an institution of democracy. This is why the bureaucrats' morale was at its lowest during Mujib era; (v) Mujib imposed blame over the bureaucracy for the breakdown of his administration but this bureaucracy was created by his government; he never thought of institutionalising bureaucracy as an essential organ of government; he did not know how to behave with a top-ranking bureaucrat; sometimes he insulted top-ranking bureaucrats in

public.[1] All these were the factors which turned the bureaucracy into an unruly institution-a colonial institution to exploit people and to disrupt the government's policy implementation process.[2]

Fourth, he argued that "... the amended system that we are taking is also a democracy; democracy of the exploited people. There will be voting right for the people in it." It certainly makes one amazed how democracy could be thought of in a system where there remained no right to speech, no right to press, to criticise the government, to form or get into a party, to judicial remedies, to enjoy fundamental rights. Had he really wanted democracy for exploited people, how could he curtail the independence of judiciary? Was the judiciary playing any negative role in democracy? Was judiciary particularly the Supreme Court doing any corruption? How could he delete the democratic provision, "effective participation by the people through their elected representatives in administration at all levels shall be ensured"?

Thus what Mujib contended about the defects of colonial bureaucracy were not the real reasons for introducing the 4th Amendment. Defects did not lie within the system; it lay with his lack of administrative and policy formulating capacity to run the system.

B. Political Crisis

In explaining the rationale behind the change Mujib said that the old parliamentary system was a 'free style democracy' which was not able to cope with the situation. And for this 'free style democracy' he blamed seriously the opposition parties particularly the JSD and underground revolutionary parties and their destructive activities. He pointically argued that the acts of political terrorism committed by the political opposition had resulted in the murder of thousands of his party workers including 4 members of parliament. He argued that certain groups who were opposed to government accumulated weapons in a clandestine manner in their hands and by their arms power they were trying to overthrow his government and doing all looting and secret killing. However, a reasonable explanation of the political situation of the regime

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1 Based on personal interview with professor Mozaffar Ahamed (NAP)

2 For more, see, PP. 469-474

will prove such an argument of Mujib contradictory for the following reasons.

First, it was not the opposition parties but his own wrong policy and some of his own party leaders and workers who were principally responsible for 'free style democracy' and for secret political killing and terrorism. "Petty factionalism and personal rivalries led to the killing of a large number of his workers down to the village level".[1]

Second, Mujib's personificatory dogma 'Mujibbad'[2] (Mujibism) was in no way less responsible to give rise to factionalism and splits into the party and political chaos. It made open split into the student wing of the AL giving rise to pro and anti-Mujibism groups and Mujib provoked the splitting situation by directly opting for pro-Mujib group. "Mujibbad', 'Father of the Nation'–all these were rotten issues of Mujib's personality cult and Mujib felt very cosy in using these as slogans by his followers. All his party men, officers and the whole administration, in a sense, the whole country remained busy throughout Mujib era with institutionalising these dustbin-issues disregarding the vital issues of national development.

Third, when in 1974 the armed forces were ordered to collect unauthorised arms and prevent smuggling, the officers and jawans found to their dismay that as was indeed widely believed, most of the holders of unauthorised arms and the ring leaders of smuggling operations were proteges of powerful AL leaders including the brother of Sheikh Mujib.[3] As they began to act against these AL supporters, they were asked to recover arms only from the cadres of the underground parties and not to disturb AL supporters.[4]

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1 Ahmed, Moudud, *Bangladesh : Era of Sheikh Mujibur Rahman*, P. 251
Also see, Mascarenhas, Anthony, *A Legacy of Blood*, (London: Hodder & Stoughton, 1986), P. 44

2 To get idea over 'Mujibbad' see, Khan, Zillur Rahman, *Leadership Crisis in Bangladesh*, PP. 95-97 & 113 also see Rounaq Jahan, *Ibid*, PP. 70 & 115

3 Maniruzzaman, Talukder, *The Bangladesh Revolution and Its Aftermath*, 2nd ed. (Dhaka: UPL, 1988), P. 184

4 Maniruzzaman, Talukder, *Ibid*, P. 184

Fourth, it was Mujibs wrong policy which was responsible for giving rise to underground parties. His plan of disarming all the freedom fighters without making for them any guaranteed scheme which could provide for them jobs and organise them into a productive force for national reconstruction went almost in vain. Many of the freedom fighters retained their arms. Even many of Mujibs own party men did not surrender arms.[1] This wrong plan virtually gave rise to another area of conflicts-(1) between freedom fighters and government; (2) between freedom fighters and collaborators; and (3) between freedom fighters themselves. Most of the freedom fighters were thus thrown to take refuge to different means of livelihood. A considerable number of them turned bandits which gradually paralised the political situation,[2] and strengthen the underground parties. Lastly when in 1973 Mujib granted a general clemency to 30000 collaborators held in prison, they came out in open air, began to curtail the influence of the freedom fighter and played the key role in disruption of the economy, sabotage and conspiracy to undo Bangladesh. Though it is said that this clemency was 'the manifesto of Bengali psyches and sentiments'[3] the real reason was political-to get support from the rightist groups and to curtail and lastly destroy all influences and unity of the freedom fighters who had already joined various underground and leftist parties.[4]

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1 Mujib knew about it and he made concessions to his partymen on the question of arms surrendering. Moudud., *Ibid,* P. 83 (Footnote 14)

2 See Ahmed, Moudud, *Ibi,d,* P. 39
It is pertinent to mention here that on point of disarming freedom fighters Tajuddin Ahmed had a plan that before disarming all freedom fighters should be recruited to a National Militia so that their patriotic spirit could be turned into an organised force for national reconstruction and if they were disarmed without making for them any guaranteed scheme a large number of arms could not be recovered. But Sheikh Mujib did not accept this plan : rather he gave emphasis, in the first instance, on disarming all the freedom fighters. He told that to form a National Militia would cost a huge amount of money. But Tajuddin in response told that if a huge amount was not expended to this scheme a far larger amount would be destroyed. Also the freedom fighters had series of discussion with Mujib but he did not move from his decision of disarming at first instance (based on personal interview with Barrister Amir-Ul Islam and K.M. Obaidur Rahman).

3 Based on personal interview with Barrister Amir-Ul Islam.

4 See also Khan, Zillur Rahman, *Ibid,* P.95

Fifth, it was Mujib's wrong policy and politics of patronage and favouritism that made the whole administration a hot bed of corruption. "Mujib reinstated several senior officers with established reputations for corruption who had been dismissed from the Pakistan Civil Service. Some of them were placed in positions of influence near the throne ... many other officers had little or no commitment to Bangladesh. As they say in London pubs: they were only 'here for the beer'-and made no bones about it."[1] No country that has wretched its freedom through a bloody struggle retains the civil and military officers of the defeated administration. Whether it was Fidel Castro or Mao Tse-Tung, the fact is that the new leaders had got rid of the officers of the previous governments and framed new rules and laws in the interest of the country. For this reason they have been able to foil one conspiracy after another. But in Bangladesh Sheikh Mujib was persuaded that all experienced officers of the previous regime would be necessary in the reconstruction of the country and so they should be given new posts in the administration. Accordingly except a handful of officers who were accused of open collaboration with the Pakistani Army all officers of the previous government were allowed to retain their jobs by Mujib. These officers became patriots overnight by signing a bond and declaring allegiance to Bangladesh. It was these officers of the former regime who persuaded Mujib that it had become very difficult to control the boys of Mukti Bahini-"There will be trouble if you do not take bold measures against them. They will become a menace in the future.[2] Mujib put his relatives in key political and administrative positions.[3] In the nationalised industries majority of those appointed to managerial posts were AL workers who grew rich overnight by smuggling spare parts and raw materials to India. Again, the distribution of both locally produced and imported goods were carried on by licensed 'dealers' most of whom were AL workers rather than professional traders. The AL licensees sold their permits to professionals at high prices. Thus a middle class was created. It was this class who, by exploiting the foreign aid that flooded Bangladesh after the war, were responsible for man-made famine in 1974. Again, most of the permits for intending (import-export) firms were given to AL workers and sympathisers. In addition, about 60,000

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1 Mascarenhas, Anthony, *Ibid*, P. 27
2 Dasgupta, *Ibid*, P.31
3 Jahan, Rounaq, *Bangladesh Politics : Problems & Issues*., Dhaka : UPL, 1980), P. 13

houses abandoned by non-Bengalis were appropriated by AL leaders and workers[1] "Among many local-level ALs the expression of Louis XIV of France seemed apt: 'The state is ours ! Let us enjoy it.' Many persons qualified only by political persuasion were appointed to key positions thereby adding both to inefficiency and to corruption."[2] It was found that the closest associates and family members of Mujib became involved in blatant corruption and smuggling operations. Gazi Golam Mustafa one of Mujib's trusted political associates earned international notoriety for misappropriating Red Cross and United Nations relief goods. He was titled as "the fox in defence of ducks."[3] Sheikh Abu Nasser, Mujib's only brother, was one of the ring leaders of jute smuggling operation to India. Each of Sheikh Mujib's nephews– Sheikh Fazlul Hoq Moni, Abul Hasnat and Sheikh Sahidul Islam–not only made quick advantages in politics but also amassed much personal wealth by illegal means.[4] Mujib's two sons Sheikh Kamal and Sheikh Jamal, however, were not above corruption and other misdeeds.[5] All these were known to Mujib but on many occasions he was altogether blind about them.[6] The conditions of nationalised jute mills were most deplorable under the incompetent and corrupt hands of managers and administrators. It was alleged that bales of raw jute had been smuggled across the border. All these were preplanned and Mujib knew about it.[7] "Mujib Knew which minister and which officer took bribes, who manipulated the markets and who were the king-pins behind the smuggler gangs and currency racketeers. His intelligence services kept tabs on everyone. But Mujib adopted a camalier attitude to all this corruption. Once when a leader of another political party drew his attention to a particularly seamy scandal involving one of his ministers, Mujib shrugged it off with the remark, 'Yes, ! know he is a greedy bastard.' This makes clear that it was not the lack of accountability that allowed corruption to spread, but the fact that Mujib did not enforce this

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1 Maniruzzaman, Talukder, *Ibid*, P. 159

2 Baxter, Craig, Government and Politics in South Asia, 2nd ed. P. 259

3 Hasanuzzaman, *Awami League and BAKSAL : 1972–75*, (in Bengali), P.40

4 Maniruzzaman, Talukder, *Ibid*, PP. 159–160
Khan, Zillur Rahman, *Ledership Crisis in Bangladesh*,
(Dhaka : UPL, 1984) P. 216

5 Dasgupta, Sukharanjan, *Midnight Massacre in Dhaka*, (New Delhi : Vikas Publishing House Pvt. Ltd, 1978), P. 74

6 Dasgupta, Sukhranjan, *Ibid*, P. 74

7 Dasgupta, *Ibid*, P. 35

accountability[1] . If anybody complained to Mujib about corruption in high places, Mujib usually dismissed the complaint with typical comment that the people about whom the allegations were made had undergone great sacrifices for Bangladesh.[2] Thus it was Mujib who, though himself was not corrupt, allowed his party-men and relatives to make Bangladesh an object of rapine and plunder – a complete state of siege. Patronage resulted that the power at every level was personalised, leaving the masses very little scope for appeal to institutionalised authority for redress of their grievances[8]. Even the rural masses who had previously given their unquestioned loyalty to the leader, therefore, started holding Mujib responsible for deteriorating conditions.[4] Thus when Mujib repeatedly said that he could not get the country moving to rebuild 'Sonar Bangla' (Golden Bengal) because of widespread corruption around him, he just tried to pretend himself to be innocent. And when the operation of army to stop corruption was withdrawn by him for political purpose, it can undoubtedly be said that Mujib was more concerned about his power than the question of national interest. 'Mujib's unwillingness to arrest people guilty of economic crimes or to curb anti-social propensities of his close associates and relatives, was the major factor in shifting sentiments against him. By 1974 Bengalis had already begun to describe Mujib whom once they had affectionately named *Bangabhandu* (Friend of Bengal) as the main person responsible for the troubles they were facing."[5]

Thus the problem of deplorable socio-economic condition which forced Mujib to introduce 4th amendment did not necessarily lay, as Mujib argued, with the opposition parties but with his own wrong decisions one after another and his politics of patronage and favouritism towards his party supporters and relatives.

