CHAPTER VIII

ANTI-DEFECTION LAW IN ARTICLE 70 AND THE MYTH OF PARLIAMENTARY DEMOCRACY IN BANGLADESH[1]

Political Defection

The term 'political defection' generally means to resign from ones own party or to desert a political party in order to join another one. The term is otherwise called 'floor crossing' or 'side swapping' which in the constitutional and political terminology generally means to cross one members own party floor to another floor at the time of voting in the House. It is also known as 'hopping from one side to the other'. In wider sense both the terms have got application in changing a member's allegiance from one party to another, being absent in the parliament ignoring the direction of the party at the time of voting, voting against the party, abstaining from voting being present in the House etc. Though 'political defection' is basically connected with some fundamental rights like personal liberty, freedom of expression, freedom of association etc., it has been a growing political disease particularly in third world countries like Pakistan, India, Nepal, Bangladesh, Malaysia etc. threatening their very political development and hampering the institutionalisation of democracy in many ways. This is because politics in third world countries is hardly based on broad principles or issues. Mostly the political parties are characterized by the politics of conspiracy, self-interest, greed and power-expectation. At present in Bangladesh there are more than one hundred political parties but none of them has definite ideology or programmes to be followed by future generation. Though one or two major parties have their ideology and programmes, their leaders often defy them for their selfish end; almost all parties are based around individuals; most do not have any grass-roots organisations or sufficient support to claim public representation. Those who lack fixed ideas but control money and influence here tends to prosper in political life. Absence of democracy within the party

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[1] A modified form this chapter was published by CAC in 1996 under the heading 'Article 70: Does it Lead to Dictatorship?', and also was read in a seminer in 1997 under the title 'Provisions for Floor Crossing in Atricle 70 of the Constitution and the Parliamentary Democracy in Bangladesh."

organisation, power-expectation among leaders, absence of proper organisational activities of the party, mutual suspicion among party leaders, anti-democratic dynastic phenomenon in party leadership, absence of proper knowledge about a party as an institution of democracy both among leaders and workers, illiterate and politically unconscious people- all these are the factors leading to factionalism and mushroom-growth of political parties. As to political factionalism in Bangladesh there is a frequently quoted statement - 'That one Bengali is one party; two Bengalis, two political parties; and three Bengalis, two political parties with dissident faction in one of them.'[1] If we look at the politics of our elected representative we will also find a very sordid picture; once members are elected, they tend to cross the floor for their selfish end, they defy party decisions and ignore party commitment made to the electorate resulting in splitting of parties and destroying party cohesion. The lure of government office and the consequent illegal economic advantages or, in other words, the scope for corruption and kickbacks are a temptation that very few legislators can resist. As a result they change party or cross the floor frequently. This encourages factionalism and ultimately disrupts the stability of the government and smooth functioning of the entire system.

In the 1970's the problem of defection in India reached alarming proportions. In local Hindi parlance the defecting legislators were called 'Ayaram' and 'Gayaram'- persons who cross the floor (or hop) again and again.[2] Subhash C. Kashyap, who was Secretary - General of Lok Sabha (the House of People) from 1980 to 1990, states in his book '*Anti-Defection Law*':

> 'Between the fourth and fifth general election in 1967 and 1972 from among 4000 odd members of the Lok Sabha and the Legislative Assemblies in the States and the Union Territories, there were nearly 2,000 cases of defection and counter-defection. By the end of March, 1971 approximately 50% of the legislators had changed their party affiliations and several of them did so more than once.... some of them as many as five times. One MLA was found

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1 Baxter, Craig, *Government and Politics in South Asia,* Second ed, (Oxford : West View Press, 1991), P. 248

2 Diwan, Anil, Anti-Defection Law in India, Compiled in *"The Peoples' Representatives : Electoral System in the Asia Pacific Region"*–edited by Graham Hassall & Cheryl Saunders, (Australia: Allen & Unwin, 1997), P. 163

to have defected five times to be a Minister for only five days. For sometime on an average almost one State Government was failing each month due to changes in party affiliations by members. In the case of State Assemblies alone, as much as 50.5 percent of the total number of legislators changed their political affiliations at least once. The percentage would be even more alarming if such state were left out where government happened to be more stable and changes of political affiliations or defections from parties remained very infrequent. That the lure of office played a dominant part in this 'political horse trading' was obvious from the fact that out of 210 defecting legislators of the various States during the first year of 'defection politics', 116 were included in the Council of Ministers in the governments which they helped to form."[1]

Thus the evil of political defection has been a matter of national concern in many developing countries. To stop this widespread floor-crossing (or hopping) many countries have incorporated anti-defection (or anti-hopping) laws in their constitutions. India has made this law through the 52nd Amendment of the Constitution.

Similarly taking a bitter lesson from the political defection in the then undivided Pakistan our Constitution makers have incorporated anti-defection laws in Article 70 of the Constitution. But in doing so the Constitution makers have done more than was necessary to prevent defection and to sustain stability of the government. Now Article 70 has been a stumbling block to the flourishment of democracy in the country. Before going to discuss the historical background of anti-defection law in Article 70 it seems, therefore, more convenient to discuss first Article 70 and its impact over constitutionalism in Bangladesh.

Article 70 of the Bangladesh Constitution

"70 (1) A person elected as a member of Parliament at an election at which he was nominated as candidate by a political party shall vacate his seat if he resigns from that party or votes in Parliament against that party.

Explanation. - If a member of Parliament-

(a) being present in Parliament abstains from voting; or

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1 Quoted, *ibid*, P. 164

(b) absents himself from any sitting of Parliament,

ignoring the direction of the party which nominated him at the election as a candidate not to do so, he shall be deemed to have voted against that party.

(2) if, at any time, any question as to the leadership of the Parliamentary party of a political party arises, the Speaker shall, within seven days of being informed of it in writing by a person claiming the leadership of the majority of the members of that party in Parliament, convene a meeting of all members of parliament of that party in accordance with the rules of procedure of Parliament and determine its Parliamentary leadership by the votes of the majority through division and if, in the matter of voting in Parliament, any member does not comply with the direction of the leadership so determined, he shall be deemed to have voted against that party under clause (1) and shall vacate his seat in the Parliament.

(3) if a person, after being elected as a member of Parliament as an independent candidate, joins any political party, he shall, for the purpose of this article, be deemed to have been elected as a nominee of that party.

Article 70 is one of the grounds of vacation of seats of members of parliament. But as the provision goes, Article 70 has been independently made in the Constitution as an anti-defection law or in the other sense all the conditions of Article 70 have been designed to prevent floor-crossing of the members of the parliament. In the original Constitution of 1972 only two conditions were imposed against defection:

i) if a member resigns from his party; or

ii) if he votes in parliament against his party.

By the 4th Amendment, another two conditions were added by inserting an explanation of the words 'votes in Parliament against his party'. They are:

i) if a member, being present in the parliament, abstains from voting; or

ii) if he, ignoring the direction of his party, absents himself from any sitting of parliament.

Again, by the 12th Amendment, another two conditions have been inserted. The effect of these two conditions are:

i) forming a group within the parliamentary party of a political party has been quite impossible due to provision in Article 70(2).

ii) if an independent elected member of parliament joins any political party, he will come under the purview of anti-defection provisions.

After the 12th Amendment, a member of parliament can be unseated on six grounds under Article 70. This Article, which had only seven lines in the original Constitution, is now almost a full-page.

Implications and Effect of Article 70 in the Politics of Bangladesh

The spirit of parliamentary government lies in the sense that unlike presidential government, this form of government is directly responsible to the legislature. Parliament does not govern the country but the government is formed from within the parliament and parliament retains the stick to beat the government any time it goes beyond the limits expected of it. In presidential system, executive is not responsible to the legislature. It is indirectly responsible to the people and the test of such responsibility comes after a definite period during which it is quite impossible to remove the executive from office. But in a parliamentary system the executive has no definite time limit to run the country though it is elected for a definite period. The executive can govern as long as it can retain majority in parliament. As soon as it looses the support of the majority members of parliament, it falls. A parliamentary form of government has to run the country always in fear of being defeated in the House and therefore, it has to always feel the pulse of the members, and as result, it is more responsive. But when the government finds itself in a position where it cannot be defeated easily in parliament, it becomes less responsive and then it gets easy to be dictatorial. This has been the tendency in Bangladesh, Pakistan and Indian parliamentary democracies and it is Article 70 of our constitution that makes parliamentary government in Bangladesh tend to become an elected dictatorship.

The implications of Article 70 can be discussed under the following heads:

1) Article 70 is contradictory to the fundamental rights of MPs namely personal liberty, freedom of association, freedom of thought and conscience and of speech:

From the broader point of view, political defection is a democratic right connected with personal liberty and freedom of thought and of speech. Right to vote against party decision, or to be absent in the house

in protest of party's undemocratic decision, or abstain from voting, is connected with the personal liberty of a member. A member of the legislature who is elected directly by the people is always expected to act in a democratic spirit. People's mandate is reposed on him not to act on undemocratic party line but to raise voice against whimsical or undemocratic decisions. But as the provision goes, it is quite impossible for a group of a parliamentary party inside parliament to revolt and form a dissident group. Neither an individual nor a group has the right to dissent. It is compulsory for MPs to vote on party lines. No MP can dare raise his voice against his party decision. Though Article 70 is not a bar for free deliberation in party-meetings or committee meetings many MPs have opined that as a result of this provision they can neither speak their mind freely in the parliament nor in the party-meetings. By loosing his free right to vote, or to be present or absent in the parliament, he turns into a puppet of his party. People who elected him cannot expect him to use his conscience on their behalf. Many of the members of the 5th and 7th Parliaments of Bangladesh have expressed their views that Article 70 is repressive. It has been a deterrent to their playing an effective democratic role in legislation and other functioning in the parliament.

2) Article 70 undermines the spirit of responsible government and leads to elective dictatorship in Bangladesh:

The underlying principle of a parliamentary democracy is that the government is directly responsible to the legislature. Parliamentary government has to pass every step counting the pulse of the majority members of the legislature, for it may at any time be defeated on the floor. It is called a responsible government mainly because of two intrinsic features - individual responsibility of the ministers and collective responsibility of the cabinet. In the Bangladesh Constitution, no provision for individual responsibility has been made; nor does it exist in the political culture. Article 55 however provides for collective responsibility to the effect that 'The cabinet shall be collectively responsible to parliament'. But ironically enough, this provision for collective responsibility has become a soundless vessel because of Article 70 as the cabinet is always sure that it is not going to be defeated by motion of no-confidence or confidence, for no member of the majority party has the right to vote against the party. The cabinet does not need to feel the pulse of the majority members. So obviously it is easier for the Prime Minister to be dictatorial and hence the lofty idealism with which

the parliamentary government was accepted has been negated. Undoubtedly, it can, therefore, be said that the Bangladesh polity has parliamentary democracy in form, not in essence or culture. 'Article 70 is contradictory to the principle of democracy and right of conscience as guaranteed by the Constitution . . . . . Democracy cannot flourish if members of parliament were to be blackmailed by party hierarchy. It tends to place the party above the interest of the nation. Although in practice, members are to go along with the line of the party to implement its programme, to impose a constitutional bar on the freedom of the members, in case the party deviated from its declared policies and programmes, could have impaired the functioning of the parliament itself. Members are elected for a period of five years making pledges to their respective constituencies on the basis of political programme and, therefore, it was undemocratic to tie them down to the dictates of a political party[1] ".

3) Article 70 is a great hindrance to the ensuring of rule of law in the country:

Rule of law as distinguished from rule of man or party, means rule of that law which is passed in a democratically elected parliament after adequate discussion and deliberation. When there is the scope of adequate deliberation and discussion over a bill, it creates environment to remove undemocratic provisions from it. But because of Article 70 no dissenting opinion can be made by the members of the ruling party and as a result every bill, however undemocratic it may be, gets quickly passed or approved. The government always with a view to avoiding debate makes law by ordinances and later gets them approved under the sweeping power of Article 70. The number of ordinances placed for approval is always far larger than the general bills passed. Sometimes ordinance is made 4 or 5 days before the starts of parliament session and sometimes a parliament session only approves ordinances and no other legislative function is done at all. The second session of the fourth parliament, first, thirteenth and nineteenth session of the fifth parliament provide glaring example of it. This tendency of the government as pointed out by a commentator 'shows an attitude of complete disregard for the parliamentary culture and reluctance for building political

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1 Ahmed. Moudud , *Bangladesh : Era of Sheikh Mujibur Rahman*, P.108

institutions. This is an attitude that has become ingrained in our society resulting in the deep morass into which politics in this country has sunk'.[1] For this widespread misuse of ordinance making power by-passing the parliament it is sometimes typically said that Bangladesh Parliament does not legislate but legitimates. So Article 70 has turned a responsible government into an elected dictatorial government and rule of law into the rule of party.

Floor-crossing, or voting against the party decision, or being absent in the House in protest of a party's undemocratic decision is always connected with the democratic rights like personal liberty freedom of expression etc. In developed countries like Britain, USA, Canada, France, there exist unfettered voting right for members of the legislature. To stop floor-crossing is an inconceivable matter in those countries. Now a question, therefore, arises why have such undemocratic provisions been incorporated in the Constitution?

It was the result of bitter experience of severe political defections in 25 years of the then Pakistan politics. Unfettered political defection and widespread floor-crossing were the only cause of fall of parliamentary government in the then Pakistan. Now, we should see the scenario of politics in the then East Pakistan and defections within the AL which have justified the insertion of anti-defection law in Article 70.

Scenario of Political Defection in the then East Pakistan

The past experience of the parliamentary system in Pakistan, both at centre and in the states, showed that members once elected tended to cross the floor for their selfish ends rendering the parliamentary system unworkable on many occasions. They would defy party decisions and ignore party commitments made to the electorate resulting in splitting of parties and destroying of party cohesion. This encouraged factionalism and ultimately disrupted the stability of the government and smooth functioning of the entire system.

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[1] *Legislation by Ordinance*, A Paper by, Choudhury, Nazim Kamran, P. 22 (Published by CAC)

The fall of parliamentary government in Pakistan was mainly caused by political defection. Let us see the scenario in the then East Pakistan. In the provincial elections of 1954 the United Front had an unprecedented victory which affected the Muslim League administration of the central government and created a sense of panic in the mind of ruling elite. 'It was a healthy sign to provide a suitable basis for the growth and success of democracy in East Pakistan'.[1] Winning the landslide victory the United Front formed government in East Bengal[2] under the leadership of A.K. Fazlul Haq.

The impact of the election also had a direct bearing on the members of the Constituent Assembly, particularly those who were representing East Pakistan on behalf of Muslim League. But the United Front could not remain united due to political defections. It broke as each constituent party was racing to have the test of power. The AL, the major component of United Front, came out of the Front for power sharing in the centre.

Coming out from the United Front, AL became the opposition, and Abu Hossain Sarkar of United Front formed the government in 1955 under the leadership of A K Fazlul Haq, the leader of the rest of the United Front. But this cabinet, supported by some minor parties like, Congress Party, Scheduled Cast, and United Progressive Party, was very weak. A coalition such as this did not have a common policy. Each group

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1 Chowdhury , Dr. Muzaffar Ahmed, *Government and Politics in Pakistan*, P.193

2 From the 14th August ,1947 till 1956 the name of this country was 'East Bengal.' In the 1956 Constitution of Pakistan this name was replaced by 'East Pakistan' as one of the two wings of Pakistan. In 1962 Constitution the same 'East Pakistan' was retained which continued till the independence of Bangladesh. The name 'Bangladesh' came to be visible for the first time, most probably, in some slogans used by 'Nucleus' a group of Chatra Leaque (Student League) under the leadership of Sirajul Alam Khan in the days of mass-upsurge, particularly in February, 1969, against Ayub Administration. Two of the slogans were 'Amar Desh, Tomar Desh, Bangladesh' (My country and your country is Bangladesh), 'Bir Bangalee Astra Dhar, Bangladesh Shadhin Kar' (Heroic Bangalee ! Take arms and liberate Bangladesh) [See. Sirajul Islam, *Bangladesher Itihas* (History of Banlgadesh) Voll.I. PP. 556 – 557]. Later on 5th December, 1969 in a gathering on the death anniversary of Hussain Shahid Suhrawardy Sheikh Mujib formally declared the name of this country as 'Bangladesh' . This name came to be realised through the war of independence in 1971. (Based on interview with Barrister Amirul Islam.)

of this coalition had different ideas to incorporate into the Constitution of 1956. Major disagreements on both local and national issues caused four of the minor parties to withdraw their support to Abu Hossain Sarkar, and government had to resign on 6th September 1956. After the fall of the Abu Hossain Sarkar government, Ataur Rahmn Khan, the leader of the opposition AL, formed the new government. A week later H. S. Suhrawardy also became of Prime Minister of Pakistan. So AL came to power both at the centre and in the province. However, due to disagreement with Suhrawardy's foreign policy Moulana Abdul Hamid Khan Bhashani came out of the AL and formed a new party, the NAP. About 28 members of AL joined the NAP, and decided to withdraw their support to the provincial government. As a result, Ataur Rahman Khan's cabinet was dismissed on March 31, 1958.

The AL ministry was reinstated by the intervention of the centre.[1] But on June 18, 1958 the ministry was defeated on the floor of the House on a cut-motion, when all on a sudden the NAP and some Hindu members withdrew their support.

After the fall of AL government Abu Hossain Sarkar was commissioned to form a new ministry on June 18, 1958. But the Sarkar ministry was again defeated on the floor by AL with the support of NAP on June 22, 1958.

As a result of this chaos in politics of East Pakistan, the government was taken over by the centre. After the withdrawal of the central government's rule on 25th August, 1958 Ataur Rahman Khan was again invited to form the government. The East Pakistan Provincial Assembly was called into session on September 20, 1958. The Speaker was Abdul Hakim. Government members moved a no-confidence motion against the Speaker. The threatening attitude of government members towards the Speaker, intending to remove him from the House, resulted in scuffling and rioting between the members of government and opposition parties

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[1] It is to be noted that in March 31,1958 after the fall of the Ataur Rahman's government Abu Hossain Sarkar was invited to form government. But within 12 hours Abu Hossain Sarkar's ministry was dismissed by the central government and the next day ,1st April, Ataur Rahman was invited to form the government.

and the Speaker was removed from the House by force. On September 23, the government was determined to carry on with the business of the House with Deputy Speaker Shahed Ali in the chair. But the opposition (KSP) did not accept him as acting Speaker. The House became virtually an unruly chamber from the start, causing insult to the National Flag and causing death to the Deputy Speaker. Thus the law-makers of the East Pakistan Provincial Assembly became law-breakers, and the blackest chapter in the history of our parliamentary politics was created. This disgraceful state of affairs was one of the main cause of declaring martial law on October 7, 1958. In the proclamation President Mirza in justification of the military take over said:'

> "The disgraceful scene enacted recently in the East Pakistan Assembly is known to all .....it certainly not a civilized mode of procedure. You do not raise the prestige of your country by beating the Speaker, killing the Deputy Speaker and desecrating the National Flag. The mentality of the political parties has sunk so low that I am unable any longer to believe that elections will improve the present chaotic internal situation and enable us to form a strong and stable government capable of dealing with the innumerable and complex problems facing us today....."

Defections and Factional Strife within the Awami League

Now we should evaluate the splits and conflicts within the AL during Pakistan which left an impact on it to subsequently enact anti-defection laws in Bangladesh.

The AL suffered a split first in February, 1955 over the issue of A.K. Fazlul Huq's leadership. A group of AL (above 32 members) led by Abdus Salam Khan and Hasimuddin Ahmed disobeyed the AL mandate to vote for no-confidence motion against Huq at the United Front parliamentary party meeting.

The second split which seriously destroyed the organization of the AL and also weakened the strength in the legislature, was the formation of NAP. NAP was formed by Moulana Bhashani due to disagreement between him and Suhrawardy on the question of foreign policy of Pakistan. These differences within the party were a source of

embarrassment to the AL in power in the centre, as well as in the province." For the AL, the implications of the formation of NAP were twofold. In the organizational field, the EPAL lost the control of several district branches and Dhaka City AL. In the Assembly, the AL lost the support of about 25 of its members. Its position in the government was further weakened by the loss of a coalition partner— the Ganatantri Dal. The official Ganatantri Dal merged with the NAP, while a rump body claimed to continue its separate entity in the legislature".[1] In 1957 before the Autumn session of the Assembly the NAP parliamentary party was formed and a distinct political force emerged in the Assembly. And this new force (NAP) played a disruptive role of supporting and then opposing one ministry after another in East Pakistan. At the first, the AL government had to resign, for it no more commanded the majority in the House (31st March, 1958). NAP's withdrawal of support led to fall of the AL ministry on 19th June, 1958 and the United Front ministry succeeded it. The same day the NAP switched support to the AL and brought down the United Front ministry.

Besides the loss of members in two solid blocks (NAP and Salam-Hashem group) damaging seriously the party cohesion and organization, AL also suffered several minor individual defections in the legislature. The real picture of these individual defections has not been worked out by any academic research or investigation. But some idea may be had from Ataur Rahman Khan's reminiscences of his two years as Chief Minister. He wrote that individuals and groups of members of his party (at both legislative and organizational levels) threatened to severe links with the party and withdraw support for ordinary matters in the nature of personal favours.

> 'Several individual members for their personal interest did not attend party meetings, did not follow party decisions and in the House they whimsically crossed floor.....
>
> Even for some highly subjective reasons such as lack of adequate courtesy shown by the Chief Minister, loss of prestige etc., party members defected or voted against the party.....

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[1] Chowdhury Dr. Najma, *The Legislative Process in Bangladesh: Politics and Functioning of then East Bengal Legislature 1947-58*, P. 197.

One member did not get the intervention of the Chief Minister in his personal case and as a result he defected.....

Another member did not get the intervention of the Chief Minister in reinstating a police officer who had been dismissed for indecency towards a girl and as a result he defected.....

Another member was accused of black-marketing. He sought intervention of the Chief Minister and failing to get this he defected.....

Another member's name was not included in the local relief committee, and in protest he defected.....

Money for flood affected people was sent in the name of a school secretary and not in the name of the member of the locality. The member in protest defected.....