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1 Mascarenhas, Anthony, *Ibid.*, P. 28
2 Maniruzzaman, Talukder, *Ibid.* P. 191 (Fotnote 16)
3 Khan, Zillur Rahman, *Ibid.* P.115
4 *Ibid.* P. 108
5 Khan, Zillur Rahman, *Ibid.* P. 126

C. Pressure within the Party

Some authors contend that one of the reasons of introducing 4th Amendment was internal party pressure.[1] It was Sheikh Moni and his faction who, from 1974, began to advocate publicly the view that the parliamentary system had failed in Bangladesh and 'second revolution' was inevitable which would be led by Mujib. Here I would pointically argue that this pressure within the party was not any real and independent pressure; it was rather tactically created, as the real situation dictated, by Mujib himself so that he could get a favourable environment towards his authoritarian rule.

First, since the pressure to introduce one party system first came from Sheikh Moni, Mujib's nephew and one of his closest associates, "one was not sure whether it was a trial balloon by Mujib himself."[2]

Second, all party leaders were committed to parliamentary system since that was the only model they were familiar with and nowhere can a minimum indication be found that any of the leaders of the AL opted for or requested Mujib to introduce one party system.

Third, it is doubtful how could a junior group of AL led by Sheikh Moni dare say Mujib-"Leader! It looks odd that a person will sit as a President above you and you, the Father of the Nation, will remain a mere Prime Minister. We request you to be the President of Bangladesh immediately reverting the parliamentary system into a Presidential one ... And we also want you to be the life-President of Bangladesh,"[3] if he did not allow them say so. It was quite unthinkable that a junior faction of the party could utter such words before a dominating personality of Mujib who believed he was Bangladesh[4] ' and who used to say egotistically to

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1 Bhuyan, M.A. Oadud, *Political Development of Banladesh*, (Dhaka : Royal Library, 1989)(in Bengali), P. 89
Jahan, Rounaq, *Ibid*, P. 119
Maniruz zaman, Talukder, *Ibid*, P. 179

2 Jahan, Rounaq, *Ibid*, P. 119

3 See, Mia, M.A. Wazed, *Some Events Around Sheikh Mujib and Bangladesh*, (in Bengali) (Dhaka : UPL, 1993), PP. 197–198

4 Ziring, Lawrence, *Bangladesh : From Mujib to Ershad*, (Dhaka : UPL, 1994), P. 93

the people, "it is Mujibur Rahman saying this"[1] and against whom there was nobody in Bangladesh to raise any voice.

It is not, therefore, correct to say that pressure within the party compelled Mujib to introduce 4th Amendment.

D. Role of the Awami League.

Despite the fact that the pressure within the party as has been mentioned just now, was not a real one, it is logical for one to say that 4th Amendment was made by the AL not by Mujib since Mujib could not do that without the support of AL MPs. But it is a technical truth and such an argument can be posed for the sake of criticism only. The real situation dictated otherwise.

First, though Mujib was empowered at the meeting of the AL parliamentary party 'to take any step he considered necessary for resolving the problems the country was facing', no free-will of the members acted behind it. 'The whole atmosphere of the meeting was quite intimidative; it was like a terrible slaughter-house and there was no protest for fear of being killed.'[2] "None was in a position to controvert what Mujib said. A large number of members did not raise their voice out of fear of being killed by the counter-forces within the party and there were allegations also that the plan to change the Constitution could be proceeded so easily because tactics of intimidation and blackmail was applied by the key-ruling groups over others. In such a situation members were swayed into accepting the proposition for a change.

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1 Dasgupta, *Ibid*, P. 73

2 Based on personal interview with Barrister Moinul Hossain, who defected protesting the 4th Amendment Bill. Barrister Moinul Hussain also told me that he tried to get support of at least 25 MPs to oppose the plan of Mujib. Because, according to him, if 25 MPs could oppose Mujib, it would have been impossible for him to introduce the change. But none raised voice out of fear of being killed by counter forces within the party. Some of the members were given frightful warning that if they would oppose, they would be cut into pieces an d fed to dogs.
He also told me that some of the MPs were wiping in the House when 4th Amendment Bill was adopted, for this was against their political commitment and they did not fight for this authoritarian rule.

Mujib's authoritative stature was the single dominating factor in creating an atmosphere for the members of parliament to bedevil their own status."[1] "The party submitted to the threat and gave full authority to Sheikh Mujib to take such measures as were necessary for the national interest."[2]

Second, if the AL had opted for one party dictatorship, it would have not demanded for introducing parliamentary system after Mujib's killing when political activities were liberalised. During the whole Ershad regime the AL struggled for parliamentary democracy and after the fall of Ershad regime in 1990 it was again the AL which spearheaded the campaign for reversion to a parliamentary system and lastly it compelled BNP (majority winning party in the 5th parliamentary election) to introduce parliamentary democracy.

Third, an investigating look will reveal the idea that it was not the AL that proceeded to introduce authoritarian rule. Because under the dictatorial leadership of Mujib AL as a party did no longer remain as an institution of democracy particularly during 1973–75. There was nothing as ideals and principles of AL as a political party; everything virtually turned into the whims and caprices of Mujib and he himself became the AL. His whimsical politics of patronage and favouritism destroyed the ideals of and democracy within the party. "From the way Mujib ruled Bangladesh, both before and after the 4th Amendment, it can be said with all fairness that as long as Mujib was alive he was Bangladesh. He had the total control over the party, government and parliament".[3]

It is, therefore, clear that what Mujib said in justification was not the real reasons behind the 4th Amendment; nor was it any pressure from within the party. The real reason lay with Mujib himself. He was not feeling cosy in parliamntary democratic system. He struggled for democracy but he himself coming to power was not prepared to give and institutionalise democracy. Struggling for democracy being outside

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1 Ahmed Moudud. *Ibid*, P. 234 & 259
2 Maniruzzaman. Talukder. *Ibid*. P. 179
3 Hakim. Muhammad A. *Bangladesh Politics : The Shahabuddin Interregnum*. Ibid., P. 72

power and institutionalisation of democracy being in power are two different phenomena of politics. The former does not need so much education, wisdom and vision, since it is almost a one-way traffic. And the qualities which one should possess to lead a movement particularly in a third world country where the largest section of the population is illeterate and poor are basically two-demagogy and friendly and sympathetic behavior towards people which can create special appeal to them. But in the latter it essentially requires many-sided knowledge. particularly substantive knowledge and education over various institutions of democracy and their mechanisms. When a leader is in power he finds himself in constant pressure from various forces both from within the state and from outside which he has to face with careful decision and steps because, politics as far it relates to state administration is never a safe way. Mujib did not know how to drive the car of parliamentary democracy; neither was he prepared to get learning over its proper mechanism from his learned associates. This was mostly because he was a leader without proper institutional education. Leadership without education and vision is a like a drunken driver of a car of democracy.

It is vehemently argued by many of Mujib's staunch supporters that Mujib had no lack of sincerity to establish and institutionalise democracy. It is argued that Mujib was not a dictator; rather he was made dictator. He was made to change the system.[1] But the practical situation and Mujibs activities do not necessarily prove so. I do not believe in ones hearsay sincerity like a fairy tale if it cannot be substantiated by ones performance. That Mujib had no sincerity to institutionalise democracy in Bangladesh and that he had not the least respect towards parliamentary democracy can be substantiated by various facts some of which have already been discussed earlier.

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1 The author had interviews with M.R. Akhter Mukul (a close associate of Mujib, and particularly famous for his 'Charampatra' during the war of liberation and now a writer and journalist) and Abdul Mannan (first Home Minister under Mujib cabinet, a minister of Mostaq cabinet and now an MP and a Presidium member of the AL). They told the author vehemently that Mujib had done no wrong in the political development of Bangladesh; in no way is he responsible for the setback of constitutionalism in Bangladesh. In response to some counter questions they told that Mujib was compelled to take some repressive measures under the pressure of the prevailing situations but those cannot be said to be his personal faults.

From the very beginning of parliamentary democracy in Bangladesh Mujib began to show his intolerant and dictatorial attitude. Returning to Bangladesh he instantly changed the governmental system from presidential to parliamentary one but he did neither make the cabinet responsible to the Constituent Assembly nor the Constituent Assembly was allowed to do legislative functions. And the most important point is that he changed the system at his own initiative; of course, as the President under the Proclamation of Independence he had power to do so but he should have, had he been a true democratic leader, taken the consent of elected representatives of Bangladesh (the erstwhile East Pakistan) if they actually wanted the Constituent Assembly devoid of legislative functions. Thus the first act done by Mujib in his long cherished free land was undemocratic and dictatorial. And when this most vital question was raised by K.M. Obaidur Rahman in the Constituent Assembly, Mujib became almost furious and he technically by-passed the subject requesting the Speaker to oust him (K.M. Obaidur Rahman) from the Assembly*.