Another member failed to acquire possession of a house in an unfair way, and crossed floor of the House.....

Another woman member failed in lobbying for husband's service and absented herself from the sitting of the House....."[1]

The above discussion makes it clear that splits and individual defections in the AL was not for any clash of ideology or principle but for self-interest, personal likes or dislikes etc.' Sometimes in the hope of rewards like cabinet posts, parliamentary appointments, permits, licenses etc. members changed their parties".[2] 'Party indiscipline and lack of solidarity within the parties were manifested in the free use of threats and pressures. Members crossed the floor and changed parties freely and even charges of kidnapping and manhandling of Assembly members were made by the both sides".[3]

It is to be noted that though AL suffered several minor individual defections as mentioned above in the legislature, none of these were the cause of the fall of government in the province. But these, specially the role of NAP, left a bitter lesson that politics in our society is based not on principle and ideology, but on selfish needs. Politicians after being

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1 Khan, Ataur Rahman. *Two Years of Chief Ministership.* (in Bengali), P. 176-203, (emphasis added by the author).

2 Chowdhury , Dr. Najma: *ibid.*, P. 216

3 Khan, Mohammed Ayub, *Friends not Masters*, P.55.

elected think that power is the ultimate goal of politics and for that end, they can easily defy party mandate and change parties making the parliamentary process unworkable.

'It is with this end in view that the AL committed itself since long to stop this possible anarchy within the parliament. As long back as in 1969 when a Constitution Amendment Bill was drafted for the National Assembly of Ayub Khan amending the 1962 Constitution, the AL incorporated such a provision. It provided that:

4(a) If any person, having been elected to a legislature as a candidate or nominee of political party -

i) withdraws himself from it; or

ii) is expelled by his political party for violation of the party's mandate in respect of any matter relating to his activities as a member of the legislature;

iii) votes, or abstains from voting against the direction of such political party upon any legislative measure or any motion put to vote in the legislature, he shall cease to be a member of the legislature for the unexpired period of his term unless such member is re-elected at a by-election occasioned by the vacancy created by such cessation of membership.

It is evident from the above provision that the thought-process of the AL leader was working for a long time on this line and therefore, in the 1972 Constitution they maintained the same views with some leniency.[1]

Comment and Suggestions for Article 70

Political defections and floor-crossings have been a frequent phenamenon in democracy of India, Bangladesh, Pakistan etc. Recently Nepal has also been affected seriously by this political disease. India, Pakistan and Bangladesh taking bitter lessons from their past history were bound to insert anti-defection provisions into their constitutions. So anti-defection law is a political reality in these countries, however undemocratic it may be. Because for national interests stable and effective government is always more important than the system. However, it should not be forgotten that in the name of stable government the whole spirit of responsible government and rule of law cannot be negated. But such has been the outcome of Article 70 when

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[1] Ahmed. Moudud . *Bangladesh: Era of Sheikh Mujibur Rahman*, P.109.

major laws of vital national interests are being made by ordinances and are getting easy approval without any protest or challenge.

Again, politics in third world countries like Bangladesh, Pakistan and India are hardly based on broad principles or issues. Mostly the political parties are characterized by the politics of conspiracy, self-interest, greed and power expectation. They are personality-oriented with followers clustering round a party leader who in turn becomes dictatorial.

What we now, therefore, have to do is to find a compromise process whereby floor-crossing can be prevented and the spirit of responsible parliamentary government can also be sustained. The existing provision in Article 70 is quite destructive to the spirit of parliamentary democracy. So the author ventures to make the following recommendations:

The prevention of floor-crossing and defection is essential only for the stability of the government. The stability of the government is tested only by a motion of no-confidence or confidence. The application of the anti-defection law i.e. the provision of Article 70 must, therefore, be restricted to a vote on a no-confidence or confidence motion only. A normal or general bill is not necessarily connected with the stability of the government. The government may fail to pass a bill, be it a money bill or cut-motion or any other bill. But failure of passing this bill, or even defeat in a cut-motion does not mean the fall of the government. The government has to face a no-confidence motion and lose before it falls.

If the anti-defection law is applied only to motions of no-confidence or confidence MPs will have freedom to oppose an undemocratic bill, be it money bill or approval of an ordinance. As a result, rule of law and the spirit of responsible parliamentary government will not be so hampered. A proviso may be inserted by an Amendment to Article 70 to the following effect:

> 'Provided that the provision of this Article shall be applied only when the government faces a motion of no-confidence or confidence.'

It is to be noted that in the 7th parliament a private member's bill named the Constitution (Fourteenth Amendment) (Parliamentary

Privileges) Bill 1997 was moved. This bill moved by a JP member, Golam Mohammed Kader, sought to amend Article 70 of the Constitution with a view to giving the MPs more freedom in voting in parliament. In particular, the Bill provided that the restriction of Article 70 would be applicable only when an MP was required to vote on a motion of no-confidence against the Government or when a member was required to prove that he/she commanded the support of the majority of the MPs. However, being a private member's bill it was not introduced in the House though the Committee on Private Members Bill and Resolutions recommended its introduction in July 1999.

Parliamentary democracy should be allowed to grow in its natural way. The success of parliamentary democracy depends on democracy and discipline within the political parties. It is difficult to maintain democracy at the governmental level if there is no democracy within the party unit. And democracy within the party is a matter of gradual development; it cannot be made by force of a law . It is for the disciplined party system that no government with a majority has been overthrown in the House of Commons since 1895. A political instance like voting against the party or being absent in the House with a view to defeating the government for selfish end can never be found in developed countries. There is no need to pass motion of censure, no-confidence motion or cut motion in a well-developed parliamentary polity. Whenever any such possibility appears in the House, the cabinet or respective minister willingly resigns. Here lies the true political spirit and culture of responsible government. It cannot be sustained by anti-defection law. So from the broader point of view, we need greatly democracy and discipline within the parties, the political spirit of responsible government among the party leaders and MPs.

With regard to floor crossing a writ was filled in the High Court Division in 1998 following two opposition MPs joining Treasury Bench without permission from their party. The matter was decided by the Appellate Division in the *Secretary, Parliament Secretariat v. Khandaker Delwar Hossain and Others* 19 BLD(AD) 276. The AD held that if there is any dispute with regard to disqualification of an MP, the matter is to be decided by the Election Commission; Speaker of the Parliament does not have any power. The court also held that the subject matter of Article 70 is within the exclusive jurisdiction of the Election Commission.

CHAPTER IX

RESPONSIBLE GOVERNMENT

Responsibility

Generally responsibility means the accountability of a person or body to another person or body. This responsibility may be political or legal. But the term 'responsibility' in relation to modern democratic governmental system means political responsibility i.e. responsibility to the people or a body representing the people. This political responsibility may be used in two senses (i) Direct Responsibility; and (ii) Indirect Responsibility. Both the presidential and parliamentary form of government are responsible government but the presidential system has no, in a sense, direct responsibility; its responsibility is indirect whereas the parliamentary system has direct responsibility.

Indirect Responsibility

When the accountability or responsibility of a government cannot be enforced directly by an elected body or parliament, the responsibility is indirect. Presidential system of government has this indirect responsibility. This is because in a presidential system all ministers are like servants or advisers of the President. Unlike in the parliamentary system ministers in presidential system have neither individual responsibility nor collective responsibility to be enforced by parliament. They are absolutely responsible to the President who can dismiss them whenever he wishes. All political responsibility is vested in the President alone and he has to take responsibility for all governmental actions. But there is no mechanism in this system to enforce this responsibility of the President directly. Because the President is not accountable to parliament; he has no responsibility to justify his action in parliament and parliament can never proceed for no-confidence motion against him. He is truly indirectly responsible to the people and the test of such responsibility comes after a definite period, e.g. five years, during which it is quite impossible to remove him from office.

It is pertinent to mention here that in presidential system the President may be removed from his office through impeachment.

But this impeachment is not any device to make him responsible to parliament directly. Because-

First, the impeachment procedure is a very difficult procedure; it cannot be enforced by any simple majority. To impeach the President under the US Constitution a resolution thereto is to be moved in the House of Representative by one or more members. If the resolution is supported by the majority in the House, it then goes to the Senate for trial. If the charge is supported by votes of two-thirds of the total members present, the president shall vacate his office (Article 1 Sec. 3 & Article 2 Sec. 4). During more than 200 years of the US presidential system only two times the Congress took attempts to impeach the President. The first was in 1867 when the Congress moved an impeachment motion against President Andrew Johnson. But the motion could not be passed for the want of one vote in favour of the motion. The second was in 1972 when the Congress proceeded to move impeachment against President Nixon on the ground of his Watergate scandal. But Nixon resigned before the motion could be moved.

Second, the President cannot be impeached on any ground of political responsibility. He can be impeached only on some limited grounds specifically mentioned in the constitution.

Direct Responsibility

When the responsibility of a government can be enforced directly by a representative body of the people i.e., parliament, the responsibility may be termed as a direct responsibility. This type of responsibility exists in Westminster type of parliamentary form of government. "The term responsibility which is more common in Britain than in most other countries is to signify the accountability of ministers or of the government as a whole to an elected assembly".[1] Thus in true sense responsible government means a government which is directly accountable to a parliament and is bound to resign whenever it loses support of the majority in it. For two specific reasons or intrinsic features attributed to this system

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1 Birch, A.H. *Representative & Responsible Government*, (London: George Allen And Unwin Ltd, 1966), P. 20

the parliamentary form of government is called responsible government. They are-

i) Individual responsibility of ministers; and

ii) Collective responsibility of the cabinet or government as a whole.

Individual Responsibility

Every individual minister is responsible to parliament for the work of his department. He must answer all questions relating to his department and must give the House a full and frank explanation of policy and decisions. He is personally responsible to parliament for every failure of departmental policy or administration whether it is the minister himself who was at fault, or a civil servant or if the failure resulted from a defect of departmental organisation. He cannot get rid of his liability by pleading that he acted in obedience to royal order or by imputing the blame to civil servants. The minister must submit to the judgment of parliament and if the failure is a serious one, he should resign (or be ready to resign) from office without wanting for a vote of censure.

Collective Responsibility

In parliamentary form of government the cabinet headed by the prime minister is the real executive. This executive i.e., the cabinet is collectively responsible to parliament in the sense that it can remain in power so long it commands the confidence of the majority in parliament and as soon as the confidence is withdrawn the government as a whole must resign. The government in parliamentary system has, therefore, no definite time-limit to run the country although it is elected for a definite period. It has to rule the country always in fear of being defeated in the House and therefore it has to always feel the pulse of the majority members, and as a result, the responsibility of such a government is definitely a direct one.

How far a Responsible Government has been ensured in the Constitution of Bangladesh.

The original Constitution of 1972 of Bangladesh introduced parliamentary form of government. Then after 16 years of presidential system introduced by the 4th Amendment in 1975 the 12th Amendment has again re-introduced parliamentary system in the country. But the fact is that the Constitution (neither the original nor the 12th Amendment) has not ensured a responsible government. Because none of the two necessary conditions (individual responsibility and collective responsibility) of a true responsible government have been ensured in the Constitution.

First, there is no provision for individual responsibility of ministers in the Constitution. No mechanism is provided either in the Constitution or in the parliamentary procedure whereby a motion of censure can be moved in parliament. A minister can be questioned and criticised in the House but cannot be forced to resign by passing a vote of censure. As a result, a minister can easily engage himself into departmental corruption.

Second, Article 55(3) of the Constitution provides for collective responsibility to the effect- "The cabinet shall be collectively responsible to parliament". But ironically enough this provision for collective responsibility has become a soundless vessel because of Article 70 of the Constitution. Under Article 70 no member of the majority party has right to vote against the party and as result, the cabinet is always sure that it will never be defeated on the floor by motion of no confidence. So under the Constitutional arrangement the cabinet cannot be made responsible to parliament. The Constitution of Bangladesh, therefore, provides for parliamentary form of government but not a responsible government; it is rather a prime ministerial dictatorship.[1]

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1 See, further, Chapters VIII, IX and XXIV

CHAPTER X

MINISTERIAL RESPONSIBILITY

The doctrine of ministerial responsibility is a cardinal principle of the cabinet system of government. It is the doctrine which makes this form of government a directly responsible government. This doctrine is embodied purely in conventions which cannot be legally enforced. Both the conventions relating to ministerial responsibility (individual and collective) were developed during the eighteenth and nineteenth centuries corresponding with the rise of parliament and the decline in the power of the crown. And in both the cases the practice was established long before the doctrine was announced. The underlying philosophy behind it was to bring the executive under the direct control of parliament.

The principle of ministerial responsibility means the political accountability of the executive to parliament. From broader point of view a British minister has responsibility in three ways - he is directly responsible to parliament, indirectly to the people and constitutionally to the King or Queen. Individual ministers are responsible to parliament for the work of their departments and the cabinet is collectively responsible for government policy. This responsibility is direct in the sense that ministers have to answer and explain departmental policies and decisions directly to parliament and have to resign as soon as a vote of censure or of no-confidence is passed. Secondly, ministers are indirectly responsible to the people in the sense that they are not bound to justify their actions directly to common people. But the parliament to which they are directly responsible is the House of elected representatives of the people. To be directly responsible to parliament is, therefore, to be indirectly responsible to people. Thirdly, ministers are constitutionally responsible to the king. This responsibility is a legal one as opposed to political one. Because in Britain there has been monarchy from time immemorial and from legal point of view the king is the fountain of all power and ministers are his subordinate employees whom he can dismiss any time. But this legal responsibility of ministers now is a theory only – a legal fiction; the reality is quite opposite, for the absolute monarch is

now a constitutional monarch who cannot, unlike in the past, dismiss a minister according to his wishes ; his power is now strictly controlled by conventions.

Kinds of Ministerial Responsibilities

Ministerial responsibility is of two kinds- individual responsibility and collective responsibility.

Individual Responsibility

Every minister is the political head of a government department. Individual responsibility of a minister means that as the political head of his department he is individually answerable to parliament for all its acts and omissions. He must answer all questions relating to his department and must give the House a full and frank explanation of policy and decisions. He is personally responsible to parliament for every failure of departmental policy and administration whether it is the minister himself who was at fault or a civil servant or if the failure resulted from a defect of departmental organisation. He cannot get rid of his liability by pleading that he acted in obedience to royal order or by imputing the blame to civil servants. The minister must submit to the judgment of parliament and if the failure is a serious one, he should resign (or be ready to resign) from office without wanting for a vote of censure.

According A.H. Birch the doctrine of individual responsibility has two strands-

> Firstly, the political head of a government and only the political head, is answerable to parliament for all the actions of that department. Secondly, the minister must receive the whole praise of what is well done and the whole blame of what is ill' in the works of his department, and that in consequence he must resign if serious blunders are expressed.[1]

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1 Birch, A.H. *Representative and Responsible Government*, (London: George Allen and Unwin Ltd. 1966), P. 140

Collective Responsibility

The wheel-power of the government in a Westminster type parliamentary system is the collective responsibility of ministers in parliament. In England this principle has so long been considered indisputable and essential part of the constitution. Collective responsibility means the accountability of the cabinet[1] or of the government as a whole to parliament. Lord Salisbury gives a good explanation of this principle -

> "For all that passes in cabinet each member of it who does not resign is absolutely and irretrievably responsible and has not right afterwards to say that he agreed in one case to a compromise while in another he was persuaded by his colleagues."[2]

Another better explanation can be found in Joseph Chamberlain's statement -

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1 **Difference between the Ministry and the Cabinet**
In British system there is a clear distinction between the Cabinet and Ministry. The distinction is two-fold-from the view-point of their composition and of their functions. From the view-point of composition it can be said that the Ministry consists of all those members of parliament who are selected by the Prime Minister to hold important executive posts and who are to resign their posts when the Prime Minister resigns. On the other hand, the Cabinet consists of such members of the Ministry as the Prime Minister invites to join him in "tendering advice to the King on the government of the country". The Cabinet is, therefore, the inner circle within the Ministry. All Cabinet members are ministers but all ministers are not cabinet members. From the view point of functions, Ministry and Cabinet differ in that whereas the Ministry never meets as a body, the Cabinet frequently meets as a body. Ministers as such have duties only as individual officers of administration, each in his particular portfolio. Cabinet members have collective obligation i.e. to hold meetings, to deliberate, to decide upon policy, to co-ordinate and in general to 'head up' the government.
The Constitution of Bangladesh also maintains the distinction between the Ministry and the Cabinet. Article 56 of the Constitution says that 'there shall be a Prime Minister and such other Ministers, Ministers of State and Deputy Ministers as may be determined by the Prime Minister'. Again, Article 55 says, "There shall be a cabinet for Bangladesh having the Prime Minister as its head and comprising also such other Ministers as the Prime Minister may from time to time designate". Thus according to Bangladesh Constitution the Ministry consists of four types of ministers- (i) a Prime Minister; (i) Ministers; (iii) Ministers of State ; and (iv) Deputy Ministers. And according to Rules of Business (Chapter–4) only the Prime Minister and Ministers are members of the Cabinet.

2 Quoted by Jennings, *Cabinet Government*,. 3rd ed, (London: Cambridge University Press, 1969), P. 277

"The decision (of the cabinet) freely arrived at should be loyally supported and considered as the decision of the whole of government. Of course, there may be occasions in which the differences is of so vital a character that it is impossible for the minority ..... to continue their support, and in that case the minority breaks up or the minority member or members resign."[1]

Sir Ivor Jennings says that the parliamentary aspect of collective responsibility is that the defeat of a minister on any issue is a defeat of the government. The proposals made by a minister whether or not they have been approved by the cabinet, are the proposals of the government. An attack on a minister is an attack on the government.[2]

Harvey and Bather says -

"In its decision, 'the cabinet is a unity to the House'. While a minister can speak against any proposal in a cabinet meeting, he must either support the policy decided upon or resign .... the cabinet stands or falls together .... In practice, therefore, all that collective responsibility means today is that every member of the government must be prepared to support all cabinet decisions both inside and outside the House."[3]

Lord Morrison says -

"All ministers whether members of the cabinet or not share a collective responsibility including that for cabinet or cabinet committee decision in the reaching of which they have taken in part whatever ..... . The Government must stand together as a whole and ministers must not contradict each other, otherwise cracks will appear in the governmental fabric .... All this is part of contract of service. It has to be endured as a condition of acceptance of office."[4]

Lord Morley's views are also noteworthy. He says-

"The cabinet is a unit -a unit as regards the sovereign, and a unit as regards the legislature. Its views are laid before the sovereign and before parliament, as if they were the views of one man. It gives its

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1 Quoted by Jennings, *Cabinet Government,* Ibid, P. 277

2 Ibid, P. 497

3 Harvey & Bather, *The British Constitution and Politics,* 5th ed, (London : MacMillan, 1990), P. 239–40

4 Morrison, Lord, *Government and Parliament,* 3rd ed, (London : Oxford University Press. 1967), P. 74

advice as a single whole, both in the royal closet, and in the hereditary or the representative chamber ..... The first mark of the cabinet, as that institution is now understood, is united and indivisible responsibility."[1]

From the above quotations it may now be concluded that 'collective responsibility' means essentially that the cabinet must have the same and single voice as a 'unity to the House'. Every minister must support all cabinet decisions both inside and outside parliament. A minister who is not prepared to defend a cabinet decision must, therefore, resign. And secondly, the tenure of the cabinet or, in other words, the government as a whole depends on the confidence of the majority in parliament. As soon as the confidence is withdrawn from the cabinet, the government as a whole must resign. All ministers, therefore, share a collective responsibility for the major issues of policy and general conduct of affairs. To put it into the words of John Alder, the principle of collective responsibility has three aspects : (i) it requires all ministers to be loyal to the policies of the government whether or not they are personally concerned with them ; (ii) it requires the government as a whole to resign it defeated on a vote of confidence in parliament; and (iii) it requires that cabinet and the government business must be confidential.[2]

Purposes Served by the Principle of Collective Responsibility

Both the principles of individual and collective responsibility serve political purposes in constitutional working. But the importance of collective responsibility is always more than that of individual responsibility, for it relates to the wheel-strength of the government as a whole. The principle serves the following purposes.

Firstly, the original purpose or philosophy "underlying the doctrine of collective responsibility is that the government should be held continuously accountable for its actions, so that it always

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1 Quoted by Appadorai, A. *The Substance of Politics*, 11th ed. (Madras : Oxford University Press, 1987), P. 257

2 Alder, John. *Constitutional and Administrative Law*, (London : MacMillan Education Ltd. 1989), P. 202

faces the possibility that a major mistake may result in a withdrawal of parliamentary support."[2] In other words, the principle of collective responsibility is the means of assuring that the government is in tune with public opinion.

Secondly, the principle provides the key-strength to the unity and stability within the government. The real executive is the cabinet and collective responsibility ensures that the cabinet presents a united front before parliament. "Cabinet is by nature a unity and collective responsibility is the method by which the unity is served".[1] It is collective responsibility which ensures that the cabinet works as a team and hence a minister who is not prepared to defend a cabinet decision must, therefore, resign. If a minister does not resign he is responsible. The policies and programmes of the cabinet have to be supported by each minister. Even if there may be differences of opinion within the cabinet, once a decision has been taken by it, it is the duty of every minister whether member of the cabinet or not to stand by it and support it both within and outside parliament. If the cabinet faces any criticism in parliament concerning any of its policy every minister must come forward and speak in defence of the cabinet policy. The principle, therefore, ensures that the cabinet members 'must be all in the same story' ; they must swim and sink together. This unity of the cabinet enables the government to retain easily the support of the majority in the House.

Thirdly, the collective responsibility of the cabinet also helps greatly in maintaining party unity and its cohesion. Because if the ministers were allowed to contradict the cabinet decision it would certainly open a cabinet split. "Cabinet split', as Jennings says," may become a party split and a party-split may lose the next election".[2] Cabinet Government is a party government and its members come into office under the leadership of a person whom the party acclaims. All ministers stand for the political programme of the party and represent the uniformity of political opinion. They must, therefore, have the same voice ; otherwise the fall of the cabinet

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2 Laski, quoted by M.P. Jain. *Indian Constitutionall.law*, Ibid., P. 103
1 Ibid. P. 103
2 Jennings. Quoted by Kapoor, A.C. *Select Constitutions*, Ibid, P. 65

will result in the fall of the party and consequently its political programme.