* *See, Constituent Assembly Debate Vol-II, P.23. It was the most important question concerning the start of constitutionalism in a new born country on which Mujib should have given, had he been a true democratic leader, an explanation –Why the Constituent Assembly was not given legislative function? I made a thorough search in the Assembly Debate but nowhere had I found even a word justifying the denial of Constituent Assembly's legislative power. I asked K.M. Obaidur Rahman if he was to face any hostile situation after he had made such a question pointing to Sheik Mujib in the Assembly. He repeatedly refused to answer.*

Why was not the Constituent Assembly given the legislative power? In response to this question most political leaders have now a readymade answer. Both Dr. Kamal Hossain and Barrister Amirul Islam told me that Pakistan Constituent Assembly took nine years to make a Constitution; the Assembly had to employ a huge time in law making. Considering this Pakistan case it was decided that the Constituent Assembly of Bangladesh would not be given any legislative power so that it could make a Constitution without making any unnecessary delay. But this logic is not at all tenable because it is well known to all who were associated with the political development and long time Constitution making in Pakistan that the Pakistan Constituent Assembly's law-making function was not any of the reasons behind its unnecessary delay in Constitution-making. The main reasons were following (i) Problem as to determine the character of the Republic. It was very difficult for the framers of a Constitution for Pakistan to produce an Islamic Constitution which could satisfy

different groups holding divergent views regarding the structure and nature of an Islamic State; (ii) Controversy between East Pakistan and West Pakistan as to quantum of representation in the Federal Legislature. This problem, more than any other, delayed Constitution-making in Pakistan; (iii) Controversy over language between East Pakistan and West Pakistan; (iv) Controversy between East Pakistan and West Pakistan regarding the distribution of powers between Federal and the Provincial Governments; (v) and the last factor for delay was caused by the then Governor-General of Pakistan Golam Mohammad who abruptly and almost whimsically dismissed the Constituent Assembly just at a time when it was about to finish its work. (For details, see. Choudhury, G. W. Constitutional Development in Pakistan, ibid, PP. 67-84)

None of these factors was present before the Constitution-makers in Bangladesh. I do not find any reason which could justify the denial of Constituent Assembly's legislative power. The real reason, as I think, lay with Mujib himself and I found a trace of it in another occasion. In an informal discussion with Professor Shamsul Huda Harun and me while I was assisting him in his research work Barrister Amirul Islam told that returning to homeland Mujib expressed his desire to change the system from presidential to parliamentary one. The important issue in the meeting on 10th January dictated by Mujib was that the Constituent Assembly would neither be given legislative power; nor any power to control the cabinet. There was a pin-drop silence in the meeting. Because Mujib who was like a demi-god among the people just arrived in the country and what Mujib said and wanted on that moment could not be opposed by any one. But it was only Mr. Amirul Islam, as he told, who opposed Mujib expressly and he tried to make Mujib understand that before making the draft of the Provisional Constitutional Order a meeting of elected representatives should be convened and it would be undemocratic if the Constituent Assembly was not given the power of legislation. But Mr. Islam was stopped by saying- "You are an inexperienced young man. What knowledge do you keep about state administration?" Mr. Islam discovered himself as a stupid in the meeting since it was only he who was expressly opposing and for his strong opposition he was suspected on the part of Mujib to lead a conspiracy to make Tajuddin Ahmed Prime Minister. Mr. Islam also told that from that very day he decided to wind up himself from politics.

Likewise, when Mujib said in the Constituent Assembly, "We could declare martial law and could say-Emergency! No Democracy! No talk for three years! No criticism will be allowed ... We had power to do so but we did not do that ... The name of the opposition is being heard. I do not know if there is any such party ... those who are doing the opposition

are giving speeches just to see their names on headlines of newspapers,"[1] he was just attacking as well as provoking some of his people who once titled him *Bangabandhu*. Nine months could not be passed since the country achieved independence; there was nothing as opposition; Mujib was a demi-god among his people; the whole nation was looking forward to his leadership. But when he began to utter such provoking words people began to be dismayed.

There are many speeches of Mujib like this which are full of wrath and which virtually played the destructive role in Bangladesh politics. Leadership without vision and education is a danger to democracy. This substantiates that Mujib was not prepared to tolerate even the smell of opposition and criticism against him. Mujib lacked the most important quality of leadership in power-tolerance and sacrifice. He could not tolerate those who were wiser and more experienced than he. That is why he had a jealous look over both Tajuddin Ahmed and Ataur Rahman Khan.[2] He turned the government machinery into a personal one man-show; he would decide even small details, leaving no scope for a sound administrative framework. His enormous personal power and his intolerant personality went a long way in retarding healthy growth of autonomous, independent and free institutions like the press and media which are so vital for the working of a sustainable democracy.[3] As the criticism and opposition began to grow against him, he, without making a moment's delay began to take resort to all kinds of brutal weapons like emergency, preventive detention to crush down all criticism and opposition and 'in the process he discarded everything Bangladesh was supposed to represent-constitutionalism, rule of law, freedom of speech, right to dissent, equal opportunity etc.[4]

Mujib was like a demi-god to pioneer a nation building. He was the leader who had both power and people to give Bangladesh politics a positive turn. Unlike in Pakistan there was no ethnic clash, no regional

1 Constituent Assembly Debate Vol-II, P. 700 & 704
2 Based on personal interview with Barrister Moinul Hossain.
3 Choudhury, Dilara, *Ibid*, P.216
4 Mascarenhas, Anthony, *Ibid*, P.20

problem in the starting of Bangladesh politics; there was no problem over state language; there was no arbitrary power over the President to destroy abruptly all initiatives of democracy as was done repeatedly in Pakistan; there was no want of strong party system which is the backbone for the success of democracy, for the AL party had strong organisational base down to the village level.

Thus factually almost all favourable conditions for the success of democracy were present in Bangladesh at its starting. But the leader did not take opportunities of these conditions; he rather set the sail of democracy on a wrong direction. In many emergent nations the process of democracy and constitutionalism, after an initial rough sailing, have been set on a firm footing due to mature and pragmatic leadership. Again, in most developing countries emerging from the bondage of colonialism inherited fragile democratic institutions and the executive rulers of these countries rule by mass appeal and through broad political power and as a result, the rises of charishmatic leaders in these countries have been common. The success or failure of charismatic leaders depends on how they use their charisma. A charismatic leader can bridge the gap between modernity and tradition by pushing institutional development'. In doing this he has to relinquish his personal power in favour of institutionalisation. He has to make a conscious choice between the uses of arbitrary power and power to create institutions.[1] This is a critical choice which may set the future course of polity because individuals take cues from their leaders or follow their examples. "At the birth of societies, it is the leaders of the Commonwealth who create the institutions; afterwards, it is the institutions that shape the leaders'.[2] And only in very few cases of the developing countries where leadership of a high order capable of creating and developing institutions was available-generally in the person of the founder of the state - the country was able to settle down under normal democratic institutions.[3] But unfortunately in the case of Bangladesh the founding leader Sheikh Mujib had made the choice for personal arbitrary power rather than institutionalisation of democracy. The reality is that Mujib was not a far-sighted leader. He had

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1 Hantington, SP, *Political Development And Political Decay.* Quoted by Choudhury, Dilara, *Ibid,* P. 16

2 Montesquieu – quoted by Choudhury, Dilara, *Ibid,* P. 16

3 Khan, Mohammad Asghar, *Generals in Politics,* (Dhaka: UPL, 1988), P.2

the quality of a demagogue – a flimsy and egotistic man but not as a constructive administrator. He had the quality to boast emphatically of his being the *Bangabandhu* and the Father of Nation'[1] but had no quality of tolerance to hear any criticism about these. He had the quality to pronounce big commitments but had no quality to work on consensus to implement them. In most cases of vital policy making he did not consult nor did take any advice from those of his colleagues who had liberal trend in politics.[2] He had the quality to give a quick response to the toiling masses by his sympathetic speeches, to sob out the heroic story of freedom fighters but no quality to share their feelings in his administration. "He promised everything but he betrayed everyone".[3] Almost all political crisis now confronting Bangladesh and hampering the way to constitutionalism have got their unexpected start at the very hand of Sheikh Mujib himself.[4] One commentator goes on to say that 'virtually Mujib was a dictator.[5] I would say here that Mujib was a dictator but he was not a constructive dictator rather he was a demagogue a whimsical dictator, for a constructive dictator can go a long in bringing efficiency within the administration in furtherance particularly of economic development.

It is widely contended that Mujib was largely persuaded by the conspirating faction of his party, particularly Khandaker faction. It is also true that when he returned Bangladesh, he was given wrong information both about the leader like Tajuddin Ahmed and the freedom fighters and it was also fact that during the whole 9 months of bloody war he was not in the country and he knew nothing what happened really in or who supplied the real strength of war. But my question is-Was it completely

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1 Unlike the term *Bangabandhu* which is a historical fact and on which nobody should have any doubt the term 'Father of the Nation' is debatable. Mujib may be called the founder of Bangladesh but the term "Father of the Nation" as such is always far more than a mere founder.

2 See, BBC Interview with Mr. Ataur Rahman Khan. Quoted by, Rahman, Sirazur, *Bangladesh : Fifteen Years of Independence* (in Bengali) (UPL, 1987), P. 27

3 Mascarenhas, Anthony, *Ibid,* P.11

4 The author had interviews with some of Mujib's political colleagues who are still in politics and other areas. All of them except two (M.R. Akhter Mukul and Abdul Mannan) told the author that Mujib had a dictatorial attitude and power expectation was very high in him. For M.R. Akhter Mukul and Abdul Mannan Please See P. 137

5 Dasgupta, *Ibid,* P. 73

impossible for Mujib whose boast was "It is Mujibur Rahman who knows the best about the psychology of Bangalis and it is Mujibur Rahman who can emphatically claim a Ph.d. degree on this subject,[1] " to discover the real fact? What prudence and conscience did he apply to find the real trend? In no way can I convince myself that a democratic leader like Mujib, had he truly been so, who had all executive power would always be persuaded by a conspirating faction and would take wrong decisions one after another pushing the country into a point of no return. He was repeatedly informed and warned about conspiration and corruption.[2] But he did not pay a heed to those warning.

Mujib personally did not entangle himself in any corruption. Surely he was the *Bangabandhu,* a true friend of Bangalis; "his emotional behaviour reflected the life style of the Bengali nation and he combined in himself all the characteristics of a Bengali'. But all this is what Mujib was as a person- a *Bangabandhu*-which has nothing to do with state administration.

Someone still goes so far as to say that Mujib introduced one party dictatorial system for a temporary period just to get out of the political chaos and to uproot corruption and he had a mind to get back to democratic system again.[3] He told his party MPs "give me only 3 years time; I will uproot corruption and then get again back on the right track of democracy."[4] However, Mujib's performance does not prove so. Neither the 4th Amendment itself nor in his speech justifying the 4th Amendment indicated that the change was temporary. What really induced Mujib to introduce a constitutional monolithic system? A commentator says," perhaps Mujib could foresee that the disenchantment in the opposition camp might one day generate an irresistible mass upheaval against his regime by capitalising on gradual erosion of his personal charisma and ineffectiveness of his government and administration in responding properly to the aspirations of the people. As a cautionary measure he eradicated all organised political opposition to

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1 Based on personal interview with Barrister Amir-Ul Islam.
2 Gupta, Shukhranjan Das, *Ibid,* P.74
3 Mia, M.A. Wazed, *Some Events around Bangabandhu Sheikh Mujib and Bangladesh,* Ibid, PP. 220, 229.
4 Based on Personal interview with Barrister Amir-Ul Islam.

his regime. It thus became clear that perpetuation of power was the dominant motive behind the fourth constitutional amendment."[1] And this is clearly manifested when we see that under the 4th Amendment provision was made so that one could continue as a President for life.

MUJIB'S SECOND REVOLUTION AND ITS UNFINISHED PROSPECTS

On the basis of Mujib's activities, programmes and speeches commencing from the date of 4th Amendment till 15th August, 1975 his concept of 'Second Revolution' may be categorised as having following four dimensions:

1. Constitutional or base Dimension given effect by the 4th Amendment itself.

2. Political and Philosophical Dimension which was to be implemented through BAKSAL.

3. Administrative Dimension which was to be implemented through the President and his Ministry at the centre level, District Council at District level and Thana Council at the lowest level.

4. Economic Dimension which was to be implemented through Compulsory Multipurpose Co-operatives.

The constitutional dimension has already been discussed in detail. Here I will discuss the other three dimensions of the 'Second Revolution' because every future generation will try to know what was in the mind of *Bangabandhu* to implement his 'Second Revolution' and how far it bore prospects for the greater interest of the nation. Since none of the last 3 above mentioned dimensions could be implemented before Mujib's killing someone still says that if Mujib could implement BAKSAL and other administrative reforms, he would have been able to uproot corruption and set the state administration in right direction. But I do not see any sign of improvement in the new system because of following observations.

First, as mentioned earlier the various provisions of the 4th Amendment necessarily indicate that it was a stern measure taken to perpetuate autocratic rule and not to proceed to do any material benefit to

1 Hakim, Muhammad A. *The Sahabuddin Interregnum*, ibid, mP. 72

people; a sinister looking intention worked behind the Amendment althrough.

Second, those who were mostly associated with corruption and smuggling were retained in power; rather who were efficient and of liberal attitude were removed from the real power of the administration. 'Mujib's 'Second Revolution' lost its weight when it was revealed that most of the fifteen members of the all-powerful Executive Committee, excepting one, were Mujib's close associates and relatives."[1] Though Mujib promised in his 'Second Revolution', democracy for the *Sarboharas* (have-nots), Mujib still depended on the same old Awami Leaguers who were discredited as corrupt and inefficient; and these same corrupt Awami Leaguers were now members of BAKSAL who, therefore, were not *Sarboharas* ; they were all new rich class who benefited in the three years of the AL rule and could not win the support from the real *Sarboharas*.[2] So the instrument Mujib used for the revolution was hardly revolutionary. It was to be a revolution for *Sarboharas* but no *Sarbohara* was given chance to run the instrument of revolution; it was actually a kind of political bluff in the name of revolution. It was this reincarnation of Awami Leaguers in the new brand of BAKSAL to realise the revolution which kept the ordinary people still in the state of uncertainity and fear.

Third, the new system did not do away with the AL factions. It accommodated them and added a few more. As there was no channel for constitutional opposition, factional fight within the regime could be expected to intensify and if that happened, the government would continue to remain ineffective under the new system.[3]

Fourth, though Mujib said that he introduced one party to ensure national unity, it was impossible to bring such unity by force. But Mujib proceeded to do it by force when he declared that no person could continue to be a member of parliament unless he joined the BAKSAL

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1 Chudhury, Dilara, *Ibid*, P. 52
2 Jahan, Rounaq, *Ibid*, P. 52
3 Jahan, Rounaq, *Ibid*, P. 122

within a fixed time. In seeking national unity Mujib did not go beyond his boundary. Nor did he make any honest and sincere effort to bring all the political forces together. Although hundreds and thousands of people at individual or group level from different walks of life began to join the new party, no national convention or meeting of the representatives of other political parties or groups was convened, nor were they taken into confidence. Although some individual members of JSD and the NAP also joined the new party, their party hierarchies kept aloof from the bandwagon. So the style of forging national unity was somewhat erratic. Mujib did not make any sincere attempt to bring about a formal unity of all the political parties or forces in the country[1]. 'Thus in a more significant way, BAKSAL was meant to serve the purpose of the *Bangabandhu's* personal dictatorship, not the cause of national development and unity."[2]

Fifth, the economic dimension of the 'second revolution' was to be implemented through compulsory multi-purpose cooperatives. But to make such a multi-purpose cooperative system success it necessarily needed, particularly in a system where judicial control was done away with, a large number of devoted and oath-bound workers and officers who could work relentlessly with the spirit of revolutionary socialism sacrificing even their personal interests. But no such plan to select such comrades was at the hand of Mujib; he wanted to lead his so-called 'revolution' with his Awami Leaguers who were greedy, selfish and expert enough to exploit the toiling masses. This is why the people were in a state of confusion what the new system would bring about. Although Mujib repeatedly promised that land ownership would be left intact, surplus farmers feared that compulsory co-operatives were a prelude to state ownership of land.[3]

Sixth, as to the administrative reform he wanted to introduce, I would argue that Mujib had lack of knowledge over state administration. He wanted to keep in him the total political control. But in a country with vast population this is quite impossible. He thought that the President

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1 Ahmed, Moudud, *Ibid,* P.248
2 Ziring, Lawrence, *Ibid,* P. 105
3 Jahan, Rounaq, *Ibid,* P. 135

should play the role of a referee but that is a foolish thinking particularly in state administration. Because the role of a referee is possible only within the four corners of a limited field where the eye-sight can catch any wrong. But in a state administration where policy formulation and implementation take a complex course in various dimensions at various governmental departments which are far beyond the President's reach and where the President himself will be refereed by other organs like parliament etc., he cannot play the role of an umpire and thinking for such role disregarding other controlling institutions of democracy would certainly lead the country into a field of uncontrolled corruption, chaos and nepotism. Actually in state administration there should always be more than one referee to maintain discipline and efficiency within an entire administration. The first one is an independent judiciary; the second one is parliament; the third one is a strong committee system in parliament; the fourth one is department of an Ombudsman, the fifth one is a free press and media. If these referee-like controlling bodies are not allowed to work independently to monitor the activities of the government one can only retain a rule of tyranny as was done by Hitler or other military dictators.

However, with the establishment of one party rule Mujib declared a thorough overhaul of the administration uprooting the 200 year-old British administrative chain. The whole country was now divided into 62 districts, each under a governor. The governors were given enormous power. They were entrusted with development, planning and implementations, administration and judiciary. They were even responsible for the maintenance of law and order in their respective districts. All of them were to maintain direct communication with Sheikh Mujib and take orders from him. One commentator says that in this new set-up two things were very clear. Firstly, the Dhaka Secretariat was virtually left without any real power; and secondly, the power had been shifted overnight from the cities to the country side. Thus the power of both the traditional bureaucrats, ministers and MPs who were the most corrupt in his administration were curtailed.[1]

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[1] Dasgupta, Sukhranjan, *Ibid*, P.37

Thus one may say that Mujib now really set the sail to the right direction to bring efficiency in and to uproot corruption from his administration for the better welfare of the people and nation. But I do not find any positive merit in this change because of the following reasons:

(a) The administration of the district was now vested in a politically appointed governor as opposed to an earlier bureaucrat like District Magistrate or Deputy Commissioner. Thus he was to appoint now the same party-men or MPs and one was not sure that they would be above corruption.

(b) As the District Governors were now at the second stage of the administration i.e. after the President and his cabinet, they now, therefore, took the place of Ministers and Secretaries. But since Mujib could not introduce effective control over his ministers earlier, how could he now be sure that this time he would be able to take effective control over the governors?

(c) Since the whole administration of the entire district along with planning and policy-making was vested in the governors and since the Dhaka-based bureaucracy was to go at the district level, the departments of governors would have surely turned now into 62 bureaucracies in the whole country. While Mujib could not control the centralised bureaucracy headed by some Ministers who were always within his eye-sight it was quite impossible for him to keep an watchful eye over 62 district bureaucracies.

(d) Mujib's landlord style of politics was not at all adaptable to this plan also since he was to discharge now huge responsibilities which in the earlier administration could be left to his ministers.

(e) One might, of course, argue here that since Mujib decentralised administration into three tiers–Centre, District and Thana level through representatives of BAKSAL, he had an avowed intention to introduce the concept of local government. But his mechanism never comes under the

democratic concept of local gvoernment. Because (i) the entire chapter III of part IV of the Constitution dealing with 'Local Govenment' was deleted by the 4th Amendment. Aslo the democratic provisions of 'effective participation by the people through their elected representatives in administration at all levels shall be ensured' as inserted in Article 11 was deleted. If he had honest thinking in decentralisation of administration in the form of strong and effective local government, certainly he would not abolish the Constitutional provisions of local government; (ii) the District Governors were to be appointed by Mujib himself and not to be elected directly by the people. Again, since the District Administrative Council would function under the direct control of Mujib and any time Mujib could remove the governor, it was not in any sense a democratic local government. It was, therefore, a type of authoritarian or colonial decentralisation in the sense of local government though Mujib went on to say this system as a 'people oriented administration'; (iii) Local government bodies should always be autonomous bodies but no such position was allowed to be in the BAKSAL-oriented decentralisation.

(f) Since Governors at every District was made the chief executive and centre figure in the functioning of the District administration and since he was now directly responsible to the president, it was not clear what his ministers would do now. In this regard Mujibs statement made on 19th June 1975 is not clear what he actually meant.

(g) Since governors were now under only central control of the President and since also the judicial administration was made subservient to the governor and since the Supreme Courts powers and independence were completely curtailed, it was not clear where the ordinary citizens would go to have their redresses and grievances against the governor and his administration settled. Was it possible for ordinary people to come to the President to file their cases against the governor and his administration? It was also not clear how the President himself being in the realm without free press and media would get information as to irregularities and maladministration of the governor and his departments? Again, in the absence of such information was it possible for him to retain effective control centrally over the 62 District Governors and their departments? In such a situation he, by his policy of retaining complete

control, could only make order to execute or implement his dictation but it was impossible for him to know whether the implementation was made duly–whether the ordinary people of his *Sonar Bangla* (Golden Bengal) really received any benefit from newly created administration.