Fourthly, collective responsibility of the cabinet helps greatly in maintaining, the stability in public opinion. Because the public opinion never wants to see disagreement among ministers. If ministers are allowed to contradict each other, cracks will appear in the government fabric which may lead to an immediate swing of public opinion. This principle, therefore, 'compels ministers to be discreet and prevents the sort of confusion that sometimes arises in other countries, for instance the United States, when government spokesmen make pronouncements which reveal differences of view within the administration.[1]

Fifthly, it serves the purpose of advising the King. Because the cabinet is legally bound to offer unanimous advice to the sovereign even when its members do not hold identical views on a given subject. It is for this collective responsibility that the cabinet can render unanimous advice to the sovereign.

Harvey and Bather says that the doctrine of collective responsibility has following practical advantages :

First, it counteracts departmental separation, for each minister has to be concerned with policies of other departments.

Secondly, it prevents the policy of one department being determined unilaterally. Since it is the cabinet as a whole which decides, ministers are less likely to be over-influenced by their civil servants.

Thirdly, it ensures that cabinet decisions are based on principles and not on personalities.[2]

Difficulties with Collective Responsibility

The most significant point to be mentioned about collective responsibility is that this traditional doctrine has been subject to much debate. The gist of the criticism is that the doctrine is out of line with practices of modern government and far from making

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1 Birch. A.H. *Representative and Responsible Government*, Ibid. P. 138
2 Harvey & Bather. *The British Constitution and Politics*, Ibid. P. 40

government accountable; in fact it shields government from public accountability. Originally the doctrine was developed with a view to subjecting the executive to the control of parliament. But now conversely it operates to strengthen the power of the prime minister, and to reduce the parliament's control. The main reason behind this reversal lies in the disciplined party system and in the size and complexity of modern government.

Purposes Served by the Doctrine of Individual Responsibility.

The doctrine of individual responsibility is based upon the fundamental doctrine that 'the king himself can do no wrong'. As the personal responsibility of monarch was withdrawn ; he was turned into a titular head and parliaments supremacy was established, it was now ministers who, on behalf of the king, came to be responsible before parliament for their individual departmental acts. Like collective responsibility the original purpose behind the principle of individual responsibility was the same i.e., to bring the political head of every government department under the direct control of parliament. It therefore, serves a vital purpose of liberal democracy. There being no separation of powers in parliamentary form of government, the actions of the administrations are controlled by peoples' representatives in parliament through this doctrine of individual responsibility.

Secondly, the Cabinet is responsible to parliament for the general policy of the government. This does not, of course, mean that each and every decision must be taken by the cabinet. Every individual minister as the head of a ministry has, therefore, personal responsibility for every action taken or omitted to be taken in his ministry.

Thirdly, the doctrine serves another purpose. The official who cannot defend himself publicly is protected from attack. There is no direct link between civil servants and parliament. Civil servants, therefore, cannot be brought under the direct control of parliament. It is, therefore, the minister, the political head of every ministry who is a member of parliament must be accountable for every mismanagement of public affairs in his department.

Fourthly, by making a minister ccountable to parliament for his departmental acts a democratic chain is fulfilled. Because civil servants are not elected by the people and hence the elected head of a department, i.e. the minister should be made responsible. It, therefore, serves another purpose of ensuring political neutrality of civil servants.

Fifthly, the doctrine prevents the minister from trying to evade criticism of his own actions by shuffling the responsibility on to the subordinates. No minister can absolve himself by passing on the blame to someone else or saying that what was done had not been authorised by him. This doctrine, therefore, compels the minister to keep always vigilant eyes over the entire administration of his ministry.

Difficulties with Individual Responsibility

The traditional spirit of individual responsibility lies in the sense that a minister must resign whether or not he is personally to blame if serious fault is attributed to his department. If he does not resign it is the prime minister who can force him to resign ; or if a vote of censure is passed in parliament against him, he must resign. This is the punitive effect of individual responsibility. But most of the modern constitutional experts are of the view that in reality the principle of individual responsibility does not have any punitive effect.[1] This is because the modern political practice do not entirely correspond with this effect of the doctrine. In practice very few ministers have resigned in response to parliamentary criticism of the work of their departments. Innumerable errors have been exposed but in most cases the minister concerned has simply refused to offer his resignation. Lowell says that no vote of censure was passed in the House of Commons since 1866.[2] And the resignation in response to criticism occurred from time to time during the hundred years (1855-1955) were not more than 20 but the number of ministers against whom parliamentary criticism were made during this time were far more.[3] This is because it is not

1 O' Hood Phillips, John Alder, Herman Finer etc.
2 Lowell, A. Lawrence, *The Government of England*, Vol. 1 (New York : The Mackmillan Company, 1910), P. 73
3 Turpin, Collin, *Ibid*, P. 430

strictly obligatory on the part of a minister to resign when he is criticised in parliament. Whether a minister has to resign or not depends upon a variety of political factors including the temperament of the minister, the attitude of the prime minister, the mood of the party and the toes of the opposition. In most cases it is seen that if severe criticism does not come from the party and the concerned minister is loyal to the prime minister, he need not resign. Professor Hood Phillips says that an examination of ministerial resignation in the past century shows that the doctrine of individual responsibility in practice has no punitive effect, because either

i) the erring minister who resigns is appointed to another post; or
ii) a timely reshuffle of a ministerial posts render resignation unnecessary; or
iii) a minister who is unpopular with the opposition is protected by the solidarity of his colleagues. [1]

Method of Enforcing Ministerial Responsibility

Methods of enforcing ministerial responsibility may be classified into two groups :

A. Traditional Methods of Scrutiny ; and

B. Modern Methods of Scrutiny.

A. Traditional Methods of Scrutiny

They are folloing :

1. Parliamentary Questions
2. Vote of Censure
3. Cut Motion
4. Adjournment Motion ; and
5. No-Confidence Motion.

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[1] Phillips, O'Hood, *Ibid,* P. 310

Parliamentary Questions

The responsibility of ministers to the House of Commons involves a constant control of the House over the government. One of common and effective devices of ensuring this control is asking questions to ministers. Parliamentary questions tend to keep the ministers constantly conscious of the fact that they will be called upon to give an account of what they do. A definte period is allotted at every sitting to put questions to ministers. Subject to some conditions any member of the House of Commons may address a query to the prime minister or to any other minister. The device of asking questions has some important merits.

Firstly, it brings the work of the various departments of government under the public scrutiny. As professor Lowell says- 'question time is a search light upon every corner of the public service."[1] It is the most effective check on the day-to-day administration. According to Erskine May, the Parliamentary Question in an useful tool for 'extracting information' and 'pressing for actions.'[2] Questions in brief, bring to light the activities of government and subject government to public scrutiny and this is. according to Herman Finer, 'the fundamentally characteristic British way of keeping the cabinet painfully sensitive to public opinion'.[3]

Secondly, it enables a member publicise a grievance. He can raise special local problems affecting his constituency. As professor de Smith says- 'a question to a minister is rather a method of ventilating a grievance than of securing remedy'.[4]

Thirdly, parliamentary questions are also a means of exerting pressure on ministers to achieve a particular outcome. Oral questions in full view of the press and other media can have a compelling influence on a minister and he may be able to see new merit in a case that he had not seen before. It, therefore, serves to bring particular issue to the attention of ministers.

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1 Quoted by Harvey & Bather, *Ibid*, P.146

2 May, Erskine T, (ed. Sir Charles Gordon), *Parliamentary Practices*. 20th ed. (Butterworths, 1989)

3 Quoted by Kapoor, A.C. *Ibid*. P. 160

4 Smith, de and Brazier, *Constitutional and Administrative Law*, 6th ed, (London : Penguin Books, 1989), P.291

Fourthly, parliamentary questions enable the public to get, through their representatives, the information about day-to-day administration of the government. Information over various ministries help to build up strong public opinion.

Fifthly, parliamentary questions mitigate the danger of bureaucratic habits, because 'men who have to answer day by day for their decisions will tend so to act that they can give account of themselves'. As answers to parliamentary questions are prepared in the ministries the bureaucrats become careful in advising the minister.

Sixthly, Parliamentary quetions helps back-bencher MPs to put an effective control over ministers. It develops a vigilant type of responsibility both among the ministers and back-benchers. It is the device whereby the 'back-benchers take a delight in heckling a Minister.'[1]

As to the importance of parliamentary questions professor de Smith has given a beautiful explanation-"for a few minutes the House of Commons comes to life audibly and visibly wit; feigned or genuine outrage, cheers and jeers intrude upon the solemnity of the proceedings ; government and opposition are briefly locked in fascinating verbal combat; the prime minister and the leader of the opposition may gain or lose a point or two in the public opinion poll; a backbencher shows his ministerial potential and the House wonders how much longer the Minister of Cosmology can last.[2]

Prime Minister's Question Time

In the House of Commons the British Prime Minister has to answer questions twice a week. The PMQT serves many purposes. First, it focuses public attention on parliament. As media coverage is extensive, the people get to see and notice their representatives and their government actually functioning. Second, the PMQT is powerful tactic to strengthen the PM's control on his cabinet colleagues. As the PM could be questioned on any aspect of government policy, the departmental ministers are likely to be

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1 Jennings, quoted by Choudhury, Dilara, *Ibid*, P.118

2 Smith, de, & Brazier, *Ibid*, P. 291–292

careful in discharging their duties. Third, the PM can use the opportunity of question time to highlight points of the government. Fourth, it develops a vigilant type of responsibility both among the PM and the back-bencher MPs. Fifth, it makes the PM aware of all eventualities of government policies. Since the PM does not know what supplementaries would be asked, his staff prepare for all eventualities. They look at the constituency of the MP asking the question, try to anticipate the problems he may be facing, the issues of his interest and any other worries he may have. In this process the PM is acquinted with the Member and his or her constituency. As to the PMQT a former Leader of the House of Commons Richard Crossman described it saying:

"The whole British politics is centered there. The man that's running the Executive has to be there at the dispatch-box, has to present himself, has to fight the contender for power, and the whole press and television will report that evening on what happened to him. He is being tested and the House of Commons feels itself to be participating in the test."[1]

Vote of Censure

Another device for holding ministers accountable is the motion of censure, ordinarily directed at individual ministers and specifying particular acts or policies for which they are regarded as responsible. Such a motion may be offered by any member who can gain the floor for the purpose, and they may lead not only to embarrassing debates but also hostile votes. If any such motion is passed in the House the minister concerned has to resign.

Cut Motion

During the budget discussion a token cut may be made by the opposition and if such a motion is moved and passed in the House the cabinet i.e. the government as a whole must be prepared to resign.

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[1] Alderman, R. K. (1996) 'Prime Minister's Question in the British House of Commons', *The Parliamentarian*, Vol. 77, No. 3 pp. 290-2

Adjournment Motion

After questions and before the commencement of public business, any member may move the adjournment of the House for the purpose of discussing ' a specific and important matter that should have urgent consideration'. If the motion is supported by at least 40 members and the speaker has agreed that the matter is definite and urgent, a debate will take place. The government will oppose the motion and if it fails in voting it must be prepared to resign.

Vote of No-Confidence

The Ministers are at all times subject to challenge upon general policy. Because the leader of the opposition may move a resolution of no confidence against the cabinet, in other words, against the whole government. It the motion is supported by a required number of members a debate will take place and then the motion will face voting. If the votes recorded shows that the government is in minority it must resign.

B. Modern Methods of Scrutiny

The above mentioned methods are traditional methods of enforcing ministerial responsibility. But now-a-days governmental activities have become more complex and have been expanded far wider. Through traditional methods the legislature now is not capable enough to make full inquiries into matters of interest to it or to consider matters in detail. This created need for far greater parliamentary scrutiny than that which could be achieved by traditional methods. To that end some modern devices have developed to carry out the task of continuous scrutiny and investigation of the executive. They are :

1. Control by Committee System; and
2. Control by Ombudsman.

Control by Committee System[1]

Control of executive through the working of the committee system is now considered the most effective device of ensuring ministerial responsibilities. "Investigation by committees" says Laski, "has been one of the most vital techniques contributed by the parliamentary system to the methodology of representative government ; and it has been possible only by the fact that the parliamentary system exists." It is the committee system which, as Garrett says, has "shifted the style of the House of Commons from theater to serious and penetrating scrutiny of the government". There are 16 Departmental Select Committees working in the House of Commons. They examine the expenditure, administration and policy of the relevant government departments (ministry) and its associated public bodies. They can take evidence in public ; send for persons including the departmental minister, its officials, or any one it feels can enlighten them in the investigation it is conducting. The reports of these committees are published and given in press and also tabled in the House. If any report gives a serious blunder about maladministration in a ministry the government has to correctify it quickly ; otherwise it may face an uproar and even a hostile vote in the House.

Control by Ombudsman

A post of Parliamentary Commissioner i.e. Ombudsman was created in the House of Commons under the Parliamentary Commissioner's Act, 1966. It is an office of the House of Commons independent of the executive. Its function is to investigate complaints of maladministration made to it by members of parliament against any person acting in the service of the state.[2]

Ministerial Responsibility and their Enforcement under the Constitution of Bangladesh

1. Parliamentary Questions

Chapter VIII of the Rules of Procedure of Parliament provides for questions and short notice questions. The first hour of every

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1 Details of committee system, See, Chapter XI

2 For details , see, Chapter .XVIII

sitting is fixed for the asking and answering questions. A member can make questions to a minister concerning any matter of administration within his ministry. Questions may be asked by giving a 15 day's notice.

2. PMQT

The PMQT is not mentioned in the Rules of Procedure. However, the 7th parliament introduced a major change in the parliamentary practice by introducing the PMQT in 1997. Prime Minister Sheikh Hasina answered questions of MPs in the House for 30 minutes every Tuesday. It is the most lively scene both for the MPs in the House and audiences in television. However, the opposition BNP were not helpful with this new procedure of accountability. It's member did not attend the session when the PMQT was being held; the opposition leader even did not confront the PM during this PMQT. In the 8th parliament the same is happening with the AL in the opposition. The success of any device of accountability depends more on the willingness of parliamentarians than on the rules or procedure. In the 5th parliament Khaleda Zia did not attend sessions regularly. Even whenever present, she rarely took part in the proceedings. Her reluctance to take part in parliament proceedings caused serious risk not only in the opposition but also among many government back-benchers[1]. In the 8th parliament under the leadership of the Prim e Ministere Khaleda Zia there was no effective PMQT as the oppistion party boycotted the parliament for most of tis tenure and the hole parliament remained as a voice of the government in power.

3. Other Motions

There are three types of motions apart from adjournment and no-confidence motions. They are:

a. Call-attention motion;
b. Discussion for short duration;
c. Half-an Hour Discussion.

The full discussion of all the motions is beyond the limit of this book now. The author would consider this in the next edition, if possible.

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[1] Ahmed, *ibid,*

4. Adjournment Motion

Chapter X of the Rules of Procedure of Parliament provides for adjournment motion. Under Rule 61 a motion for an adjournment of the business of the House for the purpose of discussing a definite matter of recent and urgent public importance may be made with the consent of the speaker. If the motion is supported by at least 25 members and the speaker has agreed that the matter is of recent and urgent public importance, a debate will take place. But unlike in true parliamentary system the motion cannot be given on votes in the House. Thus though there is provision for adjournment motion it has lost its importance.

5. Vote of Censure

As mentioned earlier there is no provision for motion of censure in the constitution of Bangladesh. No motion of censure, therefore, can be made against a minister for any corruption in his ministy. The constitution of Greece specifically provides for vote of censure.[1] It is to be mentioned here that constitutions of some countries with parliamentary system e.g. India, Japan etc. do not provide for specific provision of vote of censure. But parliamentary culture like conventions in British constitutional system has, from the very beginning, developed in these countries to the effect that whenever a minister is seriously criticised for maladministration or corruption in his department, he willingly resigns ; there is no need to pass a motion of censure. But in Bangladesh such a positive and responsive political culture is yet to develop.

6. Cut Motion

Provisions for cut motions are provided for in Rules 118, 119, 120 and 121 of the Rules of Procedure. According to Rule 118 three types of cut motions may be moved—'Disapproval of Policy cut,' 'Economy cut' and 'Token cut' may be moved by any member in relation to any Money Bill or Finance Bill. These motions are given on votes.

7. No Confidence Motion

The strongest device for ensuring collective responsibility of the cabinet or the government as a whole is the motion of no confidence.

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1 Article 84

Article 57(2) of the Bangladesh constitution provides 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 parliament. On the basis of this constitutional provision the Rules of Procedure provides for in Rule 159 the provision of motion of no-confidence against the government. If the speaker is of opinion that the motion is in order and if it is supported by at least 30 members, a debate will take place. After debate the motion will be given on votes and if the majority votes in favour of the motion, the government as a whole must resign. It seems, therefore, that this provision has been maintained keeping line with parliamentary spirit. But ironically enough, this provision is nothing but a mere facade of a device of ensuring collective responsibility. Because due to barricade created by article 70 of the constitution no member of the majority party has right to vote against the party and as a result neither a motion of no-confidence nor a cut-motion works as a threat to government. Article 70 makes the government always sure that it will never be defeated by motion of no-confidence.[1] Thus ministerial responsibility cannot be ensured in Bangladesh.

The first no-confidence motion in Bangladesh was moved in the 6th session of the 5th parliament against the BNP Governement headed by Khaleda Zia. The notice of the motion was given on 5th August 1992; on 9th August the motion being supported by more than 30 MPs the speaker fixed the day (12th August) for debate and discussion. After debate the motion was put on vote and was rejected by the House on a division vote by 168-122.

Now comes the question of modern modes of scrutiny i.e. the committee system and the department of ombudsman. Article 70 of the constitution provides for a department of Ombudsman. A law has been passed long ago to implement this provision but so far this law has not been made effective. As a result no control of executive is possible through ombudsman.[2]

As to control by committee system it can be said that there are some standing committees on ministries in our parliament which are similar to the Select Committees in the House of Commons. But these ministerial standing committees cannot function properly. Details of committee system have been discussed in chapter XI.

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1 For details, see, Chapter VIII

2 For Ombudsman, see, details, in Chapter XVIII

CHAPTER XI

COMMITTEE SYSTEM IN BANGLADESH

In a parliamentary system of democracy one of two important functions of parliament is ensuring the accountability of the government. This is done through two categories of techniques: individual and collective. This collective device is worked out through an effective committee system. Modern legislatures are unthinkable without a committee system. Committees exist to meet a practical need. The House as a whole is too widely a body to make full inquiries into matters of interest to it or to consider matters in detail pressure of circumstances and in particular the increasing range of subjects with which parliament is concerned, has led to the steady development of committees[1]. Committees are considered mini parliaments within the parliament.

Different Types of Committees:

In most parliaments committees may be of two main categories:

a) Standing Committees (which are permanent in nature); and
b) Ad hoc or Special Committees (which are temporary in nature).

Permanent Committees

These committees are mainly appointed for the duration of the parliament. They are specialized in the sense that each is concerned with one particular branch of activity such as finance, foreign affairs, education etc.

It is to be mentioned that in British Parliament departmental select committees are permanent in nature; they are elected for the duration of the whole parliament. On the other hand, Standing Committees in the House of Commons are ad-hoc; bills are commonly referred to them and their terms expire when they report on bills to the House. In Japan, Malayasia, Bangladesh and India Standing Committees are permanent in nature.

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[1] Committees of Parliament, CAC 1996

Ad-hoc or Special Committees:

They are established to deal with a particular matter and cease to exist as soon as they have made a report to the House. Ad-hoc or Special Committees are found alongside permanent committees in most countries.

Evolution of Committee System

The growth of governmental functions in recent time has created a need for greater parliamentary scrutiny than that which could be achieved by traditional methods like question-making etc. This need has resulted in committee system. Control of executive through committee system actually developed in the USA almost from the first session in 1789 which later came to be blended in parliamentary system in the latter part of the 20th century. By 1919 the House of Representative in the USA had 63 Committees and the Senate 74. After the Second World War the number of committees declined to the present level of 23 in the House of Representative and 18 in the Senate. The Congressional Committees have numerous Sub-Committees and the whole nature of the system is both elaborate and complex. It performs a range of legislative functions, budgetary functions as well as that of serious scrutiny of both the Executive and matters of public concern. In fact, the major work of Congress is said to be in committees.

It was only in 1978 when the House of Commons set up 16 departmental Select Committees whereas the Bangladesh Constitution makers had felt the need for this system in 1971. We will see that though in thinking and inserting provisions for Committees Bangladesh was well ahead of all other Parliamentary System in the Commonwealth, the effective working of the Committee has not yet been developed.

Advantages of Committee System

An effective committee system helps developing and functioning parliamentary democracy in many ways:

First, since committees can take evidence in public, send any person including ministers to justify their actions; since reports of committees are published, given in press and also tabled in the

House, departmental ministers and bureaucrats cannot adopt unfair means or do corruption; if any report gives a serious blunder about maladministration in a ministry, the government has to correctify it quickly; otherwise it may face even a hostile vote in the House.

Second, committee functions give message to the general public about efficiency and transparency in the governmental functionaries and people can decide whether they will elect the same government or not in the next election.

Third, it is the nature of parliamentary system that once a government is formed a distinct difference develops between the government i.e. the ministers and their own party MPs. The backbenchers feel left out as they have no role in the policy, legislation or anything else. This creates an unnecessary hostility towards their own government and results in party intrigue and backbiting which, in turn, leads to the government developing a siege mentality and being over-sensitive to criticism.[1] Both these differences and unnecessary hostility can be mitigated if all MPs are given role to play and this is possible by proper committee functioning. In committees backbench MPs can effectively play their role to scrutinise the government; though policy-making is the sole prerogative of the ministers, it is committee system through which other MPs can examine and criticise those policies and can play role in ensuring their implementation in the spirit it was formulated.

Fourth, it is through the functioning of the committee system that bureaucracy comes under the direct scrutiny of the parliament since the committee concerning a particular ministry along with its associated bodies can send for any official or bureaucrat to appear before it to justify his action or send for any paper or document.

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1 Choudhury, Nazim Kamran, *The Mirage of Parliamentary Democracy*, Daily Star, June 2, 1996.