Actually Mujib had, as his activities prove, inherent lack of knowledge about institutions of democracy and particularly of knowledge how to operate democratic institutions. In any system, be it parliamentary or presidential one, there is and must be system of checks and balances and particularly the courts work as the all time watch-dog against the irregularities of the administration from top to the bottom of the system. A huge number of bureaucrats and actions taken by bureaucracy cannot be scrutinised by one President. Effective control over the administration is ensured through the working of some important institutions of democracy. Firstly, if any maladministration or irregularities occur, the affected people will go to courts where all the administration is bound to justify their actions and their grievances settled; and the wrong-doing administration will get even punishment. Secondly, administrative control over top bureaucracy i.e. Secretaries and Ministers are effectively ensured through strong committee system in the parliament both in parliamentary system and presidential system. Thirdly, a department of Ombudsman also keeps an all time watchful eye over all types of maladministration. Fourthly, a free press gives information to the public about various negative and positive aspects of the government policies, laws and activities; as a result, both general people and other agencies can be aware both of their own rights and administrative efficiency and sincerity. On the other hand, government itself may know about efficiency of its various departmental administration and also the feedback from the people and may take, at its own initiative, appropriate measures in cases of maladministration or irregularities or correctify its policies; also other voluntary agencies like NGO's get channels to act *suo motu* or otherwise against various inefficiency and irregularities of the government departments. Thus the openness and transparency occurs in the government activities; government becomes more responsive and the people can have their rights enforced. But in the new system Mujib completely curtailed the independence of all democratic institutions; he amputed the whole judiciary and made it subservient to his administration; he turned the parliament into a secondary rubber stamp body; he never allowed the committee system to work; he stopped the

free press; he stopped political liberalism. In such an environment he could administer tyranny only. So the problem did not lay with the system; problem lay with him since he did not allow from the very beginning the basic institutions of democracy to work. A commentator has made a similar observation," if we examine what actually led to the collapse of the economy, breakdown of law and order in the country and rise of organised smuggling and corruption, it will be found that the system had a secondary role to play and the leaders and the party had the primary role in creating such a situation".[1]

Apart from what has been stated here, Mujib did not come forward with any other concrete economic or social programme; he did not spell out how the domestic resources were going to be increased, how the standard of living of the people would improve, how discipline would be restored to in the nationalised industries, how vices like corruption, black marketing and hoarding which were crippling the economy of the country were to be checked, how the organised looting, smuggling, sabotage and secret killing was to come to an end.[2]

FIFTH AMENDMENT

Background

In a military coup led by a group of army officers Mujib was killed brutally along with his family members on 15th August, 1975. With his killing his new system of one party BAKSAL had gone. The first martial law regime got its firm start in Bangladesh governance which continued till 6th April, 1979. Though martial law was declared on 15th August, 1975 the Constitution was not abrogated; it was kept alive in subordination, though it was the supreme law which allowed no means of martial law, of martial law. The Constitution was changed several times by various martial law proclamations and orders. From the constitutional point of view all these changes to the Constitution were illegal, for the Constitution did not allow such a process of amendments; constitutionally it is the only body parliament which can amend the Constitution. However, the martial law was declared and the Constitution was amended in an extra-constitutional way which has been a frequent

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1 Ahmed, Moudud, *Ibid*, P. 250
2 Ahmed, Moudud, *Ibid*, P 250

phenomenon in politics of developing countries with new start of democracy. The second parliamentary election was held in 1979 while martial law administrator Zia's party secured a two-third majority. The first session of the parliament was convened on 1st April, 1979 and on 6th April a constitutional Amendment Act (5th Amendment) was passed which legalised all the activities of the martial law government made and done during the period between 15th August, 1975 and 9th April, 1979. The Act amended the 4th Schedule to the Constitution by an addition of new paragraph 18 thereto which provided, inter alia, that all amendments, additions, modifications, substitutions and omissions made in the constitution during the period between the 15th August, 1975 and the 9th April, 1979 by any Proclamation or Proclamation Order of the Martial Law Authorities were ratified and confirmed and were declared to have been validly made and would not be called in question in or before any court or tribunal or authority on any ground whatsoever. Through four major Martial Law Proclamations and various Proclamation Orders made there under the Constitution was amended several times according to the wishes of the Martial Law government. After the 5th Amendment Act was adopted the overall Constitution came to be a different one, though not completely an uprooted one, from one introduced by the 4th Amendment.

Changes made by the 5th Amendment

The 5th Amendment brought about, inter alia, the following important changes in the Constitution.

1. Part VIA of the Constitution dealing with one party system as introduced by the 4th Amendment was omitted.

2. The independence of judiciary which was completely destroyed by the 4th Amendment was restored partially (Articles 96 and 116).

3. The jurisdiction of the High Court Division of the Supreme Court to enforce fundamental rights was restored to its original position as was in the original constitution (Article 44 and 102).

4. Provision of Supreme Judicial Council in respect of security of tenure of the judges of the Supreme Court was inserted (Article 96).

5. The provision of absolute veto power of the President introduced by the 4th Amendment was abolished (Article 80).

6. Provisions of referendum in respect of amendment of certain provisions of the Constitution was inserted and to that end a new clause IA was created in Article 142.

7. Religious words "Bismillahir Rahmanir Rahim" was inserted in the beginning of the Constitution i.e. above the preamble.

8. In the original Constitution it was provided in Article 6 that the citizens of Bangladesh would be known as 'Bangalees'. But this was changed and it was provided now that citizens would be known as 'Bangladeshis'.

9. One of four major fundamental principles of state policy 'secularism' was omitted and in its place a new one 'the principle of absolute trust and faith in the Almighty Allah' was inserted (Art. 8).

10. One of four major fundamental principles of state policy 'socialism' was given a new explanation to the effect that socialism would mean economic and social justice (Article 8).

11. A new article 145A was created where it was provided that all international treaties would be submitted to the President who should cause them to be laid before parliament.

12. Another new Article 92A was created whereby the President was given power to expend public moneys in certain cases.

13. Article 58 was amended to the effect that four-fifths of the total number of ministers should be taken from among the members of parliament. It was also provided that the President would appoint as Prime Minister the Member of Parliament who appeared to him to command the support of the majority of the members of parliament.

Merits of the Amendment

To compare with the 4th Amendment the 5th Amendment introduced some important democratic provisions to pave the way, albeit in a limited sphere, for constitutionalism.

Firstly, dictatorial one party system which had been a permanent block to constitutionalism was abolished and multi-party democratic system as was adopted in the original Constitution was restored which again opened the door of liberal democracy and constitutionalism.

Secondly, all fundamental rights which were reduced into meaningless versions of the Constitution were now again given their full

life and enforcement by reverting Article 44 of the Constitution to its original position of 1972.

Thirdly, the independence of judiciary specially the constitutional status and sanctity of the Supreme Court was restored. Though the unhealthy provisions introduced by the 4th Amendment relating to appointment of judges were left untouched, the provisions for security of tenure which is the first and the most important condition of independence of judiciary was restored by providing a healthy device of Supreme Judicial Council. Moreover, in respect of control including the power of posting, promotion and grant of leave and discipline of the subordinate judges and magistrates which was vested absolutely in the President under the 4th Amendment, it was provided that the President should exercise that control in consultation with the Supreme Court. Thus constitutional aspect of independence of both higher and lower judiciary was restored.

Fourthly, the undemocratic provisions of absolute veto power of the President introduced by the 4th Amendment were abolished. Thus the democratic principle of check and balance between the President and the parliament particularly in the matters of law-making was restored.

Fifthly, insertion of the provision of referendum in respect of certain important provisions of the Constitution is a healthy one. Because it now provides a check on the parliament to make any abrupt but fundamental change in the Constitution overnight as was done by the 4th Amendment. Now a party even with two-thirds majority in the parliament will have to think twice before making a fundamental change in the Constitution.

Demerits of the Amendment

Firstly, as regards the composition of the parliament, the number of reserved seats for women was increased from 15 to 30 and the period this provision was to remain in force was extended from 10 to 15 years. This provision enabled the Zia Government to manage two-thirds majority in the parliament. On the other hand, this provision undermined the spirit of

representative government in Bangladesh, for these reserved seats of women members in the parliament works as a balance of power and the ruling party in the parliament uses them as tools to satisfy their undemocratic political purpose.[1]

Secondly, this Amendment inserted a new Article 145A relating to international treaties. It provided that all treaties with foreign countries should be submitted to the President who should cause them to be laid before parliament but there was a significant sub-clause that 'no such treaty should be so laid if the President would consider it to be against the national interest so to do.' This proviso has virtually curtailed the parliament's power in relation to international treaties, for it actually armed the President with dictatorial power to take decisions in matters of international treaties ignoring the parliament. In a true presidential system as it exists in the USA the President cannot make any treaty without the approval of the parliament.

Thirdly, a new Article 92A was created by this Amendment and this Article curtailed the parliament's power over the financial matter and the President was given power to get money from the Consolidated Fund and to expend it without the parliament's approval. In a true presidential system as it exists in the USA the parliament exercises the supreme controlling power over the public money. The US president has no power to expend even a penny from the public purse without the approval of the Congress. "This curtailment of the power of the legislature in matters of finance was, therefore, a serious set-back in the evolution of constitutionalism and democracy in Bangladesh."[2]

Fourthly, religious words 'Bismillahir Rahmanir Rahim' were inserted in the beginning of the Constitution i.e. above the preamble. This was done necessarily with a political end. It was a constitutional tricks played by Zia especially to get quick blind support form a large section of people who are religious but politically unconscious. Likewise one of four major fundamental principles of state policy 'secularism' was omitted and in its

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1 See further, Chapter XVI

2 Choudhury, Dilara. *Ibid*, P. 130

place 'principles of absolute trust and faith in the Almighty Allah' was inserted. This was also done with the same political end.

Fifthly, in the preamble the words, 'historic struggle for national liberation' were replaced by words 'historic war for national independence.' 'Thus the spirit of the struggle which continued for long 24 years against Pakistani colonialism and exploitation, the growth and role of political parties and political leaderships, the role of cultural workers, intellectuals, teachers, students and professional groups and that of common people were undermined, ignored and concealed. The army factor in the 1971 liberation struggle was only brought into prominence though the war, in most cases, was fought by the common people"[1]

Nature of the Governmental System after the 5th Amendment

The above discussion makes it clear that the 5th Amendment actually modified and somewhere liberalised the relations among the institutions of the government introduced by the 4th Amendment. It did not change the fundamental structure of the constitution as introduced by the 4th Amendment. Nor did it make the whole system a democratic one to pave the full way for constitutionalism. And also that cannot be expected particularly from a military government who comes to power completely in an illegal way. The governmental system as it stood after the 5th Amendment was neither a true presidential system as is practised in the USA nor a parliamentary one as is practised in the UK. Neither was it the same presidential system as is practised in France where the Prime Minister and his cabinet are collectively responsible to parliament.[2] The presidency as modified by the 5th Amendment was much more powerful than the presidency under the French Constitution. It was really 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 similarities to that of Ayub Khan of Pakistan. The executive 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

1 Hasanuzzamman, *Search for a New Dimension*, (Dhaka : Pallab Publishers, 1992), P. 19

2 Choudhury, Dilara, *Ibid*, P. 61

of terms in office. Once elected it was quite impossible to remove him from office, for the impeachment procedure as introduced by the 4th amendment was unprecedentedly a difficult one. The Amendment also did not repeal any of the extra-ordinary constitutional devices like emergency, ordinance making, preventive detention etc. through which the president was capable of exercising almost dictatorial power. The President was also the chief legislative initiator through his power to address and power of dissolution of parliament. Also the power of the parliament was kept restricted in many important cases. Zia's system was, therefore, neither a fully democratic responsible government; nor was it an ever hated one party dictatorship as introduced by Mujib. It was a multi-party presidential system blended of democratic and autocratic features.

SIXTH AMENDMENT

On May 30, 1981 President Zia was brutally killed in an unsuccessful army coup. On his death Justice Abdus Sattar, the then Vice-President assumed the role of Acting President. Under Article 123 of the Constitution the presidential vacancy caused by death was to be filled by an election within 180 days of the vacancy occurring. Acting President Sattar was nominated by BNP as a presidential candidate in the election. But a constitutional problem arose respecting the method of Sattar's nomination, for the Constitution did not permit him to contest the election as he was holding an office of profit. Under Article 50 of the Constitution the President could appoint Vice-President any person qualified for election as a member of parliament. Under Article 66 (dd) a person would be disqualified for election as a member of parliament if he was holding an office of profit in the service of the Republic other than an office which is declared by law not to disqualify such holders. There was no law stating that the office of Vice-President was not an office of profit. On the other hand, under Article 66(2A) some persons were exempted from holding an office of profit—such as Prime Minister, Deputy Prime Minister, Minister, Minister of State and Deputy Minister. It was, therefore, clear that the office of the Vice-President continued to be an office of profit and this debarred Sattar from contesting in the election. To overcome this problem, on July 1, 1981 a Bill called the Sixth (Constitution Amendment) Bill was introduced in the House. On 8th July the Bill was passed which now enabled Sattar to contest the

election without resignation from his office. This Amendment amended Articles 51 and 60 excluding, inter alia, the office of 'President, Vice-President, and Acting President free from being office of profit. This Amendment was, therefore, made to face a real situation. No sinister-looking political purpose worked behind it.

SEVENTH AMENDMENT

After the brutal killing of Zia the presidential election was held on 15th November, 1981. Justice Abdus Sattar, the then Acting President and nominee of the ruling party BNP won a landslide victory and became the next President of Bangladesh to Zia. But in the early hours of 24th March, 1982, 128 days after the presidential election was held, a military intervention led by Hussain Muhammad Ershad, the then Chief of Army Staff took place. This is known as the bloodless coup of March, 24. Through this coup Ershad seized power ousting Sattar. Martial law was declared for the second time in Bangladesh; parliament was dissolved; the Constitution was suspended and political activities were banned. Ershad first assumed the office Chief Martial Law Administrator and he nominated Justice Ahsan Uddin Chowdhury as a phantom president. Later on Ershad assumed the offices of both CMLA and president. Ershad kept martial law in force for four years and seven months beginning from 24th March, 1982 to 11th November, 1986. On 11th November, 1986 the Seventh Amendment to the Constitution was passed in the third parliament. By this Amendment Ershad's seizure of power in 1982 and his long term action as CMLA were legitimized. In the Fourth Schedule to the Constitution a new paragraph 19 was added which provided, inter alia, that all Proclamations, Proclamation Order, CMLA's Order, Martial Law Regulation Order, Ordinance and other laws made during the period between 24th March, 1982 and the date of commencement of the Constitution (7th Amendment) Act, 1986 had been validly made and would not be called in question in or before any court or tribunal or authority on any ground whatsoever.

It is important to mention here that Ershad, unlike his two predecessors Mujib and Zia, did not, through this 7th Amendment, make any major constitutional changes. The reason behind may be that what constitutional structure Zia left was very much in favour of maintaining Ershad's dictatorial rule. He inherited a system with all powerful dictatorial executive and a rubber stamp parliament, which in no way

hampered rather it helped to the continuation of limited or controlled democracy.

Except the ratification clause in the 4th Schedule the 7th Amendment amended only one article and it was Article 96 where the age of the Supreme Court judges was increased from 62 to 65 years.

EIGHTH AMENDMENT

The Constitution (Eighth Amendment) Act was adopted by the Fourth Parliament on 7th June, 1988. It introduced the following changes in the Constitution:

1. The word 'Bengali' was replaced by the word 'Bangla' in Article 3 of the Constitution.

2. The word 'Dacca' was replaced by the word 'Dhaka' in Article 5 of the Constitution.

3. A new Article 2A was created where it was provided that 'the state religion of the Republic is Islam but other religions may be practised in peace and harmony in the Republic."

4. Two sub-clauses [30(1) & 30(3)] of Article 30 were omitted. Now, therefore, there remained no bar for the state to confer title, honour or decoration.

5. Articles 100 and 107 were amended and provisions were inserted for setting up six permanent Benches of the High Court Division outside Dhaka. Judiciary was, therefore, decentralised. But this part of the Amendment was challenged in the Supreme Court and the Appellate Division of the Supreme Court in the historic 8th Amendment case nullified the same as unconstitutional.

It is needless to say that this Amendment was done not to face any real situation; a sinister-looking political purpose of Ershad worked behind this Amendment. Though Ershad legalised his seizure of power and long time actions as CMLA through an elected parliament, he was not treated as legitimate ruler by the opposition. The opposition from the very beginning began to look upon Ershad's attempts with suspicion. There was continued movement against his regime. On the way to subdue this continued movement, he first, as a follower of Zia, took the religion 'Islam' as a handy weapon to use it as a posture of his activities so that he could gain the support of the largest section of illiterate population who

are religious but politically unconscious. To that end in view he inserted 'Islam' as the state religion in the Constitution through the 8th Amendment. As a commentator says, frustrated by the failure to acquire legitimacy through electoral process, the regime resorted to widen its support-base by exploiting the religious sentiment of the country's overwhelming majority of Muslim population. Because of the marginal representation of opposition in parliament and its leader known throughout the country as 'loyal opposition leader' the bill caused more uproar outside the parliament than inside it. Almost all major opposition parties, including the ones propagating Islamic dogmatism opposed the Amendment Bill. It was opposed on such grounds as: (i) the bill was politically motivated; (ii) the amendment would constitutionally divide the nation into majority and minority; (iii) it would have bad impact on the communal harmony in the country; and above all, (iv) the parliament itself was illegal and therefore, had no moral right to amend the constitution.[1]

NINTH AMENDMENT

This Amendment was passed on 10th July 1989 and it became a law on 11th July. But it was to come into effect on 1st march 1991. This Amendment amended Articles 49, 50, 51, 53, 54, 72, 119, 122, 123, 124, 148, 152 of and 4th Schedule to the Constitution. It also inserted a new article 53A in the Constitution. It introduced some important changes in the Constitution. Most significant features of this Amendment were following;

1. Provision for direct election for the Vice President.

2. Provision for the election of the President and Vice-President simultaneously.

3. Both President and Vice-President were to hold office for a term of five years.

4. No person was to hold office as President or Vice-President for more than two terms; whether or not the terms were consecutive.

The Amendment, therefore, sought to democratise the executive. But it carries no importance now for the 12th Amendment which reverted the

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[1] Hakim, Muhammad A, *Bangladesh Politics : The Sahabuddin Interregnum*, (Dhaka : UPL, 1993), P. 31-32

governmental system to a parliamentary one has made all its provisions ineffective.

TENTH AMENDMENT

This Amendment was passed in the 4th parliament on 12th June, 1990. It mainly related to the reserved women seats in the parliament as provided for in Article 65.

The original Constitution provided for 15 reserved seats for women members and this provision was to remain in force for 10 years. But in 1979 through the 5th Amendment the number of reserved seats was increased form 15 to 30 and the period this provision was to remain in force was extended from 10 to 15 years. This period expired on 10th December 1987 and as such the 4th parliament did not have any reserved women seats. There were, therefore, debates and discussions within Ershad's ruling party whether such a reservation was necessary or desirable. The mode of election for the women's reserved seats and their role in the parliament had prompted a weekly to term these 30 ladies as "30 sets ornaments in parliament".[1] However Ershad and his ruling party decided to keep such reservation for another period of 10 years. To that end the Constitution (Tenth Amendment) Bill was introduced on 10th June and passed on 12th June, 1990. This Amendment reinserted clause (3) to Article 65 providing for 30 reserved women seats for a further period of 10 years beginning with the commencement of the next parliament (i.e. from the 5th April, 1991 which was first day of the 5th parliament. Certainly this Amendment was done with political purpose, for as mentioned earlier, these reserved seats work as a balance of power or a vote-bank in the parliament.[2] Therefore the 5th and 7th parliaments had 30 indirectly elected women members. However, the 10 years period expired with the expiry of the 7th parliament and hence the 8th parliament does not have any reserved seats for women.

On 16 May, 2004 the 8th Parliament passed the Constitution Fourteenth Amendment Act whereby provisions have been made for 45 women members in reserved seats for another ten years starting from the 8th parliament (See 14th Amendment below).

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1 Weekly 'Jai Jai Din', 2nd year. No 2, July 29, 1986

2 For details, see, chapter XVII

ELEVENTH AND TWELFTH AMENDMENT

Background

As mentioned earlier the armed forces under the leadership of Ershad, the then Chief of Army Staff, overthrew the Sattar government in a bloodless coup on March 24, 1982. Under this second military rule in Bangladesh Ershad came to power and he remained in power for the longest period- 8 years and 9 months. But with the passage of time the intensity of anti-regime movement increased. Throughout his rule, the issue which haunted Ershad was the question of his legitimacy to govern the country. 'His hand picked political party and fraudulent parliamentary elections of 1986 and 1988 and Presidential election of 1987 were looked upon as attempts to apply a democratic vaneer in order to continue his autocratic rule'.[1] The government was convinced by the intensity of the opposition movement that for its survival parliamentary elections were unavoidable. Election was held on 7th May, 1986. Some parties in the AL-led alliance contested in the election. But BNP-backed alliance boycotted it. To be mentioned here that during Ershad 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's rule particularly from November, 1987 faced a serious challenge from the opposition. The parliamentary election of March, 1988 was a watershed in Ershad's rule. In the face of mass-boycott by the major opposition parties the government resorted to such unprecedented election manipulation that a British newspaper openly termed it as 'lies and cheating in the Dhaka poll booth'.[2] The fourth parliamentary election actually further deepened the legitimacy crisis of Ershad government. The anti-regime movement reached its peak. People could not be stopped through killing, arrest and torture. Continuous movement reached its climax in 1990 when 22 major student organisations formed the All Party Students Unity (APSU) and vowed to continue their agitation until the country was emancipated from the clutches of autocratic Ershad and his regime. Moreover, all three main alliances (AL-led Eight party alliance, BNP-led seven party alliance and the left-leaning five party alliance) and

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1 Choudhury, Dilara , *Ibid*, P. 76.
2 Choudhury, Dilara, *Ibid*, P. 77.