Committee System in Bangladesh

The sources of Parliamentary Committees in Bangladesh are two: (a) Constitution; and (b) Rules of Procedure of Parliament. Article 76 (1) of the Constitution of Bangladesh provides that parliament shall appoint the following Standing Committees:

(a) A Public Accounts Committee;
(b) Committee of Privilege; and
(c) Such other Standing Committees as the Rules of Procedure of Parliament require.

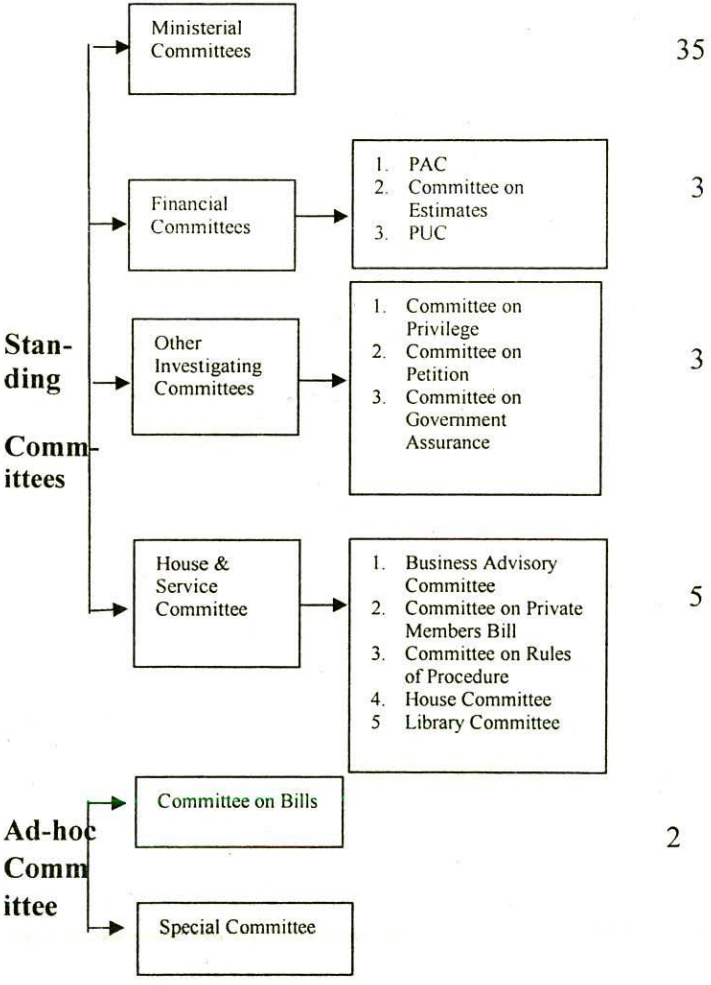
Again, Article 76(2) states that in addition, Parliament shall appoint other Standing Committees to -

(a) examine draft bills and other legislative proposals;
(b) review the enforcement of laws and proposes measures for such enforcement;
(c) investigate or inquire into the activities or administration of a Ministry etc;
(d) perform any other functions assigned to it by Parliament.

It is interesting to note that all three parts of Article 76 i.e. 76(1), 76(1)(c) and 76(2) authorise Parliament to form or appoint Standing Committees only (i.e., Permanent Committees as Bengali reading stands). There is no indication or source of any Ad-hoc Committee or a Committee other than Standing Committees in the Constitution. Neither has there been any Constitutional interpretation or explanation of the term "Standing Committee" in Article 152 of the Constitution.

Rules 187 to 266 of the Rules of Procedure deal with Rules regulating committees. These Rules provide for as many as 14 different committees which include two committees (Public Accounts Committee and Committee on Privilege) specified in Article 76(1) of the Constitution. Out of these 14 committees Select Committee on bills, Standing Committees on certain other subjects and Special Committees need explanation. Select Committee on bills is an ad-hoc committee: this is evident from the treatment given in Rule 189 and 225. Secondly, Standing Committees on certain other subjects mean that each Ministry will have one Standing Committee. Lastly, Special Committees under Rule 266 is a kind of ad-hoc committee. The rest of the committees are all standing (permanent in nature) committees.

Structure of Parliamentary Committees in Bangladesh:



Three Financial Standing Committees

a. Public Accounts Committee;
b. Public Undertaking Committee; and
c. Committee on Estimates

The main function of the PAC as per Rule 233 is to examine:

-the annual appropriation accounts of the government;
-the income and expenditure of the government;
-that the expenditure conforms to the authority which governs it and is applicable to the service or purpose to which they have been applied or charged etc.

According to Rule 238 the function of the Committee on Public Undertakings is to examine the working of Public Undertakings specified in Schedule IV of the Rules of Procedure. Schedule IV has a list of 24 corporations, in others words, Public Undertakings. This Committee in particular examines and report on:

-the reports and accounts of the Public Undertakings;
-the reports of CAG on the Public Undertakings; and
-remedy and irregularities and lapses of the Public Undertakings and recommend measures to make them corruption-free.

As per Rule 235 the function of the Committee on Estimates is to-

-report improvements, efficiency and reforms in administration consistent with the policy underlying the estimates.
-examine whether the money is well laid out within the limits of the policy implied in the estimates etc.

PAC examines the accounts showing the appropriations of the sums granted by parliament for government's expenditure. The purpose of the PAC which base its functions on the audit reports made by CAG is that the grants made to different departments are used only for the purposes set out in the estimates. On the other hand, the Estimate Committee has nothing to do with scrutinising accounts; it rather examines the details of the estimates presented to the parliament in the budget and may suggest alternative policies

with a view to ensuring efficiency and economy in the administration.

The Public Accounts Committee

The post-budgetary financial responsibility of the government is enforced through two powerful organs– the Comptroller and Auditor-General (CAG)– a constitutional body and the PAC in the parliament. The main function of the CAG is to audit the accounts of the Republic to ensure that the moneys approved by parliament are spent for the purpose intended and in an effective and efficient manner. After such auditing the CAG lays its reports to the parliament directly. In all democratic countries the CAG is an officer of parliament; he is responsible only to the parliament. And since responsibility to audit all the public accounts is vested upon him, he and his whole staff should be fully independent of the executive. The complaints or observations made in the report by the CAG is again scrutinised by the PAC of the parliament and in doing this examination the PAC can question the accounting officers of the concerned ministries; it can also take evidence in public; question other witnesses. So for the success of such a scrutiny the PAC, as like as the CAG, should be made democratic. In all democratic countries PAC is headed by a senior MP of the opposition. But in Bangladesh though PAC was formed in the first parliament, it was headed by a Treasury Bench Member. Again, unlike other democratic countries, the CAG has been made responsible to the president and not to the parliament.[1] Again, unlike the system of other democratic countries there is no provision in Bangladesh for consultation with the PAC in respect of the appointment of CAG. The whole staff of CAG including his audit section has been kept under the executive control of the Ministry of Finance. Again, unlike in India & Britain the CAG in

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

Bangladesh does not have authority to conduct performance audit; it only prepares annual audit report.

Thus from the very outset this vital organ of constitutionalism has been kept handicapped. And still the CAG is in such a handicapped position. The success of the PAC especially in respect of its financial control over executive depends mostly on the fruitful activities of the CAG and since the CAG is tightly handicapped so has been the role of the PAC.

The PAC had 3 meetings in the first parliament; 9 in the second; 52 in the fifth and 103 in the 7th parliament. This Committee had not submitted any report in the first parliament. In the second parliament it had submitted 1 report. During the martial law regime of Ershad an adhoc PAC prepared three reports. The 3rd parliament did not form PAC. In the 4th parliament the PAC submitted 2 reports. In the 5th parliament it submitted 4 reports. In the 7th parliament PAC submitted 5 reports[1]. In advanced countries like the USA, UK the PAC is very active and effective in seeing that the money sanctioned has been spent with economy, efficiency and for the purposes. But in Bangladesh such an important institution has not been properly used, for: (a) the legislature itself was not in existence for many years; (b) even when the legislature was in existence, the PAC was not appointed in time; (c) tightly handicapped position of the CAG. Since the audit section of the CAG has been kept under the executive control of the Finance Ministry, the most serius problem in the functioning of the PAC has been caused by the government. Because the government had not regularly submitted the audit

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[1] The PAC in Britain submits about 40 reports a year in the House of Commons and a selection of them are debated on one day per session. The PAC in the 7th parliament was chaired by A.S.M. Akram, a government party MP. I asked him about the progress of the functioning of the PAC. He told that the committee like its predecessor was facing a huge backlog of audit reports and a great portion of their time was being spent in disposing of these old cases. The Committee met 4 times a month. Does the Committee has any plan to meet more frequently to settle the pending cases? In response to this question he told that the members seemed to be reluctant to meet even four times a month, for they were very ill-paid for their committee functions.

reports to the legislature. Thus 17 audit reports on Defence, Railway, Foreign Mission, Postal Department, T & T Board, Semi-Government and Commercial organisations were submitted to the parliament after 14 years on the 11th July, 1990 and the Finance Minister could not put forward satisfactory explanation for such unusual delayed period during which hundreds of pages of the reports were destroyed by worms and insects[1].

Committee on Estimates

Mr. Nizam Ahmed has made following observations on the importance of the Committee on Estimates:

> The Estimates Committee (EC) has traditionally remained very inactive. Although different parliaments have routinely set up the EC, none has yet produced any report. Nor does its activity receive any special recognition. But theoretically speaking, it has better potential than the other financial committees or DPCs to ensure fiscal discipline and economy in expenditure. The EC can *suo moto* examine any estimates; herein lies its main strength. It can also check the estimates throughout the financial year and, in particular, before the expenditure is actually incurred, and suggest the economic use of resources. Until recently, the potential remained mostly untapped The EC, however, had a new beginning after the election of the seventh parliament. As a strategy to check the misuse of resources and embezzlement of public funds, the EC of the seventh parliament stressed on scrutinising the estimates (and use) of development expenditure. The EC, in fact, identified and documented widespread corruption in different government organisations. It compiled a list of irregularities for each ministry; in monetary terms, the loss appears to be staggering. The EC set up seven subcommittees to probe into corruption and mismanagement of resources in different organisations.[2]"

The Estimate Committee had 9 meetings in the first parliament, 7 in the second parliament, 26 in the fifth parliament and 25 in the

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1 The *Ittefaq*. daily Bengali Newspaper 12.7.1990

2 Ahmed, Nizam, *The Parliament of Bangladesh*, Ashgate Publishing, Gower House, Hants, UK, 2002. at p. 151

7th parliament. However, this committee has not produced any report in any parliament.

The Public Undertaking Committee

This Committee had no meeting in the first parliament; it had 84 meetings in the second parliament; 48 in the fifth parliament and 20 in the 7th parliament. It had produced 1 report in the second parliament; 2 in the fifth and 26 in the 7th parliament. As to the importance and functioning of this committee Mr. Nizam Ahmed has made following observations on the activities of the PUC:

> "The PUC of the fifth parliament specifically identified the organisations and persons responsible for creating mismatch in running the public sector organisations and made specific recommendations to rectify them. In its second, the PUC unveiled widespread corruption in the largest nationalised commercial bank in the country. It also accused a ruling party MP, who was the chairman of that bank, of manipulating the rules and granting millions of Taka as loans to his friends and relatives. The PUC of the seventh parliament however, remained atypical in one important respect; it conducted more inquiries than all of its predecessors, although their actual impact is difficult to measure."[1]

Departmental Standing Committees

In both Presidential and Parliamentary form of governments Departmental Standing Committees (DPCs) work as constant watchdog against the departmental functions. The departmental select committees in British Parliament has wider power to exercise control over the government departments. Ministers can not be members of these standing committees as it is their policies that are to be scrutinised by these committees. It is the function of these committees to scrutinise government policy. They regulate their own meetings and can send for persons including ministers to appear before it to give evidence; they can send for papers and hear evidence in public. The reports of these committees are

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[1] *Ibid*, at p. 151

usually by consensus and are sent to the government as advice. The reports are also published.

Functions

The sources of the departmental standing committees are Article 76 (2) (c) of the Constitution of Bangladesh and Rules 246, 247 and 248 of the Rules of Procedure.

Rule 248 stipulates that departmental standing committees shall meet once a month and their functions would be:

- to examine any bill or other matter referred to it by parliament;
- to review the works relating to a Ministry which falls within its jurisdiction;
- to inquire into any activity or irregularity and serious complaint in respect of the Ministry etc.

Rule 246 also states that these standing committees may:

- examine draft bills and other legislative proposals ;
- review enforcement of laws and propose measures for such enforcement etc.

Examination of Rules 187-218 reveals that DPCs have been given ample and wide functional power to work as a cheek against different ministries. However the real success of the committee system depends on

- their formation;
- how frequently they meet;
- regularity of members' attendance;
- number of reports prepared over a particular time;
- number of hours spent on deliberation;
- nature of issues raised and discussed etc.

Working of the DPCs and their Problems

First, in the original Constitution of 1972 it was provided in Article 76 (1) that *at the first meeting in each session* parliament shall appoint the PAC, Committee of Privilege; and such other standing

committees as the Rules of Procedure may require. However, this italic part of this Article was omitted by the Constitution (Fourth Amendment) Act, 1975 and as such it is not incumbent on the parliament to form committees at its first session. This is why it is evident that committees are formed much later than the formation of parliament. In the first parliament no DPCs were formed[1]; however, in the second and 5th parliaments committees were formed within a few months of their inauguration. In the 7th parliament 14 DPCs were formed after one year of the inauguration of parliament; they were again reconstituted in November 1997; and the remaining DPCs were formed in March 1998 i.e. after 2 years of the inauguration of the parliament. The main reason of this is the lack of consensus between the government and the opposition as to proportionate representation in the committees. In the 8th parliament DPCs have not been formed in one year of the formation of parliament. The reason lies in conflict between the government and the opposition. Around 15th July 2003 total 39 DPCs have been formed in the 8th Parliament. However, no opposition members has been given chairmanship in the committees. The opposition did not give any list because they demanded chairmanship in the committees proportionately. Thus in both 7th and 8th parliaments a good member of bills have been passed without any involvement of the committees.

The Rules of Procedure should be amended to make specific provisions as to proportional representation of parties so that this issue does not become a clue for every parliament's delay in committee formation.

Second, before 1997 all DPCs were executive dominated as they were headed by the ministers. The Rules of Procedure formed in 1974, originally made this provision. In true

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[1] Though Article 76 of the Constitution was mandatory in nature the Rules of Procedure did not provide for setting up any ministerial committees in the first parliament. In 1980 the 2nd parliament introduced Rule 246 thereby setting up 36 specific standing committees on different ministries. Due to changes in some ministries and the reconstitution of others, Rule 246 was amended on 11.05.1988 and the list of specific ministries was omitted.

parliamentary democracy ministers are not given even membership let alone chairmanship in the DPCs. As an institution of democracy DPCs function is to scrutinise the activities of different ministries. But if a minister who himself will be scrutinised by a committee heads that very committee, the serutinisation becomes a mere farce only. If the function of a committee is one of scrutiny of the executive i.e. the minister-in charge, the executive should not head or even be a member of the committee. In 1997 Rule 247 of the Rules of Procedure was amended with effect that a minister shall not be appointed as chairman of the DPCs. However as per Rule 247 (4) a minister is an ex-officio member of any departmental committee.

For better working of parliamentary democracy all Ministers, Ministers of State or Deputy Minister should be declared barred from becoming a member of any departmental committee.

Third, Rule 248 states that each DPCs shall meet at least once a month. However, the practice shows that most of the committees do not sit even once a month. Mr. Nizam Ahmed observes that DPCs in the 5th parliament had meetings about 8 times a year; the 7th parliament had 8.6 meetings per year. In both the 5th and 7th parliaments more than 60% of the committees did not produce any report at all; many reports do not cover the activities of the ministries. The DPCs in the 5th parliament submitted 13 reports whereas in the 7th parliament they submitted 11 reports. It is to be mentioned that 17 DPCs in Indian parliament hold as many as 556 meetings averaging 33 meetings per committee and present 75 reports averaging 4 report per committee a year. 16 DPCs in Britain hold 360 meetings in average a year, averaging 22 meetings a year per committee; and present 60 reports averaging 3.6 reports per committee a year. On the other hand, the Bangladesh Parliament has 35 DPCs which is more than double compared to both India and Britain. However, compared to activism, DPCs in Bangladesh parliament remains far behind. In the 5th Parliament the 35 DPCs produced only 13 reports in 5 year time; in the 7th parliament they submitted only 11 reports for the whole term of the parliament.

Fourth, unlike in Britain and India the DPCs in Bangladesh meet in private[1]; they do not have the power to take evidence in public. This element should be remedied in order to make the administration accountable to the people through the committee hearings. This will help bringing transparency in Government which is a *sina qua non* for growth of parliamentary accountability.

Fifth, in systems like Australia, Canada, UK, India departmental committees are empowered to scrutinise financial proposals of different ministries. As Mr. Ahmed observes[2], one of the important functions of the DPCs is to consider the demands for grants of different ministries and to make reports on the same to the House. After the general discussion on budget is over, the two Houses of Indian Parliament are adjourned for a specific period when each DPCs consider the demands for grants of the concerned ministry and report to the parliament. The House, in the light of the reports of the DPCs, consider the demands for grants of each ministry. In countries like UK, India, Canada the minister responsible for each department appears before the committees to justify his estimates publicly, bringing along departmental officials so that the committee members can ask for clarification. However, DPCs in Bangladesh Parliament do not have any power to scrutinise financial proposals of different ministries. The Rules of Procedure do not follow any committee-level scrutiny of the budget (Rule 111(3), the Finance Bill (Rule 127(6); and the Appropriation Bill (Rule 126(1).

Sixth, there are lack of staff and resources for committee functioning. Most officials who work for committees do not belong to the parliament secretariat. They are on deputation from various government departments.[3]

Seventh, in true democratic parliamentary form of government reports of different committees are published and debated in the House. In Bangladesh committee reports are rarely debated in the

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[1] Rule 199 of the Rules of Procedure

[2] *Ibid*, at 143

[3] Ahmed, *ibid*, 146

parliament and therefore, the recommendations made in these reports do not have any chances of being implemented.

Eighth, there is unwillingness on the part of the committee members to work enthusiastically for the success of committee scrutiny of legislative, administrative and financial activities of the government.[2] Though the Rules of Procedure does not bar committees from inviting opinion from public or experts, committees had rarely ask for any outside opinion on bills; they have mostly relied on information supplied by the parliament secretariat or departmental officials.[3]

Ninth, government officials seem very much reluctant to cooperate with committee functions. Often they do not supply documents as requested by committees; they do not turn up to give evidence when requested by committees. This tendency of ignoring committees by government officials will not improve as long as ministers remain members in committees. This is also the fact that as long as ministers remain members and do not appear before committees as witnesses, they will have a natural advantage over the back bench members. This enables them to influence the setting of the agenda and manipulating the working of committees.[4] Also when ministers are opposed to any issue or policy, committees can rarely do anything.

Enforceability of Committee Reports

A parliamentary Committee may give recommendation, opinions and finally its most important function is to prepare reports for parliament. In all systems committees do not have any power to enforce their recommendations or reports on their own. Committees are advisory bodies in nature. The usual practice is that various Government departments respond to the reports of

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2 Ahmed, *ibid*, at 158

3 The author had interviews with some committee members in the 7th parliament. Their view is that most of the committee members seem reluctant to work for committee regularly.

4 Ahmed, *ibid*, at 156

the DPCs within two months of their submission to the House, specifying the recommendations they accept and explaining the reasons for non-acceptance if any[1]. According to estimates by Rush, nearly 30% of the recommendations of various DPCs in Britain are accepted outright; while about a quarter of them is rejected[2]. In India, practice shows that the committee reports are mostly accepted by the Government. The ministers in India submit, 'action taken report's to parliament, providing details of the progress of implementation of the recommendation of various DPCs and explaining reasons for delay or rejection, if any[3].

However, in Bangladesh Government bodies always tend to by-pass or ignore committee reports; officials are generally reluctant to adhere to committee recommendations. This is evident from the report of the PAC, PUC and also of the ministerial standing committees[4].

How far can Courts Enforce Committee Report, Requests and Recommendations

Please see author's professional book on 'Practice on Bangladesh Constitutional Law'.

Parliament vis-à-vis the Courts

Please see author's professional book on 'Practice on Bangladesh Constitutional Law'.

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[1] Ahmed, *ibid.* at 153

[2] Rush, M. (1995), Parliamentary Scrutiny: in R. Pyper and L. Robbins (eds.), *Governing the UK in the 1990s*, Macmillan, London, PP. 108-29

[3] Bhardwaj, R. C (1995) 'Parliamentary Partners: *Departmentally-related standing Committees in India*, the Parliamentarian, Vol. 76 No. 4, PP. 313-9.

[4] Ahmed, ibid, P. 153

CHAPTER XII

LEGISLATION IN BANGLADESH

Generally legislation means the making of law. In broader sense the term 'legislation' is used to mean any law made by any source of law including the process of law making. In this sense precedents, customs , conventions etc. are legislation. But in true and popular sense legislation means to make laws by a politically represented sovereign body in its legislative capacity through formal legislative process. However, legislation in this popular sense is applicable only in the British legal system. In the British system it is not the Constitution but parliament is supreme and there is no legal limitation over this supremacy. It is the British Parliament which is omnipotent in law making; no other body can make any law without is authorisation.

On the other hand, where there is written constitution which is regarded as supreme or fundamental law, the definition of legislation would be different. Because the constitution may give legislative power not only to parliament but also to any other body it thinks fit. For instance, the Constitution of Bangladesh has vested general legislative power to parliament but in some cases the president has been empowered to legislate. So where there is constitutional supremacy the definition of legislation must be given in the light of the supreme constitution. Legislation under constitutional supremacy means the making of law under the constitutional limitations by any authority created and empowered to do so by the constitution itself and by any other body subordinate to and empowered by that constitutional authority to make law.

Legislation Classified

Where there is parliamentary supremacy legislation may be of following two types—

1. Supreme or Ordinary or Direct Legislation.
2. Subordinate or Delegated or Indirect Legislation.

One the other hand, where there is written constitution with constitutional supremacy legislation may be of following three types—

1. Supreme or Direct or Ordinary Legislation

2. Subordinate Legislation ; and
3. Special Executive Legislation.

Supreme or Ordinary Legislation (under written constitution)

Legislation by a body which is directly and specifically empowered by the constitution, the supreme law, to make law is called supreme legislation. For example, law made by parliament under the authority of article 65 of the Constitution comes under the category of ordinary legislation. Likewise Article 93 of the constitution directly empowers the president to make law (ordinances) when parliament is not in session or dissolved. These ordinances made by the president have same status and force of law as an Act of parliament. All ordinances, therefore, comes under the category of ordinary law.

It is important to mention here that there is a great danger if the term 'legislation' is used to indicate only the output of legislative process i.e. 'law'. From broader point of view the term 'legislation' include both the process of law making and the 'law' made itself. But it is more convenient and accurate to use the term 'legislation' to indicate the process of law-making only. This is because in British constitutional system there is nothing as supreme or fundamental law but there is supreme legislation in the sense that in law making the British parliament is supreme ; there is no legal limitation upon its power, neither is it subject to any other legislative authority. Its law making authority is, therefore, supreme but the law as an output of supreme legislation is ordinary law. Likewise in a written constitution under constitutional supremacy the general power of law-making is given to a legislature and that legislature's law-making may be termed as supreme legislation but 'law' as such made by it cannot be termed as supreme law it is rather ordinary law. Because the constitution itself is the supreme or fundamental law. Article 7 of the Bangladesh Constitution specifically declares that 'this constitution is, as the solemn expression of the will of the people, the supreme law of the Republic'. The legislation by Bangladesh parliament may also be termed as supreme legislation in the sense that, though there are certain constitutional restrictions upon its power, it is not subject to

any other legislative authotity within the state. But laws made by it are all ordinary or primary law.

Subordinate Legislation

Subordinate legislation means legislation by a subordinate authority under the powers delegated to it by the supreme legislative authority through its ordinary law. (A detailed discussion about subordinate legislation has been given elsewhere in this chapter.)

Special Executive Legislation

A trend is noticeable in written constitution of some countries. It is that the constitution itself directly empowers the president (the head of the state) to make secondary law like rule, regulation, order etc. These laws have not been given the same status as an Act of parliament ; nor do they come under the category of subordinate law as they are not made by any delegated power under an Act of parliament. They are, in a sense, a special grant to the President by the Constitution which may be termed as a special executive legislation.

It is to be mentioned here specifically that the traditional meaning of 'executive law' is the rule-making power of the executive authority like ministers or president under the authority of an Act of parliament.

Someone might argue that ordinances made by the president under Article 93 of the Constitution of Bangladesh would come under the category of executive law because it is the head of the executive who makes these ordinances. However, it is to be borne in mind that firstly, ordinance made by the President under the Bangladesh Constitution have the same effect and force as an Act of parliament and a piece of ordinance, like an Act of parliament, may delegate a subordinate body to make subordinate law. Secondly, the President's power of ordinance-making is a legislative power as opposed to executive power;[1] executive laws are made under the authority of executive power if something otherwise is

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1 *A. K. Roy* V. *Union of India* (1982) 1 SCC 270
Venkata Reddy V. *A. P.* AIR 1985 SC 724
Nagaraj V. *A.P.* AIR 1985 SC 557
Ahsanullah V. *Bangladesh* 44 DLR 179

not specifically mentioned. Thirdly, the very term 'executive law' gives an indication of secondary law. Executive law as such is always a contingent, subordinate or delegated law. So the President's ordinance-making power as specified in the Bangladesh Constitution should not be termed as executive law; it is rather ordinary law.

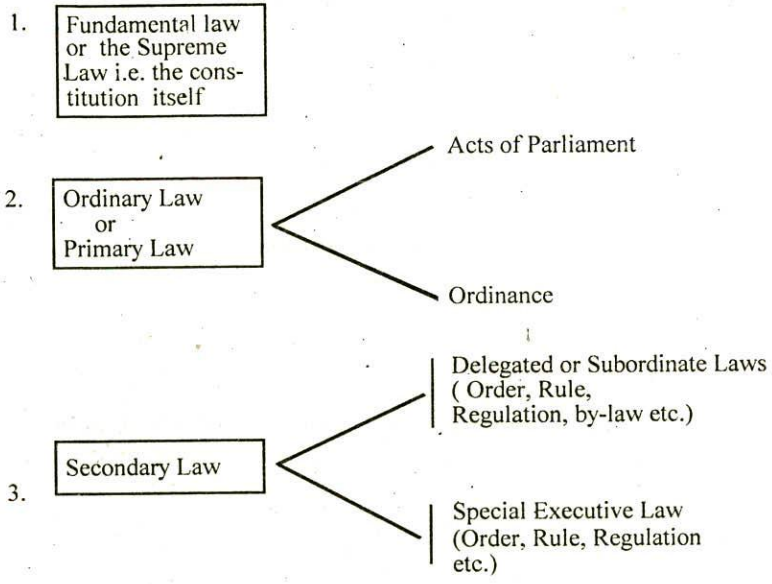
Now as to the special executive law as I have mentioned just now an elucidative discussion should be given in the light of the provision of our Constitution. Articles 55(6), 62(2), 68, 75(1)(a), 79(3), 85 115, 118(5), 127(2), 128(3), 133, 138(2), 147(2)(b), 140(2) of the Constitution directly empowers the President to make secondary law (order, rule, regulation). This power has been given subject to variety of conditions.

First, Articles 62(2), 68, 79(3), 85 and 133 condition that the President shall make rules or orders until positive law is made by parliament. So the President has been empowered to make secondary law for an interim period. But the fact is that in some cases till today no positive law has been made by parliament. For instance, the Government Servant's (Conduct) Rule, 1989 was made in pursuance of Article 133 of the Constitution.

Second, Articles 79(3), 118(5), 127(2), 138(2) and 140(2) condition that the President shall make order or rule subject to the provisions of any law made by parliament. Secondary law-making power of the President in these cases is, therefore, for all time but subject to law passed by parliament.

Third, in some cases the President has been given an unfettered power of rule-making. For instance, Articles 55(6) and 115 of the Constitution state 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 rules made by him in that behalf. Here the President's rule-making power is almost unconditional.

In view of the above discussion it may be said that under the constitutional system of Bangladesh the stages and status of law is like the following :



Masdar Hossain case 20 BLD 2000 (AD) 104

In the above case the AD has catgorised the different types of the President's rule making power within the Constitutional limits. C. J. Mustafa Kamal in his judgment has classified the President's rule making power into two divisions: *Primary and plenary rule making power* of the President and *Contingent rule making power of the President.*

> "In Article 115 it is the President who has been vested with the primary power, as distinguinst from contingent power to frame rules with regard to appointment of persons to offices in the judicial services or as magistrates exercising judicial functions. This rule-making power of the President is constitutionally different in content, manner and effect from the contingent rule-making power of the President in

the proviso to Article 133 of the Constitution" (Paragraph 27).

"President may by order or by making rules, as the case may be, make provisions for certain matters until the parliament enacts to that effect. As and where laws are made by parlaiment, either the Presidential orders or rules go out of existence or they exist to the extent not in conflict with laws made by the parliament. This is called contingent rule making power of the President and examples of these powers are to be found in our Constitution in Articles 62(2), 75(1)(a), 79(3), 85, 127(2), 128(3), proviso to Article 133, Article 138(1), 147(2)(b)" (Paragraph 28).

"Constitution confers on the President the direct, primary and plenary power of framing rules which even the parliament cannot frame *(because the constitution has not given the parliament to legislate there)* and which have an immediate legislative effect. One example is Article 55(6) which states that "the President shall make rules for the allocation and transaction of the business of the Governemnt". Article 115 provides another example of such a direct, primary and plenary power of the President to make rules with regard to appointments of persons to offices in the judicial service or as magistrates exercising judicial functions. The parliament has no authority under our Constitution to make laws or the Government has authority to pass any orders or frame rules on this subject" (Paragraph 30).

In view of the above ruling the diagram of secondary law I have mentioned above needs further explanation. Some of the special execuitve laws have been given the status of primary law by the Constitution itself and these are Articles 55(6) and 115.

Status of Order, Rule and Regulations

Order, Rule, Regulation-these three forms of law may have following three status :

Pre or Supra-Constitutional Status.

The constitution of a country has not yet been made; it is on the process. In such a situation the law-making power is given unfetteredly on the President and the President rules the country by promulgating orders, rules etc. Thus in pre-constitutional status these laws take place of primarily law. Because at that time there can be nothing in the state as true primary law.

Extra-Constitutional Status

Sometimes it is evident that completely in an unconstitutional way martial law is declared suspending the Constitution. Under such a situation all laws including the Constitution itself remain suspended and the martial law proclamation made by the Chief Martial Law Administrator takes place of the supreme law i.e. the Constitution. Country is then ruled by making martial law rule, regulation or order under the authority of a martial law proclamation. Thus Orders, Rules, Regulation etc. under an extra-Constitutional regime take place of primary law.

It is to be mentioned here that in the above mentioned two situations (pre-Constitutional and extra-Constitutional status) it is sometimes seen that Orders take place of primary law and Rule and Regulation take place of secondary law. Because sometimes Rule and Regulations are made under the authority of a martial law Order.

Constitutional Status

While the Constitution is in operation Order, Rule and Regulations are always secondary law ; of course, in some rare cases they are primary law. As secondary law they are either delegated or subordinate law or special executive law.

When an Order or Rule or Regulation is enacted under the authority of an Act of parliament or an Ordinance it is delegated law. For example, Administrative Tribunal Rules, 1982 which was made under the authority of section 12 of the Administrative Tribunal Act, 1982. Again, when they are made under the direct authority of the Constitution they are special executive law. For instance, the Government Servant's (Conduct) Rule, 1979 is a

special executive law which was made under the authority of article 133 of the Constitution.

Again, during the Constitutional normalcy it is sometimes seen that some Orders made during pre-Constitutional period are kept operative. In such a case these Orders exist as primary laws. For example, the first Schedule of the Constitution of Bangladesh declares some Orders effective which were made by the President during pre-Constitutional period.

Again, the Constitution of Bangladesh was made effective in 1972 but the law-making body parliament was constituted and first met in 1973. During this period the President was empowered under the 4th Schedule to make law by issuing Orders. These Orders till now exist as primary laws. One of them is the Dhaka University Order, 1973.

Distinction between Delegated Legislation and Special Executive Legislation

1. The source and basis of a delegated law is an Act of parliament or an ordinance. The source of a special executive legislation, on other hand, is the Constitution itself.

2. The power of making subordinate law can be delegated primarily and principally by parliament whereas the power of making special executive law can be delegated by the Constitution itself.

3. The power to make subordinate law is delegated to ministers, autonomous bodies and local governments whereas the power to make special executive law is given to the President and to the governor where there is federal government.

4. The legality of a subordinate law is tested under the conditions of an Act or Ordinance whereas the validity of a special executive law is tested under the Constitutional conditions.

Subordinate or Delegated Legislation

Generally all legislative power is vested with the legislature. But the legislature may delegate a limited power of legislation to a subordinate authority under some conditions. Legislation by a

subordinate authority under the delegated power of the legislature is called subordinate legislation.[1]

According to Jain and Jain[2] the term 'delegated legislation' is used in two senses : it may mean (a) exercise by a subordinate agency of the legislative power delegated to it by the legislature, or (b) the subsidiary rules themselves which are made by the subordinate authority in pursuance of the power conferred on it by the legislature.

To be mentioned here the concept of subordinate legislation truly includes both the senses used by Jain and Jain. In narrower sense it means only the first sense because the second sense is the output of the first.

Generally the source of subordinate legislation is Acts of parliament or Ordinances made by the President which have the same force and effect as an Act of parliament. Such an Act or Ordinance has an enabling section which enables a subordinate body to make subordinate law. The statute enacted by parliament or the ordinance made by the president delegating the legislative power to a subordinate body is known as the Parent or Enabling Act or Ordinance and the Rules, Regulation or Orders etc. made by a subordinate authority in pursuance of the legislative powers delegated by parent statute are known as subordinate law or subsidiary law or secondary laws.

Subordinate Legislation in USA

American writers have classified subordinate legislation into two categories[3] : (i) Subordinate Legislation ; and (ii)Contingent or Conditional Legislation.

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1 The legislation is subordinate in sense that the authority making such legislation is not a supreme or ordinary one (parliament) but a subordinate one. Again, it is called delegated legislation in the sense that the legislation is done under a delegated power. Again, it is called indirect legislation in the sense that the authority making such legislation has no direct power of legislation. It is also called ' child legislation' in the sense that its basis i.e. the parent legislation has already been made.

2 Quoted by Takwani, C.K, *Lectures on Administrative Law*, 2n ed. (India : Lucknow : Eastern Book Company, 1994). P. 53

3 Hart, Cooley etc Quoted by Takwani, C.K. *Ibid*, P. 74

Contingent Legislation

Hart defines conditional legislation as "a statute that provides controls but specifies that they are to go into effect only when a given administrative authority fulfills the existence or conditions defined in the statute". For example, by making a law, the provincial government was empowered to set up special courts. But the operation of the law was left on the provincial government on being satisfied that emergency had come into existence. This is a conditional legislation. Because the legislation was complete and what had been delegated was the power to apply the statute on fulfillment of certain conditions.[1]

Thus in conditional legislation no legislative power is delegated. What is delegated is the power to apply the law on fulfillment of certain conditions. On the other hand, in delegated legislation rule making power is delegated to a subordinate authority and the authority has discretion whether to exercise the power delegated to it or not. In *Hamdard Dawakhana* V. *Union of India*[2] the Supreme Court of India points out the distinction between the two in the following terms:

> "The distinction between conditional legislation and delegated legislation is that in the former the delegate's power is that of determining when a legislative declared rule of conduct shall become effective ---- and the latter involves delegation of rule making power which constitutionally may be exercised by the administrative agent."

The distinction between the two classes is said to be based on the point of discretion. In contingent or conditional legislation the delegation is of fact finding and in subordinate legislation it is of discretion.

To be mentioned here that this classification of delegated legislation was developed in US constitutional system due to the doctrine of separation of power. But at present even in USA such classification does not bear any significance at all. Because delegated legislation includes both the kinds and it is recognised in all countries of the world.

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1 *Emperor* V. *Benoary Lal* AIR 1945 PC 48
Quoted from Takwani, C.K. *Ibid*, P. 75

2 AIR 1960 SC 554 (566) Ref. Takwani, C.K, *Ibid*, P. 76

Practice of Subordinate Legislation in the USA

Though in theory the conception of subordinate legislation is not recognised in USA, in practice it is being used and applied widely. For two specific reasons subordinate legislation is not recognised in theory in USA:

1. Doctrine of Separation of Power

The US constitution embodies the doctrine of separation of power. Under article 1 of the constitution all legislative power is vested in the Congress of USA. No delegation of legislative power is possible by the Congress. The doctrine, therefore, prohibits the executive being given law-making powers. Again, the judiciary has the power to interpret the constitution and declare any statute unconstitutional if it does not conform to the provisions of the constitution.

2. *Delegatus non potest delegare*

This doctrine means that a delegate cannot further delegate his power. Since the Congress gets power from the people the real basis of the legislative power of the Congress is people and the Congress is, therefore, a delegate of the people and in this sense it cannot, according to this doctrine, further delegate its power to anybody. Taft C.J. observed as follows:

> "The well-known maxim *'delegate non-potest dalegare'* applicable to the law of agency in the general and common law, is well understood and has wider application in the construction of our Federal and State constitution than in private law .... It is the breach of the National Foundation Law, if Congress gives up its legislative power and transfers it to the president or to the judicial branch".[1]

These two doctrines, therefore, do not allow the Congress to delegate any of its legislative powers. But strict adherence to this doctrinal position was not practicable. The realities of the situation have forced the US Congress to delegate its power to the executive

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[1] *Hampton & Co.* V. *USA* 276 US 394 (1928)
Ref. Tope, T.K, *Constitutional Law of India,* Ibid, P.356

and other subordinate authorities. With the beginning of the 20th century's concept of welfare state the work of the US government like other states of the world has enormously been increased which has practically necessitated a mass of legislation. It was impossible for the Congress to enact all the statutes with all particulars. Consequently the US Congress being faced with tremendous pressure of work began to delegate a certain type of legislative functions to the administration.

This trend of the Congress was first attacked by the US Supreme Court and was declared unconstitutional. In *Field* V. *Clark* the Supreme Court observed:

> "That Congress cannot delegate legislative power to the president is a principle universally recognised as vital to the integrity and maintenance of the system of government ordained by the constitution."[1]

There are many cases in which the US Supreme Court denied Congress's power of delegation. Some noted cases are *United States* V. *Chicago* M.st. P.P.R Co. (1931) 282 US 311, *Panama Refining Co.* V. *Ryan* (Hot Oil case)(1934) 293 US 388, *Schechter Poultry Corpn.* V. *US* (Sick Chicken Case) (1935) 295 US 495.[2]

Of course, the Supreme Court could not shut its eyes to the reality and tried to create 'a balance between the two conflicting forces : doctrine of separation of powers barring delegation and the inevitability of delegation due to the exigencies of the modern government'.[3] Form 1940 the US Supreme Court began to take liberal view and in many cases it upheld delegation of legislative power. In *National Broadcasting Co.* V. *US* (1943) 319 US 190, *Yakus* V. *US* (1944) 321 US 414, Litcher V. US (1947) 334 US 742 the Supreme Court allowed Congress to delegate its power on condition that it must prescribe legislative policy or standard. Later on in *Fahey* V. *Mallone* (1947) 332 US 245 the Supreme Court

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1 (1892) 143 US 649 Ref. Takwani, C.K, *Ibid,* P. 57

2 See Takwani, C.K, *Ibid,* P. 57–77
Tope, T.K, *Constitutional Law of India*. Ibid, 356
Islam, Mahmudul, *Constitutional Law of Bangladesh.* (Dhaka : BILIA, 1995) P. 308

3 ILI : *Cases and Materials on Administrative Law in India,* (1966), Vol. I, Quoted by Takwani, C.K, *Ibid* P. 58

upheld delegation despite the absence of standards.[1] Thus even in USA where the constitution is based on the doctrine of separation of power delegated legislation has become inevitable and the Supreme Court has approved of such delegation. "The pragmatic considerations, therefore, have prevailed over the theoritical objection.[2]

Delegated Legislation in the UK

In England, on the other hand, there is no written constitution circumscribing the powers of parliament which in the eyes of law is sovereign. "The British constitution has entrusted to the two Houses of parliament subject to the assent of the King, an absolute power untramelled by any written instrument obedience to which may be compelled by some judicial body."[3] Parliament may accordingly delegate to any extent its powers of law-making to an outside authority.

From historical point of view delegated legislation have its origin and development in British legal system. The practice of delegating power to government departments to make rules began from the adoption of the Reform Act of 1832. Then with the beginning of 20th century's conception of welfare state the works of government increased tremendously which necessitated to leave very wide discretion and rule making powers in the hand of the executive. After the second World War the delegated legislation increased so greatly that it has now been an inseparable work of the gorvenment's departments. In practice, however, about 90% of English law consists of delegated legislation.[4]

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1 See Tope, T.K, *Ibid*, P. 356

2 Schwartz : *An Introduction to American Administrative Law*, 1984,. P. 47, Quoted by Takwani, C.K, *Ibid*, P. 59.

3 *R.V. Halliday* 1917 AC 260
Ref. Shukla, V. N. *Constitution of India*, 7th ed, Ibid, P. 456

4 Alder, John, *Constitutional and Administrative Law*, (London : Mackmillan, 1989), P. 79

Conditions of Delegated Law
(How far delegation is permissible)

From the study of the development of delegated legislation in USA it can be said that it is now a common principle of constitutional and administrative law that despite the constitutional enabling provisions delegation of law-making power of the legislature is possible. But can the legislature delegate its essential legislative function ? It cannot. To say, in other words, there are some recognised conditions of delegation of legislative power. Delegation is possible upon the fulfillment of the following conditions:

1. The legislature cannot delegate its primary duty of law-making i.e. the essential legislative functions which mean-

i) that the legislative policy of a particular law must be determined by the legislature;

ii) that the legislative policy of the law must be formulated by the legislature itself for the guidance of the delegate ; and

iii) that the legislative policy of the law must be made binding rule of conduct for the subordinate authority.[1]

These three conditions of essential legislative function have been beautifully described by sir Cecil Carr in the following way-

> "The legislature provides the gun and prescribes the turget but leaves to the executive the task of pressing the trigger."[2] If any of the three functions is left undone by the legislature the court can declare a delegated law illegal.

2. The delegated law made by a subordinate authority must be published though there is no rule as to any particular kind of publications. Without publication a delegated law cannot be effective.

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1 About these conditions the following cases have given decisions—
Re Delhi Laws Act, 1982 Case AIR 1951 SC 332, 245, 387
Edward Mills Co. V. *State of Ajmir* AIR 1955 SC 25 1 SCR 735
Devidas Gopal Krishnan V. *State of Punjab* AIR 1967 SC 1895, 1901
Harishankar Bagla V. *M. P. State* AIR 1954 SC 465, 1 SCR 380
Hamdard Dawakhana V. *Union of India* AIR 1960 SC 554. 2 SCR 671
Ref. Shukla, V. N., *Constitution of India*, Ibid, P. 457–464

2 Quoted by Takwani, C.K, *Ibid*, P. 67

Subordinate Law in Bangladesh

The Constitutional basis of delegated legislation in Bangladesh is the proviso of Article 65 of the Bangladesh Constitution which provides-

> "provided that nothing in this clause shall prevent parliament from delegating to any person or authority, by Act of parliament, power to make orders, rules, regulations, by laws or other instruments having legislative effect".

Thus the Constitution has expressly allowed parliament to delegate its legislative power. It is important to mention here that if the enabling provisions were not provided for in the Constitution, it would not have been any problem for parliament of Bangladesh to delegate its legislative function. Because no such enabling provision is provided for in India or US or Pakistan Constitution ; nor was it provided for in 1956 or 1962's Constitution of Pakistan. It is now a well settled principle of Constitutional law throughout the world that the legislature can delegate some of its legislative power to the administration.