Jamat-i-Islami bridged their differences in order to unseat Ershad. On November 19, 1990 all three alliances forged a common platform and signed a joint declaration that outlined the formula of transition from an autocracy to democracy. The famous four points of this joint declaration were following-

i) The 15-party alliance, the 7-party alliance and 5-party alliance would not take part in any election held under the illegitimate Ershad government. They would not only boycott such election but also would resist all elections under Ershad. They would participate only in an election to a sovereign parliament and only when such an election is held under a non-partisan, neutral government.

ii) With a view to establishing genuine democracy Ershad and his government would have to resign. Before resigning Ershad would appoint a person Vice-President who would acceptable to the three alliances and Ershad must hand over power to this Vice-President.

iii) An interim care-taker government would be formed under that Vice-President and its responsibility would be to ensure holding of a free and fair election to a sovereign parliament within 3 months.

iv) The interim government would hand over power to a sovereign parliament elected through free and fair election.

This joint declaration was a milestone in the movement for restoration of democracy. Because now strengthened by this common formula as agreed by all the opposition political parties the anti-Ershad movement gained momentum and an institutionalised coordinating body of the movement got its way to proceed to a point of no return. To suppress the anti-government movement Ershad declared a state of emergency suspending fundamental rights. But the emergency could not bring the tense situation under control; it rather produced a counter-action. The curfew was openly violated. The streets were filled with processions, demonstrations and meetings demanding the resignation of the government. Journalists and newspaper employers stopped the publication of newspaper throughout the country. Many professional groups such as university teachers, lawyers, journalists, doctors, engineers, artists and others lent their unequivocal support to the movement. In all big cities of the country thousands of people came out in the streets defying curfew orders and shouted slogans demanding resignation of Ershad. Radio and television artists, including newscasters severed their relationship with the state controlled mass media. The

whole nation came to a standstill. Under this situation on 3rd December Ershad addressed the nation and declared that in order to ensure a free and fair election he would hand over power to a neutral Vice-President and resign from the post of President fifteen days before the date of submission of nomination. But the opposition did not respond to this proposal as they demanded Ershad's unconditional resignation. Finally the last nail was driven when the army on 4th December decided to withdraw its support form the President and wanted him to leave office. Immediately Ershad decided to resign and hand over power. The television broadcasted the news of Ershad's unconditional resignation. The people's sustained struggle for democracy has at last triumphed with autocratic President Ershad and the unprecedented mass-upsurge compelled him to step down. The wearied people at last heaved a sigh of relief. Another unprecedented jubilation spread out the streets and roads of the country. On 5th December the opposition alliances decided to nominate Justice Sahabuddin Ahmed, the Chief Justice of the Supreme Court as Vice-President to enable him to become the Acting President of the interim government. On 6th December the Vice-President Moudud Ahmed resigned and Ershad appointed Justice Sahabuddin as the Vice-President. Immediately thereafter Ershad himself resigned and the new Vice-President assumed the office of Acting President. Thus the 9 years autocratic regime of Ershad came to an end and the time came to lead the nation on a new journey in search of democracy.

Fifth Parliamentary Election under the Acting President Sahabuddin Ahmed and the Problem of Transfer of Power

Assuming the office of the Acting President Justice Sahabuddin Ahmed first dissolved the existing parliament on 7th December. According to the Joint Declaration Sahabuddin's interim govenrment's main task was to hold a free and fair parliamentary election. To that direction a free and fair election i.e. 5th parliamentary election was held on 27th February, 1991. 'An unprecedented degree of enthusiasm was shown by the political parties and the voters during the 5th parliamentary election. This was mainly because the election itself was the outcome of a prolonged movement by the opposition parties, students and professional groups for the restoration of democracy also because it was the first election in the political history of the country to be held under a

caretaker[1] interim government that was to be above party politics.'[2] In the independent Bangladesh actually no general election was considered totally free and widely accepted till 1991. It was this 5th parliamentary election which came to be considered as fully free and fair for the first time in the electoral history of Bangladesh since 1970.

Local as well as many foreign observers found the election most peaceful, free and fair. The result of the election was, however, startling for it falsified all pre-election speculations. No party could win an absolute majority. The BNP emerged with single largest majority by bagging 140 seats out of 300 whereas the AL which was to emerge as the largest party under the prediction of pre-election speculations and analysis captured 88 seats only. Though the BNP won the single largest majority, it was not in a position to form the government as it lacked the required 151 seats. Addressing the nation on March 1 the Acting President said-

> " ..... Parliament shall be composed of 330 members including reserved women members. ..... At least 166 seats is required for a party to command majority in the parliament. But under the present elected party position in the parliament no member seems to command the confidence of the majority members. It is, therefore, not possible to form a cabinet at this moment under Article 58 of the Constitution"

At this situation the BNP expressed its readiness to form a coalition government with any patriotic and nationalist force. After a hectic lobbying the Jamaat-i-Islami came forward to support the BNP. Now Khaleda Zia was able to command the confidence of the majority members and accordingly under Article 58 of the Constitution Acting President formed a 30 member cabinet headed by Khaleda Zia on March,19. This cabinet was, in accordance with the Constitution, under the absolute control of the Acting President. The President had all the executive powers and the cabinet was to aid and advise the president. Khaleda Zia was not willing to revert the governmental system to a parliamentary one and she began to create pressure upon the Acting

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1 The term 'caretaker' has been used here in general sense; not in strictly legal sense. See further Chapter XXIII

2 Hakim, Muhammad A, *Ibid*, P 46

President to hand over power to the speaker of the parliament. But that was not possible Constitutionally. Acting President in an address to the nation said;

> "In accordance with the Joint Declaration of the three alliances I was to transfer power to a sovereign parliament. Though this Declaration has no Constitutional validity it has the utmost political significance."

Thus reminding the three alliances about their commitments and responsibilities the Acting President urged the members of parliament to resolve the Constitutional issue by amending its provision and thereby to pave safe way for transfer of power. Lastly Khaleda Zia in accordance with the meetings with her kitchen cabinet, of the BNP central committee and of the parliamentary party of the BNP decided to opt for a parliamentary system.

Accordingly on 2 July, 1991 two Bills, the Constitution (Eleventh Amendment) Bill, 1991 and the Constitution (Twelfth Amendment) Bill, 1991 were introduced in parliament by the BNP government. The Opposition Amendment Bill was introduced on July 4, 1991 by Abdus Samad Azad. On the same day four Amendent Bills were introduced by the Worker's Party leader Rashed Khan Menon. In order to areas of difference Parliament decided on July 9 to send all these Bills to a 15 member Select Committee comprising the Treasury and opposition members. After much deliberation and discussion in 36 meetings the committee finalised its report and come to a unanimous decision on 28 July, 1991 and on that very day two Bills, the Constitution (Eleventh Amendment) Bill and the Constitution (Twelfth Amendment) Bill were introduced in the parliament. Then amidst cheers and jubilation they were passed shortly after midnight at 6th August, 1991. The Twelfth Amendment Bill was passed with 307—0 votes and the Eleventh Amendment Bill was passed with 278—0 votes. After the Bills were placed before the Acting President he, according to the amendment procedure under Article 142 of the Constitution, sent the Twelfth Amendment Bill for referendum before his assent. Referendum was held on 15th September. Though the turnout of voters in the referendum was very low, 84% of those who voted favoured the Amedment. The official results of the referendum through a gazette notification came out at 18 September. Thus the Twelfth Amendment came to be effective on 18

September, 1991. A fresh start of counstitutionalism had begun in Bangladesh.

It is pertinent to mention here that in the past every amendment to the Constitution has been considered by political observers to be motivated by personal interest or interests of certain quarters. But the Twelfth Amendment aiming to return to the parliamentary form of government seemed to rise above criticism, for all political powers reached a consensus on the future course of the nation

Subject matter of the Eleventh Amendment

The Constitution (Eleventh Amendment) Bill, 1991 was passed with a view to removing the Constitutional hurdles to the Acting President's return to his previous position in the Supreme Court. While assumed the office of Vice President and then Acting President, he was constitutionally not in a position to hold that post. Because he was holding a post of profit as he was the Chief Justice which debarred him from holding office of Vice President [Article 147(4)]. But without resigning from the post of Chief Justice Sahabuddin Ahmed, in accordance with the positive assurance given by the three alliances, welcomed the post of Acting President for an interim period on condition that after the transfer of power to a duly elected government he would be allowed to get back to his original post of Chief Justice. Therefore to legalise his appointment as Vice-President and his subsequent actions and to find out ways and means for his return to his former office the Eleventh Amendment Act was passed. This Amendment added a new paragraph 21 which, inter alia, legalised the appointment and oath of Sahabuddin Ahmed, Chief Justice of Bangladesh, as Vice-President of the Republic and also the resignation tendered to him on December 6, 1990, by the then President Ershad. Besides, this Act ratified, confirmed and validated all powers exercised, all laws, ordinances promulgated, all orders made, acts and things done and actions and proceedings taken by the Vice-President as Acting President during the period between the 6th December, 1990, and the day of taking over the office of the President by the new President Abdur Rahman Biswas, duly elected under amended provisions of the Constitution.

Moreover, this Act also confirmed and made possible the return of the Vice-President Sahabuddin Ahmed to his previous position of the Chief Justice of Bangladesh.

The Presidential Election of 1991 and the Return of Justice Sahabuddin

With the publication of the result of the referendum on 18th September, 1991 the Twelfth Amendment came into effect and now the amended Constitution elevated the status of the Prime Minister to executive head of government and the Acting President turned into a titular head of the state. As the governmental system was changed from presidential to parliamentary one it was essential to form a new cabinet under the amended Constitution. And as such on 19th September a new parliamentary cabinet under the leadership of Kaleda Zia was sworn in. Acting President was to remain in office till a new President under the new system took oath. To that end presidential election was announced to be held on 8th October. The majority party BNP nominated Abdur Rahman Biswas for the presidency who became controversial for his alleged role in 1971 against the liberation war of Bangladesh. The opposition AL which initially were not prepared to contest in the election lastly nominated Justice Badrul Haider Chowdhury a retired Chief Justice of Bangladesh, just to show a protest against the BNP's decision to nominate a controversial person, in other words, against the politicising of the highest office of the President.[1] The BNP candidate Abdur Rahman Biswas was elected bagging 172 votes while AL-backed Justice Badrul Haider Chawdhury bagged 92 votes. Some parties abstained from voting. They were JP, JI, CPB, NAP, JSD (Siraj), Workers Party, NDP and Islami Oikya Jote. However Biswas was sworn in as president on 9th October and as per the provision of the Eleventh Amendment of the Constitution the Acting President automatically returned to his original post of Chief Justice in the Supreme Court.