Sources of Delegating Power under the Constitution of Bangladesh

Under the constitution of Bangladesh there are two specific sources of delegated law-

1. An Act of parliament in which power is delegated to make rules, by-law or regulations.

2. An ordinance made by the President in pursuance of article 93 of the constitution in which power is delegated to make rules, by-laws, or regulations. For example, the Bangladesh Hotel and Restaurant Ordinance, 1982 enables in its section 27 government to frame a rule and in pursuance of that delegated power government made the Bangladesh Hotel and Restaurant (Registration, License and Control) Rules, 1986.

It is to be noted that the general principle is that it is only the legislature which, through an Act, can delegate legislative power to the administration. How then can the President's ordinance do that ? This is possible because an ordinance made by the President has the same effect and force as an Act of parliament.

Need for Control of Delegated Legislation

The fact is that realities of modern welfare state have made delegated legislation an unavoidable and inseperable function of the government today. Due to the tremendous pressure on parliament's functioning the importance and necessity of delegated legislation can in no way be negated. At the same time there is inherent danger of abuse of the said power by the executive. In 1929 the Lord Chief Justice, Lord Harward in his book "The New Despotism" criticised the growth of delegated legislation and pointed out the dangers of its abuse. As a result, the Committee on Minister's Powers was set up which in its report accepted the necessity for delegated legislation but considered that the power delegated might be misused and recommended the following modes of control over the delegated legislation.

1. Nomenclature of various forms of delegated legislation should be supplied and better provision be made for publication.

2. The precise limits of law-making power which parliament intended to confer on a Minister should be clearly defined.

3. Parliamentary scrutiny and control should be improved.

4. Consultation with interested groups or bodies should be extended.

Control over Delegated Legislation

There are following three methods of controlling the delegated legislation.

1. Parliamentary Control

It is the primary duty of the legislature to supervise and control the exercise of delegated power by the executive authorities so that the executive authority cannot abuse their delegated power. Parliamentary control over the delegated legislation is exercised at three stages.

The first stage is the stage when the power is delegated to the subordinate authorities by parliament. This stage comes when the Bill is introduced in the legislature. At this time parliament decides how far power would be delegated to the subordinate authority.

The second stage is when the rules made under the statute are laid before the House through the committee on subordinate legislation (Such a committee is commonly known as Select Committee on Statutory Instrument or Scrutiny Committee). The Committee on subordinate legislation scrutinises the rules framed by the executive and submits its report to the legislature if these rules are beyond the permissible limits of delegation.

The third stage starts in the House after the committee has submitted its report. The rules along with their reports are debated in the House. If the rules are *ultra vires* questions may be put to the Minister concerned and if necessary even a motion of censure on the Minister responsible for the rules and regulations may be moved.

2. Judicial Control

The courts have power to consider whether the delegated legislation is consistent with the provisions of the 'enabling Act' on the ground of *ultra vires*. The courts can declare the parent Act unconstitutional on the ground of excessive delegation or violation of fundamental rights. The parent Act may be Constitutional but the delegated legislation emanating from it may come in conflict with some provisions of the Constitution and hence it can be declared unconstitutional.

3. Control by Public Opinion

In Britain a Statutory Instrument Act was passed in 1946 which provides that the delegated legislation shall be published for public information before it comes into operation. Through this publication the people and the press can express their opinion over the instrument.

Control of Delegated Legislation in Bangladesh

No research statistics has yet been made in Bangladesh as to what percentage of total laws in Bangladesh consists of delegated law. But it is evident that almost 90% Acts and Ordinances provide for delegation of legislative power to the executive and definitely the largest portion of law in the country is coming from the

delegated legislation. The reality is that a very inadequate piece of legislation is enacted by parliament providing only the skeleton and allowing the officials and executives to frame by-laws, rules and orders thereby making the executive the real law-makers. Often these Acts of parliament even omit to provide the guidelines and criterions for making rules and for the exercise of the discretion by the executive. This excessive delegations almost amount to the abdication of the legislative power of the parliament. Because unlike in Britain there is no parliamentary control in Bangladesh over delegated law. No select committee exists to serutinise and make report over delegated law. No statutory instrument Act as exists in Britain has yet been made in Bangladesh. The delegated laws, therefore, are not laid before parliament. Nor is there any mandatory obligation on the part of the executive to publish the delegated law for the information of the public before their application. Often delegated laws in the form of Statutory Rules and Orders (S.R.O) are contradictory, confusing, unclear and allow enormous discretion to be exercised by the executives. It suits bureaucracy enjoying enormous power. These delegated laws sometimes expressly violate even constitutional provisions.

The only control which exists in Bangladesh is judicial control. The High Court Division of the Supreme Court can declare the parent Act or Ordinance unconstitutional on the ground of excessive delegation or violation of fundamental rights. The court can consider whether the delegated law is consistent with the provisions of the 'enabling Act' on the ground of *ultra vires.*

CHAPTER XIII

THE PRESIDENT: POSITION, POWER & FUNCTION

Part IV of the Constitution of Bangladesh deals with the 'Executive' which comprises the President, the Prime Minister and the cabinet, the local government and lastly the attorney general.

The Status of the President

From theoretical and constitutional or legal point of view the President is the head of the state; he is also the head of the executive. Because Article 48(2) states that the President, as Head of State, take precedence over all other persons in the state. Again, Article 55(4) states that all executive actions of the government shall be expressed to be taken in the name of the President. This is the theoretical or constitutional status of the President but in reality he is a figure head only ; the real executive power of the state is exercised by the cabinet under the leadership of the Prime Minister. Because firstly, Article 48(3) states that in the exercise of all his functions, save only that of appointing the Prime Minister and the Chief Justice the President shall act in accordance with the advice of the Prime Minister. And secondly, Article 55(2) provides that the executive power of the Republic shall, in accordance with this constitution, be exercised by or on the authority of the Prime Minister.

Thus like the British Crown the President of Bangladesh reigns but does not govern the country. He is the titular executive and the cabinet is the real executive.

As to the President's immunity it is stated in Article 51 that the President shall not be answerable in any court for anything done or omitted by him in the exercise or purported to exercise of the functions of his office. An aggrieved person may take proceeding against the government of Bangladesh but not directly against the President. Again, during his term of office no criminal proceeding whatsoever shall be instituted or continued against the President. No court shall issue any process for his arrest or imprisonment.

Qualifications and Disqualifications of the President

Qualifications:

Article 48(4) lays down the qualifications which one must possess for being elected to the office of the President of Bangladesh. These are following:

i) He must have completed the age of 35 years.

ii) He must be qualified for election as a member of parliament.

iii) He has not been removed from office of President by impeachment under this constitution.

iv) As it has been conditioned that he must be qualified for election as a member of parliament, he must be a citizen of Bangladesh.

Disqualifications:

1. The President during his term of office shall not be qualified for election as a member of parliament and if a member of parliament is elected as President he shall vacate his seat in parliament on the day on which he enters upon his office as President. [Article 50(b)].

2. The President shall not hold any office, post or position of profit or emolument or take any part whatsoever in the management or conduct of any company or body having profit or gain as its object. [Article 147(3)]

Election of the President

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 12th 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 provisions 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.

Term of Office of the President

1. Article 50 says that the President shall hold office for a term of five years from the date on which he enters upon his office.

2. Even after the expiry of his term the President shall continue to hold office until his successor enters upon his office (Art. 50).

3. The President shall not hold office as President for more than two terms, whether or not the terms are consecutive [Art. 50(2)].

4. Before the expiration of his term the President may resign his office by writing under his hand addressed to the Speaker [Art. 50(3)].

5. If a vacancy occurs in the office of President or if the President is unable to discharge the functions of his office on account of absence, illness or any other cause the Speaker shall discharge those functions until a President is elected or until the President resumes the functions of his office, as the case may be (Act. 54).

6. In the case of vacancy in the office of the President occurring by reason of the expiration of his term of office an election to fill the vacancy shall be held within the period of ninety to sixty days prior to the date of expiration of the term (Art. 123).

7. In the case of vacancy in the office of the President occurring by reason of the death, resignation or removal of the President, an election to fill the vacancy shall be held within the period of ninety days after the occurrence of the vacancy (Art. 123).

Removal of the President

Before the expiry of his term the President may be removed from his office by parliament. Such removal has two aspects.

A. Impeachment of the President; and

B. Removal of President on grounds of incapacity.

Semester Final

A. Impeachment[1] of the President

According to Article 52 of the Constitution the President may be impeached on two grounds:

i) On a charge of violating the Constitution; or

ii) On a charge of grave misconduct.

Procedure:

i) The impeachment charge against the President must be preferred by a notice of motion signed by a majority of the total number of members of parliament. The notice must be delivered to the Speaker. The notice must set out the particulars of the charge.

ii) The motion shall not be debated earlier than fourteen not later than thirty days after the notice has been delivered to the Speaker.

iii) Having received the notice the Speaker shall forthwith summon parliament if it is not in session.

iv) The President shall have the right to appear and to be represented during the consideration of the charge.

v) If after the consideration of the charge a resolution is passed by parliament by the votes of not less than two-thirds of the total number of members declaring that the charge has been substantiated, the president shall vacate his office on the date on which the resolution is passed.

B. Removal on the Ground of Incapacity

Under Article 53 the President may be removed on the ground of two types of incapacity: i) physical incapacity; and ii) mental incapacity.

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1 The term 'impeachment' means an act of charging a public official with misconduct in office. When an impeached official is found guilty. he or she can be removed from office and forbidden to hold office again. The person may also be tried in regular courts.

Procedure:

i) A notice of a motion may be given to the effect that the President has been physically or mentally incapacitated.

ii) The notice of motion must be signed by a majority of the total number of members of parliament.

iii) The notice must be delivered to the Speaker setting out the particulars of the alleged incapacity.

iv) On receipt of the notice the Speaker shall forthwith summon parliament if it is not in session and shall call for a resolution constituting a Medical Board.

v) As soon as medical board is constituted a copy of notice thereto shall be transmitted to the President together with a request signed by the Speaker that the President submit himself within a period of ten days from the date of the request to an examination by the Board.

vi) If the President submits himself to an examination by the Board, the Board shall submit its report within seven days of the examination.

vii) If after consideration by the parliament of the motion and of the report of the Board the motion is passed by votes of not less than two-thirds of the total number of members of parliament, the President shall vacate his office on the date on which the resolution is passed.

viii) If the President has not submitted himself to an examination by the Board before motion is made in parliament, the motion may be put to the vote, and if it is passed by the votes of not less than two-thirds of the total number of members of parliament, the President shall vacate his office on the date on which the motion is passed.

ix) The President shall have the right to appear and to be represented during the consideration of the motion.

Powers and Functions of the President

According to Article 48(2) the sources of the power of the President are two—the Constitution and any other law. The Constitutional powers of the President may be of following five types

A. Executive power;
B. Legislative Power;
C. Financial Power;
D. Judicial Power; and
E. Miscellaneous Power.

A. Executive Power of the President

1. The President is the Head of state [Article 48(2)]. And all executive actions of the government shall be expressed to be taken in the name of the president [Article 55(8)].

2. The President shall by rules specify the manner in which orders and other instruments made in his name shall be attested or authenticated [Article 55(5)].

3. The President shall make rules for the allocation and transaction of the business of the government [Article 55(6)].

4. The President shall appoint as Prime Minister the member of parliament who appears to him to command the support of the majority of the members of parliament [Article 56(3)].

5. The President shall appoint the Prime Minister, other ministers and of the Ministers of State and Deputy Ministers [Article 56(2)].

6. In accordance with the advice of the Prime Minister the President shall appoint the Attorney General of Bangladesh, judges of the Supreme Court, the Chief Election Commissioner and other Election Commissioners, the Comptroller and Auditor-General, the Chairman and other Members of the Public Service Commission (Articles 64, 95, 118, 127 138).

7. The President shall appoint the Chief Justice (Article 95).

8. The President is the supreme commandeer of the defence services of Bangladesh (Article 62).

These executive powers of the President of Bangladesh are more or less similar to those exercised by the heads of other countries of the world. The US President exercises also the same power but his appointing powers have to be approved by the senate; otherwise appointments become illegal. This is because there is the principle of checks and balances in the US Constitution. But in parliamentary system no such approval from the legislature is required. The executive powers exercised by the President of

Bangladesh are similar to those exercised by the British Crown. Like the President of Bangladesh the British Crown exercises its executive powers in accordance with the advice of the Prime Minister and in some cases of the Lord Chancellor.

B. Legislative Powers of the President

1. In accordance with the written advice of the Prime Minister the President summons, prorogues and dissolves parliament (Article 72).

2. The President has right to address parliament and may send message thereto (Article 73).

3. The President assent to every Bill passed by the parliament. Without his assent no Bill comes into law. After a Bill is passed by the parliament it is presented to the President for his assent. Within 15 days after a Bill is so presented, the President shall assent to it. However, the President can return the bill to the parliament for reconsideration after it is presented to him for his assent. But if the Bill is again passed by the parliament with or without amendment by the votes of a majority of the total number of the members of the parliament and it is presented to the President, the President has to assent within seven days failing which the Bill automatically becomes a law[1].

4. When parliament stands dissolved or is not in session the President may make law by promulgating ordinances and such ordinances have the same force and validity as an Act of Parliament (Article 93). The President cannot exercise this power independently; he has to act in accordance with the advice of the Prime Minister (Article 48(3)).

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[1] In the 7th Parliament one Bill- the Code of Civil Procedure (Amendment) Bill 1998- providing for empowering the subordinate courts to try cases more speedily, was returned to parliament by the President Sahabuddin Ahmed for reconsideration. 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 the majority votes of the total MPs needed to pass it and to resubmit it to the President for considerations.

C. Financial Power.

1. No Money Bill or any Bill which involves expenditure form public moneys, shall be introduced into parliament except on the recommendation of the President (Article 82).

2. No demand for a grant shall be made except on the recommendation of the President (Article 89(3).

3. The President has the power to authorise expenditure from the Consolidated Fund for supplementary or excess grants (Article 91).

4. If parliament in any financial year fails to make any grant the President, upon the advice of the Prime Minister, would have power to draw from the Consolidated Fund, the necessary funds for a period not exceeding 60 days, stipulated in the Annual Financial statement for that year [Article 92(3).

As to these financial powers of the President the last one as provided in Article 92(3) is undemocratic and against the concept of rule of law. Because this power of the President has curtailed the power of parliament in financial matter. No such provision exists in India, Britain or USA, for in a true democratic system not a single penny from the public purse can be spent by the executive without the prior approval of the parliament.

The AL Government (1996-2000) introduced four Bills in the winter session of 1998 with a view to giving legal shape to a peace agreement it signed with the insurgents in the Chittagong Hill Tracts. The opposition BNP which sought to resist the passage of the agreement as well as the Bills, turned to the President requesting him to send back the Bills for reconsideration of the parliament if the ruling AL passed them using its absolute majority in the House. The Government, however, adopted a fraudulent tactic, introducing them as money Bills and thereby practically limiting the authority of the President to exercise discretion had he

wanted to it. The Public Safety Act 2000 was also introduced and passed as money bill.

D. Judicial Power of the President

The judicial power of the President is provided for in Article 49 of the Constitution. It says that the President shall have power to grant pardons, reprieves and respites and to remit, suspend of commute any sentence passed by any court, tribunal or other authority. This power is also called the pardoning power or the prerogative of mercy. The object of conferring this judicial power on the President is to correct possible judicial errors, for no human system of judicial administration can be free from imperfections[1]. Taft, C.J. remarked that executive clemency exists to afford relief from undue harshness or evident mistake in the operation of criminal law. The administration of justice by the courts is not necessarily always wise or certainly considerate of circumstances which may properly mitigate guilt. The power to pardon is, therefore, a check entrusted to the executive for special purposes such as to ameliorate or avoid a particular criminal judgment.[2] This power of pardoning exercised by the President of Bangladesh is practically similar to that in America or England or in any other country. Like in all other countries the President of Bangladesh exercises this pardoning power in accordance with the advice of the Prime Minister. A short explanation of some legal terms used in article 49 has been given below for better understanding of the advanced students.

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1 Basu, *Introduction to the Constitution of India,* 2rd, ed, Part-II. P. 21

2 Ex. Parte Grossman (1924) 267 US 81 : 69 L .527 Ref. Shukla, V. N, Ibid, P. 240

Pardon	*: A pardon completely absolves the offender from all sentences and punishments and disqualification and places him in the same position as if he had never committed the offence.*
Reprieves	*: A temporary suspension of punishment fixed by law.*
Respites	*: Postponement to the future execution of a sentence or awarding a lesser punishment on some special grounds e.g. the pregnancy of a woman offender.*
Commutation	*: It means exchange of one thing for another. Here it means substitution of one form of punishment for another of a lighter character e.g. simple imprisonment for rigorous imprisonment.*
Remission	*: It means reduction of amount of sentence without changing its character e.g. a sentence of one year may be remitted to six months.*

E. Miscellaneous Powers of the President

Besides above mentioned powers the President has to perform some other functions like administration of some oaths. The oath of the Chief Justice, the Prime Minister, Minister, Deputy Ministers, Speaker and Deputy Speaker etc. are administered by the President under the Third Schedule of the Constitution. Likewise as the Head of the state, the President sends and receives Ambassadors and other diplomatic representatives. All treaties with foreign countries, annual reports of the Public Service Commission, of the Auditor–General are submitted to the President who causes them to be laid before parliament. (Articles 145A, 141, 132).

The Power of the President in a Caretaker Government

Article 58C of the Constitution gives some special power to the President with regard to appointment of the Chief Adviser of the Caretaker Government. Recently this power and his assumption of the post of the Chief Adviser to the Caretaker Government has come under huge criticism. For details, see chapter 23 of this book.

CHAPTER XIV

ORDINANCE MAKING POWER OF THE PRESIDENT

The ordinance[1] making power of the president is provided for in article 93 of the Constitution. It is also called the law making power of the President.

Justification for Ordinance Making Power of the President

Generally the supreme power to make laws for a country or any part thereof belongs to parliament. But constitutions of some developing countries provide for provision of legislation by the head of the executive in some special situations. The Constitutions of India[2], Pakistan[3] and Bangladesh provide for such provisions. The power to make ordinances is justified on the ground that the executive must be armed with powers to meet unforeseen or extreme necessity when the ordinary law making body i.e. parliament is not in session or is dissolved. It is not difficult to imagine the cases when ordinary law-making powers may not be able to deal with a situation which may suddenly and immediately arise. It is, therefore, not undemocratic to invest executive with law-making power to take immediate action to face an exceptional situation. While adopting the constitution of India Dr. Ambedker, the chairman of the drafting committee explained the need of the power as follows:

> "The emergency must be dealt with and it seems to me that only solution is to confer upon the president the power to promulgate a law which will enable the executive to deal with that particular situation because it cannot resort to the ordinary process of law because again, *exhypothesi*, the legislature is not in session."

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1 **Ordinance** : According to old authorities, ordinance means a declaration by the Crown in answer to a petition by the Commons enquiring as to the law relating to a particular matter as contrasted with a statute laying down new law. The term is also sometimes given to a various kinds of prerogative orders issued by English Kings prior to the Bill of Rights of 1688

2 Art. 123 for ordinance making by the President and Art. 213 for Governors.

3 Art. 89 of the Pakistan Constitution provides for ordinance making by the President and Article 128 for Governors.

Though this exceptional power is not undemocratic, there is a danger in it. It carries with it the risk of abuse of power.

History of the Ordinance Making Power

The real history of ordinance making power in the sub-continent traces back to the colonial constitution i.e. the Government of India Act, 1935. This Act introduced in India, for the first time, representative legislatures at both the provinces and center. The structure of the Act was to introduce a parliamentary system to India but the British reserved certain safeguards which were alien to their own system. They retained with the Governor-General and Governors power to disallow Bills, to certify Bills, to legislate by ordinances. They did it deliberately to safeguard their colonial interest. It is for this the Act was called by Winston Churchill, 'a gigantic quilt of jumbled crochet work, a monstrous monument of shame built by pigmies.'[1] This Act contained two provisions on ordinance-making.

First, article 72 of the 9th Schedule provided for-

> "The Governor-General may, in cases of emergency, make and promulgate ordinances for the peace and good government of British India and any part thereof."

It is worthy of notice that the life of ordinances was to be for 6 months from the day of its promulgation and there was no obligation cast upon the Governor-General of placing ordinances before the Indian Legislature upon its first meeting after promulgation of such ordinance.

Second, section 42 of the Government of India Act, 1935 provided for -

> "If at any time when the Federal Legislature is not in session the Governor-General is satisfied that circumstances exist which render it necessary for him to take immediate action, he may promulgate such ordinances as the circumstances appear to him to require."

It was also provided that such an ordinance was to be laid before the Federal Legislature and should cease to operate at the expiration of six weeks from the re-assembly of the legislature.

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1 Hodson, H.V, *The Great Divide : Britain-India-Pakistan,* (Karachi: Oxford University Press, 1985), P.48

The pattern of the ordinance law as provided for in article 42 of the Government of India Act, 1935 was retained in both the Indian Constitution and the Pakistan Constitution.[1] Article 123 of the Indian Constitution gives legislative power to the President to promulgate ordinances between sessions of parliament only if he is satisfied that circumstances exist which render it necessary for him to take immediate action.

During Pakistan period till the Constitution of 1956 was adopted the country was run on the basis of the Act of 1935 where section 93 (allowing for dismissal of provincial governments) and the ordinance making instruments were freely used. Like the Constitution of India the Constitution of Pakistan of 1956 also retained the ordinance making power. After the imposition of Martial Law in 1958 legislation by ordinances became the rule rather than the exception. The slogan 'Ayub Khan ruled by ordinance, not by law' was widely used to highlight the democratic struggle of the time, particularly in East Pakistan. This movement to attain democratic and economic emancipation ultimately led to the birth of Bangladesh. But unfortunately the Constitution of Bangladesh has also retained this colonial provision.

Ordinance Making Provisions in Bangladesh Constitution

Condition Precedent to an Ordinance

Under Article 93(1) the President may make ordinance in following two situations-i) Parliament is not in session ; or ii) Parliament stands dissolved. In these two situations the President can promulgate ordinance only when he is satisfied that circumstances exist which render immediate action necessary.

Legal Status of an Ordinance

As to the legal status of an ordinance article 93(1) says that an ordinance shall, from its promulgation, have the same force and effect as an Act of parliament. This is because the power to issue an ordinance is not an executive power of the president; it is his legislative power which is devised to meet urgent situations and necessary for peace and good government in the country. The only difference between an Act and

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[1] Ordinance making power of the President was provided for in article 69 and for the Governor in Article 102 of the Constitution of 1956.

Ordinance is with regard to the duration. Like an Act of parliament an ordinance may repeal parliamentary enactments or an earlier ordinance or may give retrospective effect to its provisions.[1]

Limitations of an Ordinance

i) What cannot lawfully be made under the Constitution by an Act cannot be done by an ordinance.

ii) An ordinance cannot alter or repeal any provision of the constitution; and

iii) An ordinance cannot continue in force any provision of an ordinance previously made.

Conditions Subsequent to an Ordinance

i) Every ordinance made during the recess of parliament must be laid before parliament at its first meeting following the promulgation of it, if it is not repealed earlier.

ii) Once the ordinance is placed in parliament, a corresponding Bill must be passed in 30 days; otherwise it will cease to have any effect at the expiration of 30 days.

iii) Before the expiration of 30 days parliament may pass a resolution disapproving the ordinance and if such a resolution is passed, the ordinance will cease to have any effect upon the passing of the resolution.[2]

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1 *State of U.P.*V. *Atiqua Begum* 1052 FCR 110

2 **How an Ordinance Becomes an Act of Parliament**
All ordinances promulgated before the session starts must be, by operation of law i.e. under the authority of Article 93 of the Constitution, laid before parliament at its first meeting of the session. 'Lay before parliament' means to inform parliament i.e. to distribute the copies of ordinances to all members of parliament. This is the first stage (i.e. laying before parliament). After so laying the minister-in-charge (here the Minister of Law and Parliamentary Affairs) must give notice to the Secretary of Parliament of his intention to move for leave to introduce Bill relating to any or all of those ordinances. On the basis of this notice the motion for leave to introduce the Bill or Bills shall be entered in the orders of the Day for a day meant for government business. When the item is called the minister-in-charge shall move for leave to introduce the Bill or Bills. The leave being granted by the Speaker the minister shall introduce the Bill (second stages i.e. the introduction). After this introduction the Bill shall follow the regular procedure of an ordinary Bill.

Before discussing the impact of ordinance making over the constitutionalism in Bangladesh it would be convenient to give a statistics of ordinance since 1973.

Statistics of Law and Ordinances Passed by Parliament

The First Parliament

7 April, 1973—17 July, 1975

Session	Total Law Passed by parliament	Number of Bills passed which have been initiated from ordinances	Total Ordinances promulgated between two sessions
1st	0	0	0
2nd	19	10	10
3rd	15	8	8
4th	31	15	16
5th	32	9	9
6th	13	12	14
7th	2	1	3
8th	42	34+1* = 35	34
Total	154	90	94

* This bill was introduced via ordinance in the 7th session but remained unresolved and was later passed in the 8th session.

The Second Parliament

2 April, 1979—2 March, 1982

1st	1	0	268*
2nd	5	0	0
3rd	16	5	6
4th	15	3	4
5th	14	4	4
6th	4	3	4
7th	10	0	0
8th	0	0	9
Total	65	15	295

* The 8th session of the First Parliament ended on 17th July, 1975. From this 17th July to 15th August, 1975 Mujib promulgated 9 ordinances. Later before the start of the 2nd Parliament Mustaq promulgated 9. Sayem promulgated 123 and Zia promulgated 127 ordinances. Of these 268 ordinances 159 (excluding 9 ordinances promulgated by Mujib before his death) were given

auto-legality by the 5th Amendment. These ordinances were not formally introduced as Bill in parliament and as a result, they were not transformed into Acts of Parliament; they exist till today as valid law in the name of ordinances so far as they are not repealed or otherwise amended by parliament or by any subsequent ordinance.

The Third Parliament

10 July, 1986—13 July, 1987

1st	0	0	307[1]
2nd	1	0	3
3rd	19	$6+2^2 = 8$	6
4th	19	6	7
Total	39	14	323

1 Martial Law was re-imposed on 24th March, 1982 Article. 93 of the Constitution was revived under the Martial Law Proclamation and before the start of the 3rd Parliament Ershad promulgated 307 ordinances. None of these ordinances was introduced in the 1st session of the 3rd Parliament as Bill and they could not become Acts of Parliament. But all of them were given auto-legality by the 7th Amendment Act and till now they exist as valid laws in the name of ordinances so far as they are not repealed or otherwise amended by parliament or by any subsequent ordinance.

2 3 ordinances were introduced as Bills in the second session but they were not passed i.e. they remained as unresolved / immatured Bills before the session ended. 2 of them were passed in the 3rd session.

The Fourth Parliament

25 April, 1988—25 August, 1990

1st	38	33	34
2nd	7	7	7
3rd	21	9	9
4th	17	4	4
5th	29	26	26
6th	30	10	12
7th	0	0	0
Total	142	89	92

The Fifth Parliament

5 April, 1991—18 November, 1995

1st	18	18	44
2nd	10	1	1
3rd	4	2	10
4th	18	10+5 = 15	10
5th	0	0	0
6th	18	4	4
7th	18	4	4
8th	12	4	4
9th	0	0	4
10th	9	3	0
11th	6	4	4
12th	7	4	4
13th	2	2	3
14th	6	1	1
15th	7	0	0
16th	4	0	0
17th	7	1	1
18th	9	3	4
19th	1	1	2
20th	8	1	2
21th	8	2	0
22th	1	0	0
Total	173	70	102

The Sixth Parliament

19 March, 1996—25 March, 1996

1st	1	0	19
Total	1	0	19

The Seventh Parliament

14 July, 1996—13 July, 2001

1st	19	15	15
2nd	1	0	0
3rd	13	4	4
4th	0	0	1
5th	4	0	0
6th	4	0	0
7th	4	0	0

8th	12	0	0
9th	4	0	0
10th	0	0	0
11th	8	1	1
12th	14	0	0
13th	8	0	0
14th	0	0	0
15th	1	0	0
16th	8	0	0
17th	4	0	0
18th	18	0	0
19th	8	0	0
20th	7	0	0
21st	5	0	0
22nd	21	0	0
23rd	29	0	0
Total	190	20	21*

*One progressive feature is very much evident in the 7th parliament and this is the gradual slowing down of the resorting to ordinance making in between two sessions of parliament.

The Eighth Parliament

28 October, 2001—27 October, 2006

1st	5	2	2
2nd	11	0	0
3rd	7	0	0
4th	2	0	0
5th	13	2	2
6th	13	1	1
7th	2	0	0
8th	21	0	0
9th	3	0	0
10th	1	0	0
11th	14	0	0
12th	9	0	0
13th	0	0	0
14th	7	0	0
15th	13	0	0
16th	1	0	0
17th	5	0	0
18th	9	0	0

19th	0	0	0
20th	15	1	1
21st	5	0	0
22nd	13	0	0
23rd	15	0	0
Total	184	6	6

Ordinances after the 8th Parliament[1]

28 October, 2006—December, 2007

Sl No.	Name of the Ordinance
1	জরুরী ক্ষমতা অধ্যাদেশ
2	The Code of Criminal Procedure (Amendment) Ordinance
3	The Special Powers (Amendment) Ordinance
4	The Code of Criminal Procedure (2nd Amendment) Ordinance
5	আইন-শৃঙ্খলা বিঘ্নকারী অপরাধ (দ্রুত বিচার) (সংশোধন) অধ্যাদেশ
6	জরুরী ক্ষমতা (সংশোধন) অধ্যাদেশ
7	দুর্নীতি দমন কমিশন (সংশোধন) অধ্যাদেশ
8	Criminal Law Amendment (Amendment) Oridinance
9	The Members of Parliament (Remuneration and Allowances) (Amendment) Ordinance
10	অর্থ আইন
11	সংযুক্ত তহবিল (সম্পূরক মঞ্জুরী দান ও নির্দিষ্টকরণ) অধ্যাদেশ
12	সংযুক্ত তহবিল (অগ্রীম মঞ্জুরী দান ও নির্দিষ্টকরণ) অধ্যাদেশ
13	Bangladesh Biman Corporation (Amendment) Ordinance
14	পদ্মা সেতু প্রকল্প (ভূমি অধিগ্রহণ) অধ্যাদেশ
15	পাবলিক প্রকিউরমেন্ট (সংশোধন) অধ্যাদেশ
16	বার কাউন্সিল
17	মানি লন্ডারিং প্রতিরোধ (সংশোধন) অধ্যাদেশ
18	ভোটার তালিকা অধ্যাদেশ
19	Bangladesh Flag Vessels (Protection) (Amendment) Ordinance
20	The President's (Remuneration and Privileges (Amendment) Ordinance
21	The Paurashava (Amendment) Ordinance
22	ব্যাংক কোম্পানী (সংশোধন) অধ্যাদেশ

[1] The tenure of the 8th parliament under the BNP led 4 party alliance government was completed in October, 2007. Because of partisan role played by the President Iajuddin Ahmed and CEC MA Aziz the election for 9th parliament could not held in time and in the wake of a huge political unrest the army interfered into politics and new caretaker government led by Dr. Fskhruddin Ahmed was formed on 12th January, 2007 and this government is now running the country by promulgating ordinances one after another as there is no parliament.

23	The Chittagong City Corporation (Amendment) Ordinance
24	The Dhaka City Corporation (Amendment) Ordinance
25	The Khulna City Corporation (Amendment) Ordinance
26	রাজশাহী সিটি কর্পোরেশন (সংশোধন) অধ্যাদেশ
27	সিলেট সিটি কর্পোরেশন (সংশোধন) অধ্যাদেশ
28	বরিশাল সিটি কর্পোরেশন (সংশোধন) অধ্যাদেশ
29	আদালত সংস্কার বাস্তবায়ন (সহায়ক বিধান) (সংশোধন) অধ্যাদেশ
30	The Pesticides (Amendment) Ordinance
31	মোবাইল কোর্ট অধ্যাদেশ
32	Income Tax (Amendment) Ordinance
33	ইপিজেড শ্রমিক সংঘ ও শিল্প সম্পর্ক (সংশোধন) অধ্যাদেশ
34	দুর্নীতি দমন কমিশন (দ্বিতীয় সংশোধনী) অধ্যাদেশ
35	Islamic University (Amendment) Ordinance
36	Islamic University (Amendment) (Amendment) Ordinance
37	ইসলামী বিশ্ববিদ্যালয় (সংশোধনী) অধ্যাদেশ
38	Jamuna Multipurpose Bridge Authority (Amendment) Ordinance
39	অর্থ ঋণ আদালত (সংশোধন) অধ্যাদেশ
40	জাতীয় মানবাধিকার কমিশন অধ্যাদেশ
41	এসিড নিয়ন্ত্রণ (সংশোধন) অধ্যাদেশ
42	Income Tax (2nd Amendment) Ordinance
Total	42

Ordinances in 2008

Sl No.	Name of the Ordinance
1	Income Tax (Amendment) Ordinance, 2008
2	Grameen Bank (Amendment) Ordinance, 2008
3	নির্বাচন কমিশন সচিবালয় অধ্যাদেশ, ২০০৮
4	সুপ্রীম জুডিসিয়াল কমিশন অধ্যাদেশ, ২০০৮
5	সার (ব্যবস্থাপনা) (সংশোধন) অধ্যাদেশ, ২০০৮

Demerits and Effect of Ordinance Making over Constitutionalism in Bangladesh

As mentioned earlier the philosophy underlying the ordinance making power is that to meet an unforeseen and urgent situation which may suddenly arise during the recess of parliament the executive should be armed with legislative measures. But this discretionary power has a danger because it carries with it the risk of abuse of power for political end that has been the fact of ordinance making in Bangladesh.

Firstly, during the recess of parliament the President may promulgate ordinance if he is satisfied that circumstances exist which render immediate action necessary. The ordinance making power, therefore, depends absolutely upon the subjective satisfaction of the President. It is not an objective satisfaction in the sense that whether or not the President is satisfied that circumstances exist rendering immediate action necessary is a matter which is not a justiciable one and the courts can not be called upon to determine its existence by the application of any objective test.[1] It is to be noted here that the satisfaction here is not the personal satisfaction of the President. In reality it is the satisfaction of the cabinet on whose advice the president exercises this power. The ordinance issued by President may, therefore, be called as 'cabinet-made law.[1] This subjective satisfaction of the president has enabled the executive to play an uncontrolled hand in abusing this power. Not to meet any urgent and emergency situation but just with a view to by-passing parliament the executive makes a huge number of ordinances during every recess of parliament. With political purpose government makes all black laws through ordinances. Bureaucrats as well as the government prefers the way of ordinances as it simplifies matters for them. The ordinance becomes law with immediate effect on being signed by the President and gazetted. Ordinances are framed in the privacy of the ministries and passed by the cabinet without any public exposure. The statistics given in this chapter shows that the number of ordinance placed for approval before parliament is always far larger than the general Bills introduced. The statistics also shows that between 1973 to 1996 940 ordinances in total were promulgated whereas the number of laws passed by parliament in this period was 594 in total out of which 293 originated from ordinances. If we exclude the number of ordinances promulgated during the martial law period, even then we find that 49.33% of the total laws in the country have originated through ordinance, and the average number of ordinances promulgated in every recess of parliament is more than 7. Sometimes ordinances are made 4 or 5 days before the parliament session starts and sometimes a parliament session only approves ordinances and no other legislative function is done at all.

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1 Brohi, A.K, *Fundamental Law of Pakistan*, Ibid. P.283
One may also say it 'executive law' but here one must be careful because this type of executive law is not a subordinate law. See, details, PP. 237–238

The second session of the 4th Parliament, first, thirteenth and nineteenth session of the 5th Parliament provide glaring example of it. This tendency of the government as pointed out by a commentator 'shows an attitude of complete disregard for the parliamentary culture and reluctance for building political institutions. This is an attitude that has become ingrained in our society resulting in the deep morass into which politics in this country has sunk'.[1] For this widespread misuse of ordinance making power by-passing parliament it may typically be said that the Bangladesh parliament does not legislate but legitimises and legislation by ordinance has become a rule-a regular work of the government rather than the exception.

One point which is very important to mention here is that whether the law made by ordinance is a democratic one or not is not the real question; the question is that such laws are made by-passing parliament. It, therefore, negates all the safeguards of law-making on the one hand, and it reduces the role of parliament into a minimum on the other hand and it institutionalises only backdoor democracy. When ordinances are promulgated 4 or 5 days before the session starts, it shows utter disregard to the supremacy of parliament.

Secondly, legislation by ordinance is contradictory to the concept of rule of law. Rule of law as distinguished from rule of man or party means rule of that law which is passed in a democratically elected parliament after adequate deliberation and discussion. When a Bill is formally introduced in parliament, it needs to go through a number of stages- first reading, second reading, committee stage, third reading, etc. At every stage there is scope for discussion both in parliament and in public media. This scope of adequate deliberation and debate over a Bill creates an environment to remove undemocratic provisions from it; public opinion can be judged and suitable amendment introduced. Ordinances, on the other hand, are framed in the privacy of the ministries and passed by the cabinet without any public exposure. Though an ordinance is introduced in parliament as a Bill, it does

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1 Choudhury, Nazim Kamran, *Legislation by Ordinance*, P. 22 (A paper published by CAC in 1995)

not go through all the stages of safeguards of law making. Because once an ordinance is placed in parliament, a corresponding Bill must be passed in 30 days; otherwise the ordinance lapses. So the mover of the Bill argues for speedy consideration and adoption of the Bill. The argument given is that since the provisions of the Bill have already been given lawful effect, there is no need for detailed discussion. Since the larger part of total laws in the country are coming through ordinances and since these ordinances, however undemocratic they may be, get quickly approved without debate under the sweeping power of article 70, it may definitely be said that it is the abuse of the ordinance making power which has been a great hindrance to the ensuring rule of law in Bangladesh.

It is to be noted here specifically that A.K. Brohi, in his admirable and laborious work, 'Fundamental Law of Pakistan' calls ordinances 'temporary laws' containing with their own womb seeds of their own destruction.[1] But Brohi forgot about one vital point that these laws, though they contain with their own wombs seeds of their own destruction, leave as well behind powerful seeds of rule by tyranny; they die after giving a brutal birth of undemocratic law.

Thirdly, except in Bangladesh, India, Pakistan and some other developing countries this ordinance making power is not found in true democratic countries. The British monarch or the US President does not have any such law making power.[2] Ordinance making power as is practiced in Bangladesh is totally unknown in true democratic countries. If any urgent situation demanding a legislative action occurs, there is provision for emergency summoning of parliament both in USA and UK.

Fourthly, legislation by ordinance is against the principle of institutionalisation of democracy. Since all the ordinances originate from the hands and influence of the bureaucrats, this institution i.e.

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1 Brohi, A.K, *Fundamental Law of Pakistan,* Ibid, P.283

2 One must not confuse 'ordinances' with Orders-in-Council in British legal system. In British system Orders-in-Council are made by the Privy Council of Her Majesty but these are all subordinate laws and are made under powers given in a Parent Act. [Factsheet on Statutory Instument, Factsheet No 14 (1993) published by Public Information Office, House of Commons, London]

the bureaucracy is getting an easy hand to defy and flout the supremacy of parliament which is against the norms of constitutionalism. Because the bureaucracy must be under the absolute political as well as legal control of parliament and of cabinet and ministers. To give democracy an institutionalised shape every institution of democracy should be allowed to discharge its usual function. Law-making function should, therefore, be exercised by parliament except in grave emergency situation. Legislation by ordinance is also against the political belief, ideology and commitment of the government and peoples representatives. Because people elect the government and parliament not to allow to make law by ordinances but to see that their elected representatives i.e. legislators are performing the function of legislation on their behalf.

Fifthly, ordinances are issued even on financial matters violating the constitutional embargo. Article 83 of the Constitution specifically lays down, 'No tax shall be levied or collected except by or under the authority of an Act of Parliament'. But there are some ordinances by which the government has imposed taxes. One of them is the Value Added Tax Ordinance, 1991 (Ordinance 26 of 1991). This law introduced new taxation with vast implications on trade, industry, agriculture and almost every economic activity. It has expressly violated the provisions of article 83 of the Constitution. Because an ordinance, though it has the same effect and force as an Act of parliament, is not necessarily an Act of parliament. A fundamental principle of jurisprudence is that no law which has penal or punitive financial implication shall be given retrospective effect. But the Value Added Tax Bill, 1991 originated from the Value Added Tax Ordinance (Ordinance no 26 of 1991) was passed by parliament on 9th July and was given effect from the 1st July, 1991. Likewise, ordinances no 17, 28, 29, 30 and 31 of 1991 dealt with financial matters and all of them were given retrospective effect by parliament while transforming then into Acts.[1]

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[1] Legislation by Ordinance. *Ibid.* P. 16

Usurpation of the Function of the Legislature by the Executive and the Role of the Court

If we look at the statistics of the first parliament we find that it made 154 Acts out of which 90 originated from ordinances which amounted to 58.44% of the total law passed by it. Likewise, the statistics of the 5th Parliament dictates that it made 173 Acts out of which 70 originated from ordinances which amounted to 40.46% of the total law passed by it. Also the statistics of the 7th Parliament up to its second session dictates that it made 20 Acts out of which 15 originated from ordinances. Particularly these three parliaments in the constitutional history of Bangladesh were mostly democratically elected parliaments and the governments formed by them were truly democratic governments. But the statistics of ordinance making during the recess of parliaments by these democratic governments has definitely outnumbered the statistics of ordinance making by the two military governments. Even after returning to a parliamentary system, when the period between sessions of the House cannot be more than 60 days, the government is resorting to emergency provisions of ordinance for the most mundane of reasons'.[1] An ordinance is an emergency measure and should be resorted to only in cases where delay in the enactment of any measure is calculated gravely to affect the interests of any section. Can anyone seriously contend that this growing trend of issuing ordinances by-passing parliament conform to that principle? Definitely no. And this trend is, as the Indian Court says, nothing but a 'subversion of the democratic process' and colourable exercise of powers which amounts to a fraud on the Constitution.[2] The courts of our country should come forward to declare such a colourable exercise of power by the executive unconstitutional. Because the executive cannot usurp the function assigned to the legislature under the Constitution.

Where Does the Real Problem Lie?

The main instruments behind the promulgation of ordinances are the bureaucrats. Our bureaucrats have become accustomed to operating outside parliamentary scrutiny. This is a result of our

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1 Choudhury, Nazim Kamran, *Legislation by Ordinance,* Ibid, P. 9

2 *D.C. Wadhwa* V. *State of Biher* (1987) ISCC 378

historical political development, long periods of martial law and absence of legislatures. They prefer the way of ordinances as it simplifies matter for them. This is why sometimes it is strongly argued that bureaucrats are mainly responsible for ordinance making.[1] But the real problem lies with the political head of the government i.e. the Prime Minister. The lack of political and institutional education of the ministers including the Prime Minister is the main reason. Because, as mentioned by a researcher, if the government demonstrates its political will and its respect for parliamentary practices no civil servant will venture to suggest to his minister for the promulgation of ordinances. Similarly legislation by ordinances may be prevented if any member of a cabinet simply questions or wants to know the immediacy of such legislation'.[2] But it is the fact that in most cases it becomes almost impossible for a minister to ask such a question where the Prime Minister keeps a dominating attitude. Actually the very starting of constitutionalism in Bangladesh got a serious set back at the hand of Sheikh Mujib, the founding president of this country. It was Sheikh Mujib who and under whose advice, while he was the Prime Minister, the president misused this ordinance making power almost in a naked way. Since the Constituent Assembly was not given any law making power all laws in the country before the first parliament was constituted were made by presidential orders (see more P. 438). This trend of law making by the executive by-passing and ignoring the role of the parliament has left a far reaching bad impact in the development of constitutionalism in Bangladesh. What then do we really need to stop this by-passing parliament? We need to develop a parliamentary culture or tradition and to create such a tradition we are greatly in need of qualified and educated political leadership which we are acutely lacking since our independence. Because as said by Montesquieu, 'at the birth of societies it is the leader of the Commonwealth who create the institutions; afterwards it is the institutions that shape the leaders"[3]

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1 Most of the discussants who were existing memebrs of parliament in the seminer "Legislation by ordinance" expressed their views that bureaucrats are responsible for suggesting legislation by ordinance. (Summary proceeding of workshop on ' Legislation by Ordinance, organised by CAC, held on July 15, 1995.)