Changes Introduced by the Twelfth Amendment

It was the Twelfth Amendment which, like an unexpected beginning, reintroduced parliamentary system in Bangladesh paving the way for a fresh start of constitutionalism. After 16 years of existing dictatorial

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1 For details, see, Hakim, Muhammad. A. *Ibid.* Chapter V.

presidential system introduced by the 4th amendment in 1975 parliamentary system was reverted to for the second time by this Amendment. Except for a few Articles the spirit and language of the Twelfth Amendment are similar to those replaced by the Fourth Amendment. The fundamental changes to that end introduced in the constitution are following:

A. Position of the President

1. The President is now the titular head of the state while the Prime Minister is the chief executive as per the provisions of Articles 48 and 55 of the amended Constitution. The posts of Vice-President and Deputy Prime Minister have been abolished.

2. In the original Constitution the President was to be elected by members of parliament in a poll by secret ballot as provided for in the Second Schedule of the Constitution. But the Twelfth Amendment did not restore that Second Schedule. Now after this Amendment as per Article 48 the President is to be elected by the members of parliament *in accordance with the law* meaning that parliament may by law make provision for election by open ballot which actually imposes a bar on the exercise of personal freedom of members of parliament in electing the President. A law was accordingly enacted which provided for that the presidential election was to be done through open ballot. This provision has, therefore, obviously created an open invitation for the election of a partisan President. A well established practice in all dominions of Great Britain and independent countries adopting parliamentary system of ensuring the neutrality of the head of the state was, therefore, not accepted.

3. Under the provisions introduced by the Fourth Amendment the President could remain in office for an unlimited number of terms. These undemocratic provisions have been abolished and now after the Twelfth Amendment it is provided in Article 50(2) that no President shall hold office for more than two terms. whether or not the terms are consecutive. It has, therefore, restored the democratic provisions of the original Constitution.

4. Under the original Constitution the President could exercise only one function independently. But now after the Twelfth Amendment President can under Article 48(3) exercise independently two functions—

(i) to appoint Prime Minister who appears to him to command the support of the majority of the members of parliament; and

(ii) to appoint the Chief Justice.

The extended power unlike in the original Constitution i.e., appointment of Chief Justice is a healthy provision in the sense that if it were to be exercised on the advice of the Prime Minister then political consideration would have hampered in the appointment procedure in the judiciary.

5. Compared to the original Constitution the Twelfth Amendment has imposed double check on the President's power to summon, prorogue and dissolve parliament by inserting a new proviso to Article 72 " ..... provided further that in exercise of his functions under this clause the President shall act in accordance with the advice of the Prime Minister tendered to him in writing" meaning that now the president shall summon, prorogue and dissolve parliament only under written advice of the Prime Minister and not otherwise. This double check has been imposed with a view to preventing undue and whimsical exercise of power by the President to dissolve parliament making a directly elected government unworkable as had occurred several times in Pakistan.

6. As to the declaration of emergency Article 141A has been amended to the effect that the proclamation of emergency shall require for its validity the counter signature of the Prime Minister before the emergency is proclaimed. Thus the whole power of declaring emergency virtually rests with the Prime Minister. This double check has also been inserted with the same view i.e. to safeguard the possible misuse of power by the president. The politics of united Pakistan left, bitter experiences of such an abuse of power by the presidents for their selfish end rendering the governmental system unworkable.

7. As to the suspension of enforcement of fundamental rights during emergency under Article 141C another double check has been imposed with the same view that the President shall, during emergency, suspend

the enforcement of fundamental rights by order on the written advice of the Prime Minister.

8. As to the impeachment and removal of the President the provisions of the original Constitution have been revived i.e., both the cases of initiation of motion and passing the resolution need simple majority and two-thirds majority respectively.

B. The Prime Minister and the Cabinet

The cabinet headed by the Prime Minister has been re-introduced keeping similarities with the provisions of the original Constitution.

1. It has been categorically provided in Article 55 that the executive power of the Republic shall be exercised by or on the authority of the Prime Minister. And that the cabinet shall be collectively responsible to parliament.

2. The President shall appoint as Prime Minister the member of parliament who appears to him to command the support of the majority members of parliament. Other ministers shall also be appointed by him as may be determined by the Prime Minister (Article 56).

3. Compared to the original Constitution of 1972 two changes have been introduced by the Twelfth Amendment as regards the cabinet.

(i) In the original Constitution under Article 56 ministers could be appointed from outside the parliament but the condition was that such a minister would have to be elected as a member of parliament within six months. But now after the Twelfth Amendment one-tenths of the total number of ministers can be appointed form outside parliament and they unlike as provided in the original Constitution, need not be elected as members of parliament but they must be qualified for election as members of parliament.

It is noteworthy that this provision of appointment of ministers form among non-parliamentary members is not recognised in true parliamentary system. But this is justified in the sense that it enables the government to utilize the service of technocrats. Because in most

developing countries there is a shortage of capable and skilled persons among members of parliament.

(ii) In question of tenure of the office of Prime Minister the original provision was that if the Prime Minister ceases to retain the support of a majority of the members of parliament, he shall either resign his office or advise the President to dissolve the parliament and on such advice the President shall dissolve parliament. But a new condition imposed by the Twelfth Amendment is that if the President is satisfied that no other member of parliament commands the support of the majority of the members of parliament only then he shall dissolve the parliament (Article 57(2)].

Compared to the provisions of the original Constitution the Twelfth Amendment has made a definite improvement with regard to the power of the President to dissolve parliament. Because in the original Constitution it was provided that if the Prime Minister after losing the majority in the parliament or for any other reason requested the President to dissolve parliament, the President had no option but to do so. President's role as a neutral head of the state to provide a check against the whim of a Prime Minister was, therefore, turned into a nullity and also the legislature's role in the dismissal of a Prime Minister and his cabinet was negated. To this point the present Constitution, after the Twelfth Amendment, contains the conventional features of a parliamentary system as far as the powers of the President to dissolve parliament are concerned. Because the President may now exercise a sort of discretion to keep the balance of the Constitution on right turn. President has now an option, before dissolving a parliament at the request of the Prime Minister, to examine the possibility of forming an alternate cabinet. It has, in other words, ensured the legislature's effective role in the dismissal of a Prime Minister and his cabinet.

It should be pointed out that in true parliamentary form of government as is practised in UK, India, Australia etc. the power of dissolution is given to the King or President at his discretion and he uses this power in accordance with well-established traditions and conventions of parliamentary system. But as mentioned earlier this discretionary power of the President was misused during the Pakistan

period which created cabinet instability and rendered parliamentary government unworkable. Taking this bitter experience into consideration the framers of the Constitution of Bangladesh provided for strict provisions without leaving any scope for the President to act arbitrarily.

It is also noteworthy that though the Twelfth Amendment has restored the conventional features of a parliamentary system as far as the powers of the President to dissolve parliament are concerned, that power has lost much of its importance due the barricade created by Article 70 of the Constitution.[1]

C. The Issue of Floor Crossing and Ministerial Responsibility

Compared to the provisions of Article 70 as it stood before the Twelfth Amendment, the Twelfth Amendment has introduced more stringent measures to prevent floor crossing. Two sub-sections have been added to Article 70. Section 70(2) now prevents forming any dissident group within the party. And section 70(3) provides that if an independent member joins any political party he will come under the preview of anti-defection provisions. (For implication and effect of Article 70 please see chapter VIII).

D. The provisions as to the intervening period between two sessions of parliament as provided for in Article 72 were reverted to that of the original Constitution. It has, therefore, strengthened the role of parliament (See also P. 114)

E. Chapter III dealing with the provisions of local government of Part IV of the Constitution which was omitted by the Fourth Amendment has been revived by the Twelfth Amendment. (See also P. 122, 474 – 477)

F. Compared to the original Constitution and the 5th Amendment the Twelfth Amendment has made a sort of improvement with regard to the power of parliament in respect of international treaties. A new Article 145A has been created which now provides that all treaties with foreign

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[1] For details, see, Chapter VIII

countries shall be laid before parliament by the President. Earlier the President could refuse to lay before parliament any of such treaty on the ground of national interest. (see also at P. 154).

THE THIRTEENTH AMENDMENT

For details of this Amendment please see Chapter XXIII.

THE FOURTEENTH AMENDMENT

Background: This amendment was passed on 16 May, 2004. As mentioned above in Tenth Amendment, the last extension of 30 reserved seats for women members in parliament expired in 2001 and as a result the 8th parliament did not have reserved seats. However, after three years of the life of the 8th parliament, on 16 May, 2004 the ruling BNP placed and passed the 14th Constitution Amendment Act to re-introduce reserved seats for women in parliament. This time the number of reserved seat for women member have been increased from 30 to 45. The main provisions of the Act are as follows:

"65(3): Until the dissolution Parliament occurring next after the expiration of the period of ten years beginning from the date of the first meeting of the Parliament next after the Parliament in existence at the time of the Commencement of the Constitution (Fourteenth Amendment) Act, 2004, there shall be reserve forty fives seats exclusively for women members and they will be elected by the aforesaid members in accordance with law on the basis of procedure of proportional representation in the Parliament through single transferable vote."

Insertion of new paragraph in Fourth Schedule:

"23. **Temporary special Provision regarding women members in the Parliament.** (1) for the residual period of the Parliament in existence at the time of the Commencement of the Constitution (fourteenth Amendment) Act, 2004 there shall be reserved forty five seats exclusively for women members and they will be elected by members of the Parliament in accordance with law on the basis of

procedure of proportional representation in the Parliament through single transferable vote.

(2) During the period mentioned in sub-paragraph (1), the Parliament shall consist of the three hundred members mentioned in clasue (2) of article 65 and the forty five women members mentioned in sub-paragraph (1) of this paragraph."

Criticism: The 14th Amendment as a whole has more political ramification than real. The provision for 45 reserved women seats in the parliament has demoralised the idealism and spirit embedded in the original constitution of 1972 particularly articles 10, 19(1), 27, 28(1), 28(2) of it. The thinking of the Constitution makers was to keep this vote bank system operative only ten years which has been extended from time to time by various government by amendments. When the 8th Parliament increased the number of reserved seats for women from 30 to 45 with indirect election system and extended for another ten years, it is clear that the government's aim is to strengthen stigmatic vote bank system rather than true democracy or women representation (See more discussion in Chapter XVII).