2 Choudhury, Nazim Kamran, *Legislation by Ordinance*, Ibid, P. 6

3 Quoted by Choudhury, Dilara, *Ibid*, P.16

CHAPTER XV

EMERGENCY PROVISIONS

What is Emergency ?

There are emergency provisions in the constitutions of some countries but nowhere it is exactly defined what emergency is. Normally emergency means an unexpected occurrence requiring immediate action. In *Bhagat Singh* V. *King-Emperor* Lord Dunedin said, "a state of emergency is something that does not permit of any exact definition. It connotes a state of matters calling for drastic action."[1] Stiphen P. Marks says that emergency is a situation which results from temporary condition, which place institutions of the state in a precarious position, which leads the authorities to feel justified in suspending the application of certain principles.[2] Strictly speaking, the concept of emergency, from the view point of constitutional law, means the suspension of and restriction over certain fundamental rights of citizens in order to deal with a situation when the security of the state is threatened or the national interest is in peril. From the Bangladesh constitutional point of view, emergency means the existence of a condition whereby the security or economic life of Bangladesh or any part thereof is threatened by war or external aggression or internal disturbance.

Need for Emergency Provisions

Providing for emergency provisions in the constitution is not an undemocratic something. Because the security of the state as a whole is of greater importance than the liberty of some individuals. The state is to safeguard the liberties of all the people within its territory. If the state itself is destroyed or in great peril the liberties of the individual citizens stands annihilated. As Shukla V.N. says-

> "Events may take place threatening the very existence of the state, and if there are no safeguards, against such eventualities, the state together with all that is desired to remain basic and immutable, will be swept away."[3]

It was also held in *R.* V. *Halliday*,-

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1 581-A, 169, 172, Source, Jain, M.P, *Ibid*, P. 111

2 Quoted by Shahnaz Huda, *Human Rights under Emergency Situations*. The Dhaka University Studies Part-F. Vol. III

3 Shukla, V.N. *Constitution of India*, Ibid, P.631

> "However precious the personal liberty of the subject may be, there is something for which it may well be, to some extent, sacrificed by legal enactment, namely national success in the war, or escape from national plunder or enslavement."[1]

The idea of suspension of some fundamental rights in time of emergency is common to all legal systems. Somewhere the constitution itself and somewhere a special law makes provisions in legal terms for situations of crisis when states of emergency may be invoked.

The necessity for suspension of certain rights in times of emergency is internationally recognised. Almost all regional and international instruments of human rights make provisions for suspension of rights in cases of emergency. Article 4(1) of the International Covenant on Civil and Political Rights, 1966, article 15 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, 1950 and article 27 of the American Convention on Human Rights, 1969 make, more or less, the same provision to the effect that in time of war, public danger, or other emergency that threatens the independence or security of a state party, it may take measures derogating from its obligation under the convention.

Thus providing for emergency measures suspending some fundamental rights is allowed both nationally and internationally. But the problem is that there is a danger in investing such discretionary power with the executive authority. Because such a provision carries with it the risk of abuse of power if stern safguards against its abuse are not provided for specifically. Most governments in developing countries abuse emergency power for political purpose; they use it as a necessary weapon to suppress the opposition and to perpetuate power; they thereby destroy the democratic institutions. The Secretary General of the International Commission of Jurists in his introduction on an ICJ report on States of Emergency opined that the most serious human rights violations tend to occur in situations of tension when those in power are or

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[1] Quoted by Patwari, A. B. M. Mafizul Islam, *Liberty of the People : Britain and Bangladesh*, (Dhaka : Institute of Human Rights and Legal Affairs, 1987), P.29

think they are threatened by forces which challenge their authority if not the established order of the society. This is why he thinks that there is an understandable link between cas of grave violations of human rights and state of emergency.[1]

Classification of Emergencies

From the view point of territorial extent emergency may be of two types : National Emergency ; and Partial or State Emergency.

When emergency is declared, whatever may be the reason behind the declaration, throughout the whole territory of the state, it is called national emergency. On the other hand, when emergency is declared in a particular area of a unitary state or in a state of a federation, it is partial or state emergency. For example, article 352 of the Indian Constitution provides that emergency may be declared throughout India or any part thereof. Likewise, article 356 provides state emergency. The Constitution of Pakistan also provides the same provisions.[2]

On the basis of its nature emergency may be of following three types :

A. Emergency of War,
B. Emergency of Subversion: and
C. Economic Emergency.

Emergency of War

When emergency is declared as a result of war or external aggression, it is called emergency of war. For example, emergency of war was declared in British India during the Second World War. This emergency was declared by the British Government under the authority of the Emergency Power (Defence) Act. 1939. In independent India emergency of war was declared for two times. First in October, 1962 when China launched a massive attack on India's North-Eastern border. Emergency was declared under article 352 on account of external aggression. Second in December, 1971 when Pakistan attacked India.

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1 ICJ Report on States of Emergency : *Their impact on Human Rights,* (Geneva 1983) Quoted by Huda, Shahnaz, *Ibid,* P.101

2 National emergency is dealt with Article 232 of Pakistan Constitution and state emergency is provided for in Article 234.

Emergency of Subversion

When emergency is declared due to internal disturbances within the state i.g. to suppress civil war or any anti-government movement or a riot in any particular area of the country or to face any natural disaster, it is called emergency of subversion. For example, in Bangladesh emergency was declared four times due to internal disturbance.

Economic or Financial Emergency

When emergency is declared with a view to overcoming a situation in which the economy of the state is about to breakdown or has broken down, it is called economic emergency. It is worthy of notice here that from the broader point of view economic emergency should be included in emergency of subversion but constitutions and laws of some countries provide specifically, in addition to emergency of subversion, for economic or financial emergency. For example, article 360 of the Indian constitution specifically provides that if the president of India is satisfied that a situation has arisen whereby the financial stability or credit of India or any part of it is threatened, he may declare emergency. Similar provision is provided for in article 235 of the Pakistan constitution. The constitution of Pakistan of 1956 also provided for such provisions (article 194). In USA economic emergency was declared by President Roosevelt under the authority of the National Industrial Recovery Act, 1930. By declaring emergency Roosevelt adopted New Deal Policy to overcome world wide financial depression.

Distinction between Emergency of War and Emergency of Subversion

1. Emergency of war is connected with war or external aggression whereas emergency of subversion is connected with any type of internal disturbance within the territory of the state.

2. Generally emergency of war is declared throughout the country but emergency of subversion may be declared to any part of the territory.

3. Emergency of war is related to the question of sovereignty of a state because it is declared when the sovereignty of a state is

threatened. But emergency of subversion has no relation with the question of sovereignty of a state.

4. The immediate purpose of emergency of war is to defend the sovereignty and security of the state whereas the purpose of emergency of subversion is to suppress the civil war or anti-government movement.

Double Emergency

Somewhere provisions of double emergency is visible. Emergency is of three kinds which have been discussed earlier. This double emergency is not a class apart. While one type of emergency is in operation declaration of another type of emergency is called double emergency. For example, in India the proclamation of emergency of war made in December, 1971 was still in operation when another proclamation of emergency of subversion was made on 26 June, 1975 on the ground that security of India was threatened by internal disturbances. This double emergency continued for a long time. When Janata Party came to power in March, 1977 replacing the Indian National Congress the emergency of subversion declared in 1975 was withdrawn on March 22, 1977 and the emergency of war was withdrawn on March 27, 1977. The provision of this double emergency was inserted in the constitution by adding clause 9 to article 352.

History of Emergency Power

In Indian Sub-Continent the history of emergency power of the executive traces back to the Government of India Act, 1935. Under article 102 of the Act the Governor-General could declare emergency if in his opinion a grave emergency existed whereby the security of India was threatened whether by war or internal disturbances.[1] This provision which is fully alien to the British democratic system was kept candidly as a weapon by the British ruler in India to perpetuate their colonial design. But unfortunately this undemocratic and democracy-destroying provisions continued to have place in the subsequent constitutions in the Sub-Continent

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1 Reference. Keith, Arthur Beoriedale, A *Constitutional History of India 1600—1935*, 2nd ed, (London : Methuen & Co. Ltd. 1969), P. 364

although freedom was achieved and countries became independent sovereign states.

Keeping in line with the 1935 Act, the Indian constitution in article 352 provides for emergency provisions to the following effect: "352. Proclamation of Emergency.

> (1) If the President is satisfied that grave emergency exists whereby the security of India or of any part of the territory thereof is threatened, whether by war or external aggression or internal disturbance beyond the power of a Provincial Government to control, he may issue a proclamation of emergency."

Following the same line, the 1956 constitution of Pakistan incorporated this emergency provision in article 191. The 1962 Constitution of Pakistan also contained the same provision.

The experience of the application of the emergency provisions in Pakistan was extremely bitter. In its 23 year long history Pakistan witnessed a series of action taken by the ruling elite or sometimes by one individual in the office of the President under the garb of these emergency provisions.[1] The two Governor-Generals of Pakistan Golam Mohammad and Iskandar Mirza used this emergency powers to perpetuate their rule and thereby they destroyed political institutions. The emergency which was proclaimed in 1965 due to war with India was not withdrawn till the mass-upsurge forced Ayub Khan in 1969 to leave power whereas the war was over in three weeks. During this continued emergency the political opposition parties were suppressed and hundreds of citizens were put into prison for years together. Almost all the political leaders of Pakistan particularly the prominent ones in the former East Pakistan were extremely critical of this harsh law. The Awami Leaque in particular was committed since the formation of the United Front in 1954 to repeal not only the black laws but also to remove any scope or prerogative enabling an individual to retard the process of democracy. The experience of Pakistan showed that whenever such power was enshrined in the constitution, however well intentioned the laws might have been, the tendency to use or in most cases misuse them was overwhelmingly predominant. These

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

authoritarian powers were, therefore, considered contradictory to the concept of nourishing a living democracy.[1]

With these experiences in mind, the Awami League Government did not want to leave any scope for such exercise of power by the president. As a result, in the original constitution of Bangladesh no provision was embodied for any emergency situations. The decision was bold, praise-worthy and conducive to the nourishment of living democracy. But sooner than 9 months had passed provisions for emergency were inserted in the constitution by the Second Amendment to the constitution of Bangladesh by the same party which made the constitution.[2]

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Emergency Provisions in the Constitution of Bangladesh

Emergency provisions are dealt with part 9A of the Constitution. The part contains three articles 141A, 141B and 141C.Article 141A says,

> "if the president is satisfied that a grave emergency exists in which the security or economic life of Bangladesh, or any part thereof is threatened by war or external aggression or internal disturbance, he may issue a proclamation of emergency".

Thus the president can declare emergency on three grounds - war, external aggression or internal disturbance. Two types of emergency, therefore, can be declared under the constitution of Bangladesh - emergency of war and emergency of subversion.

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When can the President declare Emergency ?

Article 141A says that the president can declare emergency whenever he thinks that a grave emergency exists in which the security or economic life of Bangladesh or any part thereof is threatened by war, external aggression or internal disturbance.

Article 141A(3) says that a proclamation of emergency may be declared before the actual occurrence of war or any such aggression

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1 Ahmed, Moudud, *Ibid*, P. 102
2 See further P. 104

or disturbance if the President is satisfied that there is imminent danger thereof..

Again, the proviso of article 141A(1) says that the proclamation of emergency shall require for its validity the prior counter signature of the prime minister. Thus virtually the declaration of emergency depends on the wish of the prime minister. Whenever the prime minister advises the president to declare emergency the president is bound to do so. The declaration of emergency, therefore, depends on the subjective satisfaction of the executive and the court cannot question the justifiability of such satisfaction.

The Consequences of a Declaration of Emergency

1. A proclamation of emergency may be revoked by a subsequent proclamation.

2. A proclamation of emergency shall be laid before parliament and shall cease to operate at the expiration of 120 days unless before the expiration of that period it has been approved by a resolution of parliament.

3. If emergency is declared at a time when parliament stands dissolved or the dissolution of parliament takes place during the period of 120 days, the proclamation shall cease to operate at the expiration of 30 days from the date on which parliament first meets after its re-constitution, unless before the expiration of the said period of 30 days a resolution approving the proclamation of emergency has been passed by parliament.

4. As soon as emergency is declared fundamental rights mentioned in articles 36, 37, 38, 39, 40 and 42 shall automatically remain suspended and they will remain suspended so long emergency will be in operation. As a result, the executive may take any measure against these rights and parliament may make any law inconsistent with these rights. As soon as emergency is withdrawn these rights will get their full constitutional status.

5. While a proclamation of emergency is in operation, the president may by an order declare the suspension of enforcement of any of the fundamental rights conferred by Part III of the constitution.

The Misuse of Emergency Power and its Impact over the Constitutionalism in Bangladesh.

Firstly, on three grounds emergency can be declared-war external aggression and internal disturbances. As to first two grounds there is no objection because both the concepts of 'war' and 'external aggression' are specifically defined in international law. But the problem of misuse of emergency power lies in the third ground-' internal disturbance'. The word 'internal disturbance' is nowhere defined. It is a vague term and due to its vagueness the executive can easily misuse this emergency power. Emergency may, therefore, be declared even at a peaceful time on the excuse of internal disturbance though there is no disturbance in reality. In fact, as had been the fact of emergency declaration in Pakistan, the ruling elite uses this power as a ready weapon, due to the vagueness of the term 'internal disturbance,' to crash down the opposition and anti-government movement. In the constitutional history of Bangladesh emergency was declared four times.[1] Every time it was declared on the ground of internal disturbance. Three times emergency was declared necessarily for political purpose i.e. to suppress the anti-government movement and to perpetuate rule. The emergency declared for the second time after the death of president Zia was not necessarily for perpetuating rule; it was declared just to face an unexpected situation which might have occurred following Zia's death. Like in Bangladesh the Indira Gandhi Government in India widely abused this emergency power.[1] To prevent this widespread misuse of emergency power the 44th Amendment of the Constitution of India has inserted the word, 'armed rebellion' in place of 'internal disturbance'. Thus the scope of abuse of emergency power now has come to a minimum one. Likewise, to prevent the abuse of this power in Bangladesh such a word should be inserted in place of the term 'internal disturbance'.

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1 1st emergency was declared on 28th December, 1974.
2nd emergency was declared on 30th May , 1981.
3rd emergency was declared on 26th November, 1987.
4th emergency was declared on 27th November, 1990.
5th emergency was declraed on 11th January, 2006.

1 A terrible picture of abuse of emergency power in India by Indira Gandhi Government has been depicted in the book *'Judgment'* by Kuldip Nayar which was published by Vikas Publishing House, New Delhi in 1977.

Secondly, under the provision of the Bangladesh Constitution once an emergency is declared, it can be continued to be in operation for 4 months (120 days) without the approval of parliament. And a resolution for such an approval is to be passed by a simple majority. Both these provisions are undemocratic. Because no mandatory time limit should be given for the continuance of emergency. It should be specifically provided for that once emergency is declared by the executive it shall be laid before parliament as soon as practicable for its approval and if parliament is not in session an emergency session must be summoned within a shorter period like 7 days or 10 days etc. And for such approval the resolution should be passed by two-thirds of the total number of members of parliament so that the executive cannot prolong the continuance of emergency. To be mentioned here that in India once emergency is declared it has to be approved by a resolution of parliament within one month and such a resolution has to be passed by a majority of the total membership of each House and not less than two-thirds of the total number of members present and voting in each House. Otherwise after one month emergency will cease to operate. In both the 1956 and 1962 Constitutions of Pakistan there was no mandatory time limit for the expiry of the proclamation. Under these Constitutions the proclamation was to be laid before parliament as soon as practicable[2]. Under the present Constitution of Pakistan it is to be laid before parliament within 2 months.

Another important feature of emergency provisions in democratic countries is that when emergency is declared an special or emergency session of parliament must be summoned immediately if it is not in session. During the emergency of the World War II the British Parliament was in session till the war ended and emergency withdrawn. During the period of emergency parliament should continue to function so that it can directly exercise its control over the actions of the executive. Under the present Constitution of Pakistan joint sitting of parliament has to be summoned by the president to meet within 30 days of the

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2 Article 30 of the Constitution of 1962
Article 191 of the Constitution of 1956
Article 232 of the present Pakistan Constitution.

declaration of emergency[1]. In India there is a provision for special sitting. But in Bangladesh Constitution no such provision was inserted.

Thirdly, another interesting point is that it is not indicated in the Constitution how long emergency will remain in force once parliament approves it. It, therefore, means that if emergency is once approved by parliament, it can continue in operation for an indefinite period. In India the provision is that if emergency is once approved, it shall remain in force not more than 6 months.

Fourthly, it is provided in article 141B that with the proclamation of emergency 6 fundamental rights (Articles 36, 37, 38, 39, 40 & 42) will automatically be suspended. This is undemocratic. Because the proclamation of emergency does not always mean the suspension of fundamental rights; more restriction instead of suspension may be imposed over them. In German Constitution there are provisions for 'state of tension' (Article 80a) and 'state of defence' (Article 115a) which are equal to emergency of subversion and of war respectively. But it is specifically mentioned in article 19 that in no case may the essence of a basic right (fundamental rights) be encroached upon. Thus even in emergency period there is no provision for suspension of rights. The Constitution of Singapore provides for emergency provision (Articles 150 and 151) but no power has been given to suspend fundamental rights[1]. In India the provision as amended by the 44th Amendment is that in time of emergency of subversion no fundamental right can be suspended and in time of emergency of war and external aggression only six fundamental rights as mentioned in Article 19 shall be suspended.

Fifthly, once emergency is declared Article 141C empowers the President to suspend the enforcement of all fundamental rights. If the enforcement of a right is suspended, the right itself becomes

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1 Article 232 (7) of the present Pakistan Constitution.

1 In time of emergency in Singapore parliament can pass preventive detention law and that law is limited to emergency period only. And under that preventive law a detenue has been given 3 rights so that even in emergency citizens are not unnecessarily harassed

meaningless as like as a car without its engine. Emergency of subversion was declared four times in Bangladesh and it is the fact that every time the enforcement of all fundamental rights was declared suspended and they remained suspended for months together. No democratic principle can justify such a situation. There are some rights e.g. right to property etc. which are in no way connected with the emergency of subversion. But still then the enforcement of all rights was kept suspended. It should, therefore, be specifically demarcated in the Constitution as to the enforcement of which particular rights would be suspended during the emergency of war and which during the emergency of subversion.

It is worthy of notice that in India through the 44th Amendment it has been provided in article 359 that even in time of emergency of war or external aggression the enforcement of rights mentioned in Articles 20 and 21 i.e. protection in respect of conviction of offence and protection of life and personal liberty cannot be suspended.

It is also to be mentioned here that in Britain the Queen has no inherent power to declare emergency. Two types emergency are known to the British constitutional system - peace time emergency and war time emergency. For peace time emergency, there is Emergency Powers Act of 1920 and of 1964. Under this law the Queen can declare state of emergency to face any riot or natural calamity. But if emergency is declared -

i) it must be forthwith communicated to parliament. If parliament is not in sitting, it must be summoned within 5 days.

ii) it will remain in force only for one month.

iii) so long emergency is in force, regulations may be made by Orders-in-Council for securing the essentials of life to the community. The regulations must be laid before parliament and expire after 7 days unless a resolution is passed by both Houses providing for their continuance.

iv) the writ of *habeas corpus* will not be suspended and the Emergency Powers Act expressly prohibits the alteration of any existing procedure in criminal cases or the conferring of any right to punish by fine or imprisonment without trial.[1]

Emergency of war in Britain cannot be declared without the authority of parliament. Parliament makes laws on the basis of which emergency may be declared. Only in time of emergency of war arbitrary arrest and imprisonment by the executive is legalised by Acts of parliament. During the World War I the Defence of the Realm Acts of 1914-1935 and during the World War II the Emergency Powers (Defence) Acts of 1939 & 1940 were passed by the British parliament. Under these Acts extensive power was given to the executive for preventive detention. As soon as war ended these laws themselves also ended respectively. But even in such grave emergency the writ of *habeas corpus* was not suspended. Likewise, in USA the executive cannot declare any emergency without the authority of law made by the Congress.

From the above discussion it becomes clear that the emergency provisions were inserted in the Constitution with an express intention to perpetuate rule and to suppress the opposition. This draconian law has been a permanent stigma on our good Constitution made by the same AL government which piloted the Constitution making. This law is nothing but a necessary weapon to weaken the political institutions in the country; to neglect the supremacy of parliament; to hamper building a normal democratic system. These authoritarian powers are always contradictory to the concept of nourishing a living democracy. Unlike in other constitutional system in the world declaration of emergency in Bangladesh factually means the total negation of fundamental rights, for during emergency period they turn into a meaningless reality. After the freedom of India it was Jawharlal Nehrue, who as Prime Minister for 17 years nurtured the institutions of parliamentary democracy with his vigilant leadership quality. His daughter Prime Minister Indira Gandhi, in 20 months of emergency

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1 Reference, Wade and Bradley, Constitutional Law, 8th ed, 1970 (London: Longman) PP. 717–718

curbed the very fundamental rights for which her father had fought. It took another man of great stature, Prime Minister Morarji Desai, to restore to the Indian Constitution the values and safeguards for which he, as a young man, had struggled so hard. So that a state of so-called emergency would not be easily repeated in India to destroy further the institutions of democracy Article 352(1) of their Constitution amended to replace 'internal disturbance' with 'armed rebellion' as possible cause for declaring emergency. To end with the words of a commentator "our institutions are not strong enough to shape leaders. At this new rebirth of democracy this nation looks upon its leaders to create institutions. Special provisions are to be used with care and discretion, and if we cannot do so, perhaps we should not have this provision at all".[1]

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[1] Choudhury , Nazim Kamran, *Legislation by Ordinance,* Ibid, P. 24